

WHISTLEBLOWING : THE OTHER SIDE OF THE COIN

by

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Submitted in accordance with the requirements

for the degree of

MASTERS OF LAW

in the subject

LABOUR LAW

at the


UNIVERSITY OF KWAZULU-NATAL

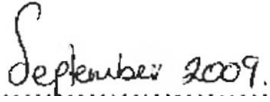
September 2009

DECLARATION

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I declare that the whole dissertation, unless specifically indicated to the contrary in the text, is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references. It is submitted as the whole research dissertation which counts 100% the requirement for the degree of Masters of Law in the Faculty of Law, University of KwaZulu-Natal.


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Acronyms

EAT	-	Employment Appeals Tribunal
ERA	-	Employment Rights Act 1996
ET	-	Employment Tribunal
ISS	-	Institute for Security Studies
LRA	-	Labour Relations Act (66 of 1995)
ODAC	-	Open Democracy Advice Centre
PCaW	-	Public Concern at Work
PDA	-	Protected Disclosures Act (26 of 2000)
PIDA	-	Public Interest Disclosures Act 1998

CHAPTER 1

Introduction

“You gain strength, courage and confidence by every experience in which you really stop to look fear in the face. You are able to say to yourself : I have lived through this horror I can take the next thing that comes along ... You must do the thing you think you cannot do”. Eleanor Roosevelt (US Diplomat and Reformer 1884-1962)¹

According to Near and Micelli² “whistleblowing is the disclosure by organizational members of illegal, immoral or illegitimate practices under the control of their employers, to person or organizations that may be able to effect action”. Borrie³ stated: “whistleblowing is the disclosure by an employee of confidential information which relates to some danger, fraud, or other illegal or unethical conduct connected with the workplace, be it of the employer or of his fellow employees”.⁴

Peter B Jubb⁵ defined whistleblowing as a “deliberate non-obligatory act of disclosure, which gets onto public record and is made by a person who has or had privileged access to data or information of an organization, about non-trivial illegality or other wrongdoing whether actual, suspected or anticipated which implicates and is under the control of that organization, to an external entity having potential to rectify the wrongdoing”.

A further definition noted by PB Jubb⁶ is “whistleblowing is the act, by an employee or officer of any institution, profit or non-profit, private or public, of informing the public about a belief that (s)he has, or (s)he has obtained knowledge that the institution is engaged in activities which (a) cause unnecessary harm to third parties,

¹ Quotation No. 2258 from Laura Moncur’s Motivational Quotations.

www.quotationspage.com/quotes/Eleanor_Roosevelt (Accessed: 5 August 2009).

² JP Near et al “Organisational Dissidence : The case of whistleblowing” (1985) 4 *Journal of Business Ethics* 1-16.

³ British Charity Organisation, Public Concern at Work 1996.

⁴ CJ Auriacombe “What happens when one blows the whistle? Recent SA Cases” (2005) 24 (1) *Politeia* 88.

⁵ PB Jubb “Whistleblowing: A Restrictive Definition and Interpretation” (1999) 21 (1) *Journal of Business Ethics* 78.

⁶ See fn 5.

(b) are in violation of human rights, or (c) run counter to the defined purpose of the institution”⁷

The objective of this dissertation is to evaluate the concept of whistleblowing and the specific role the Protected Disclosures Act (26 of 2000) (hereinafter referred to as the PDA) and the Public Interest Disclosures Act 1998 (hereinafter referred to as PIDA) promulgated in the United Kingdom play in fulfilling their mandate to protect whistleblowers. The practice of whistleblowing has been growing steadily over the past two decades and this research is concerned with not only determining the factors that employees use to make true disclosures but also determining the factors that motivate employees to make false disclosures.

This study draws attention, not only to the disclosures that are made by employees who have true and substantive allegations to make, but also the situation where disclosures are made for malicious and vindictive personal gain. It takes a look at the psychological and ethical standing of employees who have an “axe to grind” with their employers, leaving behind a trail of devastation which has to be cleaned up afterwards. The concept of “good faith” and a “reasonable belief” which appear in the legislation, are discussed and examined in detail.

The focus is mainly on unsubstantiated allegations and the consequences of those *mala fide* disclosures. The questions that are dealt with are: how do these allegations affect the victims and organizations of *mala fide* disclosures, and how equipped are organizations to deal with them?

This study begins with the history, background and definition of whistleblowing, and an examination of how the PDA views the issue of whistleblowing and how it interprets it. The reason behind the discussion on PIDA is that South Africa has borrowed largely from it to establish its PDA. Although these two Acts are not identical, the concepts are the same and the United Kingdom has enacted a large amount of the Employment Rights Act 1996 (hereinafter referred to as the ERA) into its PIDA (PIDA) whereas South Africa has not taken much out of the Labour

⁷ Adapted from the Borrie and Duska definition of whistleblowing 1990, page 73.

Relations Act (66 of 1995) (hereinafter referred to as the LRA) and introduced it as part of the PDA. However, when cases are determined in terms of the PDA, the LRA is looked at very closely in terms of constructive dismissal, and most commonly unfair labour practices or unfair dismissal. Both Acts have “good faith” and “reasonable belief” as requirements to fulfil in order to fall under the ambit of the protection of the Acts. Right through this study you will see a thread of United Kingdom cases that are used so that the reader is able to see how the Employment Tribunal (hereinafter referred to as the ET) and/or the Employment Appeals Tribunal (hereinafter referred to as the EAT) have looked at the different aspects of whistleblowing cases. What is important to note in Chapter 2 is the reason why it was important to establish whistleblowing legislation. The urgency of this legislation was simply because of the disasters and tragedies that were taking place without anything being done about it⁸.

We see that in both the United Kingdom and in South Africa there was much work done through negotiation and comment that came from different Commissions, legal professionals and academics before the Acts were passed. One can say that there was an incredible amount of thought that was applied by many minds in order to put together legislation that would allow people to disclose information without the fear of intimidation, victimisation or dismissal.

The framework of the PDA and PIDA are highlighted in Chapter 4 in order to understand how the different Acts work. It is important to highlight the particular sections of the Acts that are relevant and often taken into account when a case has to be decided. Important to note is the fact that both Acts highlight the requirements of “good faith” and “reasonable belief”. In literally all of the sections of these Acts, good faith is a requirement which is understandable. Although there is no absolute or fixed standard of good faith, it is important that a person disclosing information has this requirement to prevent the disclosure from being made with the motive of bad faith. As you will see from the Chapter 6 concerning unsubstantiated allegations, it is very difficult to determine whether the person who disclosed information in fact had a

⁸ These situations are discussed in Chapter 2.

motive of “good faith”. I will consider how the EAT looked at the issue of good faith in the case of *Street v Derbyshire Unemployed Workers Centre*⁹.

It is common knowledge that blowing the whistle is an incredibly difficult moral decision to make. This is because whistleblowing is seen as something negative and although there is now legislation to protect whistleblowers, there are still organizations that believe that whistleblowers are troublemakers. However, it is submitted that the more credible a person is, the more likely it is that top management will listen and investigate the problem, thus relieving the pressure to whistleblow. This, however, is debatable as we have seen in the case of *Tshishonga v Minister of Justice & Constitutional Development & Another*¹⁰ who should have been seen as a credible witness but who got no help from top management, simply because the topic was too difficult to deal with. A difficult problem is how to prevent organizations from victimising a person who has made such a disclosure.

In Chapter 5 the difficulties for whistleblowers disclosing legitimate information is highlighted, even though there was legislation in place to protect them. They were still victimised and inevitably ended up suffering negative consequences such as being disciplined and dismissed even though ultimately legal recourse was available.

Tshishonga's case took four years to be finalised, in which time he had endured disciplinary action and was severely affected by the elements of the content of the occupational detriment which included being insulted, ill-treated and having his dignity impaired¹¹. What I will emphasise in this case is the fact that although organizations are aware of the legislation that protects whistleblowers they still do not have the correct mindset which would enable them to deal with the problem efficiently. Instead, true whistleblowers like *Tshishonga* may suffer the worst kinds of consequences for something that was in the public interest and for the benefit of the public sector. It was only through sheer bravery, strength and dedication to put a stop

⁹ (2004) EWCA Civ 964.

¹⁰ (2007) 4 BLLR 327 (LC). Can also be found at (2007) 28 ILJ (LC).

¹¹ See fn 10, para 300.

to corruption in the public sector that *Tshishonga* continued with his quest for justice.¹²

Tshishonga's case is a ground breaking case concerning whistleblowers in South Africa and will be used as a precedent case which will determine how other similar whistleblowing cases will be decided. This case illustrates how the court applied its mind to all the aspects of the case and the close examination of the PDA. This is evident from the list of cases that were referred to, not only South African cases but a wide variety of foreign jurisprudence. The majority of the case law discussed in this dissertation were quoted and referred to in the *Tshishonga* case. The outcome of this case was a favourable one, and according to the South African Law Reform Commission Report¹³ (hereinafter referred to as the SALRCR) “this was a significant victory for whistleblowers in that legal costs were awarded in the whistleblower’s favour”, and brings to the fore the importance of whistleblowing especially if it is for the benefit of society as a whole. The issues of “good faith” and “reasonable belief” were highlighted in this case as important factors that must be considered when disclosure of information concerning any wrongdoing is made.

However, it must be noted that generally, by the time a disclosure is made, there tends to be ill feelings between the whistleblower and the organization or person directly involved. This does not necessarily mean that the disclosure was not made in good faith. It would be inconceivable for one to believe that when a disclosure is made that the relationship between that organization and the whistleblower is healthy. However, the personal feelings one has before whistleblowing must not interfere with the fact that one must have made the disclosure in good faith and with a reasonable belief. This entails that there must be a reasonable belief in the truth of the disclosure, which should be able to be substantiated by evidence. As illustrated in the *Street* case¹⁴, note must be taken of how easy it is for the element of good faith to turn into an element of bad faith. It is submitted that personal feelings should not distract one from the fact that the disclosure must be made with the requisite good faith. The underlying motive

¹² Refer also to a critical analysis of the *Tshishonga* case in a case note by F Van Jaarsveld “Arbeidsregtelike perspektief op die lotgevalle van fluitjieblasers” (2008) 2 *Tydskrif vir die Suid-Afrikaanse Reg* 324-329.

¹³ Project 123 *Protected Disclosures* (August 2008) 74.

¹⁴ See fn 9, para 41.

behind one's disclosure is an important factor that must be considered when investigating cases such as these.

CHAPTER 2

History, Background and Definition of Whistle-blowing

Corruption in all its different forms is a complex and multi-layered issue. The reporting of corruption is an age-old practice which can be dated back to early China and is today known there as *jubao*. In comparison to whistleblowing in the West where there usually is (or was) an existing relationship between the employee and employer, in China, *jubao* can be made by any individual against any government official or institution as long as there was some kind of wrongdoing. China not only makes provision for reporting centres, but *jubao* is also an officially controlled process in which the government attempts to involve the ordinary citizen in the anti-corruption campaign and supervision of its officials.¹⁵ The notion of whistleblowing in America was first documented in 1963 and it is therefore a new name for an ancient custom which remains a worldwide issue.¹⁶

During the apartheid era in South Africa, spies surfaced increasingly, blaming and pointing fingers at each other because of the monetary rewards they were offered to act as informers to “spill the beans” on their comrades. Because of the poverty and high unemployment rates and greed, these rewards were tempting and for many irresistible. People who decided to take these rewards spoke up and were reportedly called ‘*impimpis*’¹⁷ by their betrayed comrades. If they were caught by their comrades, they suffered gruesome public deaths as a deterrent for behaviour that would not be tolerated. The lesson to be learned was “not to tell tales” and to protect their comrades in the name of a good cause, creating a culture of non-disclosure of wrongdoing.¹⁸

¹⁵ F Uys “Whistleblowing in Disaster Prevention and Rehabilitation”. (2006) 41 (2.1) *Journal of Public Administration* 219.

¹⁶ See fn 15.

¹⁷ A derogatory term reserved for apartheid era police spies.

¹⁸ R Calland and G Dehn. *Whistleblowing around the world: Law, Culture and Practice* 1st ed (2004) 143-144.

In addition, according to Calland and Dehn,¹⁹ South Africa's private sector was generally unaccountable to the public and public authority for their wrongdoing, causing them to be open to the abuses of fraud and corruption.

Transformation of this culture began in 1994 with South Africa's first democratic election.

The Interim Constitution (Constitution of the Republic of South Africa Act, 200 of 1993) was negotiated prior to the 1994 elections enshrining the principle that "democracy empowers the people to participate in their governance and for government to be accountable to them for its decisions".²⁰ Furthermore the Constitution of the Republic of South Africa Act, 108 of 1996 aspires to an "open and democratic society".

In 1995, the Task Group on Open Democracy submitted its policy proposals for an Open Democracy Act.

This long drawn out process resulted in the final draft Bill which was published in the Government Gazette in October 1997.²¹

The whistleblower protection provision in section 63 of the Bill provided protection to whistleblowers that made "disclosures in good faith about evidence of contravention of the law, corruption, dishonesty and serious maladministration in organs of state or by government officials".²²

However, one of the glaring flaws in the Bill was the fact that it applied to the public sector only and did not offer the same protection to potential whistleblowers in the private sector.

¹⁹ See fn 18.

²⁰ Section 35(1) of the Interim Constitution.

²¹ One of the objectives stated in the Bill was to: "provide for the protection of persons disclosing evidence of contraventions of the law, serious misconduct or corruption in governmental bodies, and to provide for matters connected therewith". http://us-cdn-creamermmedia.co.za/assets/attachments/00506_draftopedemactbill.pdf (Accessed: 25 March 2009).

²² Section 63(1)(a) of the Open Democracy Bill, 18 October 1997. Government Gazette No. 18381. Pretoria.

The Bill was finally tabled in Parliament in July 1998. Public submissions were received including those from the Open Democracy Campaign which comprised ten leading non-governmental organisations. The campaign group argued that the whistleblowing protection section of the Bill needed to include the private sector.²³

The Institute for Security Studies (ISS), organized a number of seminars on the practical implications and potential effects of the proposed legislation. Key among its proposals was that the whistleblower protection section be removed from the legislation dealing with freedom of information and be made separate legislation. The justification for this was that it would result in whistleblower protection becoming more visible.²⁴

The Institute's other proposals included looking at other legislation in other jurisdictions that may have been relevant to the South African situation. This included looking at British i.e. United Kingdom law, in particular PIDA.

In October 1999, the Chairperson of the Justice Committee was introduced to the Executive Director of the London-based non-governmental organisation, Public Concern at Work. Advocate Johnny De Lange (Chairperson of the Justice Committee) stated in the Committee that the United Kingdom law would be used as the central model when the Committee looked at the redrafting of the Bill.²⁵

A new whistleblower protection Bill was being drafted at this time, borrowing from the concept behind the British Public Interest Disclosure Act and being adapted to South African law and society. This draft was then developed for public comment and deliberation.²⁶

The PDA was finally passed in 2000 as "The Protected Disclosures Act (26 of 2000)". The Protected Disclosures Act (26 of 2000)²⁷ has come a long way in alleviating the worst fears of those who decide to blow the whistle in good faith. Blowing the whistle

²³ See fn 18.

²⁴ See fn 18, page 146.

²⁵ See fn 18, page 147.

²⁶ See fn 18, page 148.

²⁷ Commonly known as the PDA.

is subject to certain conditions put in place by the Act, and deals with what constitutes a protected disclosure. The Act creates legal protections for employee whistleblowers against reprisals by employers. The Act only provides protection against reprisals for whistleblowing done in good faith, provided there is reliable evidence to support the concern.

2.1 Background and History of the Public Interest Disclosures Act 1998²⁸

In the United Kingdom, The Public Interest Disclosure Act 1998 was introduced as a Private Member's Bill and later promoted in the House of Commons. It received very strong support from the Government because it was relevant across all sectors. The legislation also received broad support from the Confederation of British Industry and the Institute of Directors. The protection formed part of employment legislation and was put forward in the Fairness at Work White Paper as one of the key new rights for individuals. It was recognised as a valuable tool to promote good governance and openness in organisations and received broad support from the Confederation of British Industry, the Institute of Directors and all key professional groups.²⁹

The legislation was linked to the work of the whistleblowing charity, Public Concern at Work (hereinafter referred to as PCaW) which was launched in 1993. PCaW offered confidential legal advice free of charge to any worker with a concern about malpractice within the workplace, yet this charity remained relatively unknown among the general public.

The background to the Act lies in the analysis by PCaW because of a number of scandals and disasters during the 1980s and early 1990s. Most of the public inquiries investigated resulted in the finding that workers had been aware of the danger but had been either too scared to say anything or they had raised the matter in the incorrect manner or with the wrong person.

²⁸ <http://www.pcaaw.co.uk/law/pida.htm> (Accessed: 18 February 2009).

²⁹ See fn 18.

The following tragedies are examples where staff knew of serious problems, but were too afraid to say anything:³⁰

- (i) Clapham Rail crash, was an incident which occurred in 1988 and concerned the issue of safety. The inquiry into the crash found that workers i.e. the inspector, knew and had seen the loose wiring but had said nothing because he did not want 'to rock the boat'. Thirty five people were killed and 500 were injured in this tragedy;
- (ii) Piper Alpha disaster also occurred in 1988 and concerned oil platform safety. The Cullen Report found that workers did not want to put their continued employment in jeopardy through raising a safety issue which might embarrass management. This incident resulted in a tragedy of 167 people being killed; and the
- (iii) collapse of BCCI (Bank of Credit and Commerce International) occurred in 1991 and concerned the issue of fraud and corruption with an estimated value of £2 billion world-wide. This incident was kept under wraps and avoided exposure for almost 19 years. The Bingham Enquiry found that there was an atmosphere of intimidation in the Bank and nobody dared to speak for fear of being intimidated. An internal auditor eventually raised concerns and was summarily dismissed.

Examples where concern was raised but nothing was done: -

- (i) The Zeebrugge Ferry tragedy concerned a situation where staff had raised numerous concerns concerning the fact that ferries were sailing with their bow doors open;
- (ii) The collapse of Barings Bank concerned the issue surrounding not blowing the whistle when there was a moral duty to do so. In this incident, a regulator of the bank failed to blow the whistle with dire consequences; and
- (iii) The Arms to Iraq Inquiry concerned the issue surrounding an incident where an employee had written to the Foreign Secretary concerning ammunition equipment being unlawfully produced for Iraq.

³⁰ See fn 28.

Other cases include the Kirkwood Inquiry into the assault and sexual abuse of children in a Leicestershire County Children's Home where at least 30 concerns had been raised and not heeded, as well as investigations into malpractice in the health service, i.e. the high mortality rate amongst babies undergoing heart surgery at the Bristol Royal Infirmary. Although these were eventually investigated, it took a while before anything was done to prevent incidences such as these happening again.

The PCaW group was closely involved in the formulation of the Act and was tasked with consulting key stakeholders on various provisions. PIDA (also known as the "whistleblowers charter") was passed and endorsed by business, professional bodies and unions.³¹ PIDA is part of the United Kingdom's employment law³² and builds on the principle that "there is no obligation on an employee to keep information secret if it relates to such misconduct on the part of the employer or fellow employees that there is a public interest in its disclosure".³³ PIDA also shifts the focus from the motivation of the whistleblower to the nature of the information and the appropriate recipient of it. It is important to note that information that qualifies as information that falls under the auspices of PIDA is subject to the provisions of the Act regardless of whether it is confidential or not.³⁴ Section 43B of PIDA provides that a qualifying disclosure is information concerning criminal acts, health and safety risks, environment dangers, a breach of a legal obligation, potential miscarriages of justice and any other information that tends to show concealment of the above.

The provisions of PIDA shift the legal burden to the employer in order to prove that the dismissal of the employee was a fair one. Section 5 of PIDA (or section 103A of the ERA) provides that, if an employee is dismissed for the principal reason of making a protected disclosure, that dismissal will be deemed unfair. The effect of this is that the tribunal determining the case will not consider whether the employer's actions were reasonable or not. Even if there were a number of reasons for the dismissal, the dismissal will still be deemed automatically unfair if the predominant reason for the dismissal was because of a protected disclosure. PIDA also provides a quick resolution to an unfair dismissal through its provisions for interim relief and

³¹ See fn 18, page 101.

³² Employment Rights Act 1996; s 103A. The section was added as from 2 July 1999.

³³ See fn 18, page 106.

³⁴ See fn 28.

allows access to a tribunal system which is designed to facilitate quick, non-legalistic resolutions to disputes in accordance with the United Kingdom employment law. Section 9 of PIDA (or s 128(1)(b) and s129(1) of the ERA) which relates to interim relief provides that an employee dismissed for making a protected disclosure can claim for interim relief by seeking an order for reinstatement within seven days of his/her dismissal. If the order is granted and the employer refuses to reinstate the employee, the employer is still liable to pay the salary of the employee until the date of the full hearing. Section 43C of PIDA stresses the procedural correctness of the disclosure and more importantly, the ethical requirement of good faith.

CHAPTER 3

What is Whistleblowing?

Disclosure of information in South Africa is a fairly new concept which has only recently been developed into legislation. With the help of this legislation, employees are able to disclose information knowing that the disclosure, if done according to the prescribed legislation, will be protected. However, in order to deal with the concept of whistleblowing, an explanation of what this whistleblowing concept is all about needs to be discussed.

“Whistleblowing generally entails that employers facilitate disclosures by employees concerning wrongdoing in the workplace. This is often done by making available to employees a dedicated telephone number or other mechanism to be used in the event of the employees having knowledge of criminal or other wrongful conduct within the organization. Employees are often in the best position to detect criminal activities and irregular conduct at work. Whistleblowing legislation generally aims to protect employees from retaliation and other detrimental conduct”.³⁵

In the definition of Calland and Dehn³⁶ “whistleblowing is:

- (a) “bringing an activity to a sharp conclusion as if by the blast of a whistle (Oxford English Dictionary);
- (b) raising a concern about wrongdoing within an organization or through an independent structure associated with it (UK Committee on Standards in Public Life);
- (c) giving information (usually to the authorities) about illegal or underhand practices (Chambers Dictionary);
- (d) exposing to the press a wrongdoing or cover-up in a business or government office (US, Brewers Dictionary)”.

According to the Open Democracy Advice Centre’s (ODAC) Boardroom Brief – whistleblowing is about ‘raising a concern about malpractice within an organization’.

³⁵ SA Law Reform Commission Discussion Paper 107 Project 123 *Protected Disclosures* (June 2004)

1.

³⁶ See fn 18.

According to the United Kingdom Standing Committee on Standards in Public Life (formerly known as the Nolan Committee but now known as the Wicks Committee)³⁷ whistleblowing is defined as “raising a concern about malpractice within an organisation or through an independent structure associated with it”.³⁸

It is clear from the above definitions that there is no universally accepted definition of whistleblowing. The Australian Senate Select Committee however maintains that “what is important is not the definition of the term but the definition of the circumstances and conditions under which the employees who disclose wrong-doing should be entitled to protection from retaliation”.³⁹

Thus, in spite of the many discussions on whistleblowing, exact definitions are seldom found. Some definitions are extremely complex whereas others are oversimplified. In practice, whistleblowing means different things to different people.⁴⁰

All these definitions stress the importance of whistleblowers “because they promote and provide an essential and valuable service to the public by exposing wrongdoing”.⁴¹

“Whistleblowing is a key tool to promoting individual responsibility and organizational accountability. It is also about acting in good faith and in the public interest to raise concerns. Unfortunately, whistleblowers often risk victimization, recrimination and sometimes dismissal”.⁴²

³⁷ This is a standing committee set up by the UK Parliament to safeguard standards in public life and was first chaired by Lord Nolan. The Nolan committee produced three reports. In its first (1995) it recommended that all civil servant departments in the UK should nominate a member of staff to hear the concerns of employees in confidence; its second and third reports recommended that local authorities should introduce codes of practice and procedures for whistleblowing.

³⁸ K Drew “Whistleblowing and Corruption: An initial and comparative review”. January (2003) 1 <http://www.psiru.org/report/2002-08-C-whistle.doc> (Accessed: 9 June 2009)

³⁹ MP Glazer and PM Glazer. “*The Whistleblowers*”, New Jersey, Basic Books (1989) 5.

⁴⁰ F Uys “Whistleblowing in Disaster Prevention and Rehabilitation”, (2006) 41 (2.1) *Journal of Public Administration* 218-230.

⁴¹ P Latimer and AJ Brown “In whose interest? The need for consistency in to whom, and about whom, Australian Public Interest Whistleblowers can make protected disclosures”. (2007) 12(2) *Deakin Law Review* 3.

⁴² National Anti-Corruption Forum -Guide to the Whistle-blowing Act. Section 1 “What is Whistleblowing” [http://www.nacf.org.za/guide to the whistle blowing act/section one.html](http://www.nacf.org.za/guide%20to%20the%20whistle%20blowing%20act/section%20one.html) (Accessed: 16 February 2009)

For all intents and purposes, whistleblowing is a process whereby employers make available to employees ways in which they may disclose confidential information about any worrying facts that they may have concerning the company that employs them. Companies have now initiated programmes, policies, rules and regulations concerning how employees can disclose confidential information. Just about every company and employer has initiated some sort of whistleblowing program for their staff. It is however up to the employee to utilize these programs properly and to use them in the way in which the legislation intended them to be used.

3.1 A brief commentary on the relevant provisions of the Protected Disclosures Act (26 of 2000)

In order for whistleblowers to effectively disclose information, the employee must understand what the PDA provides, what a disclosure is, what a general protected disclosure is and, how it is defined within the Act. Whistleblowers or potential whistleblowers need to understand how the Act will help to protect them if they intend to disclose information and under what circumstances their disclosures will be protected.

Section 1 of the PDA provides that a disclosure is information concerning criminal acts, a breach of a legal obligation or failure to comply with any legal obligation, environment dangers, potential miscarriages of justice, unfair discrimination in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act (4 of 2000), and any other information that tends to show concealment of the above.

Section 2 of the PDA states what the objects and application of the Act are and provides that an employee will be protected from being subjected to an occupational detriment on account of having made a protected disclosure.

Section 3 of the PDA reinforces the provision in section 2 in that it provides that *no employee* may be subjected to *any* occupational detriment if they have made a protected disclosure.

The PDA further provides that a disclosure will be deemed to be a protected disclosure if it is made in good faith to a legal adviser (section 5); an employer (section 6); a member of Cabinet or of the Executive Council of a province (section 7); or to a person or body such as the Public Protector or Auditor-General (section 8).

It must be noted that each of these provisions have a requirement of good faith which is an essential requirement that a person must have in terms of the Act in order that the disclosure is deemed a protected disclosure.

Section 9 of the PDA is an important section to note for purposes of disclosure of information, in that it provides the requirements for a general protected disclosure. Section 9(1) provides that any disclosure made in *good faith* and with a *reasonable belief* that the information is substantially true and was not made for personal gain is deemed to be a general protect disclosure. Section 9(2) provides that a disclosure will be a protected disclosure if an employee has reason to believe that they will suffer an occupational detriment if they disclose the information to their employer; if there is a reasonable belief that the evidence will be concealed or destroyed; that substantially the same information was previously disclosed and action was not taken within a reasonable period after the disclosure; and the impropriety was exceptionally serious in nature.

Section 4 of the Act provides remedies for employees who have disclosed information and who have suffered or reasonably believe will suffer or endure an occupational detriment on account of their disclosure.

The following cases are an example of where the disclosure of information did not adhere to section 1 of the Act (or any of the other above provisions of the Act) thus causing the disclosure not to be protected.

In the Council for Conciliation, Mediation and Arbitration (hereinafter referred to as the CCMA) case of *Gama v Checkers Hyper*⁴³ the issue was whether the applicant's dismissal for alleged misconduct was procedurally and substantively fair and if not,

⁴³ (2007) 3 BALR 274 (CCMA).

what would constitute appropriate relief. It was found that the dismissal was procedurally and substantively fair based on the fact that the applicant's disclosure did not adhere to the definition of what a disclosure is in terms of s1 of the PDA.

The facts of the case are as follows: the applicant worked as a cashier at Checkers Hyper since 1999. In August 2005 she went on sick leave and on her return to work submitted a sick note from a traditional healer which was not accepted. According to the company policy in respect of sick leave, only sick notes received from registered traditional healers would be accepted. The applicant was given a copy of the policy on sick leave when she complained that she did not get paid for the sick leave, but did not accept it. The applicant then complained to other employees that she had been badly treated. The applicant submitted that she had first lodged her complaint internally with her supervisor, then with her manager, then with personnel, and finally with her shop steward, but all in vain. She thereafter went to the Department of Labour because she had lost hope of anything getting done internally and proceeded to make serious allegations against the company. At the Department of Labour she was given a form to fill in which she took to work in the hope of getting other employees to help her fill it in and sign their names at the back of the form. The applicant submitted that the signatures at the back of the form constituted collective grievances. The applicant's allegations consisted of the following:

- pay slips were not provided for employees;
- lunch breaks were not given especially at month end and employees were not paid in lieu of that time worked;
- employees did not get leave;
- employees did not receive payment for sick leave taken; and
- employees were not paid double payment for Sundays that they worked

The respondent disputed all the above allegations and submitted that the applicant did not follow protocol in reporting her complaint.

At the hearing the applicant was issued with a notice of disciplinary inquiry which outlined her alleged misconduct. The applicant did not give evidence or call any

witnesses and on this basis was charged and dismissed for bringing the company's name into disrepute by giving false information to the Department of Labour. The applicant referred the dispute to the CCMA on the basis that her dismissal constituted an occupational detriment in terms of section 3 the PDA because she made a protected disclosure to the Department of Labour.

