

PROTECTED DISCLOSURES ACT 26 OF 2000

[ASSENTED TO 1 AUGUST 2000] [DATE OF COMMENCEMENT: 16 FEBRUARY 2001]

(English text signed by the President)

ACT

To make provision for procedures in terms of which employees in both the private and the public sector may disclose information regarding unlawful or irregular conduct by their employers or other employees in the employ of their employers; to provide for the protection of employees who make a disclosure which is protected in terms of this Act; and to provide for matters connected therewith.

Preamble

Recognising that-

- the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom;
- section 8 of the Bill of Rights provides for the horizontal application of the rights in the Bill of Rights, taking into account the nature of the right and the nature of any duty imposed by the right;
- criminal and other irregular conduct in organs of state and private bodies are detrimental to good, effective, accountable and transparent governance in organs of state and open and good corporate governance in private bodies and can endanger the economic stability of the Republic and have the potential to cause social damage;

And bearing in mind that-

- neither the South African common law nor statutory law makes provision for mechanisms or procedures in terms of which employees may, without fear of reprisals, disclose information relating to suspected or alleged criminal or other irregular conduct by their employers, whether in the private or the public sector;
- every employer and employee has a responsibility to disclose criminal and any other irregular conduct in the workplace;

- every employer has a responsibility to take all necessary steps to ensure that employees who disclose such information are protected from any reprisals as a result of such disclosure;

And in order 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;
- promote the eradication of criminal and other irregular conduct in organs of state and private bodies,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:-

[a26y2000s1]1Definitions

In this Act, unless the context otherwise indicates-

'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:

- (a) That a criminal offence has been committed, is being committed or is likely to be committed;
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
- (d) that the health or safety of an individual has been, is being or is likely to be endangered;
- (e) that the environment has been, is being or is likely to be damaged;
- (f) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); or
- (g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed;

'employee' means-

(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;

(b) any other person who in any manner assists in carrying on or conducting the business of an employer;

'employer' means any person-

(a) who employs or provides work for any other person and who remunerates or expressly or tacitly undertakes to remunerate that other person; or

(b) who permits any other person in any manner to assist in the carrying on or conducting of his, her or its business,

including any person acting on behalf of or on the authority of such employer;

'impropriety' means any conduct which falls within any of the categories referred to in paragraphs (a) to (g) of the definition of 'disclosure', irrespective of whether or not-

(a) the impropriety occurs or occurred in the Republic of South Africa or elsewhere;

(b) the law applying to the impropriety is that of the Republic of South Africa or of another country;

'Minister' means the Cabinet member responsible for the administration of Justice;

'occupational detriment', in relation to the working environment of an employee, 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 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;

'organ of state' means-

(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or

(b) any other functionary or institution when-

(i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation;

'prescribed' means prescribed by regulation in terms of section 10;

'protected disclosure' means a disclosure made to-

(a) a legal adviser in accordance with section 5;

(b) an employer in accordance with section 6;

(c) a member of Cabinet or of the Executive Council of a province in accordance with section 7;

(d) a person or body in accordance with section 8; or

(e) any other person or body in accordance with section 9, but does not include a disclosure-

(i) in respect of which the employee concerned commits an offence by making that disclosure; or

(ii) made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5;

'this Act' includes any regulation made in terms of section 10.

[a26y2000s2]2Objects and application of Act

(1) The objects of this Act are-

(a) to protect an employee, whether in the private or the public sector, from being subjected to an occupational detriment on account of having made a protected disclosure;

(b) to provide for certain remedies in connection with any occupational detriment suffered on account of having made a protected disclosure; and

(c) to provide for procedures in terms of which an employee can, in a responsible manner, disclose information regarding improprieties by his or her employer.

(2) This Act applies to any protected disclosure made after the date on which this section comes into operation, irrespective of whether or not the impropriety concerned has occurred before or after the said date.

(3) Any provision in a contract of employment or other agreement between an employer and an employee is void in so far as it-

(a) purports to exclude any provision of this Act, including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract; or

- (b) (i) purports to preclude the employee; or
- (ii) has the effect of discouraging the employee, from making a protected disclosure.

[a26y2000s3]3Employee making protected disclosure not to be subjected to occupational detriment

No employee may be subjected to any occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure.

[a26y2000s4]4Remedies

(1) Any employee who has been subjected, is subject or may be subjected, to an occupational detriment in breach of section 3, may-

(a) approach any court having jurisdiction, including the Labour Court established by section 151 of the Labour Relations Act, 1995 (Act 66 of 1995), for appropriate relief; or

- (b) pursue any other process allowed or prescribed by any law.

(2) For the purposes of the Labour Relations Act, 1995, including the consideration of any matter emanating from this Act by the Labour Court-

(a) any dismissal in breach of section 3 is deemed to be an automatically unfair dismissal as contemplated in section 187 of that Act, and the dispute about such a dismissal must follow the procedure set out in Chapter VIII of that Act; and

(b) any other occupational detriment in breach of section 3 is deemed to be an unfair labour practice as contemplated in Part B of Schedule 7 to that Act, and the dispute

about such an unfair labour practice must follow the procedure set out in that Part: Provided that if the matter fails to be resolved through conciliation, it may be referred to the Labour Court for adjudication.

