



PUBLIC PROTECTOR
SOUTH AFRICA

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“Corruption and intimidation of whistle-blowers”



“There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.”

Glenister v President of the Republic of South Africa and Others CCT 48/10 [2011] ZACC 6, Para 166

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1. INTRODUCTION

“Corruption Is World’s Most Talked About Problem” (together with *environmental issues, global economy, unemployment, poverty and terrorism*) (BBC World Service Poll)

Since the mid-1990s the General Assembly of the United Nations has expressed serious concern about the problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice, and jeopardizing sustainable development and the rule of law.

Corruption in public procurement is the primary cause of poverty in Africa, fostered by poor governance and weak legislation. According to World Bank and African Union surveys, public procurement corruption costs **Africa \$148-billion** a year and **worldwide** it is estimated to be **\$390-400 billion** per year.¹ Corruption has enormous negative consequences. It diverts public funds into unnecessary, unsuitable, uneconomic and actually, “undemocratic” projects with the primary objective to serve the interests of a few individuals at the expense of the country and its citizenry.

The National perceptions on Local Government fraud and corruption² reflect that **Nepotism** is the most common form of corruption (73.2%). Other forms of corruption include **tender irregularities, maladministration and signing of cheques** without appropriate controls, as well as the **misuse of council property**. **These forms of corruptions manifest itself through:**

- a) Bribery: the promise, offering or giving of a benefit that improperly affects the actions or decisions of a public official.
- b) Fraud: actions or behaviour by a public official, other person or entity that deceive others into providing a benefit that would not normally accrue to the public official, other persons or entity.
- c) Embezzlement: involves theft of resources by persons entrusted with the authority and control of such resources.

¹ **Preventing Corruption in African Procurement**, Professor Awadi Sadiki Mawenya, Number 9, August 2008)

² 2009 **Good Governance Survey Consolidated Report (Nkangala DM)**

- d) Extortion: involves coercing a person or entity to provide a benefit to a public official, another person or entity in exchange for acting (or failing to act) in a particular manner.
- e) Abuse of power: involves a public official using his/her vested authority to improperly benefit another public official, person or entity (or using the vested authority to improperly discriminate against another person, official or entity).
- f) Conflict of interest: Any financial or other private interest or undertaking that could directly or indirectly compromise the performance of a public servant's duties
- g) Favouritism: the provision of services or resources according to personal affiliations of a public official.

The recent **Auditor General Consolidated Local Government audit Overview and outcomes** (2010/11) reflects that Procurement to the value of R3,5 billion could not be audited. Unauthorized expenditure for 2010-11 at local government level amounted to R4,3bn. Irregular expenditure amongst municipalities for 2010-11 amounted to R10bn. Fruitless and wasteful expenditure for 2011-10 amounted to R260m (2009-10: R253m)

The major reasons for fraud and corruption as identified in the Auditor-General's report relate to a lack of controls, mismanagement and lack of governance principle. Other reasons include-

- a) Override of internal Controls
- b) The improper political and administrative interface
- c) Collusion between Employees and 3rd Parties
- d) Poor Internal Controls
- e) Lack of Accountability/ Weak accountability frameworks
- f) Poor ethical culture and poor values
- g) Poor hiring practice (Filling of vacant positions, nepotism, Cronyism
- h) Weak national and provincial oversight of local government.

2. BUILDING A NATIONAL INTEGRITY FRAMEWORK IN THE FIGHT AGAINST CORRUPTION

Early in its democracy South Africa recognized the need to build a National Integrity framework as key cornerstone in its fight against corruption. Such an approach has its origins in October 1997 when Cabinet mandated a Ministerial Committee to consider proposals for the implementation of a National Campaign Against Corruption. Consequently, a National Anti-Corruption Summit was convened in April of 1999

Since then, South Africa has responded by implementing an array of legislation and the creation of democratic institutions as essential armour in its endeavours to build national integrity and fight corruption. It is acknowledged by most stakeholders that a comprehensive policy and regulatory framework is in place that provides for a **Generic Integrity Framework** through international and national instruments such as

