

Whistle-blower protections

Are whistle-blowers protected as they take on South African's corruption crisis?

South Africa is experiencing a corruption crisis and whistle-blowers could play a crucial role in addressing this. But the socio-political context is hostile to whistle-blowing and South Africans who witness fraud and corruption often prefer to remain silent for fear of reprisal.



A whistle-blower is a person who informs on or reports a person or organisation involved in illegal or immoral activity usually relating to fraud, waste, abuse, corruption or dangers to public health and safety.

On 5th November 2020, former South Africa Airways (SAA) board chair, Dudu Myeni, revealed the identity of an anonymous whistle-blower who had given evidence in camera at the Zondo Commission of Inquiry into state capture.

The Commission had ordered the protection of the identity of the whistle-blower, dubbed "Mr X", in February this year.

Despite repeated warnings not to, Myeni named the whistle-blower several times in response to allegations put to her by Advocate Kate Hofmeyr.

Hofmeyr addressed the Commission, submitting that Myeni's conduct amounted to a willful obstruction of the Commission in the performance of its function and could deter future whistle-blowers.

Disregard of protections afforded to whistle-blowers threatens the drive to eradicate corruption in South Africa. With an already hostile environment for whistle-blowing, failure to enforce these protections will allow the culture of corruption and looting to fester.

SOUTH AFRICA'S CORRUPTION CRISIS

Just last month, Thabiso Zulu, a whistle-blower who had testified at the Moerane Commission about municipal corruption in the Harry Gwala municipality, was shot in an alleged assassination attempt.

Controversial Bosasa whistle-blower Angelo Agrizzi recently told the Daily Maverick that there had been two assassination attempts on his life.

In addition to fear of physical and social retaliation, many South Africans are not aware of the protections afforded to them.

Those who have information may not know who to trust with it as corruption is rife, sometimes implicating people in positions of authority and trust.

It may be that people feel that nothing will be done with the information when they report it, due to a failure of the criminal justice system.

And, of course, people who obtain information often choose not to speak out because they may receive financial benefit in return for their silence.

If whistle-blowers are to be protected as they take on South Africa's corruption crisis, the protections afforded to them will need to be strictly enforced.

There is an argument for the increase in protection of whistle-blowers in the current climate.

The South African regulatory framework lacks robust protection of witnesses to fraud and corruption, particularly relating to state governance and public funds.

PROTECTION OF "MR X" AND OTHER WITNESSES IN THE STATE CAPTURE COMMISSION

The state capture Commission is regulated by a set of Regulations specially drafted and enacted for the purposes of the inquiry.

COMMISSIONS ACT (1947)

The protection of "Mr X"’s identity and Dudu Myeni’s brazen disclosures of it must be dealt with in terms of these Regulations and the overarching Commissions Act (1947) in terms of which the Commission was created.

The Regulations allow for certain witness hearings to be held in camera – a legal term meaning ‘in private’.

Generally, the Commission hearings are held in public in the interests of accountability and transparency.

When a hearing is held in camera the Commission, where requested to do so, must order that nobody may directly or indirectly disclose the identity of the witness.

The Commissions Act creates the offence which Hofmeyr argues Myeni is guilty of.



The Act says that any person who willfully hinders or obstructs the commission in the performance of its functions shall be guilty of an offence and liable on conviction to a fine, imprisonment, or both.

OTHER LEGISLATED WHISTLE-BLOWER PROTECTIONS

THE PROTECTED DISCLOSURES ACT (2000)

Separate to the Commission's framework, the key protections for whistle-blowers in South Africa are contained in The Protected Disclosures Act (2000) which seeks to protect employees making confidential disclosures in an employment relationship ("the PDA").

The PDA has been criticised for having narrow protection for whistle-blowers – it applies only to whistle-blowers within organisations and creates obligations on employers to have certain policies in place.

Applying both to public and private employees, the PDA uses definitions of "employee" and "disclosure" to regulate who and what is protected by the Act.

Once a protected disclosure is made, any occupational detriment experienced thereafter is considered unfair.



A DISCLOSURE

Is a disclosure of information about the conduct of an employer (or employee of that employer) which the person disclosing reasonably believes indicates criminal behaviour, failure to comply with a legal obligation, or other types of specific negative conduct. What constitutes a protective disclosure in terms of the PDA will be determined by applying the detailed definition of "disclosure" together with "protected disclosure" as set out in the PDA.

This wording demonstrates that the PDA protects reasonable suspicion and that the existence of an actual crime is not required.

Employees who report certain conduct will need to do so according to the procedures set out in the Act.

THE COMPANIES ACT (2008)

The Companies Act (2008) offers protections that relate to whistle-blowers, but these protections are limited to those acting within companies only and would generally apply to South African-registered entities.

SECTION 159 OF THE ACT, TITLED "PROTECTION FOR WHISTLE-BLOWERS"

entrenches and advances the PDA protections. It provides civil, criminal, and administrative immunity for protected disclosures.

THE PREVENTION AND COMBATTING OF CORRUPT ACTIVITIES ACT (2004)

Creates a 'whistle-blowing' obligation on persons in positions of authority to report corruption, theft, fraud, extortion, and forgery. The Witness Protection Act (1998) makes it an offence to disclose the identity of protected witnesses.

THE WITNESS PROTECTION ACT (1998)

Makes it an offence to disclose the identity of protected witnesses.

Given the array of inadequate legislation, which deal with narrowly defined instances of whistle-blowing, and the poor track record of those brave enough to blow the whistle in the past, it is not surprising that we do not have ethically minded citizens queuing up to blow the whistle on corrupt offenders.

If government is to take the lead in cleansing South Africa of corruption, it will need to drive campaigns to increase awareness of whistle-blower protections and its commitment to guard those who report crime, fraud, and corruption.

Legislating bodies may need to consider additional protections which could be afforded given the current climate and existing threats.

“Most importantly, the existing provisions protecting whistle-blowers must be upheld and enforced, and any disregard for the protections should be dealt with robustly and punitively.”

These steps will need to be taken if South Africa is serious about creating a culture of freedom to report and of holding those who obstruct this accountable.

TAKE NOTE OF THE FOLLOWING HOT-LINES:

CRIME REPORTING

08600 10111

NATIONAL ANTI-CORRUPTION FORUM

0800 701 701

PUBLIC PROTECTOR

0800 112040

SARS FRAUD HOT-LINE

0800 00 28 70

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