(3) Any employee who has made a protected disclosure and who reasonably believes that he or she may be adversely affected on account of having made that disclosure, must, at his or her request and if reasonably possible or practicable, be transferred from the post or position occupied by him or her at the time of the disclosure to another post or position in the same division or another division of his or her employer or, where the person making the disclosure is employed by an organ of state, to another organ of state.

(4) The terms and conditions of employment of a person transferred in terms of subsection (2) may not, without his or her written consent, be less favourable than the terms and conditions applicable to him or her immediately before his or her transfer.

[a26y2000s5]5Protected disclosure to legal adviser

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.

[a26y2000s6]6Protected disclosure to employer

(1) Any disclosure made in good faith-

(a) and substantially in accordance with any procedure prescribed, or authorised by the employee's employer for reporting or otherwise remedying the impropriety concerned; or

(b) to the employer of the employee, where there is no procedure as contemplated in paragraph (a), is a protected disclosure.

(2) Any employee who, in accordance with a procedure authorised by his or her employer, makes a disclosure to a person other than his or her employer, is deemed, for the purposes of this Act, to be making the disclosure to his or her employer.

[a26y2000s7]7Protected disclosure to member of Cabinet or Executive Council

Any disclosure made in good faith to a member of Cabinet or of the Executive Council of a province is a protected disclosure if the employee's employer is-

(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.

[a26y2000s8]8Protected disclosure to certain persons or bodies

(1) Any disclosure made in good faith to-

(a) the Public Protector;

(b) the Auditor-General; or

(c) a person or body prescribed for purposes of this section; and

in respect of which the employee concerned reasonably believes that-

(i) the relevant impropriety falls within any description of matters which, in the ordinary course are dealt with by the person or body concerned; and

(ii) the information disclosed, and any allegation contained in it, are substantially true,

is a protected disclosure.

(2) A person or body referred to in, or prescribed in terms of, subsection (1) who is of the opinion that the matter would be more appropriately dealt with by another person or body referred to in, or prescribed in terms of, that subsection, must render such assistance to the employee as is necessary to enable that employee to comply with this section.

[a26y2000s9]9General protected disclosure

(1) Any disclosure made in good faith by an employee-

(a) who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and

(b) who does not make the disclosure for purposes of personal gain, excluding any reward payable in terms of any law;

is a protected disclosure if-

(i) one or more of the conditions referred to in subsection (2) apply; and

(ii) in all the circumstances of the case, it is reasonable to make the disclosure.

(2) The conditions referred to in subsection (1) (i) are-

(a) that at the time the employee who makes the disclosure has reason to believe that he or she will be subjected to an occupational detriment if he or she makes a disclosure to his or her employer in accordance with section 6;

(b) that, in a case where no person or body is prescribed for the purposes of section 8 in relation to the relevant impropriety, the employee making the disclosure has reason to believe that it is likely that evidence relating to the impropriety will be concealed or destroyed if he or she makes the disclosure to his or her employer;

(c) 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; or

(d) that the impropriety is of an exceptionally serious nature.

(3) In determining for the purposes of subsection (1) (ii) whether it is reasonable for the employee to make the disclosure, consideration must be given to-

(a) the identity of the person to whom the disclosure is made;

(b) the seriousness of the impropriety;

(c) whether the impropriety is continuing or is likely to occur in the future;

(d) whether the disclosure is made in breach of a duty of confidentiality of the employer towards any other person;

(e) in a case falling within subsection (2) (c), any action which the employer or the person or body to whom the disclosure was made, has taken, or might reasonably be expected to have taken, as a result of the previous disclosure;

(f) in a case falling within subsection (2) (c) (i), whether in making the disclosure to the employer the employee complied with any procedure which was authorised by the employer; and

(g) the public interest.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information referred to in subsection (2) (c) where such subsequent disclosure extends to information concerning an action taken or not taken by any person as a result of the previous disclosure.

[a26y2000s10]10 Regulations

(1) The Minister may, after consultation with the Minister for the Public Service and Administration, by notice in the Gazette make regulations regarding-

(a) for the purposes of section 8 (1), matters which, in addition to the legislative provisions pertaining to such functionaries, may in the ordinary course be referred to the Public Protector or the Auditor-General, as the case may be;

(b) any administrative or procedural matter necessary to give effect to the provisions of this Act; and

(c) any other matter which is required or permitted by this Act to be prescribed.

(2) Any regulation made for the purposes of section 8 (1) (c) must specify persons or bodies and the descriptions of matters in respect of which each person or body is prescribed.

(3) Any regulation made in terms of this section must be submitted to Parliament before publication thereof in the Gazette.

(4) (a) The Minister must, after consultation with the Minister for the Public Service and Administration, issue practical guidelines which explain the provisions of this Act and all procedures which are available in terms of any law to employees who wish to report or otherwise remedy an impropriety.

(b) The guidelines referred to in paragraph (a) must be approved by Parliament before publication in the Gazette.

(c) All organs of state must give to every employee a copy of the guidelines referred to in paragraph (a) or must take reasonable steps to bring the relevant notice to the attention of every employee.

[a26y2000s11]11 Short title and commencement

This Act is called the Protected Disclosures Act, 2000, and commences on a date determined by the President by proclamation in the Gazette.