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AN EXPLORATIVE AND COMPARATIVE ANALYSIS OF CONFIDENTIALITY PROCESSES IN WHISTLE-BLOWING MATTERS IN SOUTH AFRICAN WORKPLACES

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Abstract

When a person decides to blow the whistle on wrongdoing in their workplace, they do so at great risk. This risk is not only posed to their employment but also to themselves and their loved ones as persons implicated often resort to retaliation. Therefore, whistle-blowers must be afforded maximum protection to cover all such risks. The Protected Disclosures Act (PDA) was enacted to protect whistle-blowers from retaliation. While the Act has been amended to include independent contractors and agents as some of the individuals who may receive protection, it does not provide for the concealment of the identity of the whistle-blower, or the information being disclosed. When no measures are taken to conceal the identity of the whistle-blower, they may be easily identified by the wrongdoer who may then ensue acts of retaliation. This research assesses the importance of confidentiality in whistle-blower protection. A comparative analysis is conducted to assess how some developed countries such as Canada, Australia and New Zealand have incorporated confidentiality in whistle-blower protection laws. This comparison allows some lessons to be drawn which can be adopted in South Africa to improve whistle-blower protection. In this research, it is therefore agreed that the lack of firm and reliable whistle-blower protection clauses in South African law, has devastating consequences for those who blow or intend to blow the whistle.

Keywords: ***Whistle-blowing, Confidentiality, Protection, Workplace, Protected Disclosures Act***

1. INTRODUCTION

In South Africa, whistle-blowing is now a very prevalent mechanism. This mechanism is sometimes referred to as internal reporting, especially in situations where misconduct, illegality or wrongdoing in an organisation or workplace is occurring. Whistle-blowing is, therefore, a lawful disclosure of information which the discloser would reasonably believe that evidence of wrongdoing exists. It can be said that this mechanism is aimed at getting the correct information to the right people to counter such illegality or wrongdoing for the protection of the operation of the organisation whilst at the same time protecting the discloser. Additionally, whistleblowing may also refer to:

> An act of calling attention to wrongdoing, illegal or illegitimate conduct that has been committed, is being committed or is likely to be committed in an organisation. This act is carried out by organisational stakeholders such as employees, service providers or customers whether current or former by reporting the matter to either an internal or external body that has the authority to handle the matter (Near et al, 2016:108).

While whistle-blowers aid lawfulness by disclosing wrongdoing, they discernibly face the risk of retaliation which has the preponderance of taking up various forms including dismissal, harassment and the worst, murder (Jacquinot and Pellissier-Tanon 2021:44). This, in South Africa has been revealed to be a major problem. It has taken its toll on various stakeholders including police officers, legal practitioners, and government employees, amongst many others. These people become targets for assassination because of their close involvement and proximity to the reported cases.

South Africa is one of the many developing countries battling corruption and at the forefront of exposing this corruption are whistle-blowers. Tlhotlhalemaje AJ commends whistle-blowing and holds that:

> In as much as there are greedy people in high places, there will always be brave whistle-blowers who charge themselves with the task of exposing corruption (*Ngobeni v Minister of Communications and Another*, 2014:4).

As alluded to, whistle-blowers are faced with many risks. It is therefore advisable in such circumstances to have strong whistle-blower protections to ensure that whistleblowing is done without fear and resistance. This research comes up with an angle that confidentiality clauses in whistleblowing are necessary to provide for the much-needed protection and in so doing, alleviate some of the dangers faced by whistle-blowers. Therefore, this in the end will entail that whistle-blowing or internal reporting be done in private. Private whistleblowing would mean that the identity of the whistle-blower will only be known to the person or body to which such information is disclosed (Groenewald, 2020:19).