In analysing the evidence and arguments the Commissioner had to consider whether the allegations made to the Department of Labour by the applicant constituted gross misconduct or if they were a protected disclosure in terms of the PDA.

The Commission considered section 192(2) of the LRA which provides that the employer bears the onus of proving the fairness of the dismissal and the burden of proof must be discharged on a balance of probabilities. Based on the evidence, the Commissioner submitted that he was satisfied that the applicant had not discussed other issues with anyone internally before lodging a complaint with the Department of Labour. The Commissioner therefore submitted that the burden of proof was discharged in that the respondent's version regarding the alleged misconduct was plausible because the allegations were found to be unsubstantiated.

In terms of the PDA, the Commissioner considered section 1(vi) which defines an occupational detriment, section 1(ix) which defines when a disclosure constitutes a protected disclosure and section 3 which stipulates that an employee may not be subjected to an occupational detriment on account of having made a protected disclosure. After considering the relevant sections of the PDA, the Commissioner found that the applicant's disclosure did not constitute a protected disclosure in terms of the Act because the allegations were made to the Department of Labour without first addressing any of her grievances with her employer or shop steward. Furthermore, when inspectors from the Department of Labour investigated the allegations they found them all to be untrue and discontinued their investigation. Accordingly, the Commissioner submitted that the discontinuation of the investigation was a reasonable suggestion that the complaints were untrue. It was further submitted that it was not the intention of the legislature to protect any disclosure or to create a situation whereby employees can make disclosures that are not based on fact and still believe that they will be protected. On this basis the Commissioner submitted that the

applicant's disclosures to the Department of Labour were not a protected disclosure but instead constituted gross misconduct therefore the applicant's dismissal was fair and to be upheld.

Although this case was decided correctly in terms of the PDA, the Commissioner did not discuss the particular sections of the PDA in detail and focussed his attention only on section 1 of the Act whereas other relevant sections such as section 3 and section 9 could have been discussed. Section 9 of the Act would have highlighted the fact that the allegations were not only unfounded but the elements of good faith and a reasonable belief were absent from her disclosures. However, this case is a good illustration of the Act not extending its protection to any kind of disclosure and also not protecting employees who for revengeful and troublemaking purposes divulge unsubstantiated information.

JR Francey v Nedcor Bank (Ltd) ARB⁴⁴ is another case where the truthfulness of a disclosure was considered under the LRA and the PDA. The issue that had to be decided upon was whether the dismissal of the applicant was fair. The applicant was dismissed on the basis that he was deliberately dishonest in that he fabricated untrue and misleading information concerning the respondent which resulted in the respondent's reputation being tarnished. The applicant believed that his dismissal was unfair and that the respondent coerced him into signing a waiver concerning whistleblowing that all managers in the bank had to sign.

The facts of the case are as follows: the applicant was employed by the respondent as an asset-based financier. It is common cause that the applicant made a disclosure telephonically to the company's tip-off facility concerning the General Manager (Mr Payne). The applicant admitted that the reason he made the disclosure to the tip-off facility was simply because (i) he was influenced by other staff; (ii) he was aware that Mr Payne wanted to transfer him out of his department; and (iii) that Mrs Payne was a family friend and he was "irritated by all the information he had – it made him think that Mr Payne was a sod".

⁴⁴ Case No GA9652-02.

Based on the evidence, the Commissioner found that the applicant was not coerced into signing the waiver, because he had fully understood the nature of the document and its consequences. Furthermore the applicant could not sufficiently explain how he was coerced into signing the waiver.

In terms of the charges of allegations against the applicant, the Commissioner considered the fact that “the point of protected disclosures and the relevant protection extended to employees in terms of the LRA and the PDA when making disclosures was to encourage the practice of whistleblowing”⁴⁵.

The Commissioner referred to the cases of *Grieve v Denel (Pty) Ltd*⁴⁶ and *Communication Workers Union & Another v MTN (Pty) Ltd*⁴⁷ which provided a very useful analysis of protected disclosures. The Commissioner submitted that in terms of section 6 of the PDA, a number of conditions had to be satisfied before a disclosure could be protected, in particular, the conditions of having a reasonable belief that the information tends to show that it forms the basis for the definition of a disclosure and, that the disclosure must be made in good faith. The Commissioner submitted that it was clear that both judgments of the above cases upheld the principle that for a disclosure to be protected it must have been made in good faith.

In looking at section 1 of the PDA, the Commissioner held, that the definition of “disclosure” meant that only a disclosure that discloses or tends to disclose forms of criminal or other misconduct and, made in good faith is subject of protection under the PDA.

The Commissioner went further to highlight the fact that the protection extended to employees by the PDA is not unconditional and the intention of the PDA was not intended to protect all disclosures. Thus, an employee who deliberately sets out to embarrass and harass an employer will not satisfy the requirement of good faith nor be protected by the Act.

⁴⁵ See fn 44, page 6.

⁴⁶ (2003) 4 BLLR 366 (LC).

⁴⁷ (2003) 8 BLLR 741 (LC).

The Commissioner found that the applicant's disclosure could not be protected by the PDA because it was based on mere rumours, conjecture and personal opinions and, the applicant's clear dislike for Mr Payne prompted his call to the tip off line. The applicant was also unable to demonstrate that his disclosure was based on supporting documents and evidence.

Based on the evidence of the case and in terms of the PDA, the Commissioner submitted that the applicant's disclosures were not protected by the PDA because (i) they did not fall within the definition of a disclosure in terms of section 1 and were not based on any kind of genuine concerns or suspicions; and (ii) the applicant did not possess the required elements of good faith and reasonable belief in that the applicant's clear dislike of Mr Payne was the sole motivating factor for his actions. On this basis the applicant's disclosures did not constitute a protected disclosure and were not protected by the PDA. The Commissioner submitted that the applicant's dismissal was appropriate in the circumstances.

Conclusion

The PDA was enacted for the purpose of disclosing corruption and fraudulent activity within the workplace. Its main purpose was to create a way in which employees can disclose information without feeling intimidated and fearful. The PDA is very precise in regard to the procedure that a whistleblower or potential whistleblower must follow in order that the disclosure is a protected one. When an employee discloses information in accordance with the PDA, (s)he will be protected against any occupational detriment that the employer might subject her/him to. The PDA seeks to allow whistleblowers who have a reasonable belief in the truth of the allegations, and who are acting in good faith, to disclose information of corruption and fraud. Good faith and reasonable belief are two essential elements that a whistleblower must have in order to strengthen their case.

"The PDA makes the South African government's resolve and commitment to freedom of speech and its intention to create a climate of transparency in both the public and private sector abundantly clear. It also makes extensive provision for simple procedures to assist employees in making protected disclosures on the

unlawful or irregular conduct of their employers or co-worker, without the fear of victimization or reprisal. It is imperative that the disclosure be true and made in good faith".⁴⁸

However, it must be noted that the legislature did not intend for the PDA to protect any disclosure that is made. It is submitted that the Act will not protect a whistleblower that divulges information for the sole purpose of vindictiveness or personal gain.

Similarly, the United Kingdom's PIDA aims to protect whistleblowers from victimisation and dismissal where they raise genuine concerns about a range of misconduct and malpractice. The Act also stresses the importance of the whistleblower's motives of good faith and reasonable belief. According to K Drew,⁴⁹ some academics argue that this requirement for a motivation is misplaced on the basis that the public interest may not be served if a whistleblower has to concern him/herself of his/her motives being examined when he/she discloses information. This may deter potential whistleblowers from disclosing relevant information to prevent fraud and corruption.⁵⁰

For the purposes of understanding the origins of the PDA the significant sections of PIDA are listed as the following:

A "protected disclosure" in terms of section 43A of PIDA is defined as a qualifying disclosure which is made by an employee in accordance with any of the following sections of the Act:

- Section 43B sets out the types of "disclosures" that qualify for protection as criminal acts, health and safety risks, environmental dangers, a breach of a legal obligation, potential miscarriages of justice and any concealment of the above.
- Section 43C (to an employer);

⁴⁸ R Barker and R Dawood "Whistle blowing in the organization: wrongdoer or do-gooder?" December (2004) 23(2) *Communicare* 125.

⁴⁹ See fn 38.

⁵⁰ K Drew "Whistleblowing : an international review". Page 31. <http://www.psir.org> (Accessed: 16 May 2009).

- Section 43D (to a legal adviser);
- Section 43E (to a Minister of the Crown);
- Section 43F (to a prescribed person by an order made by the Secretary of State e.g. the Audit Commission for local and government and NHS finances, the Health and Safety Executive for workplace safety and accident investigation, the Charity Commission for charitable registration and governance and, the National Care Standards Commission for care homes and facilities);
- Section 43G (disclosures in other cases e.g. wider closures. Protection is less easily available here and it is here that the tribunal has to examine and determine the appropriate balance between the public interest and the interest of the employer. This section is much the same as section 9 of the PDA in South Africa.);
- Section 43H (disclosures of exceptionally serious failure);
- As PDA is part of the UK Employment Rights Act 1996, section 103 A is of importance. The ERA is designed to address concerns in the workplace and to balance the interests of employers with employees in comparison to PDA which balances the rights of employers with the wider public interest to prevent wrongdoing and protect society at large. Section 103A of the ERA provides that an employee who is dismissed will be regarded as unfairly dismissed for purposes of this section if the reason for the dismissal is that a protected disclosure was made.

Different authors have defined whistleblowing in various ways, and it is clear from their definitions that there is not a single clearly defined concept of what whistleblowing is. However, there is a clearly defined definition of what a disclosure is in terms of section 1 of the PDA. In terms of the PDA, whistleblowers can promote an essential and valuable service by exposing wrongdoing (i.e. corrupt and fraudulent activity) to the public, as long as the disclosure(s) are in accordance with the definition within the Act and are made with the required good faith and reasonable belief.

CHAPTER 4

Framework of the Protected Disclosures Act (26 of 2000) and the UK Public Interest Disclosures Act (1998)

Before discussing the PDA and the case law surrounding disclosures, it is necessary to set out a framework which promotes an understanding of exactly what this piece of legislation provides and how it is applied to whistleblowers and the disclosures that are made. A comparison will be undertaken looking at PIDA and selected UK cases.

4.1 The Protected Disclosures Act⁵¹

One of the objectives of the PDA is to combat fraud and corruption, through disclosing wrongdoing in the workplace. Other objectives include disclosing information concerning damage to the environment, health or safety or unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act (4 of 2000). The intention of the Act is to create a culture in which employees are able to disclose information relating to irregular conduct in a responsible manner without fear of any reprisals. The PDA provides a comprehensive statutory guideline for the disclosure of information and provides protection against occupational detriment to whistleblowers who disclose information concerning unlawful or corrupt conduct.

Advocate Johnny De Lange in his speech at a Roundtable Discussion⁵² mentioned that there has always been a slight misunderstanding amongst the general public that

⁵¹ The ideas from this chapter in relation to the PDA are taken mainly from two articles which were sourced and accessed from the internet on the 2nd March 2009. National Anti-Corruption Forum – Guide to the Whistleblowing Act – Section 2 http://www.nacf.org.za/guide_to_the_whistle_blowing_act/section_two.html and Roundtable Discussion : The Protected Disclosures Act, 2000 (Act No. 26 of 2000) http://www.nacf.org.za/anti-corruption-summits/second_summit/section6_psc_report_summit_2005.pdf. In relation to PIDA the ideas were taken mainly from the document that the Public concern at Work initiated concerning the Public Interest Disclosures Act 1998. The document sets out the background, overview, guidance and practical points both for organisations and individuals. <http://www.pcaw.co.uk/law/pida.htm> (Accessed: 16 February 2009).

⁵² NACF Summit, Section 6, Roundtable Discussion: The Protected Disclosures Act, 2000 (Act No. 26 of 2000) page 107, point18.1.

whistleblowers are protected by the PDA regardless of what they have disclosed, why they have disclosed it and how they have gone about disclosing the information.

This chapter will show that the PDA has very clear procedures that whistleblowers have to comply with in order for them and their disclosures to fall under the ambit of the PDA.

The PDA encourages honest employees to raise their concerns and report any wrongdoing within the workplace without fear of reprisals.

The PDA sets out a simple framework in order to promote responsible whistleblowing⁵³. It does this by:

- “(a) reassuring workers that silence is not the only safe option;
- (b) providing strong protection for workers who raise concerns internally;
- (c) reinforcing and protecting the right to report concerns to public protection agencies such as the Public Protector and Auditor-General; and
- (d) protecting more general disclosures provided that there is a valid reason for going wider and that the particular disclosure is a reasonable one”.

In order to meet these objectives, this necessitates an inquiry into:

- what information or disclosure is being protected;
- remedies available to the whistleblower or employee, and
- what procedures must be followed when making a disclosure.

The PDA was enacted with the idea that it would be in the common interest of both the employee and the employer to disclose wrongdoing internally, to avoid the employer being exposed and having to deal with damaging publicity.

4.1.1 Application

According to the article of the Second National Anti-Corruption Summit : Roundtable Discussions⁵⁴, the Act works retrospectively and protected disclosures can involve

⁵³ See fn 51.

⁵⁴ See fn 51.

issues which arose before the PDA. The Act is applicable to both public and private sector employees who disclose specific information such as:

- any kind of criminal offence;
- failure to comply with a particular legal obligation;
- the possibility of a miscarriage of justice;
- the endangerment of an individual's health or safety;
- damage to the environment by the employer or department;
- practice of unfair discrimination in terms of the promotion of equality legislation; and
- concealment of any of the above.

The above points appear in section 1 of the Act under definition of a disclosure.

Once it has been established that the employee's disclosure falls within the ambit of s 1 of the Act, there are other procedures (such as making sure that the disclosure is a protected disclosure in terms of s 1(ix) of the Act) need to be followed in order for the employee to be legally protected. A "protected disclosure" is a disclosure that is made in good faith and with a reasonable belief according to the requirements of the Act.

In terms of the PDA, a disclosure is protected where the disclosure is made to:

- (a) a legal advisor in accordance with section 5;
- (b) an employer in accordance with section 6;
- (c) a member of cabinet or the Executive Council of a province in accordance with section 7⁵⁵
- (d) a person or body in accordance with section 8⁵⁶
or any other person or body in accordance with section 9.

⁵⁵ (a) an individual appointed in terms of legislation by a member of Cabinet or of the Executive Council of a province; (b) 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 (c) an organ of state falling within the area of responsibility of the member concerned.

⁵⁶ (a) the Public Protector (b) the Auditor-General or (c) a person or body prescribed for purposes of this section.

A disclosure will not be protected if the employee committed an offence while getting the information or, if a legal adviser discloses information an employee disclosed to him/her for purposes of obtaining legal advice.

An example of a case where the court had to consider whether the disclosure constituted a protected disclosure was in the case of *Communication Workers Union v Mobile Telephone Networks (Pty) Ltd*⁵⁷ which was decided in the Labour Court.

In this case the applicant made an urgent application to the Labour Court to interdict the respondent from suspending him and proceeding with disciplinary action against him pending the outcome of an unfair labour practice dispute by the CCMA. The applicant alleged that the suspension and pending disciplinary action constituted an occupational detriment in terms of the PDA because he had made a protected disclosure against the company.

The applicant's communication consisted of disseminating an email to fellow employees and members of senior management suggesting that certain agencies tendering for the supply of temporary staff to the employer were being afforded undue preference in the recruitment of staff and that senior management were possibly implicated in or benefiting from this process. The applicant called for a large scale investigation of this issue.

The court noted that if a disclosure is made to an employer in terms of section 6 of the PDA, there are a number of requirements that have to be met, i.e. the person claiming protection must be an employee who has reason to believe that the information he/she possesses falls within the definition of a 'disclosure' in s 1 of the PDA; the employee must make the disclosure in good faith; if there is a prescribed procedure the employee must follow in disclosing the information, then there must be substantial compliance with that procedure; if there is no prescribed procedure then the employee must disclose the information to the employer and there should be some link between the disclosure and the detriment.⁵⁸

⁵⁷ (2003) 24 ILJ 1670 (LC).

⁵⁸ See fn 57, para 19.

The court determined that a disclosure must be made in good faith and an employee who deliberately sets out to embarrass and harass an employer is not likely to satisfy the requirement of good faith. The court further found that when disclosing information in good faith, it was not necessary to prove the validity of the employee's suspicion. The court justified this by stating that the PDA would be undermined if genuine concerns or suspicions were not protected, even if they proved to be unfounded.⁵⁹ This point was mentioned in the *Francey*⁶⁰ case by the CCMA Commissioner when considering the *CWU* case in trying to decide whether the applicant's disclosure was a disclosure in terms of s 1 of the Act. This point however did not apply to the applicant in *Francey's* case considering that the disclosure was not made in good faith nor was it based on supported documents and evidence.

This is problematic in that there is no objective standard of good faith. As will be argued below there should always be proof of the validity of the employee's suspicion in order to establish his/her case. Further, having evidential proof will also strengthen the employees case when the organisation and the court look at the element of reasonable belief. Referring to the *Francey* case which is evidence of this fact and, a good illustration of a disclosure not falling under the protection of the Act, having evidential proof is always advantageous considering that if all else fails, there is documentation to strengthen your case. This is submitted because very seldom is there a pure element of good faith when a disclosure is made, simply because by that time the "fuzzy feelings" for the person you are making allegations about have long since dissipated. However, it must be noted that the whistleblower's predominant motive must be good faith in order that the disclosure is a protected one in terms of the Act. It is submitted that this is a debatable point which will be discussed further in Chapter 6. If there is a lack of documentation available to back up allegations, then there is immediate doubt that arises out of the truthfulness of the allegation. A lack of reasonable belief in the disclosure also does not help in convincing the court that the disclosure is true. What can worsen the situation is if there is proof that the employee's motive was not pure in that the element of good faith did not exist because it was found that the predominant motive was something else e.g. vindictiveness. Hence the point made above. The legislature in creating the Act

⁵⁹ See fn 57, para 21.

⁶⁰ See fn 44, page 6.

obviously had good reason in including the elements of good faith and a reasonable belief because if these elements are attached to a disclosure, it makes it all the easier to determine whether the disclosure is protected or not and whether the allegations are true.

In referring to the case of *CWU*, the court stated that the PDA was designed in a way that protects disclosures made in private rather than in public. An internal disclosure did not require a reasonable belief that the wrongdoing had occurred, however for an external disclosure, the whistleblower had to have a reasonable belief that the allegation was substantially true.⁶¹ It is submitted that this is yet another debatable point that is discussed later in Chapter 6.

The court concurred with the findings in *Grieve*⁶² that the PDA seeks to encourage a culture of whistle blowing.⁶³ However, the protection extended to employees by the PDA is not unconditional in that the PDA sets parameters for what constitutes a protected disclosure. According to the PDA a 'disclosure' must either disclose or tend to disclose forms of criminal or other misconduct that is likely to be deliberately concealed. Furthermore, the disclosure must be made in good faith with the employee not deliberately embarrassing or harassing the employer. The court further stated in the *MTN* case⁶⁴ that the PDA was not intended to protect what amounts to mere rumour or conjecture.

The court stated⁶⁵ that the requirement that a disclosure be made through an authorized channel is an integral element in structuring the balance. The intention of the PDA is to balance an employee's right to free speech on a principled basis with the interests of the employer in mind. The PDA further tries to establish as a condition for protection that a disclosure be made in accordance with procedures that are either established or authorised. In this case, MTN did have an elaborate system in place for the reporting of allegations of fraud which included confidential hotlines that were available to employees. The requirement was that there should be substantial

⁶¹ See fn 48, para 23.

⁶² *Grieve v Denel (Pty) Ltd* (2003) 24 ILJ 551 (LC).

⁶³ See fn 62, para 20.

⁶⁴ See fn 62, para 21.

⁶⁵ See fn 62, para 23-24.

compliance with the procedures of the company that are available to employees. The applicant failed to comply with the procedures that the company had set down thereby removing himself from the protective ambit of the PDA. This caused the applicant's statement to be deemed an unprotected disclosure contemplated by the PDA and also not made in good faith.

The applicant tarnished the reputation of the company by inferring that Management was in some way committing fraud. At the general meeting the applicant was advised to refer his issues to the business risk unit which he did, but went further by blind-copying the email to other employees of the company which included his peers and other members of MTN. He brought the company into disrepute by the calling the executive "fat cats"⁶⁶ which was derogatory. He further threatened them with engaging the Scorpions to do further investigation. To exacerbate the problem, he had no real evidential proof that his allegations were correct. It is common knowledge that employees sometimes disagree with some of the policies and procedures that are implemented by their companies, but to seek revenge in a way that will tarnish the company and management without any evidential proof indicates bad faith. This type of action on the part of the employee immediately disqualifies him/her from protection under the Act and the disclosures made are consequently deemed to be unprotected.

It was found that the applicant did not suffer an occupational detriment in terms of s 3 of the Act neither did he follow the procedures set out in s 1(ix) of the Act that had to be followed substantially in order that a disclosure be deemed protected. On this basis the court found that the applicant's suspension and pending disciplinary action were upheld.

It is submitted that this case was decided correctly and illustrates the fact that protection can be lost if an employee fails to comply with the procedures of an organisations whistleblowing policy. The Labour Court applied its mind to the examination of the PDA, especially the fact that an employee must comply with the procedures of the Act for the disclosure to be protected and also to comply with any

⁶⁶ See fn 57, para 5.

whistleblower policies based on the Act that the organisation has made available to all employees. However, what is debatable is the issue concerning the fact that good faith does not require proof of the validity of the employee's suspicions which is discussed in detail in Chapter 6. It is submitted that seldom is there a situation where a disclosure is made that a person has an element of pure good faith. Furthermore, because the element of good faith is a subjective element, it is very difficult to determine whether there is good faith or not unless a preponderance test is done. It is further submitted that regardless of the fact that an employee disclosing information with a reasonable belief and good faith, there should always be evidential proof in order to back up an allegation. If good faith does not require proof of the validity of a suspicion, then it is leaving the flood gates open for employees to disclose all kinds of information that could be time consuming for the organisation to investigate. This could lead to all sorts of problems which could otherwise be avoided if all disclosures had evidential proof attached to them.

In the case of *Charlton v Parliament of RSA*⁶⁷ (popularly known as the Travelgate Scam Case) the issues the court had to determine was whether a disclosure made by the applicant was a protected disclosure for purposes of the PDA and whether Members of Parliament are employees of Parliament.

The applicant was employed by the respondent as the Chief Financial Officer on a three year fixed term contract. The applicant alleged that he was unfairly dismissed on account of having made a protected disclosure in terms of the PDA in relation to the improper travel benefit claims by members of the respondent.

The respondent's alleged defence to this claim was that the disclosures made by the applicant were not protected disclosures for the purpose of the PDA because members of Parliament (MPs) about whom the disclosures were made, were neither the employer of the applicant nor the employees of the respondent for the purposes of the Protected Disclosures Act.⁶⁸

⁶⁷ (2007) 10 BLLR 943 (LC).

⁶⁸ See fn 67, para 7.

The respondent submitted that the Members of Parliament hold constitutional positions and are entitled to participate in Parliament and as a result do not hold any contract of employment. It was submitted that Members of Parliament render no service to Parliament in the carrying on of its business and therefore Parliament has no business.

It was argued for the applicant that Parliament does have business and that business is *sui generis* and defined in the Constitution, i.e. a member of Parliament can be both an employer and an employee and is therefore at liberty to disclose information if he/she witnesses something illegal in terms of the PDA.

In trying to determine the issues of the case, the court examined s 1 of the PDA, in particular, subsection (i) which is the definition of a disclosure, (ii) which is the definition of an employee and, (iii) which is the definition of an employer. The court also looked at s 6 and s 9 of the PDA.

Ngcamu AJ found⁶⁹ in favour of the applicant and held that Parliament does have business which is to legislate for the Republic of South Africa. What is required is that that person must be assisting in carrying on or conducting the business of an employer and Members of Parliament therefore fit into the definition of “employee” because they perform duties for Parliament being an organ of state and are also entitled to and do receive remuneration. The payment to Members of Parliament is a reward for services rendered to Parliament. This therefore places them within the definition of employee in terms of the PDA.

Ngcamu AJ went further to state⁷⁰ that the parliamentary staff do the work for Members of Parliament and if there were no Members of Parliament, the staff would not have work to perform. Therefore it is the Members of Parliament that provide work to the parliamentary staff and permit the staff to assist in the carrying on of their business. For Members of Parliament to be employers in terms of the PDA, they do not have to employ or remunerate the support staff, however, they do satisfy the definition of being employers by providing work and by permitting other persons to

⁶⁹ See fn 67, para 21-23.

⁷⁰ See fn 67, para 26-30.

assist in the carrying on of their business. Any Member of Parliament who is performing his function does so on behalf of Parliament or on the authority of Parliament, therefore, if viewed from the perspective of a staff employee, a MP is an employer in terms of the definition in the PDA.

In terms of whether the PDA applies to Members of Parliament, the essence of the respondent's defence⁷¹ was that Parliament provides the law that protects individuals who disclose information. However, this did not apply to cases where the disclosure concerned Members of Parliament and persons making such disclosure would not be in terms of the PDA.

Ngcamu AJ found that there was no reason why Members of Parliament would be excluded from the operation of the PDA. The respondent's interpretation would lead to an absurdity and violate the constitutional principles or the purpose of the PDA.⁷² In interpreting the PDA, the purposive approach⁷³ had to be adopted. With this approach used to interpret the PDA, the court held that the applicant's disclosure was protected in terms of s 1(i) of the PDA and to think otherwise would deal a blow to the Government intentions and would end up being a national embarrassment.⁷⁴

The judgment handed down was a positive one for whistleblowing cases, and was indicative of the fact that members of Parliament or prominent government officials will be held accountable if they are involved in cases of fraud and corruption thereby paving the way for justice to take its course. This case illustrates how the Labour Court examined closely the relevant sections of the PDA and how the Act is able to protect whistleblowers.

An example of a leading whistleblowing case where the application of the PDA was examined closely by the court in order to determine whether a disclosure constituted a protected disclosure, and whose judgment has been referred to in other cases is:

⁷¹ See fn 67, para 43.

⁷² See fn 67, para 47.

⁷³ In terms of the purpose-orientated approach, the purpose or object of the legislation is the prevailing factor in interpretation. The context of the legislation includes social factors and political policy directions which are taken into account in order to establish the purpose of the legislation.

⁷⁴ See fn 67, para 52.

*Tshishonga v Minister of Justice and Constitutional Development and Another.*⁷⁵

This case illustrates that not even the justice department can escape the liability of corruption. It gives hope to whistleblowers that whistleblowing may be more effective than is often maintained.

The facts of the case are as follows: the applicant was employed in the Department of Justice as a Director-General in 1978. In 1994 he became a deputy Director-General when the various Departments of Justice amalgamated. One of his tasks was to eradicate corruption that was prevalent in the administration of insolvent estates, particularly around the appointment of liquidators. After a meeting with his staff, it was resolved that a panel would be established to appoint liquidators, instead of an individual appointing liquidators as was previously the practice. This was intended to prevent fraudulent activity.

In 2002, Minister Penuell Maduna (the then Minister of Justice and Constitutional Development) telephoned the applicant to tell him that Mr Motala (who was a friend of the Minister) would be contacting him because he (Mr Motala) was knowledgeable about liquidations. The applicant and Mr Motala met and Mr Motala expressed his dissatisfaction with the way he was being sidelined by the procedure for appointing liquidators. The meeting ended with the applicant being wary of Mr Motala and it was clear to the applicant that Mr Motala wanted to influence him for his own purpose by abusing his relationship with the Minister⁷⁶. The Minister telephoned the applicant expressing his dissatisfaction with the way in which liquidators were being appointed and directed the applicant to convene a meeting with the staff so that he (the Minister) could address them.

In July 2002, while the applicant was on leave, Mr Van Der Merwe (who was deputizing for him) contacted the applicant to inform him that Mr Farouk Vahed (the Master of the High Court in Pietermaritzburg) was instructed by the Minister to appoint Mr Motala as a liquidator. On the applicant's return to work, he asked Mr Vahed to prepare a report (the Vahed Report) on the reason why he appointed Mr Motala as a liquidator.

⁷⁵ (2007) 4 BLLR 327 (LC).

⁷⁶ See fn 75, para 6.

In September 2002 at a meeting between the Minister, Mr Pikoli, Mr Vahed and the applicant, the Minister announced that he was appointing Mr Lategan (the applicant's subordinate) as acting Master in Pietermaritzburg to oversee the appointment of the liquidations. The applicant was confused because it was irregular that an assistant master from one jurisdiction could be appointed to act in another jurisdiction in a specific case.⁷⁷

RAG (Retail Apparel Group) was one of the largest liquidation companies in the country involving claims in excess of R1 billion. RAG originally appointed four liquidators who successfully challenged the appointment of Mr Motala in the High Court, KwaZulu-Natal. Mr Vahed was reluctant to follow the instructions of the Minister in appointing Mr Motala as a liquidator of RAG for the reason that it did not justify a fifth liquidator. The court confirmed the opinion of the legal advisors that the Minister did not have the power to instruct the Master to appoint liquidators.⁷⁸

It was also noted that Mr Lategan's relationship with Mr Motala was unusual⁷⁹ in that the procedure for appointing liquidators would entail the company in liquidation to requisition a person to be appointed, and it was not open to Mr Lategan to make an appointment without such recommendation or requisition.

In January 2003, the applicant received yet another call from the Minister accusing him of not helping him in the RAG matter and of bad-mouthing him. The Minister declared that the applicant would be the "first casualty" in not doing what he (the Minister) required done without questioning. He continued threatening the applicant by saying that he would remove him as head of the unit with immediate effect and he did not care where the Director-General placed him. He refused to allow the applicant to speak.⁸⁰

The Director-General executed the instructions of the Minister to remove the applicant from his position, but told the applicant that the Minister gave no reasons

⁷⁷ See fn 75, para 18.

