

Legal protection for whistle blowers

By [Johan Botes](#)

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The levels of corporate wrong doing being uncovered at the moment highlights the need for employees to stand up and blow the whistle on financial irregularity, bribery or corruption, theft or other illegal or wrongful conduct.



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And while no piece of legislation will ever provide absolute protection and no one can earnestly guarantee whistle-blowers that their lives will not be affected in some way they can rely on the protection afforded by the South African Protected Disclosures Act (PDA) provided that they made a protected disclosure.

To be protected the disclosure must meet the requirements of the Act and must comply with one of the applicable procedures prescribed. The PDA encourages employees to raise alarm where they are aware of criminal or other irregular conduct in the workplace, whether this is in the public or private sector. It seeks to create a culture of disclosure of information on unlawful or wrongful conduct by providing protection against reprisals. The aim is to eradicate criminal and irregular conduct by organs of the state and private bodies.

However, not every disclosure will be protected by the provisions of the PDA. It must meet the statutory requirements relating to disclosures set out in section 1 of the PDA. Employees blowing the whistle must also follow the prescribed procedure applicable to them in raising alarm over such irregularities. Employees who do not follow the prescribed procedures or whose disclosures do not meet the requirements for a protected disclosure may not receive the protection against reprisals the PDA affords.

Protection disclosure

The first requirement for a protection disclosure is that a disclosure is only protected where it meets the definition of a disclosure in section 1.

Disclosure means any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of the following:

- *that a criminal offence has been committed, is being committed or is likely to be committed;*
- *that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is*

subject;

- *that a miscarriage of justice has occurred, is occurring or is likely to occur;*
- *that the health or safety of an individual has been, is being or is likely to be endangered;*
- *that the environment has been, is being or is likely to be damaged;*
- *unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act; or*
- *that any matter referred to above has been, is being or is likely to be deliberately concealed.*

The second requirement is that the employee must make the disclosure in good faith. The employee may not be motivated by improper or bad motives such as personal gain.

The third requirement is that the employee must follow the correct procedure in making the disclosure. There are various requirements in the PDA for disclosures made to a legal advisor, employer, member of parliament or the executive council, the public protector, auditor-general or other prescribed bodies.

The PDA also allows employees to make a general protected disclosure where they are unable to comply with the process followed, the body to whom the disclosure must be made is the subject of the complaint or the employee has previously made the disclosure to the employer but the employer failed to take action after a reasonable period. In the case of a general protected disclosure, the employee must not only make the disclosure in good faith but must also substantially believe the disclosure to be true. The disclosure need not be proven to be true, but the employee must have reason to believe the facts are true.

Occupational detriment

Employees who claim that they suffer occupational detriment after making a protected disclosure may refer a dispute to the Commission of Conciliation, Mediation and Arbitration (CCMA). The Labour Relations Act makes specific provision for an enquiry by an arbitrator where the employee alleges the employer retaliated after the employee made a protected disclosure. The CCMA can then determine whether (1) the employee made a disclosure, and (2) whether the disclosure is protected in terms of the PDA, and (3) if the employee suffered occupational detriment as a result of the disclosure.

Making a protected disclosure does not grant an employee immunity against action by an employer. The PDA aims to protect whistle blowers against reprisals. The employee is protected against unwarranted action where such employer action against the employee relates to the disclosure. An employer may thus not discipline, demote, transfer, harass or dismiss an employee without cause where the employee has made a protected disclosure as the action is likely to relate to the protected disclosure. However, this does not mean that an employee may commit fraud, sexually harass a colleague or assault a manager after making a protected disclosure without the employer being able to legitimately take action against the employee.

There appears to be a willingness and understanding at both the CCMA and Labour Court that we should protect these courageous people who are willing to take heat for doing the right thing. Employees should anticipate that they may lose some friends and become unpopular in certain circles when they blow the whistle on corruption or other impropriety.

However, if they are motivated by the right reasons and are willing to make genuine protected disclosures they may find that there are various civil society groups willing to assist them during troubled times. Employees seeking to escape liability for their own wrongdoing who improperly want to use the Protected Disclosure Act as a get-out-of-jail card may find the system less welcoming and protective.

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