2. LITERATURE REVIEW

2.1 Benefits of confidential whistleblowing

Having strong whistle-blowing management systems fosters a culture of trust and in turn, encourages whistleblowing. Groenewald holds that when whistle-blowers are allowed to raise their concerns through confidential and anonymous channels and get to see their concerns being adequately addressed, they develop confidence in their organisation's commitment to ethical conduct (Groenewald, 2020:5). According to Retief whistle-blowers are reluctant to use whistle-blowing processes that cannot guarantee confidentiality (Retief, 2022:31). On a similar note, Lewis opines that:

> If an organisation wishes to encourage whistleblowing it ought to assure whistle-blowers that it will do its best to ensure that it maintains confidentiality which includes concealing the identity of the whistle-blowers who wish to be unknown (Lewis, (2006:80)

2.2 The dangers of the lack of confidentiality in whistleblowing

Research conducted on the experiences of whistle-blowers has alluded that when whistle-blowers initiate the disclosure process, they are usually assured that the information they disclose will be kept confidential however, most employers and organisations tend to fail to maintain confidentiality (Kleyn et al, 2021:2). This material misrepresentation to the whistle-blower can discourage other potential whistle-blowers from coming forward and it may cause withdrawal and mistrust in the whistle-blowing process. Perks and Smith hold that internal whistle-blowing policy ought to have respect for confidentiality (Perks and Smith, 2008:18). They suggest that this should be done even in cases where disclosures are made through hotlines. A breach of trust discourages potential whistle-blowers from speaking out as they already know that once they make a disclosure it will not be long before they are identified. It is suspected as well that once a disclosure is made, there are high chances that those who made the disclosures may be traced or tracked and the implicated can become evasive and suddenly dangerous (Kleyn et al, 2021:2). This is just one indication of how retaliation begins. Lewis has warned that some investigation processes could lead to the disclosure of the source of the information which would be the whistle-blower (Lewis, 2006:80). Although this may be true, authorities who have been authorised to deal with the disclosed information must be charged to only disclose confidential information in circumstances that warrant such disclosure and the same ought to be carried out with the consent of the whistle-blower.

3. RESEARCH OBJECTIVES

This research objective is to conduct an explorative and comparative analysis of the whistle-blowing processes in South Africa workplaces. Whistle-blowing in South Africa has led to many key witnesses perishing and has created discomfort amongst many others as to whether there are proper and solid measures which exist to give those who want to blow, a platform to do so. This research therefore cuts across to demonstrate the gaps in our law which fall short of the requirements of protected disclosures. This research intends to further analyse and demonstrate the deficiency of our PDA which to some degree has not been able to support a structured approach to the scourge of deaths and threats following disclosures by whistle-blowers. It further suggest mechanisms which can be adopted to enhance and promote the effectiveness of the PDA and policy measures which can be put in place to combat threats and attacks aimed at those intending to blow the whistle in the South Africa

workplaces. Additionally, the objective of the research is to analyse and demonstrate how corruption and other criminal acts thrive through the gaps that exist in our law.

4. METHODOLOGY

The research adopts the mixed method. That is, the research adopts the qualitative and the comparative approach to deliver the analysis of the whistle-blowing matters in South Africa's workplaces. Therefore it is based on these that the research touches on important contributions by scholars and other legal instruments which carry relevance extracts for this research.

5. DISCUSSION

5.1. The Extent of Whistleblowing in South Africa so far

The main legislation regulating whistleblowing in South Africa is the Protected Disclosures Act No 26 of 2000 (PDA) as amended, and its main purpose is to protect whistle-blowers from occupational detriment in its many forms (*PDA* 2000: foreword). The *PDA* determines acts which may be the subject of a protected disclosure to include criminal offences, a failure to comply with legal obligations, miscarriage of justice, risks posed to the environment and individuals and any act of discrimination prohibited under the Employment Equity Act No 55 of 1998 (*PDA* 2000:1). The *PDA* determines employees as persons who may make a protected disclosure however, the Amendment Act has broadened the scope of protection by including agents, independent contractors, and temporary staff (Protected Disclosures Amendment Act 2017: preamble). This widened scope means that more individuals can speak out about wrongdoing with the comfort of knowing that they will be protected. The PDA provides the various persons and bodies to whom a disclosure may be made which includes a legal adviser, an employer, a member of cabinet and the Public Protector (PDA 2000:5-8). The Act places an obligation on employers to put in place internal disclosure procedures and requires the employer to raise awareness of the existence of those procedures (PDA 200:6(2)(i-ii)). Noteworthy is that although the act authorizes the use of internal disclosure procedures, it does not make any provision for confidentiality. In other words, there is no specific obligation on the person or body to whom the disclosure is made to maintain confidentiality concerning the identity of the whistle-blower or the information being disclosed.