- o United Nations Convention against Corruption (UNCAC)
- o Global Programme against Corruption designed by the Centre for International Crime Prevention (CICP), in collaboration with the United Nations Interregional Crime and Justice Research Institute (UNICRI),
- o Transversally applicable (national level) constitutional provisions of the Constitution such as fundamental rights (Bill of Rights, etct) founding values in section 1, principles of public administration in section 195, procurement regulation under section 217 and fiscal prudence guidelines.
- o Transversal legislation and directives including-
 - a) Preferential Procurement Policy Framework Act
 - b) Promotion of Access to Information Act
 - c) Promotion of Administrative Justice Act
 - d) the Protected Disclosures Act
 - e) the Prevention and Combating of Corrupt Activities Act

A specific **Integrity Framework for Local Government** is also provided though -

- a) The Municipal Finance Management Act, 2003;
- b) The Constitution – sections 53, 152, 195 Chapt 3 & 7;
- c) The Local Government: Municipal Structures Act, 1998;

- d) The Local Government: Municipal Systems Act, 2000;
- e) The Local Government: Municipal Demarcation Act, 1998; and
- f) Codes of Conduct for Councillors and Municipal Employees

3. THE IMPORTANCE OF DISCLOSURE IN THE COMBATING AND PREVENTION OF CORRUPTION AND THE INTIMIDATION FACED BY WHISTLEBLOWERS

While the legislation provides a basis for the development of systems and mechanisms for promoting integrity and preventing corruption in public life, the effectiveness thereof is severely hampered by **implementation gaps**³, including

- a) Non Reporting/ Ineffective implementation of the Protected Disclosures Act
- b) Limited implementation and adherence to the Codes of Conduct
- c) Non-compliance with the Financial Disclosure Framework
- d) Non-compliance with the Minimum Anti- corruption Capacity Requirements
- e) Supply chain management prescripts are not adhered to
- f) Weak enforcement and inconsistent application of disciplinary measures
- g) Resignation and transfer before disciplinary processes finalised

Disclosure mechanisms are regarded as one of the most essential tools for combating corruption and enhancing democratic principles such as accountability and transparency. Experts agree that financial disclosure, standards of conduct, and whistle-blowing protection are the most important components of a framework for tackling conflicts of interest.

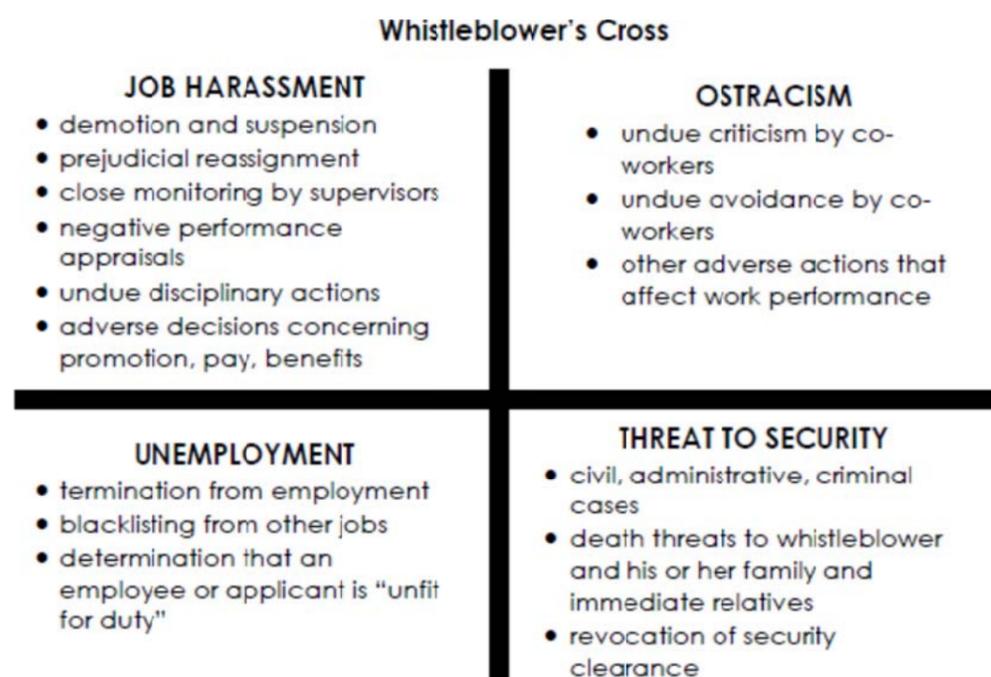
*Whistleblowing is central to these constitutional principles. It is key in the fight against corruption and mismanagement, especially of public funds, and to strengthening transparency and accountability within organisations and society more generally.*⁴

³ Source: Public Sector Integrity Management Framework

⁴ *The Status of Whistleblowing in South Africa, Tacking stock, Patricia Martin, ODAC, June 2010*

There is general consensus that whistleblowers are often best placed to bring to light serious problems within the management and operations of an organisation whether they are unintentional problems due to misjudgements, mistakes, delays, haste, or intentional integrity issues due to misconduct, corruption and/or illegality⁵.