⁷⁸ See fn 75, para 15.

⁷⁹ See fn 75, para 21.

⁸⁰ See fn 75, para 24.

why the applicant should be removed from his position.⁸¹ At the beginning of February 2003, the applicant was replaced by the Chief State Law Advisor. The Minister however, in media reports, allegedly hinted that the applicant had an “axe to grind” after being rapped over the knuckles for poor work performance.⁸²

The applicant received a letter from the Director-General giving him notice of his removal to the position of managing director in the office of the Director-General. The applicant reported to work daily but was given no work in his new position.

The Business Against Crime investigator (Mr Kinghorn) was seconded to the department to investigate the corruption in the Masters’ Office. A report⁸³ was drawn up, and together with the Vahed Report was handed to the applicant and the Director-General. The Director-General did not act upon the reports.

The applicant then lodged his complaint with the Public Protector. When he received no response from the Public Protector, the applicant lodged his complaint with the Auditor-General’s office. When there was no response from that source as well, the applicant then reported the matter to the media. Much publicity followed as a result thereof.

The Minister responded publicly, allegedly describing the applicant on national television as a “dunderhead, a relic of the Bantustans of old who were accommodated by Maduna’s people in the new order and who were now biting the hand that fed them.” The Minister was also alleged to have said that the applicant was a timid public servant who could not “box himself out of a wet paper bag”.⁸⁴

The applicant lodged a complaint of criminal defamation against the Minister. The Director of Public Prosecutions declined to prosecute and advised the applicant to pursue a civil claim.

⁸¹ See fn 76, para 26.

⁸² See fn 75, para 28.

⁸³ Kinghorn Report.

⁸⁴ See fn 75, para 45.

On the basis of the applicant's disclosures to the media, he was suspended and later charged with misconduct.

After a disciplinary enquiry where he was found not guilty, the applicant tried to get his job back but was told that the trust relationship was broken and that he and the department should come to some sort of settlement.

Mr Woudstra SC submitted the following for the applicant:

- that the applicant's case fell squarely within the ambit of the PDA by examining what the requirements are for a disclosure and determining what the definition is in section 1(a) and (b) of the PDA;
- that the disclosure was deemed to have been a protected one in terms of section 5 and 6 of the PDA;⁸⁵
- that the disclosure to the media was protected in terms of section 9 of the PDA and by submitting that a "wide and unqualified" meaning should be attributed to the word "any" in s9(1)
- that the applicant was subjected to an occupational detriment as defined in s5(1)(a) and (b) of the PDA.⁸⁶

The main legal issues the court had to decide upon was whether the applicant's disclosures to the media were protected by the PDA and whether the applicant did suffer an occupational detriment in terms of the PDA. This would have been decided upon by looking at section 9 of the Act.

The court then went on to look at the purpose and philosophy of the PDA and found that whistleblowing is healthy for organizations and whistleblowers should not be seen as "impipis".⁸⁷ The court held⁸⁸ that employees have a responsibility to disclose irregular conduct in the workplace and have an obligation to report fraud, corruption, nepotism, maladministration and other offences. Furthermore, employees have to act

⁸⁵ Section 5 – any disclosure made (a) to a legal practitioner or to a person whose occupation involves the giving of legal advice; and (b) with the object of and in the course of obtaining legal advice, is a protected disclosure.

⁸⁶ See fn 75, para 86.

⁸⁷ A derogatory term reserved for apartheid era police spies. (Refer also fn 17).

⁸⁸ See fn 75, para 169.

in the employer's best interests in terms of being loyal, and to preserve the company's viability, good name and reputation.

Pillay J found⁸⁹ that the PDA is conceived as a four-staged process that begins with an analysis of information to determine whether it constitutes a disclosure. If it is, then one has to determine whether it is protected. The third stage is to determine whether the employee was subjected to an occupational detriment. Finally one must look at what the appropriate remedy for the occupational detriment and award (for such treatment) would be.

In terms of what a disclosure is, the court looked at the definition in section 1 of the PDA which states that a disclosure is "any disclosure of information about the conduct of any employer or employee who has reason to believe that the information shows or tends to show certain improprieties". However, the requirement is that information must be disclosed that includes, but is not limited to facts (i.e. information would include such inferences and opinion based on facts which show that it is reasonable and sufficient to warrant an investigation).⁹⁰ It is enough that the information tends to show an impropriety.

As mentioned in the *MTN* case by Van Niekerk AJ at para 21, if a disclosure is made in good faith it must also include a reasonable belief that the information is true, otherwise this could amount to rumour or conjecture which is not what the PDA intended. Therefore, if the employee believes that the information is true, then a *bona fide* disclosure can be inferred.⁹¹ If a reasonable belief is determined by personal knowledge, then it would frustrate the operation of the PDA by setting a very high standard. A mistaken belief or one that is factually inaccurate can also be reasonable, unless the information is so inaccurate that the public has no interest in its disclosure. However, a mistaken belief or information that is factually incorrect could become problematic. That is why disclosures, before being made, should have some form of evidential proof attached to them to prevent factually incorrect disclosures being made.

⁸⁹ See fn 75, para 176.

⁹⁰ See fn 75, para 179.

⁹¹ See fn 75, para 187.

Pillay J⁹² stated that by setting good faith as a specific requirement, the legislature must have intended that it should include something more than reasonable belief and the absence of personal gain. Good faith is required to test the quality of the information. A factual example of this is when an employee decides to disclose information concerning a particular qualification of the director of the company, which information is not as represented or as claimed by the director. The employee bases his/her information on what s/he believes to be true (normally based on hearsay), and discloses that self same information as factual, without having verified the information.

The court held, after examining the evidence, that:

- (a) the applicant had a reasonable belief that a crime was likely to be committed because he had based his belief on the Vahed and Kinghorn reports and his personal encounters with the respondents and Vahed;⁹³
- (b) the applicant did not make the disclosures for personal gain;⁹⁴
- (c) the applicant was aware that the retaliation against him was likely to be serious as the information was substantially true and the Minister was politically the most powerful person in the department and was very angry with him;⁹⁵
- (d) a reasonable time had lapsed before he went to the media, in that seven months had passed and his lodged complaints had not been attended to either by the Director-General, Auditor-General or Public Protector;⁹⁶
- (e) in the circumstances the applicant had met all the conditions in section 9(2) of the PDA;⁹⁷
- (f) the applicant's disclosure to the media was reasonable and that the media's exposition of corruption is good for democracy⁹⁸. Disclosures to the media will not be justified if they are not in the public interest. However, in this case the disclosures were serious enough to be in the public interest as they involved the public service and public officials and in these circumstances the applicant's disclosure was in all circumstances reasonable;

⁹² See fn 75, para 204.

⁹³ See fn 75, para 218-219.

⁹⁴ See fn 75, para 239.

⁹⁵ See fn 75, para 240-242.

⁹⁶ See fn 75, para 248.

⁹⁷ See fn 75, para 251.

⁹⁸ See fn 75, para 252.

- (g) the reason the applicant made the disclosures was to put a stop to the corruption in the department. It distressed him that the PDA was being “killed” by the very department that gave life to it.⁹⁹
- (h) by making the disclosures the applicant had much to lose as a senior public servant and therefore it was not a risk he took without thinking about it carefully. On this basis, the applicant had made the disclosures in good faith¹⁰⁰;
- (i) the applicant had been subjected to an occupational detriment in that even though he was paid during his suspension and the settlement assured him of his remuneration until the age of 65, he was still denied the dignity of employment¹⁰¹.

The court held that, since the victim of an occupational detriment is in much the same position as the victim of discrimination or victimization, compensation for unfair discrimination was an appropriate guideline. Detriment suffered by whistleblowers is a form of serious discrimination which affects the very core of an individual’s right to dignity and therefore merits a high award for damages.

The court ordered the respondents to pay the applicant compensation equivalent to 12-months remuneration at the current rate applicable to Directors-General.

According to the South African Law Reform Commission Report,¹⁰² “this was a significant victory for whistleblowers in that legal costs were awarded in the whistleblower’s favour, the fact that the legal struggle was protracted over four years should not be lost sight of. The court held that the employer, the Department of Justice and Constitutional Development, was liable for the whistleblower’s legal costs including the costs of Senior Counsel.¹⁰³ It based its finding on the fact that legal representation is a necessity in cases under the PDA, because employees need to test their beliefs and the information they intend to disclose against the objective, independent and trained mind of a lawyer”.

⁹⁹ See fn 75, para 266.

¹⁰⁰ See fn 75, para 278-279.

¹⁰¹ See fn 75, para 284.

¹⁰² Project 123 *Protected Disclosures* (August 2008) 74. (Refer also fn 13).

¹⁰³ See fn 75, para 309.

Minister Maduna was replaced as Justice Minister after the elections on 14 April 2004. At the beginning of July 2004, Mr Motala and six departmental officials were arrested for fraud and corruption. Tshishonga cleared his name when he substantiated all the claims made against Minister Maduna in a recent disciplinary hearing. Tshishonga has been fully reinstated in his position in the department.¹⁰⁴

4.1.2 Fact or Fiction : Gossip in the Workplace

It is important to elaborate on this issue, because it is a concept which is relevant and needs to be dealt with and discussed in terms of disclosure of information, in particular whether this type of disclosure qualifies as a protected disclosure. There are times when employees base their information on what they believe to be true (normally based on hearsay), and they disclose that self same information as factual, without having verified the information.

As Pillay J stated,¹⁰⁵ in the *Tshishonga* case, “by setting good faith as a specific requirement, the legislature must have intended that it should include something more than reasonable belief and the absence of personal gain”. Good faith is required to test the quality of the information.

In conjunction with good faith, one needs to have a reasonable belief that the information disclosed is true.

In terms of whistleblowing or disclosure of information, the concept of reasonable belief is based on some evidential proof which must accompany the disclosure if it is made internally. This creates an opportunity for employees who want to cause disharmony in the workplace by disclosing information and hiding behind the concept of reasonable belief and good faith. Most times one will find that disclosures that turn out to be a mistaken belief or are factually incorrect are ones which stem from gossip. This becomes an issue considering the time and the resources used to investigate disclosures, only to find that they were made all in the name of gossip.

¹⁰⁴CJ Auriacombe “What happens when one blows the whistle? Recent SA Cases” (2005) 24(1)

Politeia 96.

¹⁰⁵ See fn 75, para 204.

Gossip and gossip mongers are present in every workplace environment and most of their gossip is discussed in the corridors or over a quick tea break during their comfort breaks. It is an accepted fact that office gossip and rumours exist and are part of everyday work life. It is submitted that the difference between gossip and rumour is that gossip tends to affect the victim personally, for example, it will focus specifically on information concerning the other person's personal or non-personal issues, while rumour is more general and entails divulging information that leads to gossip. It is a well known fact that gossip varies in intensity between extreme gossip as in malicious gossip and innocent gossip as in puffery. The question to ask is, when is the boundary crossed between healthy communication and malicious gossip?

Gossip, regardless of its intensity has the power to strain the work environment. According to Gouveia et al (2005)¹⁰⁶ gossip has the power to “undermine an individual, break down trust between employees, strain ethical values such as openness, transparency and honesty. The consequences are decreased staff morale, motivation and interpersonal respect between employees. Gossip has the ability to be incredibly malicious and destructive to work relationships and has been compared by Burg and Palatnik (2003)¹⁰⁷ to “a virus that can affect the bottom line and ultimately kill a business”. Gossip in its negative form is a complete fabrication and mean spirited distortion of reality and truth which allows the gossiper to feel a false sense of power over the victim/s.

Hearsay on the other hand, is a form of gossip which is not told directly to the person, but who overhears it, and then disseminates what s/he heard.

Victims of gossip suffer psychological problems and inevitably end up suffering from depression associated with feelings of victimisation, betrayal, degradation and embarrassment. Victims could end up losing their motivation to perform their work related tasks because of a lack of self-esteem and stress related diseases which can manifest themselves in a number of ways. Gossip, in a nutshell, can destroy the lives of it's victims.

¹⁰⁶ CM Gouveia et al, “Towards a Typology of Gossip in the Workplace” (2005) 3 (2) *SA Journal of Human Resource Management* 56-68.

¹⁰⁷ B Burg and L Palatnik, “The gossip threat” (2003) January, *Security Insider*, 34.

The case of *Rand Water Staff Association obo Snyman v Rand Water*¹⁰⁸ is an example of a disclosure of information arising out of gossip/hearsay, and the effect it has on the victims.

The facts of the case are as follows: the applicant (Ms Snyman) was employed by Rand Water as a human resources officer and lived in a house on the property which she stated was in a "terrible condition". The applicant gained the impression that managers and certain supervisors were given preferential treatment because their houses were better than hers, and therefore believed that her circumstances did not compare favourably in relation to these managers and supervisors. The situation was aggravated when the applicant received news that residents like herself would probably have to pay for the maintenance to their properties whereas the managers would not need to pay. In her already aggrieved manner, and relying on hearsay information disseminated by two of her colleagues, the applicant contacted the Hotline to report certain alleged irregularities that she believed the Managers and Supervisors were guilty of.

On investigation, all the allegations were found to be untrue yet the applicant insisted that the investigation be re-opened whereupon the managers then instituted grievance procedures because the inspection of their properties were viewed as an infringement of their privacy and witnessed by their family members. The managers took exception to being treated in a way which was demoralising to them and also saw it as having a negative impact on all staff at Rand Water.

The second investigation proved yet again that all the allegations made were unfounded. On this basis the applicant was dismissed for disclosing information that was deliberately untrue and trying to discredit management based on her own opinion, hearsay and gossip without sufficient proof.

Although the court found that the applicant's dismissal was unfair, it found that she had a reasonable belief that her disclosure was true even though, a little effort on her part to verify the information before disclosing it would have proved that her

¹⁰⁸ (2001) 6 BALR 543 (P).

information was incorrect. The court, however, found that the applicant's conduct was open to criticism for relying on hearsay evidence and by persisting with the allegations even though she knew that they were unjustified and on investigation found to be untrue.

What is of interest is that the applicant did not seek reinstatement and remained unremorseful and unapologetic even when she realised that her allegations were untrue and unfounded. No doubt, if she had sought reinstatement, the relationship between her and her colleagues would have been strained because of the fact that she disseminated hearsay/gossip without clarifying the information and without being remorseful. Her colleagues would then be reluctant to say anything to her for fear of being implicated. Furthermore the trust relationship between her and Management was broken.

Even though the PDA was not enacted when the applicant disclosed the allegations, according to the Arbitrator the purpose of the hotline was likened to the purpose of the provisions of the PDA in that it required disclosures to be made in good faith with a reasonable belief that the information provided was true.

It is submitted that if further investigations had been carried out it would have been found that the applicant did not have a reasonable belief, nor was her motive one of good faith. This can be inferred from the fact that the applicant relied solely on hearsay without investigating the truthfulness of the rumours and the fact that she had a grudge against management even though there was no evidential proof of these rumours.

The facts of the case show that her motive from the beginning was questionable because of her aggrieved state of mind and her attitude to disclose information that she no doubt knew to be gossip, without investigating whether those facts were true or not. It is submitted that if the PDA had been enacted when the allegations were disclosed, the applicant's disclosures would not have been protected in terms of s1 of the Act.

This case is an example of how gossip can destroy the trust relationship and how it can demoralise and destroy its victims. The consequences of gossip are such that it leaves behind an insidious doubt within people's minds about the victims and their innocence even when the investigations prove the allegations untrue. The victims are left picking up the pieces of their reputation and trying to maintain their dignity.

There is no recourse for the victims if the disclosure is unprotected. In terms of the Act, the whistleblower has recourse in that they are able to hide behind procedures, complaints of occupational detriment and unfair dismissals or procedures, continuing as though their actions were justified. At the very least, for the whistleblower the law provides an avenue for recourse in regard to occupational detriment.

When whistleblowers are able to hide behind the concept of good faith and reasonable belief even when they realise that their allegations are found to be untrue, it can be confidently argued that this is an example of a loophole within the Act that can be avoided.

It is submitted that, in comparison to gossip, fact is a sustainable truth which the purveyor thereof has at least verified in source and nature and, which s/he has a reasonable belief to be true as per the *Tshishonga* case.

It would be an injustice if information that is substantially true is not disclosed, especially if it is in the best interests of the public and the company. Disclosing information that an employee knows is in the public interest and for the benefit of the company and employees, is a principled and moral duty that one has. Disclosing such information is always a major decision because of the consequences attached to such disclosures.

A protected disclosure is information that is made in good faith and with a reasonable belief of its truthfulness. Evidential proof in conjunction with the element of good faith and reasonable belief would indicate that there is some substance to the allegation, which could then lead to an investigation into those allegations.

It is very seldom that a protected disclosure ends up being a mistaken belief if the whistleblower has truly done his/her homework by making sure that the disclosure is true and does not stem from hearsay or gossip. When a whistleblower has a genuine concern about some sort of wrongdoing concerning fraud and corruption, the concern will not be the anticipated personal gain for him/herself, but a concern for the wellbeing of the other employees, the public and the company. However, because of the stigma attached to whistleblowing, employees who want to disclose information are reluctant to divulge the information that they have.

The PDA was enacted to protect such disclosures, hence the concept of protected disclosures. The intention of the PDA was to protect whistleblowers from any kind of occupational detriment. The protection of the PDA, technically, only covers disclosures that are substantially true, made with a reasonable belief of their truth and in good faith. The majority of disclosures of information do fulfil the requirements of protected disclosures, however, as said above, because of the loophole within the Act concerning good faith and reasonable belief, what should be clear has turned out to be a rather grey area.

However, the PDA has made it possible for whistleblowers to blow the whistle on crime, fraud and corruption in the workplace. The *Tshishonga* case was one such case, where the PDA did what it was supposed to have done, by protecting a whistleblower who had disclosed information with a reasonable belief and in good faith. Even though in this case it took approximately four years for the court to finally give a judgment and close the case, the PDA did accomplish what it had set out to do.

The concept of whistleblowing and protected disclosures is a positive move towards the elimination of fraud and corruption which has become a prominent problem. When whistleblowers have the faith to believe that the PDA will protect their disclosures, there is a likelihood that they will disclose information without fear of any occupational detriment. In terms of whistleblowing, there is a need for a change of attitude of employers. If employers adopt a mindset that is open to whistleblowing, the process will become more manageable. Given that this is such a recent concept, it may take time for companies to develop the mindset that the PDA had envisaged.

It is submitted, that at present, whistleblowers that make protected disclosures are still seen as the bad people and this discourages true whistleblowers from divulging relevant information that might eliminate fraud and corruption. But, in cases such as *Tshishonga*, it is clear that the PDA will protect relevant disclosures and it is encouraging to see that the courts will do what they can to interpret the PDA the way it was supposed to be interpreted. The downside of whistleblowing and protected disclosures is, regardless of the fact that the whistleblower falls under the ambit and protection of the PDA, the side effects of disclosing information are stressful and painful and are likely to leave a whistleblower traumatised. This not only affects the whistleblower but also his/her family and day-to-day life. But, to disclose important or relevant information that is true in order to prevent further fraud and corruption, a whistleblower no doubt has to live by the philosophical ethical principle that his/her disclosure was for the greater good of all.

It is submitted that the concept of a true and substantiated disclosure that falls under the protection of the PDA is a good disclosure, and justice will be served when fraud and corruption are eliminated by a few good and brave people, who are willing to go the extra mile and disclose information that can be investigated and acted upon.

4.1.3 Consequences

When a disclosure is made and the whistleblower has complied with all the relevant procedures, the disclosure is then a protected one under the Act. According to section 1(vi) of the PDA, an employer may not effect an occupational detriment on that employee which could include subjecting the employee to disciplinary action; dismissal, suspension, demotion, harassment or intimidation; restricting the employee from been transferred or promoted; having the employee's contract subjected to any conditions of employment or additional terms; having the employee's retirement brought forward or altered; and refusing to give the employee a reference or deliberately giving him/her a bad reference.

If the whistleblower has being subjected to any kind of occupational detriment by his/her employer, section 4 of the PDA provides remedies for the employee such as approaching any court that has jurisdiction, which includes the Labour Court and

utilising any other processes that are provided i.e. the CCMA. The employee might want to resort to the Labour Relations Act, 1995 (Act No. 66 of 1995) for appropriate relief (i.e. unfair dismissal in breach of section 3 will be deemed an unfair dismissal) because proof of an unfair labour practice would not be necessary since it would be deemed as such or the employee might ask for a transfer within the department (this transfer may not be less favourable than the present position the employee is in).

According to the Guide to the Whistle-blowing Act,¹⁰⁹ “people who are dismissed for making a protected disclosure can claim either compensation, up to a maximum amount of two years salary, or reinstatement and people who are not dismissed but who are disadvantaged in some other way as a result of making a protected disclosure can claim compensation or ask the court for any other appropriate order”.

In the case of *Radebe & another v MEC, Free State Province Department of Education*¹¹⁰ the applicants claimed that the proposed disciplinary enquiry against them amounted to an occupational detriment as defined in section 1 of the PDA.¹¹¹ The critical question before the court was whether the disclosure was made in good faith and with a reasonable belief that the allegations made were substantially true.

The facts of the case are as follows”: the applicants were employed by the Free State Department of Education in the capacity of school management and governance developer and school principal based in Welkom. In December 2005 the applicants compiled a document containing allegations against the MEC responsible for education in the Free State Province. These allegations pertained to fraud, corruption and nepotism. The document was forwarded to the office of the President of the Republic of South Africa, the National Minister of Education, the Premier of the Free State, the MEC for Education in the Free State, the Head of Education (being the Superintendent General for the Free State, the Deputy Director-General of the Free State Administration and the Lejweleputswa District Director of Education. The

¹⁰⁹ National Anti-Corruption Forum – Guide to the Whistleblowing Act – s(1), “What is whistleblowing”. [http://www.nacf.or.za/guide to the whistle blowing act](http://www.nacf.or.za/guide%20to%20the%20whistle%20blowing%20act) (Accessed: 10 February 2009).

¹¹⁰ (2007) JOL 19112 (O).

¹¹¹ An occupational detriment is defined as including *inter alia*, subjecting an employee to a disciplinary inquiry.

intention of the applicants was to ensure that the relevant authorities investigate the allegations of fraud, corruption and nepotism.¹¹²

The court held that the disclosure fell squarely within the ambit of section 9 of the Act¹¹³ and looked at the requirements which must be fulfilled for a general protected disclosure.

The court held that even though the PDA seeks to encourage employees to expose wrongdoing in the workplace, it also incorporates mechanisms meant to safeguard the reputation and interests of employers, and all those against whom allegations of wrongdoing are made, bearing in mind that the allegations may turn out to be false.¹¹⁴

The court referred with approval to the judgment in *CWU v MTN (Pty) Ltd*¹¹⁵ where it stated that:

“The PDA contemplates and protects disclosures made in private rather than in public. This is obvious given the potential damage to reputation of persons against whom allegations are made, and an integral element of the balance between the protection of rights to reputations and the protection of free speech in the workplace”.¹¹⁶

The court, on looking at whether or not the disclosure by the applicants was made in good faith, and in the reasonable belief that it and the allegations contained therein, were substantially true, found that there was no attempt by the applicants to verify these allegations, that by their nature, were very serious.

Musi J stated that on examining the evidence it was not possible that the applicants could have acted in good faith when there was no basis that existed for the allegations, neither could there have been a reasonable belief that the information was substantially true. The court found that the underlying reason for the disclosure was the general dissatisfaction of the applicants with the manner in which the MEC ran her portfolio and thus portrayed a complete lack of respect for her. On this basis, the

¹¹² See fn 110, para 4.

¹¹³ See fn 110, para 13.

¹¹⁴ See fn 110, para 15.

¹¹⁵ (2003) 24 ILJ 1670 (LC) 1678 I-J.

¹¹⁶ See fn 115, para 15.

court found that the disclosure was not protected in terms of section 9 of the Act and dismissed the application with costs.

Although the Act is available to protect whistleblowers in respect of making remedies available to employees who have suffered an occupational detriment, it is important to note that the disclosures must be made in good faith and with a reasonable belief that they are true. The purpose of the Act is not to protect disclosures that are made for revengeful or malicious purposes. Therefore, the implications of this case are that, regardless of the fact that the applicants had evidential proof of their allegations, the Act will not protect whistleblowers if their disclosures are made in bad faith and for malicious or vindictive reasons.

4.2 The Public Interest Disclosures Act in Comparison to South Africa's Protected Disclosures Act

The United Kingdom's Public Interest Disclosures Act 1998 (PIDA) is an Act protecting individuals who make certain disclosures of information in the public interest and to allow such individuals to bring an action in respect of victimisation and for connected purposes. Section 43A¹¹⁷ makes the whistleblowing law part of the UK's employment legislation. It does this by inserting the main provisions of PIDA into a new part of the Employment Rights Act 1996. As a consequence, the majority of whistleblowing disputes arise in the context of labour issues such as, unfair dismissals, harassment, victimisation, occupational detriments, etc.

The employment legislation deals with employees who believe that they have been wronged and their cases can be determined and independently reviewed by the relevant authorities. These employee rights are considered when an employee seeks a remedy for harm or damage he/she believes he/she personally suffered at the hands of his/her employer. In respect of an employee who is harmed or damaged because he/she has blown the whistle, the PIDA is the legislation that is considered and the

¹¹⁷ In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker.

claim under this piece of legislation can be brought in an Employment Tribunal.¹¹⁸ An employment tribunal is similar to the CCMA (Commission for Conciliation, Mediation and Arbitration) here in South Africa and deals with claims on roughly the same basis as the CCMA. The claim is examined carefully to determine whether the harm or damage to the whistleblower is directly linked to the disclosure and also to determine whether the disclosure falls under the ambit of the protection of the Act. The Employment Tribunal in terms of section 48 of the ERA will determine whether the whistleblower has been treated fairly in terms of whether he/she was suspended or unfairly dismissed for the primary reason of making a protected disclosure. The Employment Tribunal's determination will determine whether the whistleblower may appeal the case to the Employment Appeals Tribunal or not.

In terms of PIDA one of the key provisions is the fact that compensation is unlimited if the dismissal is on the basis of making a protected disclosure which is deemed to be automatically unfair in terms of s 103A of the Act. This puts the onus of proof on the employer to prove that the dismissal was fair. Section 9 of PIDA provides a quick resolution to an unfair dismissal in terms of interim relief.

The Act applies to all employees who raise genuine concerns about misconduct and injustice occurring within the workplace. Disclosures concerning malpractice apply whether or not the information is confidential. In addition to employees, the Act covers third parties such as contractors, trainees, agency staff, police officers and homeworkers who may wish to make a disclosure.

To fall into the ambit of the Act, disclosures must be made in good faith. According to the Random House Webster's Legal Dictionary,¹¹⁹ good faith is defined as the quality of mind and heart possessed by a person who is acting with sincerity and honesty, and without intent to cheat or take unfair advantage of another. This means that the disclosure must be made honestly and sincerely with a motive to eradicate the wrongdoing. A disclosure that is made in good faith to an employer will be protected if the whistleblower has a reasonable belief that the information that he/she is

¹¹⁸ This is much the same in South Africa. Employees who believe that they have been harmed by their employer can bring an action in terms of section 187 of the Labour Relations Act whereas, a whistleblower can bring his/her action for harm done to him/her in terms of section 4 of the PDA.

¹¹⁹ 3rd ed, Clapp JE, Random House Reference, 2007.

disclosing tends to show that the malpractice has occurred or is going to occur. The rationale behind the element of good faith is honesty and sincerity in conjunction with reasonable belief that the information disclosed is true. If an employee does not have the element of good faith or if the legislature did not specify good faith as an element to disclosure of information, then disclosures will in all likelihood be made for malicious and vindictive reasons, and for purposes of self-interest which would defeat the purpose, objective and aim of the Act.

The Act represents a mid-way position and takes a 3-pronged approach to disclosure of information:

- (i) firstly, it encourages whistleblowers to use internal mechanisms, so as to give the company a chance to address the problem;
- (ii) secondly, in cases where these internal mechanisms either do not exist or fail to work, the legislation encourages whistleblowers to use prescribed external agencies;
- (iii) and finally, under a strict set of conditions, the legislation protects whistleblowers that make wider disclosures to, for example, the media. This applies in the event of a particularly serious issue, where there is fear of reprisal or cover up, or where the matter has been reported internally or to the prescribed person but has not been dealt with properly.¹²⁰

The Act makes special provisions for disclosures to be made to designated persons for example section 43C (disclosure to an employer or other responsible person), section 43D (disclosure to a legal adviser), section 43E (disclosure to a Minister of the Crown) and section 43F (disclosure to a prescribed person). Broader disclosures are protected if they are reasonable in all the circumstances and are not made for personal gain. A wider disclosure must fall within one of the following categories in order for it to be protected: (i) where the whistleblower reasonably believed he/she would be victimised if he/she raised the matter internally; (ii) where there was no prescribed regulator and he/she reasonably believed the evidence was likely to be destroyed or concealed; (iii) where the concern had already been raised with the relevant authorities and (iv) where the concern was of an exceptionally serious nature.

¹²⁰ K Drew "Whistleblowing and Corruption: An Initial and Comparative Review", January (2003) 30. (Refer also fn 38).

When a disclosure is made and the whistleblower is victimised or dismissed in breach of the Act for making that disclosure, then he/she can bring a claim for compensation to an employment tribunal in terms of section 3 of PIDA (section 48(1)(A) of the ERA).

Section 43A of the Employment Rights Act (ERA) defines the meaning of a protected disclosure as a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of the sections 43C to 43H. This section makes the whistleblowing law part of the UK's employment legislation. Because the PIDA is part of employment law, many of the legal and procedural issues relevant for tribunal claims can be found in the main body of employment law.