5.2. Current challenges

Many South African whistle-blowers were failed by the protections that are said to have been enacted to protect them. Babita Deokaran for one, had blown the whistle on corruption within her department, there were no attempts to keep the matter confidential and she was later assassinated while investigations on the matter were still underway (Zulu 2022:10). The killing of South African whistle-blowers who expose corruption has been a cause for concern, it brings one to question the viability of our whistle-blower protection mechanisms. The minister of justice has made some recommendations aimed at improving whistle-blower protection in South Africa (Bhengu 2023:06). Some foreign countries including New Zealand and Canada were benchmarked to point out and resolve gaps in our legislation. However, the recommendations come at a time when many whistle-blowers have already lost their lives.

5.3. The International Law Perspective on Confidential Whistleblowing

The rationale for exploring international law derives from the provisions of the Constitution of the Republic of South Africa, 1996 (the Constitution) which places an obligation on courts, tribunals, and forums to consider international law when they interpret the Bill of Rights (the Constitution, 1996:39(1)(b)). The Constitution further provides that when courts engage in the interpretation of any legislation, they ought to adopt any practicable interpretation of the legislation that is consonant with international law over any alternative interpretation that is not (the Constitution 1996:233). To further its endorsement of the use of international law in the interpretation of laws, South Africa has ratified and domesticated various conventions (International Labour Organisation, Normlex: Ratifications for

South Africa) and (United Nations Human Rights Treaty Bodies, United Nations Treaty Body Database). The International Chamber of Commerce (ICC) deems confidentiality to be the primary factor of a reliable whistle-blowing management system and as a result, it requires that whistle-blowing management systems should be developed in a manner that ensures that the identity of the whistle-blower along with that of other implicated persons in the report is kept confidential (ICC, 2022:2). The International Bar Association (IBA) supports this and states that confidential information should only be disclosed in exceptional circumstances (IBA, 2018:20). These exceptional circumstances may be instances where the confidential information will assist in the investigation of the disclosure. Even then, the protected person must be duly notified.

5.4 The European Union Directive on the Protection of Persons Who Report Breaches of Union Law

The European Union Directive on the Protection of Persons Who Report Breaches of Union Law of 2019 (EU Directive) allows organisations in the public and private sectors to determine and establish their own reporting channels. However, it requires that those channels must maintain the confidentiality of the whistle-blower's identity (EU Directive, 2019:53). Member states of the European Union are required to take measures to ensure that authorities and bodies that deal with disclosures establish adequate procedures for processing reports which will ensure through all stages of the process, the confidentiality of the identity of the whistle-blower and that of third parties implicated in the report (EU Directive 2019:76). The EU directive emphasises the maintenance of confidentiality because it views it as a crucial factor in the prevention of retaliation. It accordingly provides that deviation from confidentiality can only be allowed if it is warranted and per Union or National law obligations (EU Directive 2019:16). Where the identity of the whistle-blower must be disclosed, the whistle-blower concerned must be duly informed and provided with written reasons warranting the disclosure (EU Directive, 2019:16). To further protect whistle-blowers, legislative measures may be employed to limit the enjoyment of some data protection rights if the enjoyment of those rights can uncover the whistle-blower's identity (EU Directive, 2019:85).

5.5 The United Nations Convention Against Corruption

The United Nations Convention Against Crime (UNCAC) provides that in order to provide effective protection against retaliation, member states ought to establish measures aimed at securing the physical protection of whistle-blowers, experts who give testimony and their relatives to the extent where appropriate, of imposing limitations on the disclosure of information that has the potential of revealing the identity or whereabouts of the said individuals (UNCAC, 2003:32). This provision indicates that the United Nations recognises that the maintenance of confidentiality in whistle-blowing procedures can ensure the physical protection of the whistle-blower concerned. South Africa ratified this convention in 2004 and therefore must comply with its obligations (United Nations Office on Drugs and Crime 2023).