Section 43B (Disclosures qualifying for protection) sets out the information which is subject to protection, provided that the employee in sourcing the information did not commit an offence or that a legal adviser does not disclose the information which he received from the employee for purposes of legal advice. This section covers a wide variety of information which applies to most malpractice. An important aspect of this section is that these provisions apply to all information whether or not it is confidential.

The degree of belief as per Section 43B, (subsection 1), requires that as long as the worker has a 'reasonable belief', the standard is met. This means that the belief need not be correct but only that the worker held that the belief he/she had was reasonable at the time. This can be considered a qualifying disclosure if the worker reasonably but mistakenly believed that his/her disclosure was true. For the disclosure of information to fall within the definition of a qualifying disclosure, it does not matter whether the malpractice occurred or is about to occur (i.e. whether the disclosure was incorrect/false).

Section 43C¹²¹ relates to a disclosure to an employer or any other responsible person. This section is central to, and a vital part of, the Act in that it ensures that employers are made aware of the concern in order to investigate it. This section sets out the wide circumstances in which a worker is protected if he/she raises any concerns with his/her employer. There is no additional evidential test which applies besides those set out in s 43B, that the worker reasonably believes that the information tends to show the malpractice. Good faith is a requirement for this section in that the disclosure must be made honestly, even where it is made negligently or without due care.

Section 43D relates to a qualifying disclosure made in accordance with this section if it is made in the course of obtaining legal advice. This provision enables a worker to seek legal advice about a concern and to be fully protected whilst doing so. What must be noted however is that this is the only disclosure within the Act which does not have to be made in good faith in order to be protected. The issue of confidentiality and privilege between the client and the attorney has to be respected, therefore the attorney is not able to disclose that information as a protected disclosure unless his client advises him to do so. In this respect, it is best if the attorney advises his client to disclose the information internally him/herself in order to get the full protection of the Act.

Section 43E relates to a disclosure made to the Minister of the Crown. This section provides that workers in Government-appointed bodies are protected if they report their concerns in good faith to the sponsoring Department, rather than to their employer.

Section 43F relates to a disclosure to a prescribed person. This section provides that the worker is protected if he/she makes a qualifying disclosure to a person prescribed by the Secretary of State for Trade and Industry. If a regulator has been prescribed,

¹²¹ Disclosure to employer or other responsible person (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith – (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to – (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person. (2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

what is noticeable is that there is no requirement that (i) the particular disclosure was reasonable; (ii) the malpractice was serious and (iii) the worker should have first raised the matter internally. However, with this section the worker has to meet a much higher evidential burden than in s 43C which protects internal whistleblowing.

Section 43G relates to wider disclosures and sets out the circumstances in which these disclosures can or may be protected e.g. disclosures to the media. If these types of disclosures are made, then they must meet three tests in order to be protected. The first test (s 43G(1)(a)-c)) deals with the evidence and motive of the whistleblower, i.e. the element of good faith must be present. The second test (s 43G(2)) sets out three preconditions, which must be met if the disclosure is to be protected, i.e. the worker must reasonably believe that he/she will be victimised were he/she to raise the matter with his/her employer or prescribed regulator. Finally, to be protected the disclosure must be reasonable in all the circumstances (s 43G(1)(e) and (3)), i.e. in determining whether the disclosure was reasonable in all the circumstances the tribunal will have to take into consideration all the factors of the case. The whistleblower will not be protected if the purpose of the disclosure was made for personal gain.

Section 43H relates to disclosures of an exceptionally serious nature. This section provides that wider disclosures of an exceptionally serious nature can be protected even though they do not meet the conditions in previous sections such as section 43G. However, the element of good faith, reasonable belief and personal gain are relevant to this section and should be taken into account.

As Justice Mummery stated in the case of *ALM Medical Services Ltd v Bladon* [2002] IRLR 807 at para 2 “the aim of the provision is to protect employees from unfair treatment (i.e. victimisation and dismissal) for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace. The provisions strike an intricate balance between (a) promoting the public interest in the detection, exposure and elimination of misconduct, malpractice and potential dangers by those likely to have early knowledge of them, and (b) protecting the respective interests of employers and employees”.

In both the above Acts the elements of good faith,¹²² reasonable belief and personal gain are to be taken into account and should be adhered to in order for the disclosure to fall under the ambit of the relevant legislation.

4.3 A summary of the PIDA and the PDA¹²³

Below is a summary of the PIDA and the PDA for easy reference and reading.

Legislation : Public Interest Disclosures Act – enacted in July 1998

Who is protected?	Public and private sector employees (excluding the security service and the police)
Information protected?	A qualifying disclosure constitutes (i) a criminal offence (ii) a failure to comply with any legal obligation (iii) a miscarriage of justice (iv) danger to health and safety of <u>any individual</u> (v) damage to the environment (vi) deliberate concealment of information relating to any of the above has been, is being, or is likely to be committed.
Disclosure Routes Protected:	Prescribed disclosure channels – (i) internal (ii) prescribed routes (iii) media.
Motive:	Good faith/reasonable belief.
Strengths:	(i) Covers private and public sector employees (ii) linked to strong employment law that contains strong burden of proof (iii) no limits in terms of disclosure routes (iv) covers sub-contractors and trainees as per section 43K: (v) creates incentives for employers to put in place internal procedures. The process is consultative and consensual with the legislation being a vital step towards de-stigmatization. There is a wide scope of protection for both public and private sector employees. There are no upper limits on compensation. Employees are encouraged to blow the whistle internally first which encourages employers to put in place internal whistleblowing procedures. An interesting fact is that the Act has the firm commitment of trade unions who played an active role in campaigning for and supporting the PIDA for both the pre-legislation processes.

¹²² A worker who blows the whistle will be protected if the disclosure is made in good faith and is about a criminal act, a failure to comply with a legal obligation, a miscarriage of justice, a danger to health and safety, any damage to the environment or an attempt to cover up any of these.

¹²³ The overview was taken from a report drawn up by K Drew "Whistleblowing and Corruption: An initial and comparative review" January (2003). www.psir.uq.edu.au/reports/2002-08-C-whistle.doc (Accessed: 9 June 2009).

Weaknesses:	(i)no provision for central monitoring of cases by government which makes it difficult to track and (ii) doesn't compensate for the UK's cultural reluctance to "go public". Individuals are not protected if they disclose information to track unions which are not a prescribed disclosure channel. However, this is being addressed by way of local agreements whereby employers have agreed that it is acceptable for employees wanting to speak with or consult with their union representatives first, only if the trade unions agree that they will act responsibly. An important fact is that with the influence of the culture of secrecy that prevails in the UK, this tends to weaken the PIDA because it becomes very difficult to monitor cases that are settled privately and remain confidential.
Additional Information:	(i)the UK legislation was used as the model for the South African legislation (ii) the legislation has the added benefit of permitting workers to make disclosures about matters that occur outside the UK and which are not covered by the UK law.

Legislation : Protected Disclosures Act – Enacted in June 2000

Who is protected?	Public and private sector employees – specifically excludes independent contractors.
Information protected?	The same as the UK: i.e. criminal violations of civil law; miscarriage of justice; danger to health and safety of an individual; damage to the environment; unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act (4 of 2000) or the concealment of information regarding these matters. However, the disclosure must relate to the conduct of an employer or an employee¹²⁴
Disclosure Routes Protected:	(i)internal disclosures (ii) disclosures to prescribed persons on the following conditions: (a) reason to fear retaliation if made internally (b) fear that information will be hidden or destroyed (c) no action has been taken within a reasonable time after the disclosure to the employer or a prescribed person (d) the matter is exceptionally serious.
Motive:	Internal disclosures must be made in good faith. Other disclosures are to be made with the required reasonable belief that the misconduct is dealt with by the organization or person to whom the disclosure is made as well as a belief that the allegation is substantially true.

¹²⁴ D Lewis "Whistle Blowing at Work: On what Principles Should Legislation be Based?" *Industrial Law Journal* (2001) 30(2) 169 (this was referred to by the author of the above footnote in her document).

Strengths:	Provides for transference to another position.
Weaknesses:	No independent agency to investigate whistle blower complaints
Additional Information:	(i)originally drafted as part of the Open Democracy Bill together with Access to Information (i) modeled on the UK's PDA (iii) like the UK, the legislation permits disclosures on violation that occurred outside South Africa (iv) like the UK, the Act 'prefers' disclosures to be made to the employer itself.

Below is a brief discussion and highlight of other legislation dealing with fraud and corruption in the UK and SA. The sections highlighted within the Acts are done specifically to give an idea to the reader that fraud and corruption is something that is taken seriously and the intention of the Legislature was to create Statutes in order to prevent fraud and corruption.

4.4 Other legislation concerned with whistleblowing in the UK

The United Nations is in the process of drafting a United Nations Convention Against Corruption Act. Negotiations to agree upon this Convention being drawn up began in Vienna on the 21st January 2002. Currently there is a draft containing more than 80 proposed documents¹²⁵ which hopefully will be finalised soon. Article 16(1) of the provision states “systems for (safeguarding and) protecting public (servants) officials and other persons (private citizens), who, in good faith report acts of corruption, (witnesses, informers and experts who participate in proceedings against individuals who have allegedly committed acts of corruption), including protection of their identities, in accordance with their constitutions and fundamental principles of their domestic law”.

¹²⁵ K Drew – “Whistleblowing: An International Review” refers to the site www.odcp.org/corruption.html. (Accessed: 9 June 2009).

4.5 Other Legislation or Acts concerned with whistleblowing in SA

Besides the Protected Disclosures Act there are also other Acts in South Africa that aim at promoting openness and transparency and fighting corruption. Although there are many Acts, mention will only be made of three for purposes of this study. Please note that the following Acts will be spoken about briefly and only relevant sections for the purpose of this discussion will be highlighted.

The Prevention and Combating of Corrupt Activities Act (12 of 2004) came into effect after the 1992 Corruption Act was repealed, creating new definitions of corruption.

The purpose of the Act¹²⁶ is to provide for measures that could prevent and combat corruption, corrupt activities. It provides for the offence of corruption and offences relating to corrupt activities and what investigative measures can be taken in respect of corruption and related corrupt activities. The Act also provides for the establishment and endorsement of a Register in order to place certain restrictions on persons and enterprises convicted of corrupt activities relating to tenders and contracts. The Act further places a duty on certain persons holding a position of authority to report certain corrupt transactions.

Section 3 creates a general offence of corruption and reads as follows:

“Any person who directly or indirectly –

(a) accepts or agrees or offers to accept any gratification from any other person whether for the benefit of himself or herself or for the benefit of another person; or

(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act in a manner that –

(i) amounts to the –

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuses or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligations;

(ii) that amounts to –

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules;

(iii) designed to achieve an unjustified result; or

¹²⁶ As per the long title of the Act, which explains the purpose of the Act.

(iv) that amount to any other unauthorized or improper inducement to do or not to do anything, is guilty of the offence of corruption”.

Corruption can therefore, in a general sense, be described as either giving or receiving some form of gratification as an inducement to do something improper or not to do something that the other party is supposed to do.

Section 34(1) creates a duty whereby corruption must be reported by any person who holds a position of authority¹²⁷ and who knows or ought reasonably to know or suspect that a crime of corruption is about to be committed in terms of the Act or one of the crimes of theft, fraud, extortion, forgery or uttering a forged document involving R100 000 or more has been committed must report it to the police. Failure to do so would be an offence in terms of this section.

The Public Service Act (103 of 1994) is considered the most important provision relevant to the behaviour of public officials. Corruption within the public sector is often regarded as the ‘classic’ form of corruption and the predominant part of attention of the media is directed to reporting this kind of corruption. Sections 20 and 21 of the Act deal with misconduct and are typical of the efforts the Public Service has made to limit corruption and maladministration. (In terms of the amendments in Act 30 of 2007, sections 16A and 16B are relevant to how misconduct is or should be handled in terms of discipline and failure to comply with the above Act).

In a media report¹²⁸ the then Minister of Public Service and Administration, Geraldine Fraser-Moleketi stated that “corruption was a direct impediment to Africa’s development as it took away resources from priority areas such as healthcare, social development and education and overstretched the capacity of the state. Fraser-

¹²⁷ For purposes of section 1 of the Act, the following persons hold a position of authority : (a) the Director-General or head, or equivalent officer, of a national or provincial department; (b) in the case of a municipality, the municipal manager appointed in terms of section 82 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998); (c) any public officer in the Senior Management Service of a public body; (d) any head, rector or principal of a tertiary institution; and (e) the manager, secretary or a director of a company as defined in the Companies Act; (f) the executive manager of any bank or other financial institution; (g) any partner in a partnership; (h) any person who has been appointed as chief executive officer or an equivalent officer of any agency; (i) any other person who is responsible for the overall management and control of the business of an employer; or (j) any person contemplated in paragraphs (a) to (i) who has been appointed in an acting or temporary capacity.

¹²⁸ “Whistleblowing is patriotic duty”. *Business Day*, 29 March 2007.

Moleketi also emphasised the need for “other sectors of society (besides the Public Service) to increase their participation in the fight against corruption and announced that she planned to launch a campaign with business support to make people aware of the tools available to fight corruption. The campaign would also promote whistleblowing as a patriotic duty”.

In a booklet issued by the Public Service Commission (Explanatory Manual on the Code of Conduct for the Public Service: A Practical Guide to Ethical Dilemmas in the Workplace), section C.4.10¹²⁹ states that “an employee in the course of his or her official duties, shall report to the appropriate authorities, fraud, corruption, nepotism, maladministration and any other act which constitutes an offence, or which is prejudicial to the public interest”.

The Public Service Commission (PSC) reviewed the effectiveness of whistleblowing hotlines and has identified ways of improving the public service anti-corruption strategy. The PSC found that the hotlines had been unevenly implemented and others were ineffective. In August 2003, Cabinet approved the establishment of a single national public service anti-corruption hotline. This hotline became available in September 2004 and had already received in excess of 2400 calls relating to alleged corruption and service delivery complaints which were referred to other departments for action as at December 2005. Investigations on public administration and anti-corruption are still taking place.¹³⁰

The Public Finance Management Act (1 of 1999) explains the purpose of the Act in the long title as “to regulate financial management in the national government and provincial government; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those governments; and to provide for matters connected therewith”.

¹²⁹ Page 63.

¹³⁰ <http://www.treasury.gov.za/documents> - Pubic Service Commission – Vote 11. (Accessed: 22 January 2009).

Chapter 10 of the Act defines financial misconduct, and deals with the procedures for disciplining those public officials guilty of financial misconduct. It also includes a provision for criminal prosecution to apply where there is gross financial misconduct.¹³¹

The Constitution of the Republic of South Africa Act (108 of 1996) at section 195(1) sets out the basic values and principles governing public administration. It states that public administration must be governed by democratic values and principles which are enshrined within the Constitution. These principles include practicing a high standard of professional ethics, which includes the promotion of efficient and effective use of resources. Public administration must be developed and orientated in a way which offers services which are unbiased, impartial, fair and equitable. It must take into consideration people's needs and must also encourage participation of the public in policy-making. The Act further stipulates at section 195(1)(f)-(i) that public administration must be accountable, transparent, have good human resources, and must be able to cultivate and maximise human potential, making sure that it provides the public with information that is accurate, accessible and timeous. What is of importance is that public administration must be broadly representative of the people of South Africa and must be able to redress the imbalances of the past in order to achieve broad representation.

Section 195(2) stipulates that the principles set down in s 195(1) are applicable to every administrative body in government, organs of state and public enterprises.

The above section sets expectations of an open and transparent system required to hold public officials accountable for good governance. In particular is s 195(1)(a),(f) and (g) set out that not only must there be transparency and openness but also accountability and a high standard of professional ethics. This is relevant for situations when disclosures need to be made in cases of fraud and corruption.

The Financial Intelligence Centre Act (38 of 2001) provides at section 29(1) that a person who is in charge of, manages or is employed by a business and who suspects

¹³¹ Public Finance Management Act (1 of 1999) 81-84.

that the business has received the proceeds of unlawful activities, certain specified unusual transactions took place or the business has been used for money laundering purposes, must report to the Financial Intelligence Centre prescribed particulars concerning the transactions. Section 52 criminalises a failure to report such transactions. Section 38 provides for protection of persons making such reports, though it appears to be more limited than what is envisaged by the PDA.

All the above pieces of legislation contribute towards preventing corruption in the workplace and protecting employees who wish to blow the whistle on such activities which they have either witnessed or know about with certainty.

CHAPTER 5

Legitimate disclosures and the implications of those disclosures

“History will have to record that the greatest tragedy of this period of social transition was not the strident clamour of the bad people but the appalling silence of the good people” Martin Luther King Jr (1929-1968).¹³²

The purpose of this chapter is to bring attention to the fact that although there is legislation in place (the PDA) to protect employees from suffering occupational detriments at the hands of their employer/s when they have made disclosures, there are still many employees who have to endure unfavourable working conditions because of disclosures made.

Section 186(2)(d) of the Labour Relations Act (No. 66 of 1995) (LRA) states that an ‘unfair labour practice’ means “an unfair act or omission that arises between an employer and an employee involving an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act (26 of 2000), on account of the employee having made a protected disclosure defined in that Act”. In other words, the LRA renders unfair any occupational detriment in contravention of the PDA which is specifically designed to protect whistleblowers. It should be noted that both the PDA and the LRA are designed to protect employees against dismissal that is done unfairly or prejudicially based on an employee’s protected disclosures. Section 187(1)(h) of the LRA states that a dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 (which confers protections relating to the right to freedom of association on members of workplace forums), or if the reason for the dismissal is a contravention of the PDA, by the employer, on account of an employee having made a protected disclosure defined in that Act.

¹³² US black civil rights leader and clergyman.
www.brainyquote.com/authors/m/martin_luther_king_jr_2.html (Accessed: 21 July 2009).

The PDA makes it possible for employees,¹³³ without fear of reprisal, to disclose information relating to suspected or irregular conduct regarding their employer whether in the private or public sector. However, to enjoy the protection of the PDA, the employee who made the disclosure must have a *bona fide* and reasonable belief that the information disclosed is true. The employee must prove that he or she had reason to believe that the disclosure is legitimate, therefore the disclosure is protected only if it is made in good faith. If the disclosure itself constitutes a criminal offence then it does not constitute a protected disclosure. The employee cannot disclose information and be protected by the PDA if the disclosure is made for personal gain or monetary rewards i.e. the disclosure will not be within the protective ambit of the PDA.

A protected disclosure is defined in terms of its content, the manner in which and the person to whom it is made, and the state of mind of the person making it.

Based on my research, it is apparent that various themes emerge as to the reasons why people blow the whistle. One of the main reasons for whistleblowing is when an employee has observed irregular behaviour which, if left unattended, would cause immeasurable damage to the company or to the public. Another observation is that whistleblowers that have high credibility have a much greater chance of being heard by management. When one is credible, one is most likely to be a loyal employee whose work and behaviour cannot be criticised in any way. Credible employees are often seen by other workers as “teacher’s pets” that are out to get them and earn “brownie points” for themselves.

The motives of whistleblowers vary from situation to situation and are not easily known by others, however when the whistle has been blown, on investigation, their motives are revealed. The employee with the proper motive will have the best interests of the company at heart and his/her motive will be to prevent any harm or danger either to his/her colleagues or the company by disclosing the information that he/she does. Most times it is true to say that a whistleblower with the right motive, i.e.

¹³³ The PDA at section 1(ii) defines ‘employee’ as (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person whom in any manner assists in carrying on or conducting the business of an employer.

good faith and a reasonable belief has valid disclosures and information about what is actually happening and will project that motive in comparison to other whistleblowers that make disclosures for *mala fide* reasons.

Credible whistleblowers are able to influence the appropriate people concerning any misconduct because they are able to be trusted. Management of organisations or institutions is more likely to listen to a credible witness than to a whistleblower who has been a troublemaker within the workplace. However, it must be noted that there are some employees who are not labelled as credible but have witnessed an incident that is irregular and have therefore reported it. However, in situations such as these, management is more likely to look at the source of the information than the information itself. There are times in these cases, when this type of whistleblower suffers some kind of occupational detriment as opposed to the credible whistleblower who has disclosed the information.

Barker and Dawood¹³⁴ state that the following factors play a role in the whistleblowing process:

- Individual characteristics like moral development/behaviour (including moral judgement, religious and social responsibility, etc.), personality variables (like low self-esteem, field dependence, intolerance of ambiguity, etc.), demographics (like age, education, gender, etc.) or job situation (pay, job performance, supervisory status, professional status, job satisfaction, organizational/job commitment) to name but a few.
- Situational conditions that can be divided into wrongdoing characteristics (like quality of evidence, type of wrongdoing, wrongdoer low social status, seriousness etc) and organizational characteristics (like company policies, group size, bureaucracy, organizational culture and climate, incentives for whistleblowing, high performing organizations, etc).
- Power relations and the amount of power that individuals or units have in the organization.

¹³⁴ Barker et al. "Whistleblowing in the organization: wrongdoer or do-gooder?" December (2004) 23(2) *Communicare* 123.

- Other factors like loyalty, issues of conformity, social and/or financial support and membership of professional groups.

5.1 South African cases and the implications of disclosure

5.1.1 Occupational Detriment

An occupational detriment according to section 1(vi) of the PDA 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 threatened with any of the actions referred to in paragraphs (a) to (g) above; or
- (i) being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security.”

Section 3 of the PDA is quite clear concerning an employee being subjected to an occupational detriment by his or her employer on account, or partly on account of having made a protected disclosure. This is the principal protection that the Act envisages. An occupational detriment is what one would normally call victimisation and is confined to the working environment of the whistleblower.¹³⁵

A dismissal arising out of a disclosure will be deemed automatically unfair under section 187(1)(h) which states that an unfair dismissal is a “contravention of the Protected Disclosures Act, 2000, by the employer, on account of an employee having made a protected disclosure defined in that Act”. The most common remedy available to the whistleblower where an occupational detriment is threatened would be to obtain an interdict preventing the employer from either dismissing or suspending him/her. In terms of section 193 of the LRA the Labour Court is entitled to order reinstatement of

¹³⁵ A Landman “A charter for whistleblowers – a note on the Protected Disclosures Act 26 of 2000” January (2001) vol. 22 *Industrial Law Journal* 42.

or compensation to the whistleblower.¹³⁶ Maximum compensation is up to an amount equal to 24 months remuneration payable to the employee at the dismissal date.¹³⁷

If a whistleblower is aware that he/she may or might suffer some kind of occupational detriment because of his/her disclosure, he/she can ask his/her employer to transfer him/her to another post or position within the company. However, the transfer must be one that does not affect his/her employment terms and conditions, i.e. the employment terms and conditions may not be less favourable than those that applied to the employee previously.

When it comes to the protection of whistleblowers, the PDA sets down conditions where the LRA sets down remedies. The PDA sets out in more detail the types of occupational detriments that are prohibited in terms of the protection of whistleblowers. It also gives a much clearer path in relation to legal uncertainties than the LRA if the LRA alone was at their disposal. The PDA covers a much broader spectrum and scope than the LRA when it comes to whistleblowing and disclosure of information. Both the PDA and LRA consider an occupational detriment or victimization as an automatic unfair dismissal or in the case where the employee is still employed but suspended, an unfair labour practice. The cases discussed below illustrate the legal remedies that can be used if the whistle was blown in good faith, and also how whistleblowers were victimised for acts of impropriety committed by the employer.

The following cases are illustrations of employees who are unfairly dismissed and victimized when having made a protected disclosure.

¹³⁶ Section 193 – Remedies for unfair dismissal and unfair labour practice: (1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the court or the arbitrator may (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal; (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or (c) order the employer to pay compensation to the employee. (3) If a dismissal is automatically unfair or, if a dismissal based on the employer's operational requirements is found to be unfair, the Labour Court in addition may make any other order that it considers appropriate in the circumstances.

¹³⁷ In terms of section 194(3), the compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months remuneration calculated at the employee's rate of remuneration on the date of dismissal.

In the case of *Grieve v Denel (Pty) Ltd*¹³⁸ the court looked at how an employee is afforded protection against an occupational detriment and whether the threat of disciplinary action constituted an occupational detriment in terms of s 1(vi) of the PDA.

The facts of the case are as follows: the applicant was preparing a report for the respondent's Board concerning certain allegations of wrongdoing (i.e. unauthorized expenditure, nepotism and financial irregularities) by the General Manager of one of its divisions, when he was charged with misconduct, suspended from duty and summoned to attend a disciplinary inquiry. The applicant claimed that the respondent had infringed the requirements of the PDA by suspending him from his employment on full pay and charging him with misconduct pending a disciplinary inquiry/hearing because of the allegations that he had disclosed. The applicant then launched an urgent application to the Labour Court for an order restraining the company from instituting disciplinary action against him which was granted.

The court in granting the restraining order held that, although the PDA requires a dispute to be referred for conciliation before the Labour Court is approached, it does not prevent the court from entertaining urgent matters before a reference to the CCMA, and that it could also order the maintenance of the status quo pending final determination of the dispute by the CCMA.¹³⁹

The court in granting the order examined the PDA to establish how it protects employees who, in responsible manner disclose information and what protection is extended to the employee/s against reprisals for those disclosures. The court held that in terms of s 3 of the Act, an employee may not be subjected to any kind of occupational detriment by his/her employer on account of having made a protected disclosure. Furthermore, s 6 of the Act states that a disclosure is deemed to be a protected disclosure if it is made to an employer in good faith. Section 9 of the Act stipulates that any disclosure made in good faith and with a reasonable belief that the information disclosed is substantially true and not made for purposes of personal gain is a protected disclosure. If on this basis the employee is subjected to an occupational

¹³⁸ 2003 (4) BLLR 366 (LC). (Refer also fn 46).

¹³⁹ Grogan J "Whistleblower" Case Roundup: latest judgements and awards. (2003) April *Employment Law* 25.

detriment then he/she can rely upon s 3 of the Act for protection. The remedy available to the employee is in terms of s 4 of the Act.

The court held¹⁴⁰ that the disclosures made by the applicant were made in good faith because the information appeared to be documented, supported and revealed a breach of legal obligations and possible criminal conduct which amounted to a protected disclosure in terms of s 9 of the Act.

The court concluded¹⁴¹ that it was satisfied that the applicant had established a link between the charges brought against him and the disclosures made.

It is submitted that the decision of the court was correct and the finding was based directly from s 3, s 6 and s 9 of the Act. It is important to note as Pillemar AJ, stated:¹⁴²

“the PDA provides wide-ranging relief designed, it seems, to encourage a culture of whistleblowing and, in fact, its preamble describes its purpose as to “create a culture which will facilitate the disclosure of information by employees relating to criminal and other irregular conduct in the workplace in a responsible manner by providing comprehensive statutory guidelines for the disclosure of such information and protection against any reprisals as a result of such disclosures”.

Important to note is the fact that, the Act is available as a form of protection for employees who disclose information in a responsible way and in terms of the procedures set out, making sure that the disclosure is made in good faith and with a reasonable belief and, that the information is substantially true. Another important point to take note of in cases such as this is the fact that the employee has the onus of proving a strong link between the occupational detrimental and the disclosure.

This case is a good illustration of how the court can apply the PDA in cases where appropriate relief concerning an occupational detriment is needed urgently.

¹⁴⁰ See fn 138, para 12.

¹⁴¹ See fn 138, para 16.

¹⁴² See fn 138, para 8.

In the case of *H and M Ltd*¹⁴³ the applicant maintained that her allegations amounted to a 'disclosure' in terms of s 1 of the PDA, and that she had suffered an occupational detriment due to her disclosures.

The applicant was employed by the respondent company as its human resources manager. In September 2004, the applicant addressed a letter to a minority shareholder of the company in Spain, in which she listed 42 complaints concerning the management of the South African branch of the company and the actions of individual managers. She was suspended and charged at a disciplinary hearing with intent to cause harm to her employer by abusing and divulging confidential information, fraudulent activities while in a position of trust, breach of her duty of good faith, and gross negligence. She was found guilty and dismissed.

In examining the case, the Commissioner looked at s 1 of the Act, in particular subsection (i) the definition of disclosure; subsection (ii) the definition of employee; subsection (vi) the meaning of an occupational detriment and; subsection (ix) when a disclosure constitutes a protected disclosure. Section 9 of the Act was also looked at in determining under what circumstances a disclosure can be deemed a general protected disclosure for purposes of the Act.

The Commissioner considered the decisions of the Labour Court in cases where the court examined the definition of an occupational detriment and when a disclosure qualified for protection in terms of the Act. The decisions referred to were *Grieve v Denel (Pty) Ltd*¹⁴⁴, *Rand Water Staff Association obo Snyman v Rand Water*¹⁴⁵, *Communication Workers Union v Mobile Telephone Networks (Pty) Ltd*¹⁴⁶ and the UK case of *Darnton v University of Surrey*.¹⁴⁷

In *Grieve v Denel (Pty) Ltd*¹⁴⁸ (as discussed above) the court took the view that to qualify for protection, disclosures had to be made in good faith, with a reasonable

¹⁴³ (2005) 26 ILJ 1737 (CCMA) also cited as *H Bourgstein and Ocean Estates International Case No: WE 13061-04 & 11090-04*

¹⁴⁴ (2003) 24 ILJ 551 (LC).

¹⁴⁵ (2001) 22 ILJ 1461 (ARB).

¹⁴⁶ (2003) 24 ILJ 1670 (LC).

¹⁴⁷ (2003) IRLR 133 (EAT).

¹⁴⁸ See fn 144.

belief that the information is substantially true, not made for purposes of personal gain and, that there should be a sufficient link between the charges brought against the employee and the occupational detriment arising out of the fact that disclosures were made. The court found that the applicant did suffer from an occupational detriment due to his disclosure.

The Commissioner also considered the decision in the case of *Communication Workers Union v Mobile Telephone Networks (Pty) Ltd*¹⁴⁹ where the court held¹⁵⁰ that if a disclosure is made to an employer in terms of s6 of the PDA, a number of conditions must be satisfied before that disclosure can be protected. Further, that the purpose of the PDA would be undermined if genuine concerns or suspicions were not protected in an employment context even if they later proved to be unfounded. However the PDA was not intended to protect what amounts to mere rumours or conjecture.¹⁵¹

In the present case, the Commissioner, in concluding his arbitration award, stated¹⁵² that the Labour Court will have to provide further guidance on the interpretation of the PDA, in particular in interpreting the phrase 'any legal obligation to which that person is subject' (section 1(1)(b) of the PDA). "It is an established rule of interpretation that words are to be given their ordinary meaning. In the present matter the legislature has decreed that a disclosure may be made about the failure to comply with 'any' legal obligation. It seems that this suggests that as wide as possible an interpretation should be given to this phrase and should deal with whatever that obligation may be. This is the approach that was adopted in writing this award".¹⁵³

The Commissioner found that while the vast majority of applicant's allegations were not protected,¹⁵⁴ the employee was, however, perturbed about how the respondent was operating the business because it affected her directly as an employee. The Commissioner found that in terms of s 9 of the Act, the applicant had the required

¹⁴⁹ (2003) 24 ILJ 1670 (LC).

¹⁵⁰ See fn 149, page 1672.

¹⁵¹ See fn 149, para G.

¹⁵² See fn 143, para E.

¹⁵³ See fn 143, para E-F.

¹⁵⁴ Only 3 of the 42 complaints made by the employee qualified as 'protected disclosures' in terms of the PDA.

good faith and reasonable belief that the information disclosed was substantially true and that her disclosure was deemed to be a disclosure in terms of s 1 of the Act. It was found the applicant had suffered an occupational detriment in terms of s1(vi) of the Act in that her suspension and dismissal were directly linked to the disclosures that were made. It was on this basis that the applicant's dismissal was found to be substantively unfair.

It is submitted that in a whistleblowing context, this type of case is problematic and leaves a loophole for all types of malicious and vindictive disclosure that can be made resulting in unfounded hurtful allegations. It is conceded that even though a number of allegations can be made, even if one of those allegations are deemed to be protected, the employee is safe from any kind of occupational detriment in terms of s 1 of the Act. However, what is of concern is the fact that so many other allegations can be made and the question that arises is, how are those allegations treated if found to be unprotected by the Act and what consequences do they carry for the whistleblower? Should the employee not have been disciplined for the allegations that were unsubstantiated? Many questions arise out of a case such as this, with many of them not being able to be answered. This case is illustrative of shooting in the dark and hoping for the best. It is submitted that a solution to this problem is to make ethics and whistleblowing policies in the workplace stricter by highlighting the consequences of disclosing information that is unsubstantiated. It would definitely lessen the problem of employees making wild and unsubstantiated claims and make them aware that you cannot hide behind the Act for all sorts of disclosures.

In the case of *Pedzinski v Andisa Securities(Pty) Ltd (Formerly SCMB Securities (Pty) Ltd)*¹⁵⁵ the applicant claimed that her dismissal was automatically unfair on the basis that she had made a protected disclosure in terms of s 1 of the PDA. The issues the court had to examine was, (i) whether the applicant had made a protected disclosure in terms of s 1(x) of the Act and, (ii) whether the disclosure was the main reason for the applicant's dismissal which would in terms of s 3 of the Act be deemed an occupational detriment.

¹⁵⁵ (2006) 2 BLLR 184 (LC).

The applicant was employed as a compliance manager for the respondent. The applicant's duties included monitoring compliance by the respondent, its officers and all employees with regard to the statutory requirements applicable to the respondent's business and, she was also responsible for the Private client business Division.

In the applicant's course of duties she reported that irregular trading of shares involving staff members who were identified. One of the persons implicated was the respondent's executive director. The applicant's manager expressed dissatisfaction about the fact that the irregularities had been reported to senior employees elsewhere in the company before he was informed and deemed the conduct of the applicant as insubordinate. This resulted in a deterioration of the relationship between the applicant and her manager. The applicant was then informed that she must work full days, failing which she would be offered an alternative position in the group or be retrenched. The applicant was dismissed and claimed that her dismissal was automatically unfair, the reason being that she had made a protected disclosure, or that her dismissal was intended to force her to accept a demand, or that she was unfairly discriminated against on the basis of disability. The respondent claimed that the applicant had been fairly retrenched.

The applicant instituted action against the respondent for her dismissal alleging that the retrenchment proceedings were a sham designed to disguise the true reasons for her dismissals. The applicant referred the dispute to the CCMA and subsequently the case was referred to the Labour Court in terms of section 191(6) of the LRA.¹⁵⁶

When examining the evidence of the case, the court first had to determine whether the applicant's disclosure constituted a protected disclosure in terms of s 1(ix) and s 6 of the PDA. The court held¹⁵⁷ that the applicant claimed that it was within the respondent's regulations as well as her duty and function to report all regulatory breaches to Group Compliance which was part of the company's Risk Management team which was not regarded as an external party of the company. Furthermore, the

¹⁵⁶ Despite subsection 5(a) or (5A), the director must refer the dispute to the Labour Court, if the director decides on application by any party to the dispute, that to be appropriate after considering: (a) the reason for the dismissal; (h) whether there are questions of law raised by the dispute; (c) the complexity of the dispute; (d) whether there are conflicting arbitration awards that need to be resolved; (e) the public interest.

¹⁵⁷ See fn 155, para 31-33.

respondent conceded that the applicant was fulfilling her duties as Compliance Manager by reporting the irregularities. The court held that it was of the view that the applicant had a reasonable belief and the required good faith when disclosing the information and therefore under s 6 of the PDA falls squarely under the protection of the Act.

The court then had to examine the second issue which was to determine the true reason for the applicant's dismissal. The court was guided by what was stated by Froneman DJP in the case of *SACWU & others v Afrox Ltd*¹⁵⁸ where it was stated that:

“the enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. The issue is essentially one of causation and I can see no reason why the usual twofold approach to causation, applied in other fields of law, should not also be utilized here. The first step is to determine factual causation and the next issue is one of legal causation ...”

The court held¹⁵⁹ that in order for a dismissal to fall within the ambit of section 187(1)(c)¹⁶⁰ of the LRA, a dismissal must have as its purpose the compulsion of the employee concerned to accept a demand in respect of a matter of mutual interest between employer and employee. If the dismissal is not for that purpose, it cannot succeed as a ground in terms of section 187(1)(c) of the LRA. In this case, the applicant was required to agree to work on a full-time basis, i.e. working a full-day instead of a half day. This was a dispute of mutual interest between the applicant as employee and the respondent as employer and therefore fell within the ambit of section 187(1)(c) of the LRA.

The issue the court had to decide upon was whether there was a fair reason for the dismissal. If the dismissal was not automatically unfair, then it is important to establish whether there was a fair reason for the dismissal.

¹⁵⁸ (1999) 10 BLLR 1005 (LAC) at 1013G-1014B.

¹⁵⁹ See fn 155, para 67.

¹⁶⁰ A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee.

The court held¹⁶¹ that if the dismissal was not automatically unfair, it would be important to establish whether there was a fair reason for the dismissal. It was unfair to require the applicant to work on a full-time basis when the cause of problems faced by the department could have been solved by distributing the workload between the other employees of the company. Given the applicant's medical problem, the alternative proposed by the respondent that she should work full days was unreasonable. Therefore, the respondent's offer of a full-time position had been intended to force the applicant out of her job, knowing that the applicant was unable to take the position because of her incapacity.

The applicant's dismissal was found not to be a dismissal in terms of medical incapacity, but an automatically unfair dismissal, without a fair reason and was procedurally unfair, based on the disclosures that she had made. The decision to retrench the applicant was a "sham" as the real reason for her dismissal was because of the disclosures made concerning irregular trade sharing. On this basis the court found that the predominant reason for the applicant's dismissal was because of the disclosures that were made. In terms of s 3 of the PDA, the employee had suffered an occupational detriment thus making the dismissal automatically unfair.

It is submitted that the decision of the Labour Court was correct in this case and the examination of both the LRA and the PDA is proof that the court applied its mind to the issues at hand. This case is an illustration of how the PDA will protect disclosures that are made with good faith and a reasonable belief that the information is correct. Thus, if an employee discloses information in accordance with the Act they will be protected. Note must be taken that the requirements of good faith and reasonable belief are vital requirements that an employee must have when he/she discloses information. It is submitted that this case is an example of how the court will examine other cases such as this to find a way forward for whistleblowers to be protected under the Act.

In the case of *Sekgobela v State Information Technology (Pty) Ltd*¹⁶² the applicant alleged that he was subjected to an occupational detriment in that he was

¹⁶¹ See fn 155, para 80.

¹⁶² Case No: JS595/2005.

automatically unfairly dismissed for having made a protected disclosure in terms of section 3 of the PDA. The issues before the court were (i) was the applicant's disclosure defined as such in terms of s 1 of the Act and was the disclosure protected and, (ii) was the primary reason for the applicant's dismissal due to the disclosure made and if so, did the applicant suffer an occupational detriment in terms of s 1 and s 3 of the PDA.

The applicant was employed as a Programme Manager. The applicant claimed that he had written a letter to the Chief Executive Officer setting out two grievances that he had. The first pertained to his performance review of October 2003, and the second pertained to the three issues which were subsequently submitted to the Public Protector in respect of certain "perceived irregularities" in respect of the CALMIS Implementation project, the OSIS-project and Tender 0199.¹⁶³ The applicant claimed that he had approached the Public Protector because he believed that the CEO would not attend to his grievances.

The applicant believes that due to his disclosures he was subjected to a disciplinary enquiry where he received a warning which was overturned on appeal, had his job responsibilities removed, later suspended and charged with a host of charges, one of them being a charge for incompatibility for which he had to attend a hearing and, dismissed on all the charges.¹⁶⁴

Looking at the issues before it, the court held that (i) in terms of s 1 of the PDA, the applicant's disclosure did fall into the definition of what a disclosure is in terms of the Act and was deemed to be a protected disclosure due to the failure of the respondent's employees complying with a legal obligation to which they were subject; (ii) that the disclosure was protected in terms of s 8(1)(a) of the Act and; (iii) that the information disclosed was an impropriety in terms of s 1(iv) of the Act. The court further held that the applicant's disclosure was made in good faith and with a reasonable belief that the information was substantially true and not made for the purposes of personal gain.¹⁶⁵

¹⁶³ See fn 162, para 16.

¹⁶⁴ See fn 162, para 26-28.

¹⁶⁵ See fn 162, para 15.

In looking at the issue of occupational detriment, the court held¹⁶⁶ that the applicant had provided enough evidence to the court for it to believe that the predominant reason for the applicant's dismissal was due to the disclosure made. Therefore, the applicant had suffered an occupational detriment in terms of s 1(vi) of the Act and the dismissal of the applicant is deemed to be automatically unfair in terms of s 3 of the PDA.

This is yet another illustration of the Labour Court applying the law in terms of the PDA correctly and taking cases such as this, where a whistleblowing has to endure an occupational detriment in the form of suspension and dismissal for disclosing relevant information forward. The implications of an award such as this, is an encouragement to future whistleblowers who believe that they have relevant information that needs to be disclosed in order to prevent fraud and corruption. Yet again, it must be noted that the whistleblower will be protected if they can prove that their disclosures were made in good faith and with a reasonable belief and not for purposes of personal gain. Substantial evidential proof of a disclosure will always be considered by the court and will help the court to establish reasonable belief in the substantial truth of the allegation.

McWilliams v International Development and Change Services,¹⁶⁷ heard at the CCMA is another case illustrating an occupational detriment in terms of s 1(vi) of the PDA. The applicant submitted that he had resigned from his position owing to certain grievances that he had raised and it was due to these grievances that he was made to apologise for the fraud that he had not committed and found guilty of fraudulently completing call reports and given a First Written Warning.

The issue the court had to decide upon was whether the applicant's constructive dismissal was due predominantly to his disclosures.

The applicant was employed as a Field Marketing Executive. Following the applicant's disclosure of fraud to senior management, he was told that a disciplinary hearing would take place and that in order to protect his identity as the whistleblower,

¹⁶⁶ See fn 162, para 32.

¹⁶⁷ Case No: GA28900-02.

he would have to plead guilty to fraud along with the other accused. The applicant was in agreement with this suggestion and was assured by the CEO that there would be no repercussions for him. Unfortunately this was not so considering that the applicant was made to apologise publicly for the fraud that he did not commit and was identified as the whistleblower. The applicant thereafter received First Written Warning from the respondent.

On this basis the applicant resigned from his position stating the reasons as public humiliation suffered at the hands of the respondent, being identified as the whistleblower and, loss of trust in management.

The Commissioner examined the definition of an occupational detriment in terms of s 1 of the Act and also looked at s 3 of the Act in terms of an employee not being subjected to an occupational detriment for making a protected disclosure. The Commissioner held that the applicant had substantially followed the prescribed grievance procedures when making his complaint, thus making his disclosures protected under the auspices of the Act in terms of s 1(ix) and s 6 of the PDA.

The Commissioner held that the applicant's option to resign was a reasonable option considering that the trust relationship between the parties was irreparably breached. On this basis, the court held that the applicant succeeded in proving that he was constructively dismissed for having made a disclosure that amounted to a protected disclosure in terms of s 1 of the Act.

It is submitted that this case illustrates that Commissioners are also applying their minds to cases of whistleblowing, examining and applying the relevant sections of the PDA in a way that benefits the whistleblower. The outcome of this case illustrates how courts are beginning to examine cases of occupational detriments thoroughly. An outcome such as this is a warning to employers not to punish whistleblowers for disclosing relevant information by subjecting them to occupational detriments as a form of punishment, but to rather look at how they can deal and investigate the disclosures in the correct manner.

*Theron v Minister of Correctional Services & Another*¹⁶⁸ illustrates how the court dealt with the issues concerning what constitutes a protected disclosure in terms of s 9 of the PDA, and also what constitutes a occupational detriment in terms of s 1 of the Act.

The applicant was a medical doctor who had provided medical care to prisoners at Pollsmoor Prison 22 years. The applicant disclosed information in a report concerning the standards of healthcare at the prison. The applicant had, on numerous occasions, complained about these problems to a number of officials at the Department of Correctional Services and the Department of Health and action was not taken. The applicant then submitted the report to the Inspecting Judge of Prisons and to the Parliamentary Select Committee on Correctional Services, who both compiled further reports criticizing the healthcare at the prison. The applicant submitted that it was on the basis of his disclosures that he was transferred from Pollsmoor prison to a community health centre elsewhere and that there was a direct link between him being transferred and the disclosure that was made. The applicant lodged a dispute concerning an alleged occupational detriment and further sought an order setting aside the decision to remove him from Pollsmoor prison pending the outcome of an unfair labour practice.

The court dealt with the issues by examining the relevant provisions of the PDA, in particular, a disclosure in terms of s 9 of the Act. The court also relied heavily on the decision of the *Tshishonga* case.¹⁶⁹ The court found that in terms of s 9(2)(c)¹⁷⁰ the applicant contended that he had previously made disclosures of the same information to his employer and no action had been taken within a reasonable period. The court found that it was common cause that the applicant had complained to both the Department of Correctional Services and the Department of Health. In terms of s 9(2)(d),¹⁷¹ the court found the fact that the health of prisoners had been or was likely to be endangered was of a sufficiently serious consideration. In terms of s 9(3) the court found that the applicant did act reasonably in making the disclosures to the

¹⁶⁸ (2008) 5 BLLR 458 (LC).

¹⁶⁹ (2007) 4 BLLR 327 (LC).

¹⁷⁰ That the employee making the disclosure has previously made a disclosure of substantially the same information to (i) his or her employer or (ii) a person or body referred to in section 8, in respect of which no action was taken within a reasonable period after the disclosure.

¹⁷¹ That the disclosure was of an exceptionally serious nature.

office of the Inspecting Judge and the Portfolio Committee as these bodies had a direct link to the Department of Correctional Services and could in all likelihood, deal with his concerns. The court also had to consider whether in terms of s 9 of the Act, the applicant had made the disclosures in good faith and with a reasonable belief that the information was substantially true and not made for purposes of personal gain.

After a thorough examination of s 9 of the Act, the court held that the applicant had fulfilled the requirements set down in s 9 of the Act, and the disclosed the information with the required elements of good faith and a reasonable belief that the information was substantially true. This was determined by the fact that the applicant had previously made the same disclosures because of his concern about the healthcare standards at the prison. In terms of the occupational detriment the court found that there was a direct *nexus* between the disclosure and the applicant's transfer from Pollsinoor Prison to the community health centre. Therefore in terms of s 1(vi) and s 3 of the Act, the court determined that the applicant did suffer an occupational detriment as a direct result of his disclosures.¹⁷²

It is submitted that this case was determined correctly and, it is encouraging to see how the Labour Court yet again applied its mind to the sections of the Act in order to provide protection to the whistleblower. As Niewoudt AJ relied heavily on the findings of the *Tshishonga* case, it proves that this was an important decision for whistleblowers and will no doubt be used in the future as a guideline to other cases concerning disclosures of information. It must be noted yet again that in order to be protected in terms of the PDA, it is always helpful to have substantial evidential proof in the form of documentation to back up the requirement of a reasonable belief proof.

5.1.2 Appropriate Relief

The case of *Tshishonga v Minister of Justice and Constitutional Development and Another*¹⁷³ (discussed in detail in chapter 4) was taken on appeal to the Labour Appeal Court¹⁷⁴ in respect of the award of compensation for an occupational detriment suffered by Mr Tshishonga (respondent). Arising out of a disciplinary inquiry

¹⁷² See fn 168, para 29.

¹⁷³ See fn 169.

¹⁷⁴ Case No: JA 6/2007.

instituted by the Department of Justice and Constitutional Development, Mr Tshishonga sued for compensation arising out of an unfair labour practice. Mr Tshishonga contended that the suspension and disciplinary proceedings against him were tantamount to an occupational detriment following his disclosures to the media. In the court a quo, Pillay J found for Tshishonga and ordered the appellants to pay twelve months remuneration at the rate applicable to a Director-General. In justification of the award, Pillay J took into account the fact that subjection to an occupational detriment for whistleblowing is “a very serious form of discrimination” and therefore “merits a very high award”.¹⁷⁵

The learned judge stated that the longer the dispute endured, the greater the stress on the employee which was interpreted as a continuation of the retaliation against the employee by the Department. Furthermore, the Department’s failure to testify or offer any explanation aggravated the claim against it, as well as the insults and ill-treatment which the employee had to endure.

Pillay J went further by stating¹⁷⁶ that in her view, suspension and being charged with misconduct is a step away from being dismissed and therefore a dismissal for making a protected disclosure should attract as much as 24 months remuneration.

It was on the basis of this compensation award to Mr Tshishonga that the appellants took the case on appeal, stating that the award for compensation was excessive, and that Pillay J had erred in making the award of compensation.

Counsel for the Department of Justice and Constitutional Affairs (Mr Bezuidenhout) conceded before the appeal court that the following factors which Mr Tshishonga suffered at the hands of the Department, did fall within the definition of an occupational detriment, and, should be taken into account when making an award for compensation:

- the embarrassment and humiliation suffered by the respondent by being removed with immediate effect from the Master’s business unit without being given any reasons, and thereafter, being subjected to a suspension and

¹⁷⁵ See fn 174, para 9

¹⁷⁶ See fn 175.

disciplinary hearing. This embarrassment and humiliation affected not only Tshishonga, but his wife and school going children as well;

- Tshishonga suffered further humiliation at the hands of the then Minister of Justice on national television, by being referred to as a “dunderhead” and that he was “at most a timid public servant and at worst the sort of person who would not be able to box himself out of a wet paper bag”, and that he was rapped over the knuckles for poor work performance;
- he suffered gross humiliation by being moved to a position which was non-existent at the time and kept in that position without any work or instructions coming his way;
- he suffered victimisation and harassment by being subpoenaed to an interrogation in terms of s417 and s418 of the Companies Act by Mr Motala, where he had to give evidence which turned out to be irrelevant. It was later found that the only reason he was subpoenaed was to embarrass him;
- he had to pay attorney and counsel costs of over R100 000 for protecting his rights and interests at the inquiry, which the Department failed to repay;
- he paid a further amount of R77 000 for an attorney to defend him at the disciplinary inquiry where he was found not guilty; and
- he suffered psychological trauma because of the humiliation, victimisation and harassment by the Department after his disclosures to the media, and had to receive trauma counselling as a result of the Department’s relentless pursuit of him and failure to produce any evidence to substantiate its claims made in the pleadings against him¹⁷⁷.

The court considered the above points which constituted non-patrimonial loss in order to determine the appropriate compensation, in particular, the fact that he had suffered the indignity of unfortunate, intemperate attacks made by the Minister on national television which was compounded by the role played by Tshishonga in seeking to promote integrity in government. Furthermore, he had suffered the indignity of losing his employment because he had acted as a whistleblower.¹⁷⁸

¹⁷⁷ See fn 174, para 16.1-16.9.

¹⁷⁸ See fn 174, para 19.

The court stated that the Department of Justice was obligated to show deference to the PDA considering that it had promoted the Act and therefore knew the importance of the Act in promoting the constitutional values of accountability and transparency in the public administration of this country.¹⁷⁹ On this basis the court justified a compensatory award.

In determining quantum of damages, the court looked at the factors set out by Harms JA (as he then was) in the case of *Mogale v Seima*¹⁸⁰ which it considered to be of particular relevance: “the main factors determining quantum in damages is the seriousness of the defamation, the nature and extent of the publication, the reputation and the motives and conduct of the defendants which are relevant”.

It is submitted that this case is a clear example of the psychological harm that a whistleblower can suffer in the form of an occupational detriment when disclosing information that is relevant, when trying to bring about an end to fraud and corruption. Regardless of the fact that the disclosures were found to be protected, and justice was done, the psychological harm suffered by the whistleblower was significant. Therefore it is safe to say, looking at the above facts, that, the sacrifice an employee makes in seeing justice being done by disclosing information is a big responsibility. It is submitted that what is also relevant is the fact that, the courts cannot err in making judgments concerning compensation. Section 94(4) the LRA clearly stated that compensation that may be awarded to an employee in respect of an unfair labour practice must be ‘just and equitable’ and may not be more than 12 months’ remuneration. Therefore, once the court has established that the employee has been subjected to an occupational detriment, it must determine the compensation in a ‘just and equitable’ manner, bearing in mind that it may not be more than 12 months’ remuneration. It is therefore submitted that this decision will be used as a precedent in future cases where compensation for employees having suffered an occupational detriment has to be determined. This decision also illustrates the fact that regardless of how badly the employee has suffered due to an occupational detriment, the courts cannot in determining compensation move away from established legislation to make an order that he/she deems is just and equitable.

¹⁷⁹ See fn 178.

¹⁸⁰ (2008) 5 SA 637 (SCA) at 642.

5.2 United Kingdom cases and the implications of those disclosures

As discussed previously, South Africa considered and borrowed from the United Kingdom's Public Interest Disclosure Act (PIDA) extensively in order to establish its Protected Disclosures Act. Both the PDA and PIDA are similar in their requirements concerning disclosures of information and the definition of a protected disclosure. These requirements are examined closely when a case concerning whistleblowing needs to be decided. In terms of substantiated allegations, it is submitted that regardless of whether you are a whistleblower from the United Kingdom or South Africa, occupational detriments suffered are equal in severity and the remedies available to these employees are also similar. Below is a discussion of United Kingdom case law where the particular courts had to decide upon the remedies and action to be taken when employees have suffered a particular occupation detriment at the hands of their employer/s.

In the case of *ALM Medical Services Ltd v Bladon*,¹⁸¹ Lord Justice Mummery began by setting out the provisions and aim of the Act because this was the first appeal case to go to the court of appeal on the construction and application of the "protected disclosure" (provisions inserted into Part IVA of the Employment Rights Act 1996 by the Public Interest Disclosures Act 1998 with effect from 2 July 1998).¹⁸² The aim of the provision is to protect employees from unfair treatment in respect of victimisation, and dismissal for reasonably raising genuine concerns about wrongdoing in the workplace in a responsible way. The issues the court had to determine were (i) whether Mr Bladon had made a protected disclosure and, (ii) if the primary reason for the dismissal was due to the disclosure that was made.

Mr Bladon was a registered nurse who was employed by ALM Medical Services in one of its nursing home. He made a disclosure in writing relating to patient welfare and care at Lowther View Home. An inspection, followed by an investigation was carried out. A month later, Mr Bladon was given a warning which was followed by a disciplinary hearing where he was dismissed for committing serious breaches of his

¹⁸¹ (2002) IRLR 807.

¹⁸² See fn 181, para 1.

contract. The respondents disputed the fact that the reason for the applicant's dismissal was based on the fact the he had made a protected disclosure.

The court considered section 47B and section 103A of the ERA which states that an employee may not be subjected to an occupational detriment by his employer because he/she has made a protected disclosure, and if subjected to an occupational detriment in these circumstances, the dismissal would be deemed an unfair dismissal in terms of PIDA. These sections were looked at by the court to establish whether Mr Bladon had suffered an occupational detriment. The court also looked at s 43G of the Act to establish whether the disclosure is protected. In terms of this section, a whistleblower must disclose the information in good faith and having a reasonable belief that the information disclosed is substantially true and not made for purposes of personal gain.

In examining the evidence and the above sections of PIDA, the tribunal held that Mr Bladon had been subjected to an occupational detriment within the meaning of section 47B,¹⁸³ and that he was unfairly dismissed in accordance with section 103A¹⁸⁴ because the principal reason for his dismissal was due to the disclosure that was made. The court came to the above conclusion based on the fact the disclosure was relevant because it related to the health or safety of a patient, and a failure to comply with a legal obligation would possibly have led to the potential commission of a criminal offence. Mr Bladon had made the disclosures in good faith and with a reasonable belief that the information was true.¹⁸⁵ The appeal was allowed and the case remitted to the employment tribunal for rehearing.

It is submitted that the decision the court came to was correct and the implications of such a finding is that it will be used in future cases dealing with occupational detriment where the courts will examine PIDA to make sure that employers are not subjecting employees to occupational detriments primarily for reasons of making protected disclosures. This decision also comes as a warning to employers that the

¹⁸³ Section 47B(1) – a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

¹⁸⁴ An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

¹⁸⁵ See fn 181, para 9.

courts will not sit by and allow employees to be subjected to unfair dismissals when their disclosures are relevant in exposing wrongdoing in terms of the Act.

In *Lucas v Chichester Diocesan Housing Association Ltd*¹⁸⁶ the applicant submitted that she had been unfairly dismissed in terms of s 103A of the Act because she had made a protected disclosure in terms of s 43B of the Act. The issue that the court had to decide upon was whether the disclosure was made in good faith and whether the applicant's dismissal was due to the disclosure made.

The applicant was employed on a contract basis for a maximum of 18 months and during this period made a disclosure concerning misuse of funding based on the fact that it deprived her of hours of work that she was promised, and it also constituted a breach of the contractual relationship. The applicant submitted that after the disclosure her contract was terminated based on the fact that her relationship with her colleagues was becoming strained and it was having an adverse effect on her work.

In looking at how to approach cases under the protected disclosure provisions the court referred to the case of *Street v Derbyshire Unemployed Workers' Centre*¹⁸⁷ where it was held¹⁸⁸ that a court must assess on a broad and common sense basis whether the disclosure meets the requirements in s 43 C of the Act and whether the disclosure was indeed made in good faith and not with an ulterior motive such as personal antagonism which might have been the predominant purpose for making the disclosure.

On examining the evidence, the court held that the applicant's allegations were substantiated and made in good faith in terms of s 43C of the Act and, her disclosure was based on very real concerns that constituted a reasonable belief that she had expressed about the financial irregularities she encountered from the early stages of her work. The court further held¹⁸⁹ that from the evidence, it could not be inferred that the disclosure was motivated by spite following the actions by Ms Mercer in relation to the cutting of the applicant's hours, therefore, on this basis the disclosure was made

¹⁸⁶ (2005) UKEAT 0713_04_0702.

¹⁸⁷ (2004) EWCA Civ 964. See also (2005) ICR 97.

¹⁸⁸ See fn 186, para 33.

¹⁸⁹ See fn 186, para 38.

in good faith and the applicant did suffer an occupational detriment in terms of s 103A by having her hours cut. The appeal was allowed by the court.

It is submitted that this case is important in that it highlights the fact that for a disclosure to be protected, it must be made in good faith without an ulterior motive that can become the predominant factor for making the disclosure. The court referring to the *Street* case and highlighting the issue of good faith is indicative of the fact that whistleblowers must have the elements of good faith and a reasonable belief in order that their disclosures are deemed to be protected under the Act. These elements are essential for a disclosure to be protected. The outcome of this case will no doubt further whistleblowing cases in terms of good faith and a reasonable belief and also the fact that in terms of s 103A of the Act, an employer cannot subject an employee to an occupational detriment or dismiss an employee for reasons of making a protected disclosure.

In the case of *Mama East African Women's Group v Dobson*¹⁹⁰ the applicant claimed that she had suffered an occupational detriment by her employer in terms of s 103A of the Act in that she was unfairly dismissed on the ground of having made a protected disclosure. The issue the court had to determine was whether the applicant had suffered an occupational detriment in terms of s 103A for primarily making a protected disclosure.