5.6 The International Labour Organisation Convention on Violence and Harassment

The International Labour Organisation [ILO] Convention on Violence and Harassment No. 190 of 2019 although not speaking directly to whistleblowing, addresses the protection of workers against violence and harassment. The ILO Convention on Violence and Harassment protects employees as well as informal workers and job seekers. It applies with respect to violence and harassment that occurs during work-related communications which includes communications carried out through the use of Information Technology (ILO Convention on Violence and Harassment 2019:2 and 3(d)). Because of this, we find it relevant to whistle-blower protection. Article 4 of the Convention calls on member states to adopt strategies and measures aimed at preventing and combating violence and harassment in the world of work (ILO Convention on Violence and Harassment 2019:4(c)). In light of the provisions of this Convention, whistle-blowers should not only be protected from retaliation through measures provided by traditional whistle-blower protections but must also be protected in their capacity as employees. This approach would grant whistle-blowers more protection.

As a member state, South Africa has to protect whistle-blowers in their capacity as employees and workers and ensure that they do not face retaliation in the form of violence and harassment.

6. CONTRIBUTION

6.1 Drawing Realities in Other Countries

The Constitution allows courts, tribunals, and forums to consider foreign law when interpreting the Bill of Rights (the Constitution 1996:39(1)(c)). Although foreign law is not binding it can provide some guidance in the interpretation of law where national law has gaps or is ambiguous. It is in this context that Canada, Australia, and New Zealand have been considered for a comparative analysis. These countries have been chosen because they are all developed and the specific Acts chosen provide more detailed provisions on the protection, implementation and maintenance of confidentiality in whistle-blowing. As a developing country, South Africa can draw some valuable lessons from these countries.

6.2. Canadian Law

The Canadian Public Servant Disclosure Protection Act No 46 of 2005 (PSDPA) was enacted to provide the whistle-blowing procedure in the public sector and to protect whistle-blowers in the sector. The *PSDPA* recognizes that to enhance confidence in public institutions it is necessary to establish effective whistle-blowing procedures (*PSDPA* 2005, *preamble*). The *PSDPA* requires disclosures to be made internally. The task of establishing these internal procedures has been given to the Chief Executives in the different portions of the public sector (*PSDPA*, 2005:10(1)). The Chief Executive has a duty in line with any parliamentary Act, procedural fairness, and natural justice to protect the identity of the whistle-blower, witnesses and persons implicated in the disclosure. In addition to protecting the identities of the persons involved in the disclosure process, the Chief Executive must establish procedures aimed at ensuring the maintenance of confidentiality in respect to the information that is the subject of the disclosure. This information may only be disclosed to the public in necessary circumstances (*PSDPA*, 2005:11(1)).

The duty to maintain confidentiality must also be observed during the investigation process (*PSDPA*, 2005:22(f)) The commissioner and any other persons who deal with disclosures are strictly prohibited from disclosing any information that they may access while performing the duties conferred upon them by the Act unless such disclosure is permitted by law or under the Act (*PSDPA*, 2005:44).
The PSDPA offers whistle-blowers in the public service extensive protection. It does not only guarantee confidentiality with respect to the whistle-blower's identity but also goes a step further in guaranteeing their safety by prescribing the establishment of procedures that will ensure that confidentiality is observed and maintained. In *Geneviève Desjardins v Attorney General of Canada*, Justice Grammond S highlighted the dangers that whistle-blowers would face if confidentiality was not maintained. In this regard, he suggested that it is more effective to ensure confidentiality which ultimately "nips any form of reprisal in the bud" as opposed to remedying the reprisals (*Geneviève Desjardins v Attorney General of Canada* 2018:22). Additionally, the court stated that the names of witnesses who participated in the investigation of the matter, the names of whistle-blowers who made disclosures, any identifying or potentially identifying information, audio and telephonic recordings made during the investigation and handwritten notes made by investigators during the investigation should all be kept confidential (*Geneviève Desjardins v Attorney General of Canada* 2018).