The applicant was employed by the Trustees of the Mama East African Women's Group who managed a small charity whose aim was to support Somali women living in Sheffield and, to provide them with training in English as a second language. The applicant disclosed information that she had received from a student (Ms Said) concerning another student (Ms Roda Soulieman) who allegedly mistreated children at a crèche that the Trustees operated. The applicant reported the information to a member of the Trustees' group and on his advice, reported the matter to the Centre Manager who began an investigation into the matter which revealed no evidence of any ill-treatment of the children.

¹⁹⁰ (2005) UKEAT 0219_05_2306.

The applicant was called to a disciplinary hearing where she was found guilty of acting in an unprofessional manner and on this basis was dismissed for unprofessional conduct¹⁹¹ namely, that of making false allegations without any evidence and failing to follow proper procedure.

The court examined s 103A of the Act to determine whether the applicant had suffered an occupational detriment, s 43B to establish whether the disclosure qualified as a protected disclosure and, s 43C relating to the procedure in disclosing information to another person who is not his/her employer .

The court found that according to s 43B of the Act, the applicant had a reasonable belief that the disclosure tended to show that a criminal offence had been committed and, in terms of s 43 of the Act the applicant had fulfilled the requirement of good faith. Regarding the issue of the applicant not following procedure, the court held that the applicant's disclosure to the Trustee was reasonable in the circumstances and did not breach confidentiality, as it was entirely inappropriate for the Centre Manager to investigate this serious matter where the alleged abuser was her own sister.

The court concluded that the applicant did suffer an occupational detriment in terms of s 103A of the Act in that her dismissal was due predominantly to the disclosure made. On this basis the dismissal was deemed to be an unfair dismissal.

The court pointed out¹⁹² that "there is a very strong vindication of whistleblowers so that their action is protected. This does not mean that all of their claims and allegations have to be supported. They have to be investigated and, provided the disclosure meets the terms of the Employment Rights Act 1996, action against them is unlawful". Courts support the protection of whistleblowers where the disclosure was made in good faith and with a reasonable belief, even if on investigation they are found to be untrue.

It is submitted that this case was decided correctly and in terms of the Act, bringing attention yet again to the elements of good faith and a reasonable belief that must be

¹⁹¹ See fn 190, para 8.

¹⁹² See fn 190, para 19.

present when employees disclose information. This case illustrates that the findings in this case can be taken forward and applied to other cases dealing with issues of occupational detriment. An important lesson to be learned from this case is that before disclosing any information, it is important to investigate the truthfulness of it. It is of vital importance that when disclosing information, there be some evidential proof to strengthen your case, even if on investigation, the allegations turn out to be a mistaken belief or untrue.

In conclusion, it is submitted that the courts in the above cases have approached the matters in a similar way, and have decided the issues along the same lines as the South African courts. Occupational detriment/s and victimisation suffered by the employees are the same regardless of how it is disguised or interpreted.

CHAPTER 6

Unsubstantiated allegations - A look at motive and liability

“The only thing required for evil to triumph is for good men to do nothing”

Edmund Burke (1729-1797)¹⁹³

It is submitted that on many occasions unsubstantiated allegations are disclosed by aggrieved employees who in their opinion or estimation, have decided that by disclosing information that they believe to be true, are acting in the best interests of the company. It is submitted that unsubstantiated allegations are becoming more frequent and prevalent in the workplace, and this chapter will discuss this issue in detail. Consideration must be taken that the Act requires that disclosures be made in good faith and with a reasonable belief and seems to be the central pivotal point on determining whether a disclosure is substantiated or not.

Case law on the subject will be discussed, as well as the issues of good faith and reasonable belief which seem to be the central elements required for a disclosure to be determined as substantiated or unsubstantiated.

Illustrated below is a hypothetical scenario that could illustrate whether a disclosure is substantiated or unsubstantiated:

Where an employee of a company decides to disclose a number of allegations concerning management and other employees of a particular department within that company. The employee believes that the allegations disclosed are reasonable because he/she has evidential proof to substantiate the allegations made. Therefore there is reasonable belief on the part of the employee that the information is correct because of the evidential proof. The employee further believes that the disclosures are made in good faith and in the best interests of the company. As far as the allegations are concerned, the employee believes that all procedures set out in the company's policy were followed which makes the disclosures protected in terms of the Protected

¹⁹³ Irish orator, philosopher and politician. www.quotationspage.com/quotes/Edmund_Burke/ (Accessed: 21 July 2009).

Disclosures Act. On the face of it, it seems as though the employee has a solid case considering that the employee believes that he/she has fulfilled the requirements of both good faith and a reasonable belief. However, note must be taken that the employee previously disclosed similar allegations in regard to other employees in various departments within the same company, and further, it was a known fact that the relationship between the employee and management was historically problematic. The question which arises is: are the disclosures/allegations really made with good faith and a reasonable belief? What will the court examine to determine whether these allegations are substantiated or unsubstantiated?

In another hypothetical scenario, an employee discloses information concerning a member of the management team of that company. Evidential proof of the allegation is given to the CEO of the company by the employee, who starts an investigation into the allegations. The documentation is such that the reputation of the entire company would be ruined if the allegation was not investigated and was leaked to the media. However, note must be taken that the employee has had a 'bone to pick' with that particular member of the management team for a long time. The question that arises is whether the elements of good faith and reasonable belief exist in this scenario. Yet again, what will the court examine in order to determine whether the disclosure is substantiated or unsubstantiated, considering that the PDA requires a disclosure to be made in good faith and with a reasonable belief? Would this disclosure be protected or not, considering that there is evidential proof of that allegation which makes a solid case?

These questions will hopefully be answered and the hypothetical scenarios evaluated once the discussion on good faith and reasonable belief has been established.

It is submitted that there are many motives which play a role in whistleblowing. The most common motives being moral justification, revenge, greed and fear. In a report written by the Director and Commander of the National Anti-Corruption Unit,¹⁹⁴ Grobler, discusses these motives which he believes play an important part in whistleblowing.

¹⁹⁴ "Whistleblowing : Practical Issues" Director Stefan Grobler, Commander, National Anti-Corruption Unit, SAP Service, Head Office, Pretoria. CON.042001.001 COR.

In the case of moral justification, the whistleblower divulges information because he/she is so disgusted by the actions of another that he/she feels that it should be reported. In this case the whistleblower is quite prepared to support their claims by handing over evidential proof and in some cases is also prepared to assist in the investigation. There are however, whistleblowers in this instance, which prefer to divulge the information and then leave the rest up to the relevant authorities to investigate. Then there are others who feel that their moral duty has been fulfilled and wish to remain anonymous after handing over all the evidential proof to substantiate the allegations that they have made.

In cases of revenge (which is also a very powerful motive for whistleblowing) as per the above scenario, revenge is used in order to get back at another colleague or management for some perceived injustice. This motive usually causes the whistleblowers judgement to be clouded, and it is this factor that must be taken into consideration when analysing the truth of the information that was disclosed.

Greed as a motivating factor is probably the most dangerous of all motivating factors in cases of whistleblowing. Our courts take exception to people who report incidences that they perceive their colleagues were involved in solely for financial reasons. One of the redeeming factors in this situation is the fact that when a person has received money in order to inform on their colleagues, it negatively affects their credibility and this is more than likely to cause the courts to investigate every little detail to attempt to get to the bottom of the situation.

There are also incidences where whistleblowers divulge information in order to take the attention away from them as per the above scenario. Fear of being caught out as an accomplice in a crime is a big motivating factor. In cases where the whistleblower is found to be an accomplice in a crime, blackmail is usually also involved. In cases such as these, the whistleblower chooses to divulge information for the purpose or in the hope of receiving lenient treatment especially where they have previously been involved in some sort of criminal activity.

With the enactment of the PDA, employees have the assurance that if they decide to disclose information on corruption or illegalities in the workplace, they have the protection of the PDA. This has resulted in employees having a sense of security.

However, what happens when employees deliberately misrepresent information about the company by whom they are employed? Is there a right or wrong motivation for whistleblowing?

Where it is found that “whistleblowers” have disclosed information that was found to be deliberately false, different considerations emerge. In the *Tshishonga* case Pillay J held that “the purpose of the Act is not to protect disclosures that are deliberately made to embarrass or harass the employer, neither is slander and deliberate malcontents of information protected”.¹⁹⁵

It is submitted that society must be protected against disclosures that are made for malicious and vindictive reasons. Allegations such as these have caused immeasurable damage to both companies/organisations and victims. Damage to one’s dignity and the invasion of privacy is not easy to measure and therefore it is of the utmost importance to find a way in which organisations/companies can prevent these whistleblowers from alleging false and damaging information. To reiterate, section 9(1) of the PDA states that if an employee discloses information in good faith and reasonably believes that the information disclosed and the allegation/s contained in it is/are substantially true, then the disclosure is one that is protected. Section 6 of the PDA states that a disclosure made to the employer in good faith is a protected one. It is therefore submitted, that if it is found that a disclosure of information was made that was known to be deliberately false or to embarrass or harass an employer, and then it is safe to say that in terms of s9 and s6 of the Act, that disclosure will not be deemed a protected disclosure.

¹⁹⁵ See fn 169, para 191-192.

6.1 Good Faith

Good faith is a subjective element which makes it incredibly difficult to determine a standard and also whether the whistleblower does or did indeed possess this element when the disclosure was made. Although good faith is a subjective element, it is relevant to disclosures of information because good faith is linked very closely to motive. Pillay J in the *Tshishonga* case¹⁹⁶ pointed out that it is possible that an employee may reasonably believe that his/her disclosures are true, and gain nothing from making them, but the element of his/her good faith or motive would probably be questionable if the information does not disclose an impropriety or if the disclosure is not aimed directly at remedying a wrong. Furthermore, because good faith is a finding of fact, the court must consider cumulatively, all the evidence in order to determine whether the disclosure was made in good faith or whether there was an ulterior motive, or mixed motive and which motive is/was the predominant one.¹⁹⁷

6.1.1 Defining good faith

In the *Tshishonga* case, Pillay J stated¹⁹⁸ that “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 just turn on its truth. But even where the content of the 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”. Pillay J further stated¹⁹⁹ that “by setting good faith as a specific requirement, the legislature must have intended that it should include something more than reasonable belief and the absence of personal gain”. So, if one looks at the definition, it becomes apparent that there is no standard to test what good faith is because it is a subjective concept and differs from person to person based on their individual perceptions. Good faith is required to test the quality of the information. The benefit of the doubt has to be given to a person

¹⁹⁶ See fn 169, para 204-207.

¹⁹⁷ *Lucas v Chichester Diocesan Housing Association Ltd* 2005 WL 460717 (EAT) para 7.

¹⁹⁸ See fn 169, para 203.

¹⁹⁹ See fn 169, para 204.

who discloses information stating that it was made in so-called “good faith” because of the difficulty of proving whether it really is good faith or not.

A discussion of case law below will shed some light on this somewhat very grey area of good faith and how it is determined by courts in cases of whistleblowing.

The leading case dealing with the issue of good faith is the case of *Street v Derbyshire Unemployed Workers Centre*²⁰⁰ (a United Kingdom case), where the applicant stated that she was entitled to be regarded as unfairly dismissed under s 103A of the Act. The court of appeal held that an employee can fail the good faith test and lose protection under PIDA²⁰¹ where a tribunal finds that his/her dominant or predominant motive (which is linked very closely to good faith) for making the disclosure was unrelated to the public interest objectives of the Act. The court undertook a preponderance test to determine whether the applicant’s motive was one of good faith or not. The issue that the court had to decide was whether the applicant did in fact have good faith when disclosing information.

The applicant worked as an administrator for the Derbyshire Workers’ Centre which is a voluntary non-profit-making organisation providing advice and assistance to unemployed people in North East Derbyshire. The applicant wrote a letter to the Treasurer of the Borough Council making various allegations against the Manager of the Centre. The applicant justified her course of action in not following the proper procedure in that she did not trust the Centre’s Management Committee because she believed that her disclosures would be covered up and she would be victimised.

Following the investigations of the disclosures made by the applicant, the report stated that the applicant was misguided and malicious and, that all the allegations were unfounded and possibly required serious disciplinary proceedings to be taken against her.²⁰² The applicant was suspended pending an investigation into the “serious matters” that were referred to within the report.

²⁰⁰ (2004) EWCA Civ 964.

²⁰¹ Public Interest Disclosures Act 1998.

²⁰² See fn 200, para 18-19.

After the disciplinary hearing the applicant was dismissed for gross misconduct and breach of trust on the basis of her ‘unfounded and libellous’ allegations against the Manager of the Centre.²⁰³

The applicant appealed internally against her dismissal but was unsuccessful. She then appealed to the Employment Tribunal (hereinafter referred to as the ET) for interim relief maintaining that she had been unfairly dismissed on account of her disclosure and that she was entitled to automatic protection from dismissal under sections 43C, 43G and 103A²⁰⁴ of PIDA.²⁰⁵

The ET found that the applicant’s disclosures were qualifying disclosures under section 43B(1)(b)²⁰⁶ of PIDA as they were disclosures that she had reasonably believed tended to show the Centre Manager’s failure to comply with legal obligations to which he was subject.²⁰⁷ The ET then had to consider whether those qualifying disclosures became protected disclosures in terms of s 43C of PIDA (disclosures made in good faith to an employer or other responsible person) to 43H of PIDA (disclosures made in good faith in wider case not covered by s 43C-F, but subject to the additional requirements set out in s 43G(1)(b) to (e) of PIDA).

The critical issue before the ET was then to determine exactly what the requirement of good faith is. In looking at s 43C-H of the Act, the ET held that good faith adds to the requirement of reasonable belief in its substantial truth and found that the applicant believed that the definition of “good faith” was simply that it meant “honestly” and it added nothing to that concept where, a reasonable belief in the substantial truth of the allegation is also required. On this basis the ET concluded that none of the applicant’s disclosures were protected because they had not been made in good faith because her underlying motive was predominantly her personal antagonism towards the Centre’s Manager.

²⁰³ See fn 200, para 21.

²⁰⁴ Protected Disclosure – An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

²⁰⁵ See fn 200, para 22.

²⁰⁶ A qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following – (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

²⁰⁷ See fn 200, para 23.

The ET clearly took the view that even though there was an overlap between the concept of good faith and reasonable belief, good faith added a motive to the disclosure and dismissed the applicant's claim to automatic protection under section 103A of PIDA.

The case was taken on appeal to the Employment Appeal Tribunal (hereinafter referred to as the EAT) where the findings of the ET were upheld. The EAT found that it was important for the Tribunal to assess motive and it agreed that good faith involves the deployment of an honest intention²⁰⁸. The EAT held that it was not the purpose of the PIDA to allow grudges to be promoted and disclosures to be made in order to advance personal antagonism. The EAT found that the applicant's personal antagonism was her dominant, if not her sole motive for making the disclosures which meant that her disclosures were not made in good faith. On this basis the appeal was dismissed.

Lord Justice Wall went further to comment that he concurred with the finding of the court and added a short judgment of his own in support of the decision. Lord Wall stated:²⁰⁹

“that a person may reasonably believe that the information disclosed and any allegation contained in it is substantially true, and still not make the disclosure in good faith”. It is submitted that this is because good faith is a question of *motivation* and because we are human, a person may well honestly believe something to be true, but, as in this case, can be motivated by personal antagonism when disclosing this to someone else. Lord Wall went further to say that motivation is a complex concept and a person making a protected disclosure may have mixed motives because it is “hardly likely that they will have warm feelings for the person about whom the disclosure is being made”²¹⁰.

Lord Wall concurred with the ET and EAT in that the applicant's predominant motivation for disclosing the information was not directed at remedying the wrongs identified in section 43B, but was an ulterior motive unrelated to the statutory objectives.²¹¹

²⁰⁸ See fn 200, para 29.

²⁰⁹ See fn 200, para 68.

²¹⁰ See fn 200, para 72.

²¹¹ See fn 200, para 73.

It is submitted that although the findings of this case are harsh, they are necessary in that the decision will prevent other whistleblowers from disclosing information for reasons that are vindictive and malicious. This case will no doubt be used by other courts as a guideline on the issue of good faith and how it is determined, as noted in the case of *Lucas*²¹² (discussed in Chapter 5) where the Employment Appeal Tribunal (EAT) referred to the *Street* case when determining and trying to establish exactly what good faith is. The legislature's intention was to prevent any disclosures from being protected, and whistleblowers need to understand that they will not be protected if they do not have the required good faith and reasonable belief stipulated within the Act. It is submitted that the implications of a decision such as this, is that the courts in future will look more closely at motivation to establish whether there are mixed motives and whether predominant motive for disclosing the information was good faith or something else.

It is submitted that an employee disclosing information will most times have a predominant motive which will cloud whatever other motives he/she has. This was illustrated in the case of *Aziz v Muskett & Tottenham Legal Advice Centre*²¹³ where the court held that a disclosure made as a means to exert pressure for a pay rise is not a disclosure made in good faith because the underlying motive for the disclosure is for reasons of blackmail and extortion thus, making the disclosure unprotected and not in terms of s 43C of PIDA. With a decision such as in the *Street* case, whistleblowers must now examine their motives carefully and be cautious against their predominant motive being something other than good faith.

It is further submitted that when courts are trying to establish motive, caution must be taken because there will be times when a whistleblower's predominant motive will not be one of good faith but the information disclosed might be substantially true. In the *Lucas* case, the EAT cautioned other courts that they should not lightly find that a disclosure was not made in good faith. The answer as to how the courts establish a finding on a case such as that is still to be determined because, it is a debatable point as to whether a person who has a bad motive but has revealed a true disclosure is protected under the Act.

²¹² Appeal No. UKEAT/0713/04/DA.

²¹³ 2001.

In terms of onus of proving good faith and/or other motive/s, in the *Lucas* case and the *Bachnak v Emerging Markets*²¹⁴ case the EAT held that the employer must assert that there is a lack of good faith and any evidence it relies upon should be set out in advance so that the applicant can respond to it. Since malice is both an exceptional and serious allegation in a working relationship, the employer must produce cogent evidence which the court is able to weigh up together with other evidence in the case before deciding whether some dominant or predominant ulterior motive meant that the protection that the person has under the PIDA should be forfeited.

6.1.2 Other cases dealing with good faith

In the South African case based on the PDA, *Roos v Commissioner Stone NO & Others*,²¹⁵ the applicant had raised concerns regarding the tender procedures. On review, the court held²¹⁶ that the conduct of the applicant would not be protected by the PDA because the purpose of the Act was not to give licence to employees to make unsubstantiated and disparaging remarks about their employers and later hide behind the Act. On this basis the disclosure was found not to be a *bona fide* disclosure and therefore did not fall under the protection of the ambit of the PDA in terms of section 9(1) which provides that a general protected disclosure is any disclosure made in good faith by an employee who reasonably believes that the information disclosed, (and any allegation contained in it) are substantively true and the disclosure is not made for purposes of personal gain. The court dismissed the application on this basis.

It is submitted that the implications of this decision are far reaching in that it makes future whistleblowers aware of the fact that the PDA was not created to protect disclosures that are made purely for the reason to harass or embarrass the employer. Neither will the PDA protect disclosures that are unsubstantiated made for purposes of vindictiveness or maliciousness. Future whistleblowers when making a disclosure will be aware that the PDA is created to protect genuine concerns and suspicions.

²¹⁴ Appeal No. UKEAT/0288/05/RN.

²¹⁵ (2007) 10 BLLR 972 (LC).

²¹⁶ See fn 215, para 11.

The case of *Jabari v Telkom SA (Pty) Ltd*²¹⁷ was not determined as a whistleblowing case under the PDA, but a discussion around the issue of good faith is relevant because it illustrates how an employee can under the guise of good faith and reasonable belief harass an employer thereby becoming a nuisance in the workplace. Looking at the facts of the case, it is submitted that this case is not about incompatibility but rather about disclosure of information and the issue of good faith hence the victimization and unfair dismissal. The court made a correct finding based on incompatibility and found no evidence that the applicant was incompatible with the “corporate culture” of the respondent. This was so, because this case was in fact not a case concerning incompatibility at all but rather a case concerning protected disclosures. If the respondent had initially investigated the allegations as disclosures in terms of the PDA, the outcome of the case would have been entirely different, in that, the disclosures that the applicant had made would have on investigation, be found to be pure mischief making, and further that the element of good faith on the applicant’s side would not have been present.

The applicant was dismissed for incompatibility based on the irretrievable breakdown of the employment relationship based on the fact that the applicant continually challenged and questioned decisions and did not take, and/or execute instructions from his superiors. The applicant was also arrogant, insubordinate and uncooperative and habitually instituted grievance proceedings against the respondent and did not prosecute these grievances to finality. As a result the respondent devoted a large amount of human resources, time, and funds to defending these cases. Between April and September, the applicant had lodged five grievances against the respondent with the CCMA.

It is submitted that, if this was a true incompatibility case, the respondents should have done whatever they could to find a solution to address the applicant’s incompatibility. However, the court found that the respondents had no remedial options or alternatives in place to remedy the applicant’s incompatibility. The applicant had also not been given an opportunity to confront the alleged disharmonious behavioural conduct he was accused of and there was no opportunity

²¹⁷ (2006) 10 BLLR 924 (LC).

that was given to him to benefit from any counselling in order to restore an amicable employment relationship with the respondent. On the basis the court found that the dominant reason for the applicant's dismissal was predicated on the fact that the applicant initiated grievance proceedings against the respondent's management, challenging its unfair labour practices.²¹⁸

The court further stated²¹⁹ that the respondent's reasons for the applicant's dismissal were not sustainable. The applicant was victimized and unfairly dismissed for exercising his constitutional and statutory rights and on this basis the dismissal was rendered automatically unfair.

It is submitted that if an employee is unhappy in the workplace, then there is a very strong possibility that the employee would try to cause unpleasantness in the work environment by disclosing information that is untrue or fabricated as in the *Jabari* case.

6.2 Reasonable belief

In terms of reasonable belief, the PDA does not require an employee to prove the truth of information disclosed, but if the employee believes that the information is true, then a *bona fide* disclosure can be inferred. To reiterate, in the *MTN*²²⁰ case, the court highlighted the fact that, in addition to good faith, a reasonable belief in the substantial truth of the allegation must be present when making disclosures. In other words, the whistleblower must seriously believe that his/her disclosure is true.

In the *Tshishonga* case, Pillay J stated²²¹ that the reasonableness of the belief must relate to the information being substantially true. Furthermore, a reason to believe pitches the test as subjective in that the employee who makes the disclosure has to hold the belief and objective in the sense that the belief has to be reasonable.

²¹⁸ See fn 217, para 1.

²¹⁹ See fn 217, para 7–8.

²²⁰ (2003) 24 ILJ 1670 (LC).

²²¹ See fn 169, para 185.

However, it is submitted that if a reasonable belief is determined by personal knowledge, then it would frustrate the operation of the PDA by setting a very high standard. Thus, a mistaken belief or one that is factually inaccurate can also be reasonable, unless the information is so inaccurate that the public has no interest in its disclosure. It is important to note that, if an employee discloses information which he/she believes is made with a reasonable belief, based on opinion, hearsay or gossip, the PDA will not protect him/her, as discussed in Chapter 4 under “gossip in the workplace”.

Below is a discussion of UK cases dealing with whether a disclosure was made with the required reasonable belief in terms of PDA. Short of s 43D and s 43E, s 43B to s 43H require that a disclosure will qualify for protection if it is made with a reasonable belief.

In the case of *Darnton v University of Surrey*²²² the court had to determine whether the applicant’s disclosure was made with a reasonable belief that the information is substantially true.

The applicant was employed by the University as a full time lecturer at the Surrey European Management School. The relationship between the applicant and the Head of the School was not an amicable one which led to the applicant complaining about being bullied and harassed by the Head of the School. Arising from the complaint the applicant and the University went into an agreement which was accepted by both parties. A misunderstanding arose between the parties concerning the agreement as to whether the applicant was entitled to accept or reject work as he thought fit from other Universities while still being paid by the Surrey European Management School. Arising from this situation, the applicant wrote a letter disclosing information about the Head of the School. The applicant’s services after the disclosure of information were terminated.

The applicant submitted that his disclosure was a qualified one falling under the protection of section 43B of PDA and that he reasonably believed that the disclosure

²²² (2002) UKEAT 882_01_1112 (Appeal No EAT/882/01).

tended to show that a criminal offence had been committed by the University or that the University was in breach of various legal obligations.

The court in determining the issue reiterated that the ERA and PIDA were designed to protect whistleblowers and proceeded to examine the relevant sections in order to determine whether the applicant had a reasonable belief or not. Section 43A of the Act defines a protected disclosure and proceeds to stipulate reasonable belief as a factor that would determine whether the disclosure is qualified or not. In s 43B the court noted that a disclosure qualifies for protection, if in the reasonable belief of the employee, it tended to show a relevant failure. The court proceeded to examine s 43C-H where reasonable belief was stipulated as a requirement in order that the disclosure be a protected qualifying disclosure, but noted that s 43F, s 43G and s 43H stated that for a disclosure to qualify for protection, it must show that the employee reasonably believed that the information disclosed and any allegation contained in it was substantially true.

The court held²²³ that it had to consider both the law and common sense to the circumstances which include the belief in the factual basis as well as what the facts tend to show in order to determine whether the applicant did hold a reasonable belief that the information disclosed was true. The court went further by saying that the more the worker claims to have direct knowledge of matters subject to the disclosure, the more relevant the belief in the truth is that the applicant has a reasonable belief. The court stated²²⁴ that according to s 43B, it is not possible to expect a person disclosing information to hold the belief that the information and the allegation disclosed is substantially true. The court obtained considerable assistance from a passage in a book written by John Bowyers²²⁵ stating that:

“To achieve protection under any of the several parts of the Act, the worker must have a “reasonable belief” in the truth of the information as tending to show one or more of the six matters listed which he has disclosed, although that belief need not be correct (section 43B(1)) ... The control of abuse is that it must have been reasonable for the employee to believe that the information disclosed was true. This may

²²³ See fn 222, para 29.

²²⁴ See fn 222, para 30.

²²⁵ Bowyers et al, “Reasonable Belief in Truth” In *Whistleblowing: the New Law* 19.

mean that under the Act, an employee who has a reasonable belief regarding a specific malpractice which turns out to be a mistaken belief would still qualify for protection, because the disclosure would be deemed a qualifying disclosure. However, in each case, the reasonableness of the belief will be dependent upon the volume and quality of information available to the worker”.

The court held that reasonable belief must be based on facts as understood by the employee, not as actually found to be in the case.²²⁶

It is submitted that to determining whether a disclosure was made with a reasonable belief is difficult, however the whistleblower must exercise personal judgment on his/her part regarding the information, evidence and resources available to him/her concerning the disclosure. Note must be taken by the employee that there must be more than unsubstantiated rumours in order that the disclosure be deemed a qualifying disclosure. The court decided correctly in this case, in stating that it is unreasonable to require the whistleblower to hold the belief that both the fact basis of the disclosure and what it tends to show are substantially true. However, it is submitted that the more evidential proof in the factual basis there is, the easier it is to determine reasonable belief in the substantive truth of the information even if it turns out to be a mistaken belief. As submitted previously, evidential proof in the form of documentation will always provide back up in determining reasonable belief.

The court’s approach to reasonable belief²²⁷ was followed in other cases such as *Haney v Brent Mind & Anor*²²⁸ where the court stated:

“in our opinion, the determination of the factual accuracy of the disclosure by the tribunal will, in many cases, be an important tool in determining whether the employer held the reasonable belief that the disclosure tended to show a relevant failure. Thus, if an employment tribunal finds that an employee’s factual allegation of something he claims to have seen himself is false, that will be highly relevant to the question of the employee’s reasonable belief. It is extremely difficult to see how an employee can reasonably believe that an allegation tends to show that there has been a relevant failure if he knew or believed that the factual basis was false, unless there may somehow have been an honest mistake on his part.”

²²⁶ See fn 222, para 33.

²²⁷ See fn 222, para 29.

²²⁸ (2003) UKEAT 0054_03_1004 (Appeal No. EAT/0054/03).

This case illustrates quite clearly how important the element of reasonable belief is when disclosing information that the employee believes to be a malpractice. It is also important to note that in this case, the court looked at both the subjective and objective elements of a reasonable belief. The above quote summarises succinctly how the courts can determine whether an employee has a reasonable belief or not.

In the case of *Bolton School v Evans*²²⁹ the applicant claimed that he had a reasonable belief that disclosing the information concerning security issues of the computer system was in the best interest of the school and its student body and that he had the requisite elements of good faith and reasonable belief in terms of s 43B and s 43C of PIDA. The applicant further claimed that his constructive dismissal was because of his disclosure in terms of s 43B.

The applicant was employed by the respondent as a teacher in its Information and Communication Technology Department. The respondents installed a new computer system and, although the applicant was not part of the installation team and project he showed interest in this project because his main concern was security issues surrounding the new system because he believed that the security protection was inadequate. The applicant proved his doubts about the system when he was able to access the system quite easily. On this basis the applicant was given a written warning which he objected to and proceeded to resign from his position at the school.²³⁰

The Employment Tribunal examined s 43B of PIDA and found that the Act requires an employee to have a reasonable belief in matters being disclosed and that this requirement was inserted in order to achieve a fair balance between the interests of the worker who suspects malpractice and those of an employer who could be damaged by unfounded allegations. It was further stated that “to allow an employer to disregard a Public Interest Disclosures Act decision in this way would be to drive a coach and horses through the intention of the legislature that the whistleblower should have employment protection”. The case was appealed and referred to the EAT.

²²⁹ (2006) EWCA Civ 1653.

²³⁰ See fn 229, para 3.

In looking at the issues, the EAT referred to the *Darnton*²³¹ case where it stated that if an employee makes a disclosure in good faith to his employer or provides relevant qualifying information, then provided he is not committing a criminal offence in making the disclosure, he is protected from dismissal and detrimental action short of dismissal. Furthermore, the information may be inaccurate or wrong but that does not remove the protection, provided that the employee had a reasonable belief that the information tended to show one or more of the matters set out in s 43B of PIDA.

The EAT found that when examining the requirements of s 43B of Act, it seemed as though the law protects the disclosure of information which the employee reasonably believes tends to demonstrate the kind of wrongdoing but does not protect the actions of the employee which are directed to establishing the reasonableness of that belief.

It is submitted that the findings of this case are relevant in that the employee having a reasonable belief that the information disclosed is substantially true is one thing, but when the employee commits an offence in sourcing the information, that becomes another issue. The finding of this case will be warning to future whistleblowers that the Act is able to protect the employee if the information disclosed is with a reasonable belief and substantially true, but will not condone sourcing the information illegally to prove the reasonableness of the information. The finding of this case will be referred to often in cases such as this, to highlight the fact that the Act will protect information that is made in good faith, with a reasonable belief and sourced in a way that is above reproach.

In the case of *Babula v Waltham Forest College*²³² the applicant claimed that his constructive dismissal was due to the fact that he made a protected disclosure in terms of s 43 of PIDA. The issue the court had to decide on was whether the disclosure was made with a reasonable belief and whether the applicant's dismissal must be regarded as automatically unfair under section 103A of the ERA because the reason for it was that he had made a protected disclosure within the provisions of the ERA 1996, section 43A and 43B(1)(a) and (b)".

²³¹ (2002) UKEAT Appeal No EAT/882/01.

²³² (2007) EWCA Civ 174.

The applicant was a college lecturer who became concerned that his predecessor had made remarks that were deemed to incite racial hatred by informing the Muslim students that he wished that an incident like the September 11th incident in New York would occur in London and proceeded to divide up his class into Muslim and non-Muslim groups and ignored the non-Muslim students whilst teaching religion in the class to the Muslim students.

The applicant reported his concerns to the college authorities. When these concerns were ignored, he decided to report the matter to the police informing the college in writing immediately after reporting the incident to the police authorities.

The applicant claimed that it was this disclosure of information that caused the college to dismiss him. He then took his case to the Employment Tribunal stating that he had made a qualifying disclosure under section 43B of the ERA 1996 as he:

- (i) reasonably believed that a criminal offence of incitement to racial hatred under the Public Order Act 1986 had been committed and was likely to be committed again in the future by Mr Jalil;
- (ii) that he reasonably believed that Mrs Lambert was unlikely to report the commission of the aforesaid criminal offence to the authorities and had failed to comply with a legal obligation to report such offence;
- (iii) that he reasonably believed that the health or safety of individuals would be endangered by Mr Jalil's comments; and
- (iv) that he reasonably believed that Mrs Lambert's lack of action to the disclosures previously would cause her to deliberately conceal the information again.²³³

The Employment Tribunal struck out applicant's claim, stating that it was bound by the decision in *Kraus v Penna plc and another*²³⁴ which the tribunal stated was authority for the proposition that a disclosure is not a qualifying disclosure unless a criminal offence, or legal obligation that was capable of a breach actually existed. The tribunal further stated that the applicant's predecessor's comments were an incitement to religious hatred and not racial hatred, and since there was no such offence at the time, the applicant's disclosure could not be protected. The tribunal found against

²³³ See fn 232, para 23.

²³⁴ (2004) IRLR 260.

reasonable belief, stating that, reasonable belief relates to factual information in the possession of the employee and what he/she perceives to be the facts based on what he/she believes to be reasonable.²³⁵ Therefore in the light of decision in *Kraus* the tribunal found that the applicant did not make a qualifying disclosure under section 43B(1)(a) and dismissed the case. The applicant appealed to the Court of Appeal.

The Court of Appeal allowed the applicant's appeal and held that the case of *Kraus* was wrong in law and should no longer be followed. The court held that when determining whether a disclosure is a qualifying disclosure in terms s 43 of the Act, the whistleblower must be able to show that he/she reasonably believes that the disclosure tends to show that a criminal offence is likely to be committed or a legal obligation is breached. The issue is the relevance of the whistleblower's reasonable belief and not whether they are right or wrong. The court agreed with the *Darnton* case where it was stated that a belief may be reasonable and yet be wrong. The fact that the whistleblower is wrong is not the issue, instead of importance is whether the belief is reasonable and whether the disclosure is made in good faith.

The court held that although *Kraus* was decided correctly on its facts, it was not a correct statement of law and was wrongly decided and should therefore not be followed. Lord Justice Thomas stated²³⁶ that the word "belief" in section 43B(1) is subjective in that it is the particular belief held by the worker. However, the belief must be reasonable and that is the objective test. Lord Justice Thomas went further in saying that in *Street's* case the concept of good faith added an important element and is the additional element of protection for the employee in a case such as the applicant's.

The court held that the applicant had identified a criminal offence which was the incitement to racial hatred and a legal obligation which was the college's equal opportunities policy. On this basis the applicant's belief was not only reasonable but also made in good faith which made the disclosure protected under s 43 of the Act.

²³⁵ See fn 231, para 31.

²³⁶ See fn 231, para 82.

This case illustrates the fact that a whistleblower's belief may be reasonable even though it turns out to be wrong. The onus of proving whether the belief is reasonable is a matter for the court to determine. Reasonable belief and good faith are the pivotal elements around which the court will decide on whether a disclosure is protected or not under the Act. Both elements are important in that they support each other, but the concept of good faith adds an element of protection for an employee when disclosing information. This decision is relevant in taking the law forward when the courts determine similar cases on reasonable belief.

Conclusion

Throughout this chapter, reference has been made concerning the importance of the elements of good faith and a reasonable belief. Sections 43B-H of PIDA and s 1 to s 9 of the PDA require that good faith and a reasonable belief be present when a disclosure is made. However, the questions that arise are:

- whether good faith and reasonable belief can be separated or whether both elements must always be included in a disclosure;
- can a whistleblowing case be determined only on one element i.e. can a case be decided only on reasonable belief or only on good faith; and
- how relevant is the element of good faith or reasonable belief in whistleblowing cases.

If we refer to the hypothetical scenario one at the beginning of this chapter, on the face of it, the requirements for a general protected disclosure in terms of section 9 of the Act have been fulfilled. However, in examining the element of good faith, attention must be paid to the fact that the employee has previously made similar allegations concerning other members of staff within the company and the relationship between the employee and management is historically problematic. Can one then deduce from the facts, that the element of good faith is questionable? In the discussion on *Street's* case above, the court stated that good faith is a question of motivation and involves the deployment of an honest intention. Further, one must look at the motivation of the person disclosing information to determine whether the disclosure was based on an underlying predominant motive or not, since good faith is linked to motivation. There is a possibility that the employee's underlying motive

could be one of bad faith, even though in the *Tshishonga* case, the court stated that seldom is there warm fuzzy feelings towards someone that you are disclosing information about. To determine whether the employee has disclosed these allegations in good faith, it is dependent upon how the courts will interpret good faith and the circumstances surrounding those allegations.

It is submitted that good faith is an essential requirement within the Act, because it is linked to motive when disclosures are made. When a disclosure is made with an underlying good motive and with sincerity of intention, the disclosure then fulfils the good faith requirement within the Act. As Pillay J stated in the case of *Tshishonga* if the content of a statement is true or reasonably believed by its maker to be true, there is still an issue of honesty which can creep in according to whether the statement was made with sincerity of intention for which the Act provides protection. It is therefore submitted that in this scenario, taking into account the facts of the case, and the above statement of Pillay J, the employee does not fulfil the requirement of good faith or the sincerity of intention which is required by the Act, even though there is a reasonable belief by the employee that the disclosure is true. On this basis, the disclosures made by the employee are not protected by the Act.

Referring to hypothetical scenario two, the evidential proof makes for a solid case, because it is this evidence that leads to the investigation. It is submitted that if the evidence was not serious enough, the investigation would not have been initiated. On this basis we can assume that the evidence was good. However, taking the facts of the case into account, the employee had a 'bone to pick' with that particular member of the management team for a long time. The question that arises is, does good faith exist in this case, and, can the case be determined only on the basis of a reasonable belief? This is a difficult question considering that the evidence proved provided a solid case, and the employee had a reason to believe that the evidential proof was true, but, the good faith element was absent. As Pillay J in the *Tshishonga* case stated²³⁷, "a malicious motive cannot disqualify the disclosure if the information is solid, if it did then the unwelcome consequence would be that a disclosure would be unprotected even if it benefits society".

²³⁷ See fn 169, para 204-207.

It is submitted that the Act specifically included the element of good faith for a reason, because it is linked to motivation and sincerity of intention. Therefore, it is submitted that disclosures must include the element of good faith in order that the requirements of the Act are fulfilled. It is also submitted that although there was evidential proof to substantiate the claim, the disclosure would not be a protected one under the Act, because it lacked the element of good faith. Taking into account the above statement by Pillay J, it is submitted that a malicious motive must disqualify a disclosure because if it did not, it defeats the object of having a requirement of good faith and leaves the flood gates open for *mala fide* motives. It is therefore submitted that the benefit to society is not the determining factor in deciding the element of good faith.

To answer the questions of whether whistleblowing cases can be determined only on one element, and how relevant the element of good faith or reasonable belief is in whistleblowing cases, it is submitted that good faith and reasonable belief cannot be separated when deciding these cases. To reiterate, good faith is linked to motivation, and even though there might not be 'warm feelings' about the person against whom the disclosure is made. Therefore, a whistleblower cannot be consumed by an ulterior motive in order to stop the wrongdoing and still claim protection under the Act.

In determining these cases, it is submitted that the courts must always do a proportionality test to determine the dominant motive of the whistleblower.

It is submitted, that on this basis, good faith and a reasonable belief are extremely important requirements when making disclosures, taking into account the fact that the Act requires both good faith and a reasonable belief to be present if the disclosure is to be protected by the Act.

6.3 Onus of Proof

"He who alleges must prove" is relevant in terms of onus or burden of proof. It is submitted that proof is the establishment of a fact by the use of evidence. Schwikkard

et al²³⁸ refers to the terms “burden of proof” or “onus of proof” as “the duty that a litigant has to adduce evidence sufficient enough to convince a court that the claim should succeed”.

The test for determining who bears the onus of proof was set out in the *Pillay v Krishna*²³⁹ case as: “the person who makes the positive assertion is generally called upon to prove it, with the effect that the burden of proof lies generally on the person who seeks to alter the status quo”.

In civil cases the burden of proof is discharged by a balance of probability which means that the probability of the case must be such that that it is convincing enough that the particular state of affairs existed. The civil standard of proof is applied consistently in regard to a balance of probabilities irrespective of the particular cause of action. Schwikkard et al²⁴⁰ refers to the *Miller v Minister of Pensions*²⁴¹ case where Lord Denning expressed the civil standard of proof as follows:

“It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not’, the burden is discharged, but if the probabilities are equal it is not”.

However, according to Schwikkard et al, the suggestion that there are different standards of proof dependent on the nature of the facts is not correct and rejected in South African law. What is required is that the person alleging must on a balance of probability be able to show their innocence.

The question that arises in regard to whistleblowing cases is: who has the onus to proof that the allegations were made in good faith and with a reasonable belief.

In the *Street* case²⁴², Auld LJ states that when trying to determine a dominant or predominant motive of a disclosure when considering whether a disclosure is made in

²³⁸ PJ Schwikkard and SE Van Der Merwe, *Principles of Evidence* 3rd ed, Juta & Co, (2009) 571

²³⁹ 1946 AD 946 at para 953.

²⁴⁰ See fn 238, page 580-581.

²⁴¹ 1947 (2) All ER at para 372-374.

²⁴² See fn 187, para 57.

good faith, “they” should look for a malicious motive, because depending on the facts, may often find that a malicious motive is the higher threshold necessary for the proof of malice than bad faith in PIDA. Auld LJ however does not specify with whom this burden of proof must lay. However, he does refer to the word “they” in considering whether the disclosure was made in good faith therefore, it is inferred by this word, that he is talking about the court proving whether the disclosure was made in good faith and with a reasonable belief that the information disclosed is substantially true. Pillay J in *Tshishonga*²⁴³ held that the court in the *Street* case did not believe that the employee bears the onus of proving good faith. Furthermore, to expect the employee to be saddled with a burden of proof will set the standard too high and, if that standard is not met in terms of the PDA, the disclosure could be disqualified which would hinder an enquiry into whether the employer subjected the employee to an occupational detriment in breach of the PDA. Pillay J further states that the employer bears the burden of proving that it did not commit an unfair labour practice or unfairly dismiss the employee. The court in the *Lucas*²⁴⁴ case also referred to the *Street* case in terms of onus of proof and states that Auld LJ in *Street* only expresses some views on the degree of proof required to determine the existence of bad faith but does not say whether there is a burden of proof and on whom it lies. Therefore, it seems as though the court must consider all the evidence and decide for itself whether the dominant or predominant motive is an ulterior one in which case it will not attract the protection of the Act. Further, where there is an improper motive that is alleged in a disclosure, it must be made clear to the whistleblower that the onus of proving is his/hers.

It is therefore submitted that there are three aspects such as good faith, bad faith and, occupational detriment that need to be distinguished in regard to onus/burden of proof. In examining the judgments of the above cases, it is clear that, in terms of good faith, the employee has the onus of proving that the disclosure was made with the required element of good faith. The onus of proving bad faith or a dominant or predominant motive other than good faith is on the employer and must be determined by the court in considering all the evidence before them. However, if the employee makes a disclosure of information knowing that the motive was improper, then it should be made clear to them from the beginning by the employer that the onus of

²⁴³ See fn 169, para 215.

²⁴⁴ See fn 197, para 39.

proving otherwise is squarely on his/her shoulders. In terms of an occupational detriment the onus is on the employee to prove that he/she was in fact dismissed and on the employer to show that he/she did not commit an unfair labour practice by dismissing an employee for the disclosure of information that he/she made.

It is submitted that in some cases it is possible that the burden of proof shifts from one party to another as illustrated in the *Street* case. Initially the applicant bore the onus of proving her good faith, but this burden shifted when the respondent claimed that the applicant's motive had changed to an underlying motive of bad faith. The onus was then shifted to the respondent to prove the claim made. It was left up to the court to adjudicate and determine on the evidence of the case whether this was so. On a balance of probability the applicant was unable to prove that her motive was one of good faith when disclosing the information.

It is submitted that although the outcome of the *Street* case was a harsh reality, it is my opinion that whistleblowing cases in South Africa should be examined in a similar way to prevent employees getting away with disclosures made for reasons other than good faith. It is submitted that even though Pillay J in *Tshishonga* held that to saddle the employee with a burden of proof would set too high a standard, this is the only way to prevent whistleblowers with a bad motive finding a loophole in the Act and getting away with their disclosures being protected by the Act. It is submitted that if the standard of proving good faith and a reasonable belief is set at a high standard, then it dissuades employees disclosing information that they know is not true and allows employees with relevant information and a motive that is good to disclose information. It is conceded that there are times that a belief ends up being a mistaken belief but yet again, the whistleblower must be able to prove that their reasonable belief and good faith was in accordance with the Act and the reason for their disclosure was because of a true concern for the organisation or public. Ultimately it is up to the court to decide on the case on the basis of the evidence that they have.

CHAPTER 7

The Psychology of Unsubstantiated Allegations

This chapter will discuss the psychology behind allegations that are found to be unsubstantiated and untrue. To determine the psychology behind a person's motive is not an easy task, however, the findings help to explain why employees feel the necessity to make allegations that later turn out to be unsubstantiated, untrue and sometimes malicious and damaging to both the company and other employees within that company.

From the outset, the point to highlight is that most employees are honest, loyal and concerned with completing the tasks that they are given to the best of their ability. However, there are employees whose behaviours and attitudes are potentially destructive to the company. It is these employees who will be highlighted within this chapter.

The *Jabari*²⁴⁵ case (discussed in chapter 6, page 104) illustrates the point how some employees intentionally set out to make the daily lives of others miserable, by displaying behaviour which can become an obstruction in the workplace. The respondent described the applicant as someone who was arrogant, insubordinate and uncooperative, who habitually instituted grievance proceedings against them, never prosecuting these grievances to finality, resulting in them devoting a large amount of human resources, time, and funds in defending these cases. The applicant was also described as an employee who fought against every policy decision that management decided upon for the company. The applicant went as far as defaming a client who successfully sued him in a civil case for R40 000 which he was ordered to pay. On the basis of the above, the respondent dismissed the applicant for incompatibility. Unsurprisingly, the applicant appealed against this decision, playing the victim of an unfair dismissal, which resulted in him being reinstated in his position.

²⁴⁵ (2006) 10 BLLR 924 (LC). (Refer also fn 217).

In the book “Snakes in Suits – when psychopaths go to work”²⁴⁶, psychopaths are defined as people who are without conscience and incapable of empathy, guilt, or loyalty to anyone but themselves. Antisocial personality disorder is defined as a disorder that includes personality traits such as lack of empathy, grandiosity and shallow emotion. This disorder is three to four times more common than psychopathy in the general population.²⁴⁷

A classic description of antisocial behaviour in “Understanding Abnormal Behaviour”²⁴⁸ is, according to H Clerkley, MD²⁴⁹:

- (i) superficial charm and good intelligence – they are often capable in social activities and adept at manipulating others;
- (ii) shallow emotions and lack of empathy, guilt, or remorse – what is absent is genuine emotional feelings and concern over detrimental consequences of their behaviour;
- (iii) behaviour indicative of little life plan or order – the actions of antisocial personalities are not well planned and are often difficult to understand or predict;
- (iv) failure to learn from experiences and absence of anxiety – although the behaviours may be punished, the same behaviour may be repeated with little anxiety; and
- (v) unreliability, insincerity and untruthfulness – irresponsibility and the ability to lie or feign emotional feelings to callously manipulate others is common.²⁵⁰

Psychopaths more often than not come across as superficially charming with a good intelligence and are able to manipulate others easily. On the surface they appear normal and in control. In more recent research, Hare²⁵¹ states that most people fall in between being a psychopath or being anti-social therefore employers must be careful when trying to diagnose psychopathic or anti-social behaviour in their employees. It is

²⁴⁶ P Babiak and RD Hare, “*Snakes in Suits: When Psychopaths go to Work*”. 1st ed, 2007, Harper Collins Publishers.

²⁴⁷ See fn 246, page 19.

²⁴⁸ Sue, Sue, Sue, 5th edition, Houghton Mifflin Company, Boston, New York.

²⁴⁹ A pioneer in his field working as a psychiatrist in a psychiatric facility in the 1930s.

²⁵⁰ See fn 248, page 234.

²⁵¹ See fn 246.

submitted, that with Hare's statement in mind, most employees have a certain level of antisocial tendencies and some even have psychopathic tendencies, but some employees do display higher levels of antisocial or psychopathic tendencies than others. However, this does not make them psychopaths but rather employees who display anti-social behaviour and have difficulty fitting into a work environment where they have to get on with other employees. In the *Jabari* case, the respondent labelled him as being incompatible with his environment, which he disagreed with. From the outset however, his employers realised that he showed an incompatibility to working within that particular environment. He showed signs of anti-social behaviour that should have triggered some kind of warning within the organisation. The question which arises is, when should employers start taking note and action of this type of behaviour?

An interesting fact is that, it does not seem as though Mr Jabari was behaving in this manner so as to divert attention away from himself because of poor work performance (which is what one would think). Instead, on the contrary, management conceded the fact that Mr Jabari had consistently and competently performed his duties in terms of his contract of employment and was promoted to a managerial level after satisfying the promotion criteria and received positive work performance appraisals.²⁵² According to management, the only time Mr Jabari's work suffered and his focus shifted was as a result of being constantly engaged in litigation which prevented him from carrying out his duties as efficiently as he had done previously. On this basis, there had to be another explanation for his behaviour.

Psychopaths are able to manipulate their colleagues like pawns without them even knowing what is happening. They are adept at convincing their colleagues that they are good people who are misunderstood, and very quickly win over people convincing them that they are good friends and confidants. Their manipulation techniques dominate a large part of their work life and it is very difficult to pin them down to anything. They try to endear themselves to particular colleagues, making them believe that they are friends, but whom they know is more gullible than the others. Once the psychopath/antisocial person knows that he/she has the loyalty of these colleagues,

²⁵² See fn 245, para 1.

then he/she is able to work his/her destructive behaviour with the help of these colleagues. Psychopaths sometimes go so far as trying to derail the careers of co-workers which can sometimes end in disciplinary action for the unsuspecting victim.

One of the most amazing traits of people such as these is the ability to stay calm and look as though they are focussed. Most times they will not let their guard down and show how they really feel in company or in public. However, their reactions in private are something else. When psychopaths are challenged or they realise that they are being investigated in some way or other, their personalities change and they become overt bullies which is one of the tools that they use. The person begins threatening and intimidating the people that he/she knows are investigating him/her and sometimes even threats of litigation may be directed toward those who investigate the complaints.²⁵³

The question that one asks is how can this behaviour or situation in the workplace be prevented or stopped?

It is submitted that, having a psychopath or an antisocial person in a working environment is sometimes an emotionally draining and physically harmful experience. However, in order to answer the above question, one must understand that the best way for a company to prevent or stop behaviour and situations such as the above, and to defend themselves against such situations, is to learn as much as they can about psychopaths and their nature. This will enable them to see past their numerous masks to the real underlying motives. In learning about the *modus operandi* of psychopaths, you can also learn more about yourself and what your weak points are, so that when you are being challenged you are able to deal with those challenges regardless of whether they are directed at your personality or character without getting involved in a dispute that may take a long time to resolve.

²⁵³ See fn 246, page 258.

Caution must however be taken in labelling a person within an institution or organisation a psychopath since the connotation is a negative one, which may lead to a litigation and a civil suit of defamation..²⁵⁴

It is submitted, that a suggestion that management might consider when dealing with a situation in the workplace where employees show strong signs of psychopathic tendencies, is to be rational, dealing with the employee in a way that “nips the problem in the bud” immediately, thus preventing the situation from spreading and getting worse. It is submitted that it would be detrimental for the company, if situations such as there are not dealt with in a manner that prevents it from getting worse. Unfortunately, employees who have strong psychopathic tendencies or are anti-social in their behaviour, are attuned to weaknesses within management and will play on those weaknesses, making the situation worse. Management must have the capacity to put a stop to destructive behaviour immediately they are alerted to it. This can include investigating the matter and acting upon it thereby diffusing a potentially disastrous situation in an ethically correct manner.

An interesting aspect of the psychology of whistleblowing was highlighted by the empirical study done in the Nelson Mandela Metropole in Port Elizabeth with a total of 387 employees by Perks and Smith.²⁵⁵ I will discuss some of the findings which I believe to be relevant.

Some of the demographic characteristics of the respondents were highlighted as follows:

- the majority of the respondents were males (56%);
- 45% of the respondents were between the ages of 25 and 34;
- 50% of the respondents had 1-3 dependants while 43% had no dependants;

²⁵⁴ See fn 246, page 271 : A Few Trees Do Not a Forest Make – “Don’t make the mistake of turning one or two characteristics or symptoms into a general personality assessment or diagnosis. The careless use of the term is particularly common in personal disputes. If we don’t like someone, or if the person is seen as an adversary, a competitor, a threat, or as not meeting our needs, we may tend to use any piece of revealing information, relevant or not, to conclude that he or she must be a psychopath. Keep in mind that a qualified professional would use the term only with strong evidence of a very heavy dose of the defining features, and even then, judiciously.”

²⁵⁵ S Perks et al, “Employee Perceptions Regarding Whistle-Blowing in the Workplace : A South African Perspective” (2008) 6(2) *South African Journal of Human Resource Management* 15-24.

- 27% of the respondents only had a grade 12 qualification while 38% had a bachelors degree and 36% a national certificate or diploma;
- the majority of respondents were white (43%), while blacks and coloureds were 33% and 18% respectively of the total sample;
- 45% of the respondents earned a salary of between R5000 and R12000, while 17% earned less than R5000 and 38% earned more than R12000; and
- a total of 147 or (38%) of the respondents had engaged in the act of whistleblowing.

Of those respondents who had blown the whistle, the following was found:

- the majority of the respondents (86%) were still employed by their organization, while 14% had left as a result of whistle-blowing);
- 81% of the respondents were treated fairly by their companies while engaging in the act of whistleblowing; and
- 84% indicated that they would be willing to blow the whistle in the future if required to do so while 16% indicated that they would never blow the whistle again.

Perks and Smith's²⁵⁶ conclusion and recommendations after their study was particularly interesting.

It was found that there was a significant link between age and personal viewpoints of employees in that the older employees had a very different perception about whistleblowing in comparison to their younger colleagues. A possible reason for this, is that the new dispensation in the country which emphasises transparency, equal rights and ethical values which younger employees have grown up with, would impact more on them, whereas the older employees, having grown up under the old dispensation would have a different mindset.

It was also found that employees with dependents were less likely to blow the whistle in comparison to their colleagues who had no dependents. This was probably based on

²⁵⁶ See fn 255.

the fact that if they blew the whistle and were dismissed for doing so, they would not be able to support their dependents whereas employees without dependents were more open to blowing the whistle on wrongdoing considering that they did not have as much to lose in comparison to the colleagues with families who had more responsibilities.

Ethnic groups differed significantly in their personal viewpoints on whistleblowing. A possible reason for this could be the situation as discussed in Chapter 8 and also the fact that blowing the whistle is sometimes seen in a negative light.

Also significant was the relationship between income levels and personal viewpoints of employees regarding whistleblowing in the workplace. Employees with lower levels of income felt that they did not have as much to lose when reporting wrongdoing, in comparison to their colleagues with higher levels of income, who were reluctant to blow the whistle for fear of losing their jobs and losing their high income levels. A possible reason for this could be the fear of suffering an occupational detriment and victimisation which would impact on their jobs and income.

The recommendations made included that organisations should put in place an ethics policy which all employees regardless of age, ethnic group and salary level could relate to. This policy should show a significant relationship between a supportive organisation and the whistleblower. Whistleblowers should be assured that if they blow the whistle the organisation will be able to protect them and they will be safe from losing their jobs or their security within the workplace.

The results of the study revealed that whistleblowing can be improved in the following ways:²⁵⁷

- The workplace must have a personal code of ethics, based on guidelines from the Act (PDA);
- The internal policy must include a clear statement that malpractices are taken seriously and confidentiality is respected so as to prevent whistle-blowing externally;

²⁵⁷ See fn 255, page 23.

- The internal system should have proper communication channels and the organisation should have a supportive environment starting with the incorporation of ethical conduct in their vision and value statements;
- An ethics committee should be established and be responsible for ensuring that systems are in place. This committee should choose a dedicated ethics officer to whom wrongdoings in the organisation can be reported;
- The process to resolve wrongdoings must be dealt with professionally, with commitment from top management;
- At all times, management should have an open-door policy regarding employee complaints;
- Allegations must be investigated promptly and thoroughly;
- The individual blowing the whistle must act with honesty and integrity and there should be penalties for false allegations and rewards for bringing justice;
- Ethics training, in particular on whistle-blowing, should be given to new and to existing employees on a periodic basis to raise awareness and as reinforcement of ethical principles;
- Mechanisms such as a toll-free number (hotline) managed by a private company, access to independent advice, guidelines on how to raise concerns outside the organisation if necessary, should be indicated;
- An ethical audit should be conducted annually and visible steps be taken to address concerns raised”.

Perks and Smith’s study highlights the many psychological factors that are relevant when the issue of whistleblowing arises. It is not as cut and dried as one would expect and there are many different variables that one has to consider when looking at issues such as ethical and psychological factors of blowing the whistle.

It is submitted that ultimately it is up to the company to find the best possible way to deal with and respond to allegations of wrongdoing within the workplace in the most efficient way. Managers have to have their “ear to the ground” and respond immediately to anything that they suspect could go wrong, applying the policies that are in place and knowing that their actions could either make or break their organisations. It is the responsibility of management to make sure that troublemakers are not given a chance to destroy the camaraderie that is in the workplace by alleging all sorts of unjustified allegations concerning colleagues and management in order that they can look good, and in so doing, destroying the relationship between the

organisation and employees. As discussed above, it would be to the detriment of the company if it does not respond in a manner that can prevent situations that could turn out to be unpleasant.

It is further submitted, that office gossips be watched carefully and hearsay evidence examined closely before any conclusions are made. Companies should have a firm policy regarding hearsay evidence in that all hearsay evidence should be substantiated with hard evidence because hearsay evidence is tantamount to vicious gossip without hard evidence to prove otherwise.

7.1 Recommendations

In terms of ethics which would fall under the auspices of good faith in relation to whistleblowing, Perks et al²⁵⁸ state that:

“whistle-blowing is a very important ethical issue as it guards against the negative social, economic and environmental impact of multi-national corporations invading global markets”.

This statement proves that whistleblowing is an ethical issue and the two go hand in hand, i.e. you cannot have one without the other.

Law and ethics do have a relationship in that they are inextricably linked. As Richard Rowson states²⁵⁹:

“Law is seen as a device for enforcing the ethical views of a society: so long as we act within the law we act in ways that are ethically acceptable in our society”.

However, there are objections to this, one being, that in societies in which there are several cultures there is insufficient agreement on ethical issues for the law to enforce anything that can be seen as an ethical consensus and the other objection being that the law permits behaviour that many people consider ethically unacceptable.²⁶⁰

²⁵⁸ See fn 255.

²⁵⁹ Rowson R, “*Working Ethics: How to be Fair in a Culturally Complex World*”, 1st ed, Jessica Kingsley Publishers, London and Philadelphia (2006), page 22.