6.3. Australian Law

In evaluating whistle-blower protection in Australia, reference is made to the Public Interest Disclosure Act 133 of 2013 (PIDA). The objectives of the *PIDA* include the promotion of the integrity and accountability of the public sector and ensuring that these officials are protected from negative consequences that may arise due to the disclosure (*PIDA* 2013:6: (a) & (c)). The Act also seeks to ensure that disclosures are properly investigated and dealt with (*PIDA* 2013:6(d)). The *PIDA* makes provision for both internal and external whistle-blowing procedures and protects individuals who are

currently working as public officials as well as former public officials. The PIDA prohibits the disclosure of any identifying information. Even courts or tribunals may not require an official to whom a disclosure has been made to disclose such information unless the disclosure is warranted for purposes of giving effect to the Act (Australia 2013:21(a-b)).

The identifying information here refers to information that has the potential to reveal the identity of the whistle-blower (Australia 2013:20(1)). The PIDA makes it an offence to use or disclose any identifying information and declares that any person found guilty of the offence will be liable to imprisonment and or a fine (Australia 2013:65(1)). The PIDA is said to have adopted an eloquent approach to whistle-blower protection, particularly concerning the provisions on confidentiality (Ananian-Welsh et al, 2021:1252). The PIDA's commitment to maintain confidentiality in whistle-blowing can be seen in its attempts to not only prevent but also deter the disclosure of information or documents that may reveal the whistle-blower's identity. Sanctions deter breaches of confidentiality as those found guilty will be prosecuted which in turn will serve as a warning to those who may be tempted to breach confidentiality at the same time, officials dealing with disclosures will exercise more caution so as not to be negligent with confidential information or documents. The Public Interest Disclosure Scheme provides some guidelines on how agencies should apply the Act when dealing with disclosures. The Scheme provides that although an investigation into a disclosure can be made under a different law other than the PIDA, the provision on confidentiality as provided by the PIDA will continue to apply (Public Interest Disclosure Scheme, 2016:45). This effectively ensures that whistle-blower confidentiality is maintained regardless of the legislation under which the whistle-blower made their disclosure.

6.4. New Zealand Law

The main statute governing whistle-blowing in New Zealand is the Protected Disclosures (Protection of Whistle-blowers) Act No 20 of 2022 (New Zealand's PDA). New Zealand's PDA was enacted to facilitate the disclosure and investigation of serious wrongdoing in organisations and to protect the employees who make disclosures in accordance with the Act (New Zealand PDA, 2022:3(a) & (b)). New Zealand's PDA prescribes that disclosures ought to be made in accordance with internal procedures (New Zealand PDA, 2022:11(2)(a)). Like the PIDA, New Zealand's PDA also protects both current and former employees (New Zealand PDA, 2022:8). New Zealand's PDA calls on every person to whom a protected disclosure is made or referred, to try their best efforts not to divulge information that may disclose the identity of the whistle-blower. This duty of confidentiality may only be dispensed with in instances where the person disclosing the identifying information has a reasonable belief that such disclosure is vital to the effective investigation of the matter, or it is necessary to maintain public safety. Additionally, the disclosure must be in the interests of justice (New Zealand PDA, 2022:17(1) & (2)). Even in special circumstances where the disclosure of confidential information is warranted, New Zealand's PDA prescribes that the whistle-blower's consent should be obtained first (New Zealand PDA, 2022:3(a) & (b)). Interestingly, the Act also prohibits requests for information made under certain legislations if the information requested can potentially disclose the whistle-blower's identity (New Zealand PDA, 2022:19(2)).

New Zealand's PDA affords witnesses some of the protections given to whistle-blowers including confidentiality. In its guide to whistle-blowers on making a protected disclosure, New Zealand's Ombudsman holds that in addition to confidentiality a whistle-blower who makes a protected disclosure will be protected by the provisions of the Human Rights Act No 82 of 1993 that prohibit the victimisation of whistle-blowers. The Ombudsman notes that officials who receive disclosures have "a very strong obligation" to protect the identity of the whistle-blower (Ombudsman (guide), 2022:7). Additionally, the Ombudsman allows a whistle-blower who believes that their privacy was breached to inform the Privacy Commissioner (Ombudsman (guide), 2022:8). In some instances, it may appear as though a wrongful act was committed which prompts an individual to blow the whistle and it later turns out that the wrongful act was not serious as required by New Zealand's PDA. Such an individual would still be protected by the confidentiality provisions and those on immunity from civil and criminal liability (Ombudsman (guide), 2022:10). This extended protection

will encourage whistle-blowers to come forward as their identities will still be protected even if it turns out that they were mistaken in their assessment of the act committed or sought to be committed. This extended protection will however only be applied if the whistle-blower can prove reasonable belief that there was disclosable conduct as defined by the Act.