²⁶⁰ See fn 259, page 22.

The question then is, what is the solution to the problem in respect of unsubstantiated allegations? How can we prevent this from happening?

It is submitted that a solution would be to recommend that organisations create whistleblowing and ethics policies that could be put in place. The creation of these policies would be designed in a way that will:

- help to develop a culture of openness, accountability and integrity;
- encourage employees to raise concerns about wrongdoing internally;
- help to bring about good relations within the organisation by avoiding incidents where the organisation's reputation is publicly tarnished when wider disclosures are made;
- contribute to the efficient running of the organisation and the delivery of services; and
- help curb corruption, fraud and mismanagement.²⁶¹

A whistleblowing policy demonstrates that an organisation is committed to ensuring its affairs are carried out ethically, honestly and with high standards.

- It is suggested that the content of an ethics policy include amongst others, most importantly to whom and what it applies to. Time frames for concerns to be dealt with and feedback provided regarding the progress and outcome of the investigation should be clearly stipulated. The policy should state clearly that the employer is committed to tackling malpractice and wrongdoing and ensures that these issues will be dealt with seriously, taking into consideration the issue of confidentiality of the whistleblower, if he/she requests it. The policy should set out the relationship between the whistleblowing policy and the company's other procedures which allows concerns to be raised independently from the line management, recognising the fact that employees may raise their concerns externally which will be lawful and that if they want

²⁶¹ K. Drew "Whistleblowing and corruption : an initial and comparative review"
<http://www.ppsiru.org/reports/2002-08-C-whistle.doc>, page 54. (Accessed: 9 June 2009).

to raise concerns they can do so with the help of trade unions or their respective union representatives.²⁶²

In conjunction with a whistleblower policy, organisations could also create a strict set of ethical codes. A code of ethics is not a new concept because there are many companies that already have ethical codes of practice in place. However, these codes need to be revised, making compliance vital for all members of the organisation.

An ethical code may be styled as a code of professional responsibility which can do away with difficult issues such as what behaviour is ethical. Some codes of ethics are often social issues. Some ethical codes set out procedures to be used in cases of specific ethical situations such as when to accept gifts, conflicts of interest, whether the code of ethics was violated and what remedies should be imposed for that violation. The effectiveness of codes of ethics depends largely on what management is trying to achieve. Codes of ethics must be taken seriously and violations of them should lead to remedies that are metered out by the organization. Some contraventions can also violate a law or regulation and can be punished by the appropriate governmental organ or institution. It is submitted that ethics codes are distinct from moral codes which apply to the culture, education and religion of a whole society.

Organisations should encourage ethics training and this should be given periodically to help employees recognise particular ethical dilemmas that may arise. Organisations, within their ethical codes, must review their standing on whistleblowing. This would suggest an openness and willingness to work with the whistleblower/s to overcome fraud and corruption within their organisations.

Apart from a code of ethics, an ethics committee should be formed as the watchdog for compliance. This committee will be seen as a deterrence to employees who are tempted to commit fraud and corruption.

²⁶² See fn 261, page 55.

According to Barker and Dawood,²⁶³ it is the responsibility of the company and each individual employee to understand and follow their code of ethics policy. In doing so, the company will create a good reputation, develop integrity and inevitably receive support from their peers and superiors. All organisations should have an ethics policy in place which all employees regardless of his or her rank within the organisation must abide by, and if they do not abide to it, then the consequences of such deviation must be clearly explained to the employee who may face appropriate disciplinary action. It must be clear to all employees of the organisation that no one is above reproach of violating the code of ethics. Ethics policies create a culture of good governance which includes values such as honesty, fairness and trust. It is not unfair or unjust to recommend that organisations implement harsh codes of ethics which will compel employees to act in a professional manner and with integrity.

Barker and Dawood²⁶⁴ further state that:

“the ethical code of conduct has to be incorporated into the corporate culture and the procedures of the organization. In line with the policy and the code of ethics, there has to be an ambience of support and cooperation from the staff. The corporate dream is to be part of an organization that strives for excellence, and where there is a climate of personal and organizational growth, that the individual employee’s development is nurtured and defined. Stemming from this ideal, the code of ethics ought to be a document that each employee owns and honours”.

With ongoing ethics training the organisation will be able to reinforce ethical principles in their employees.

Perks et al²⁶⁵ suggests that the following practices could minimise wrongdoing in the workplace:

²⁶³ The following references were referred to in Barker and Dawood’s article, “Whistleblowing in the organization: wrongdoer or do-gooder? 127. Please note, the following arguments were proposed by (Borrie & Dehn, 2003 [0]; Camerer, 1996; Greenberg, Miceli & Cohen 1987; Jensen, 1987; Vinten, 2000) within Barker and Dawood’s article.

²⁶⁴ R Barker et al. “Whistleblowing in the organization: wrongdoer or do-gooder?” December (2004) 23(2) *Communicare* 128.

²⁶⁵ S Perks et al “Employee perceptions regarding whistle-blowing in the workplace: A South African perspective” (2008) 6(2) *SAJHRM* 15-22.

- signal the importance of ethical conduct through the organisation's vision and value statement;
- have a designated ethics officer;
- use an integrity test when screening job applications;
- provide ways for employees to report the questionable actions of peers and superiors, such as providing an ethics hotline;
- develop enforcement procedures that contain stiff disciplinary and dismissal procedures;
- treat allegations of wrongdoing seriously and treat both parties fairly;
- document the organisations's ethical rules through a written Code of Ethics;
- appoint an ethics committee to implement organisation ethics initiatives and supervise the ethics officers;
- emphasise the importance of ethical conduct in training;
- conduct an ethical audit and take visible steps to address concerns raised; and
- constantly communicate the organisation's ethical standards and principles".

Another solution would be to charge the employee with misconduct which will prevent other employees following suit.

7.2 Conclusion

Taking into consideration the above, it is apparent that to create policy an organisation must have the time and the capacity to do so, making sure that it is carried through to completion. Policy creation is a long process and will not be achieved overnight, but once it has been created, there is a strong possibility that it would deter employees from disclosing information that is untrue and damaging to their victim/s and/or the organisation. If organisations look at the long term benefits, it would be worth their while to create such policy.

In these circumstances, policies created should be adhered to. It would be disastrous in this respect, if ethical policies are not adhered to. The only way this can work is for everyone within the organisation (from management to messenger) to comply with the provisions within the particular policy.

As said above, it is ultimately up to the company to include harsher remedies and to put in place an ethical code of conduct and policies which need to be strictly complied with. It is submitted that if a true whistleblower with real concerns, you will abide by the procedures stipulated within the company's code of conduct or ethics code to get your concerns investigated. If internal disclosures do not work out then the whistleblower can rely upon the PDA and follow the procedures stipulated within it in order to make an external disclosure knowing that they will be protected. Add to that the element of good faith and a reasonable belief with evidential proof, and the whistleblowers disclosure will be one that is protected under the Act.

To conclude, a quote from Immanuel Kant, puts into perspective the above

"In law a man is guilty when he violates the rights of others. In ethics he is guilty if he only thinks of doing so" Immanuel Kant (1724-1804)²⁶⁶

²⁶⁶ www.brainyquotes.com/quotes/authors/i/immanuel_kant.html (Accessed: 3 August 2009).

CHAPTER 8

Non-Disclosure of Information

8.1 Other examples of whistleblowing not taken seriously

Despite the best rules, regulations and legislation to protect whistleblowers, the reality of the situation is that whistleblowers are often subjected to serious retaliation by their employers. Below is an example of where employees were brave enough to speak out about wrongdoing, as well as the shortcomings that hamper whistleblowing.

Factory workers lodged complaints in writing with the Department of Labour concerning their working conditions at a chemical factory in Lenasia. Their complaints included the fact that workers were locked in the premises for up to 16 hours a day in unsafe conditions. They were locked up with gas bottles and fire extinguishers that were not in working order; a lack of ventilation and the absence of an emergency alarm system. The Labour Department did not respond to these complaints appropriately. Workers did not complain to their employer directly for fear of major retaliation and victimization. Three months after the complaint was lodged, a fire broke out in the factory caused by a series of explosions of gas bottles. Consequently, eleven factory workers died. Failure to address legitimate concerns when raised resulted in innocent workers paying the ultimate price.²⁶⁷ The lesson to be learnt from the above is that employers are still victimising their employees for disclosing information and because of this, employees are afraid to report incidents directly to their employers for fear of victimisation and dismissal. Surprising is the fact that the Labour Department did not heed these complaints, thus putting innocent employees at risk of being hurt.

Although the PDA and the LRA protect whistleblowers, companies are still not willing to open themselves up to complaints which they can sometimes deal with quickly and easily. Instead, whistleblowers are scrutinized and seen as the “bad people” who are just causing trouble. They are victimized and suffer occupational

²⁶⁷ 2005 24(1) *Politeia* 93-94.

detriment most of the time. It is only the brave who are willing to take the issue further, either to the CCMA or to the Labour Court in order to prove that their complaints are legitimate. Most times, when companies are involved in improprieties, the effects of whistleblowing are disastrous for the whistleblower. Companies who run their businesses ethically are the companies willing to investigate complaints and eventually separate the wheat from the chaff. Most whistleblowers have the best interests of the company at heart, and want to prevent corruption from taking place. Their disclosures will be made in good faith and legitimate. It is very important to think of the retaliation against and victimization of a person who, in good faith, suddenly realizes that he/she is in a position to disclose information as a whistleblower that is to the benefit of the company. It is just unfortunate that the PDA is sometimes unable to protect these *bona fide* whistleblowers.

Without a proper understanding of the realities of whistleblowing and the true dilemma of the whistleblower, it is very difficult for there to be effective whistleblowing protection.

8.2 Derivative Misconduct

Derivative misconduct is an important added aspect to be examined when discussing whistleblowing. As much as employees would like to blow the whistle, they are deterred from doing so because of the stigma of whistleblowing, and the fear that they will be called troublemakers, busybodies and disloyal employees. It is submitted that in some cultures whistleblowers are still seen as school children “splitting” on each other which is something that is unforgivable and literally constitutes a mortal sin. Unfortunately this mental attitude sometimes extends itself into the workplace.

“Derivative misconduct is the term given to an employee’s refusal to divulge information that might help his or her employer identify the perpetrator of some other misconduct – it is called derivative because the employee guilty of that form of misconduct is taken to task, not for involvement in the primary misconduct, but for refusing to assist the employer in its quest to apprehend and discipline the perpetrators of the original offence”.²⁶⁸

²⁶⁸ Grogan J, “Derivative Misconduct : The offence of not informing” (2004) 20(3) *Employment Law* 15.

The idea of derivative misconduct in South Africa appears to have originated in the case of *Food and Allied Workers Union v Amalgamated Beverages Industries*²⁶⁹ In this case, the company's drivers and crewmen returned to work after an illegal strike and a group of workers then assaulted a "scab" driver who was seriously injured. Crewman was seen leaving the room after the assault but none could be individually recognised. However, the crewmen's clocking records indicated which crewmen were on the premises at the time of the assault. All the workers at the scene were charged because the company was unable to identify the actual assailants. A mass disciplinary inquiry was conducted, but none of the accused employees were prepared to give evidence. None came forward to protest their innocence or offer help in identifying the culprits. On the basis of assault and refusal by the employees to give evidence, the company dismissed them. The court upheld the dismissal as being justifiable, on the basis that all the evidence was consistent with the inference that all the employees present at that time either participated in the assault or lent their support to it and that they had all acted with common purpose.

Derivative misconduct was also an issue in the case of *Chauke & Others v Lee Service Centre CC t/a Leeson Motors*²⁷⁰ which involved a case of industrial sabotage. All the workers in the department in which newly-sprayed cars were scratched or deliberately dented were asked after each incident to identify the culprits. They refused to do so. Further incidences of sabotage occurred. Finally in desperation, the employer assembled the workers in the paint shop and gave them an ultimatum, that if the sabotage continued they would all be dismissed. The ultimatum was softened by the offer of a reward for information which would lead to the detection of the culprits. This also did not work and the sabotage continued.

The employer dismissed all the workers in the paint shop, and as a result, the employees took their case to the Labour Court on the basis that they were procedurally and substantively unfairly dismissed. The Labour Court rejected the employees complaints of procedural and substantive unfairness and upheld the dismissal.

²⁶⁹ (1994) 15 ILJ 1057 (LAC).

²⁷⁰ (1998) 19 ILJ 1112 (LAC).

The case was then taken to the Labour Appeal Court where the court found that the object of the sabotage was to deliberately slow down production by damaging property which would cause the company losses in terms of delays, time and labour costs. The court held that there was common purpose and shared responsibility for the primary misconduct of the employees, and the company could not be faulted for treating the misconduct as a collective issue and responding to it collectively by dismissing all the employees. The court therefore on this basis upheld the dismissal as justifiable.

Derivative misconduct is relevant to whistleblowing because, as much as employees want to disclose information, the possible fear of intimidation by other employees prevents them from doing so, thereby forcing them to remain silent with devastating results.

CHAPTER 9

Conclusion

Not many academics have written about the consequences of unsubstantiated allegations and the element of bad faith that is attached to these disclosures. However, there are many questions which arise out of this issue. One, being whether the consequences of disclosing unsubstantiated allegations should be more serious, in view of the fact that the reputation of the victims and the company are left in disrepute.

This dissertation was written to highlight the importance of whistleblowing but also to highlight the importance of having good faith and a reasonable belief when making those disclosures.

The investigation into any kind of allegation or disclosure takes up a large amount of organizational time and money. Investigating allegations or disclosures that turn out to be unsubstantiated, untrue and for malicious or vindictive reasons are even worse. Attached to these kinds of disclosures is the psychological stress and trauma that the victims have to endure.

After examining the Act and relevant case law, it was apparent that the issues of good faith and reasonable belief left a loophole within the Act and made this a grey area of law. It is submitted that the courts must, when deciding on an outcome to a whistleblowing case, do a proportionality test to determine the underlying motive of the whistleblower.

Tshishonga's case is a good illustration of how the court applied its mind, closely examining the Act and the issues surrounding good faith and a reasonable belief. Each aspect of that case was examined and the Act applied in order to determine whether the disclosures were protected or unprotected.

It is submitted that *Jabari's* case should have been determined differently even though it was not a whistleblowing case, the issue of good faith should have been examined.

It is important to examine a whistleblower's motive and underlying factors when determining an outcome for a case. It is obvious from the facts of this case that there were definitely elements of maliciousness and vindictiveness which are detrimental elements to have within a working relationship and which can destroy numerous employees within that environment. If these elements were obvious in the facts of the case, then there is a very strong possibility that the element of good faith is absent. If the element of good faith is absent from any disclosure then the disclosure does not fall under the protection of the Act. If there are elements such as maliciousness, vindictiveness and lack of good faith present in a disclosure, then there cannot possibly be a reasonable belief on the part of the whistleblower that his/her allegations are true. In this case, it is obvious that there was more than just the issue of incompatibility. If the elements of good faith and reasonable belief had been looked at more closely, then the outcome of the case as said above would have been decided differently.

Street's case on the other hand is an example of how the court examined the case, specifically looking at the issue of good faith, and found that it is possible for the element of good faith to result in bad faith. Here the court examined the predominant motive for disclosing information to determine whether the element of good faith was present or not and found that Mrs Street's personal antagonism was her dominant or sole motive causing her disclosure to be made in bad faith. However, in the *Lucas* case the court made a point of warning other tribunals and courts that they should not lightly find that a disclosure was not made in good faith considering that malice is both an exceptional and serious allegation in the working relationship.

Darnton's case is in my opinion, a very good precedent case in terms of reasonable belief and good faith. The EAT decided correctly in this case, by attaching the element of good faith to the element of reasonable belief in order to determine whether the disclosure was protected or not.

In discussions concerning unsubstantiated allegations, the SALRC recommended "that an employee's or worker's actions should not be criminalized where he or she knowingly makes a false disclosure. The Commission noted that a person who deliberately or recklessly discloses false information does not qualify as a

whistleblower and might also be guilty of criminal defamation, *crimen injuria* or fraud at common law. An employee may be guilty of misconduct as well, and quite possibly misconduct justifying dismissal. It was further argued that prosecution for false disclosure under the PDA would be incompatible with the recommendation of a duty of confidentiality”.²⁷¹

The Commission received a wide range of submissions. It was recommended that where an employee or worker knowingly makes a false disclosure it should not be criminalized and that it should not be made an offence to subject an employee or a worker to an occupational detriment. Criminally charging a person who has made a false allegation will definitely defeat the purpose and object of the Act, and since they will not fall under the ambit of the PDA, they will be subjected to disciplinary proceedings and dismissal in worst case scenarios.

Although the comments from the SALRC recommendations are debatable, it is submitted that criminally charging someone, where the disclosure made was found to be clearly for malicious purposes, would not defeat the object and purpose of the Act. Instead it is submitted that it would be a positive move that may dissuade malicious employees from disclosing information if there is a threat of criminal liability.

However, the possibility that the victim might charge, and sue them civilly, is an added stress. This is because the court processes take a long time and the fact that they would have to wade through court papers and the fact of having to go through the entire process again. It also reinforces the allegations in a new public forum. This would not suit the interest of the victim of the malicious “disclosure”.

It is clear that the point of the PDA is to encourage whistleblowing, but on the other hand, the PDA did not intend to expose parties to malicious or unsubstantiated gossip. In the case of *Grieve v Denel*²⁷² and *CWU & Another v MTN*²⁷³ the court upheld the principle that for a disclosure to be protected it must prima facie have been made in good faith and that the protection offered by the PDA towards employees is not

²⁷¹ South African Law Reform Commission Project 123 “*Protected Disclosures*” 77.

²⁷² (2003), 4, BLLR 366 LC.

²⁷³ (2003), 8 BLLR 741 LC.

unconditional. The PDA sets out defined parameters as to what constitutes a protected disclosure. The requirement that disclosures made in general circumstances must be based on good faith and a reasonable belief in the substantial truth of the allegation balances the interests of protecting the whistleblower and the interests of a potential victim of malicious disclosures.

The requirement of reasonable belief in the substantial truth of the allegation as well as good faith is borne out in the *Rand Water Board* case, where the allegations were ultimately proven to be unfounded.²⁷⁴

In the *Lucas*²⁷⁵ case, the EAT, drawing on the Court of Appeal, stated that tribunals should not lightly find that a disclosure was not made in good faith, as malice is both exceptional and a serious allegation in a working relationship. The employer ought to produce cogent evidence which the tribunal should then weigh up together with other evidence in the case before deciding whether some dominant or predominant ulterior motive meant that the protection that the person has under the PIDA should be forfeited.

Good faith and a reasonable belief emerge from both the PDA and PIDA (I will however refer to the PDA considering it is the South African Act) as essential elements which must be attached to whistleblowing. It is submitted that good faith is an essential requirement within the PDA because it is linked to motive. When a disclosure is made in good faith with an underlying good motive and with sincerity of intention, the disclosure fulfils the good faith requirement within the PDA. Any disclosure made for personal gain is not protected by the PDA.

Because good faith and a reasonable belief are essential requirements within the PDA, the two cannot be separated when deciding whistleblowing cases. To reiterate, good faith is linked to motivation, and even though there might not be 'warm feelings' about the person against whom the disclosure is made, an underlying good motive

²⁷⁴ Grogan J, "Blowing the Whistle: Protected Disclosures in the Workplace" February (2004) 20(1), *Employment Law* 10.

²⁷⁵ See fn 212.

must be present. A whistleblower therefore cannot be consumed by an ulterior motive in order to stop the wrongdoing and still claim protection under the PDA.

As Pillay J in the *Tshishonga* case stated²⁷⁶, “a malicious motive cannot disqualify the disclosure if the information is solid, if it did then the unwelcome consequence would be that a disclosure would be unprotected even if it benefits society”. It is submitted that even if the whistleblower has reason to believe and evidential proof which makes a solid case, his/her motive must be one made with the sincerity of intention and with an underlying motive that is good. If the element of good faith is not present when a disclosure is made, but the disclosure of information is solid, it is submitted that the disclosure cannot be protected, because it would defeat the object of the Act in having a requirement of good faith and leaves the flood gates open for *mala fide* motives. It is therefore submitted that the benefit to society is not the determining factor in deciding the element of good faith and a malicious motive must disqualify a disclosure from the protection of the PDA.

It is submitted that in determining whistleblowing cases, the courts must always do a proportionality test in order to determine the dominant motive of the whistleblower in order to determine whether the disclosure would be a protected or unprotected disclosure in terms of the PDA.

The issues of good faith and a reasonable belief are a very grey area within the Act and is no doubt a debatable topic. The PDA intimates that if a disclosure is made in good faith then the requirement of proof of the validity of the employee’s suspicions is not needed simply because the purpose of the Act would be undermined if genuine concerns or suspicions were not protected, even if they proved to be unfounded. This has been discussed above, however, it has left a loophole in the PDA for whistleblowers to disclose information and use the PDA as a shield to hide behind, stating that his/her disclosure was made with the required good faith and a reasonable belief.

²⁷⁶ See fn 169, para 204-207.

9.1 Recommendations

Even though the Report from the SALRC, Project 123 recommends that criminal liability should not be included in the provisions of the Act, my opinion on this is rather ambivalent. I will justify this by saying that on the one hand, if disclosures are deliberately made falsely, then, automatically the person does not fall under the protection of the Act because neither the element of good faith nor reasonable belief is present in their disclosure. He/she is therefore not considered a whistleblower in terms of the Act. But, on the other hand, if the whistleblower is charged with *crimen injuria* then it would deter future whistleblowers from repeating the error of deliberately disclosing false information.

The remedies available to the organization are disciplinary action with an outcome of either suspension, transfer, or in the case of serious misconduct, dismissal of the employee. The problem however does not disappear because in most cases the employee will walk away and the cycle will be repeated. It is this cycle which has to be prevented from reoccurring. The only way forward would be a consideration of criminal liability for disclosures where it is clear that those disclosures were made in bad faith. If consideration of criminal liability is not an option, then the consequences should be such that they would deter any other pseudo whistleblower/s from wanting to defame other employee/s or employer/s within his/her workplace by deliberately and with intent disclosing untrue allegations. Each case however, would have to be judged on its own merits.

A remedy for the victims of unsubstantiated allegations is that they can pursue a civil claim by suing the person for defamation, violation of their dignity along with pain and suffering. But this is a long and drawn out process that most victims just do not want to go through. If this route is followed, the action will be a private one including all sorts of costs. Generally, by this time most victims will not want to pursue this route. Therefore, it is suggested that the Act be amended to include a section on the remedies for the victim such as compensation from the whistleblower where the disclosure was clearly made for malicious reasons and in bad faith.

Criminal liability and severe consequences attached to deliberately false, malicious and vindictive allegations being made would be a deterrent for pseudo whistleblowers. If pseudo whistleblowers are made an example of, others who want to follow that same route would then think twice about the consequences of making false allegations in order to get back at management for their unhappiness.

The view of the SALRC that criminal liability would defeat the object, purpose and aim of the Act is noted, however, it is submitted that to include criminal liability in the Act, would be a positive move because it would deter other pseudo whistleblowers disclosing information that is deliberately malicious and vindictive.

Some whistleblowers may be afraid of disclosing information in case their allegations on investigation are found to be unsubstantiated and untrue. However, their fears would be unfounded because the PDA is there to protect them. Whistleblowers have no need to fear criminal liability if their motives are correct and the disclosure were made in good faith and with a reasonable belief.

Besides criminal liability being included in the Act, I believe another solution, would be for organizations to have harsher punishment available for people who disclose untruthful allegations maliciously and vindictively. By having harsher consequences it would put a stop to these types of allegations or at least deter future unsubstantiated allegations. Having said that, I believe that a reasonable belief should be accompanied by some kind of evidential proof regardless of how serious or not the allegation is. This will put a stop to hearsay or gossip being reported. The evidential proof will justify the allegation even if it is found out later that the allegation was incorrectly made. When evidential proof is given about an allegation and the person has the element of good faith, it causes the person to be credible and the allegation is taken more seriously than if the person anonymously makes the allegation with no evidential proof. Evidential proof shows from the beginning that there is a valid concern.

In terms of good faith and a reasonable belief, each element must be looked at closely and courts must apply their minds to each individual case. My observation is that the UK tends to look more closely at these elements in comparison to SA as illustrated in

the *Street* case which has been discussed above. It might be an idea for the SA courts and even employers to learn from this.

Good faith is a subjective element and hard to prove, therefore the surrounding circumstances of the case must be considered first, before a decision can be made that the allegation was not made in good faith. This must be decided cautiously.

It is recommended that the legislators of the PDA make the requirements of good faith and reasonable belief stricter, than and not as flexible as they are now, to prevent pseudo whistleblowers using the Act to hide behind and causing time to be wasted in investigating these allegations and leaving a trail of destruction behind them. It must be noted though, that as said above in the discussion concerning comments and recommendations in the SALRC Report, Project 123 concerning good faith, that if the requirements of good faith are too strict and if we consider criminal liability for false allegations being made, it may deter other whistleblowers from using the Act and disclosing information for fear of not meeting the requirements and the consequences thereof. Stricter requirements for good faith and reasonable belief would prevent the abuse of the PDA by employees who claim to have made the allegation in good faith and with a reasonable belief and on investigation finding out that the allegation was made for no other reason except for malicious and vindictive reasons simply because they have a bone to pick with the organization.

Even though legislators are not keen to include criminal liability and a stricter requirement for good faith, there are circumstances in which the Act should stipulate criminal liability depending upon how damaging the disclosures have been.

The PDA should be an Act which allows true whistleblowers to feel completely safe in disclosing their concerns, knowing that they will not suffer any kind of occupational detriment but at the same time also an Act that makes pseudo whistleblowers think twice before abusing this piece of legislation which was enacted for the purpose of good in order to prevent corruption and wrongdoing in the workplace.

Even though it would be difficult to criminally charge a pseudo whistleblower because of the fact that there is not much you can criminally charge them with, the organization can take into account the damage caused, and a harsher finding can be considered and looked at. It is suggested that organizations, create stricter policies and procedures be put in place to deter pseudo whistleblowers.

In relation to the Protected Disclosures Act, I recommend that:

- a provision be inserted with stricter requirements of good faith;
- reasonable belief be accompanied by evidential proof regardless of whether the disclosure is made internally or not, i.e. every disclosure made must have evidential proof attached;
- a provision stipulating harsh consequences attached to untrue allegations where it is clear that the disclosures were made in bad faith i.e. instant dismissal, criminal liability, civil liability for victims;
- a remedy be made available within a provision for victims of untrue allegations i.e. compensation paid to the victim by the whistleblower or company;
- a provision stipulating strict time measures regarding investigation of disclosures from time disclosure is made to investigation and remedies; and

In relation to organizations, I recommend that:

- all organizations have a whistleblowing policy, hotlines and training for staff on how to utilise the policy;
- policies should have strict measures in place and highlight the consequences of disclosures made in bad faith;
- policies include a stricter adherence to good faith and reasonable belief, in line with the PDA;
- whistleblowing and ethics policies work hand in hand in preventing unsubstantiated allegations, both highlighting the element of good faith;

- organisations should stipulate reasonable time frames when investigating disclosures in order that disclosures are investigated timeously;
- companies/organizations/institutions apply their minds to all allegations made, investigating motive as well as all aspects of the case;

In relation to Courts and Tribunals, I recommend that:

- the courts apply their minds to the requirement of good faith, reasonable belief and motive taking into account all the surrounding circumstances of the case;
- tribunals such as the CCMA apply their minds to the issue of good faith, reasonable belief and motive.

Finally, the objective and aim of the PDA is to protect whistleblowers that raise genuine concerns and to contribute to the eradication of corruption within the workplace. The Act should be dealt with as a piece of legislation that can control the endemic corruption and fraud in both public and private organisations. It is important that organisations create a culture that encourages firstly, and most importantly, internal whistleblowing and confidential assistance to employees who are unsure whether to disclose information concerning wrongdoing or not.

Organisations that are open and transparent have nothing to fear from a whistleblower, but this is only achieved once there is a culture of whistleblowing that organisations adhere to. In order to do this organisations must have in place policies concerning whistleblowing which include a clear statement that malpractice is taken seriously, and a list of what amounts to malpractice, a reassurance that confidentiality will be adhered to when an employee raises concerns, a clear outline and warning of penalties available for making false and malicious allegations outlining the requirements of good faith and a reasonable belief and a clear outline of the procedures in making disclosures. There should be a relationship of trust between the organisation and its employees that will bring about a conducive atmosphere that will allow employees to disclose information that is a concern to them.

Whistleblowing has been written about extensively by academic writers and there has been a fair amount of debate surrounding the topic. Our newly elected President (Jacob Zuma) at his inauguration speech stated that corruption is one of the key elements which must be eradicated.

With the above recommendations in mind, hopefully the problem of pseudo whistleblowers and the trail of destruction they leave can be prevented.

Since our Act is a fairly new piece of legislation, there will no doubt be many more recommendations, comments and changes to the Act.

If the above recommendations for the amendment of the PDA are considered, the implementation of said recommendations will not be an overnight process. However, with this in place together with organisations implementing their policies, it would be safe to say that there would definitely be a way forward in preventing pseudo whistleblowers from deliberately causing mischief and damage.

It is hoped that this dissertation has achieved what it set out to do and that it serves to expand existing research within this particular topic.

“Any change, any loss, does not make us victims. Others can shake you, surprise you, disappoint you, but they can’t prevent you from acting, from taking the situation you’re presented with and moving on. No matter where you are in life, no matter what your situation, you can always do something. You always have a choice and the choice can be power”. Blaine Lee²⁷⁷

²⁷⁷ Founder and vice President of Covey Leadership Centre. www.motivationalquotes.com (Accessed: 10 July 2009).

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