New Zealand's Ombudsman has also drafted a checklist that organisations can use to ensure that they comply with the confidentiality requirements of the PDA. According to the checklist, organisations must ensure the maintenance of confidentiality concerning the whistle-blower's identity by adopting measures such as modifying investigation records to delete a whistle-blower's name, role, and any contextual information that could identify them; replacing mentions to the whistle-blower with a fictitious name, letter, or number; limiting access to the pertinent documents to the officials handling the disclosure; and have any meetings concerning the whistle-blower in a secret and secure location (Ombudsman (checklist), 2022:2).

7. ANALYSING THE RESULTS

The PDA is determined to protect whistle-blowers from different forms of retaliation. It authorises various persons and bodies to receive and handle the disclosures. It is, however, not without faults. The lack of confidentiality particularly with regards to the identity of whistle-blowers places whistle-blowers in a vulnerable position and makes it easy for them to be identified and then victimised. For a whistle-blower protection policy to be effective it must maintain confidentiality throughout the procedure of receiving and investigating disclosures. When confidentiality is maintained, whistle-blowers develop confidence that they will be adequately protected which in turn motivates other potential whistle-blowers to speak out. Canada, Australia, and New Zealand have incorporated confidentiality in their disclosure procedures. The duty to maintain confidentiality is not only conferred on the authorised bodies who receive the disclosure but also on the individuals who may come across confidential information in the course of duty. The comparator countries have adopted measures to ensure the maintenance of confidentiality under the relevant Acts. International organisations and laws also require the maintenance of confidentiality in the handling of disclosures and the adoption of other measures aimed at maintaining confidentiality. The common denominator in the foreign and international laws assessed is that the identity of whistle-blowers should only be disclosed in exceptional circumstances and subject to the whistle-blowers' consent or written notice. There are some unique provisions in the foreign law. New Zealand's PDA for one, limits the right to access information provided by certain legislation in favour of protecting the identity of the whistle-blower and the PIDA prescribes the imposition of fines and imprisonment as sanctions for the breach of confidentiality.

8. RECOMMENDATIONS

It is recommended that South Africa should incorporate confidentiality in its whistle-blower protection policies, particularly the PDA. The provisions on confidentiality should be clear about which information is to be kept confidential that is in respect of the identity of the whistle-blower, that of the implicated persons and the information being disclosed. The duty to maintain confidentiality should be observed in both internal and external whistle-blowing procedures. The identity of the whistle-blower should be protected throughout the entire whistle-blowing process from the moment a disclosure is made, throughout the investigation period and even after the matter has been finalised. This is important because some implicated persons may be well-connected criminals who may have influence even beyond the bounds of prison. Such well-connected criminals may still be able to retaliate against the whistle-blower whilst behind bars. To further protect the whistle-blower, it is recommended that certain rights should be limited. These include the right to access information if that information could reveal confidential information and the right of the implicated person to confront their accuser directly. The implicated person should only be allowed to exercise the latter right in an instance where the identity of the whistle-blower will be hidden with the use of a voice changer and or blurred vision camera. Finally, it is recommended that the PDA should make it an offence to disclose confidential information and should impose sanctions such as imprisonment, fines, and dismissal.

9. CONCLUSION

Whistle-blowers play a major role in exposing wrongdoing within organisations and deserve to be adequately protected. A lack of confidentiality not only exposes whistle-blowers to retaliation but discourages other potential whistle-blowers from coming forward. Confidential whistle-blowing has the effect of not only protecting the whistle-blower but ultimately protecting their loved ones as well. If South Africa is to stand a chance in the battle against corruption, employers and organisations must endeavour to protect and maintain confidentiality in whistle-blowing processes. International and foreign laws are clear about the development of whistle-blower protection laws to include confidentiality. The Constitution has placed a duty on courts and tribunals alike to consider international law and even went further by granting them the discretion to consider foreign law which can be handy in interpreting ambiguous statutes and filling in the gaps where any exist.

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