Yet whistleblowers often face harassment, discrimination, disadvantage or adverse treatment in relation to employment, dismissal from, or prejudice in employment and disciplinary proceeding. Whistleblowers can therefore risk their livelihoods, their reputations, their lives and even the lives of their families to expose information of significant public importance, yet they do so at grave risk to themselves. The following figure depicts these risks and costs of whistle blowing in what is called in the Philippines “a whistleblower’s cross”⁶



Just recently the Public Protector released a report called “*They Called it Justice*” dealing with an investigation into maladministration in the handling of a whistle-

⁵NSW Ombudsman: 6th edition Protected Disclosures Guidelines

⁶ **Whistleblowing in the Philippines:** Asian Institute of Management June 2006, RVR Center-Hills Program on Governance

blower matter resulting in immense prejudice suffered by the whistle-blower in the form of an occupational detriment as envisaged in the Protected Disclosures Act.

Media reports refer to other instances where an employees is fighting dismissal from the State Security Agency (SSA) after she reported on alleged fraud in the SSA's medical scheme, another official dismissed from the Limpopo Department of Education, after highlighting the malfeasances leading to last year's textbook scandal, and even an incident where an official was abducted and beaten by people who demanded that he halt his investigation into their business.

As a result of the heavy personal costs associated with whistleblowing, it is not a very common occurrence. And, as some writers pointed out, "**society shoulders the costs of people's unwillingness to blow the whistle against corrupt practices. The absence of sufficient supply of whistleblowers worsens the state of corruption; it emboldens corrupt people to go on with their evil practices without fear of being punished.**"⁷

The protection of whistleblowers is therefore fundamental to the operation of open and accountable government and is a standard provision in freedom of information legislation in a wide range of countries.

South Africa has followed suit and legislature promulgated the Protected Disclosures Act, 2000 (the PDA), which recognises the value of and need for whistle blowing in South Africa by aiming 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.

4. THE PROTECTED DISCLOSURES ACT: OVERVIEW AND GAPS

In South Africa the Protected Disclosures Act (no 26 of 2000) makes provision for procedures in terms of which employees in both the public and private sector who

⁷ **Whistleblowing in the Philippines:** Asian Institute of Management June 2006, RVR Center-Hills Program on Governance

disclose information of unlawful or corrupt conduct by their employers or fellow employees, are protected from occupational detriment.

Protected disclosures

The Act defines a "Disclosure" as reporting related to past, present or future:

- *Criminal offence*
- *Failure to comply with a legal obligation*
- *Miscarriage of justice*
- *Endangering health or safety*
- *Damage to the environment*
- *Unfair discrimination*
- *And the deliberate cover up of any of these.*

A disclosure as defined above will only be protected if it follows the proper procedure. In other words it is made to one of the following agencies or entities:

- *legal adviser (section 5);*
- *the employer (section 6);*
- *a member of the Cabinet or Executive Council (section 7);*
- *the **Public Protector** or Auditor-General (section 8); or*
- *general protected disclosure (section 9)*
-

Protection

People who are victimised in breach of the Act, whether they are dismissed or not, can refer a dispute to the Commission for Conciliation, Mediation and Arbitration for conciliation and thereafter to the Labour Court. People who are dismissed for making a protected disclosure can claim either compensation, up to a maximum amount of two years salary, or reinstatement. 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 order⁸

Section 1 of the Act defines Occupational Detriment as:-

8 Acknowledgement to the PSC: A Guide for Public Sector Managers Promoting Public Sector Accountability Implementing the Protected Disclosures Act

- Any disciplinary action;
- Dismissal, suspension, demotion, harassment or intimidation;
- Transfer against your will or refusal for such transfer or promotion;
- Changes in terms or conditions of employment or retirement which is altered, or kept altered, to your disadvantage;
- Refusal for a reference, or being provided with an adverse reference, from your employer;
- Being denied appointment to any employment, profession or office;
- Being threatened with any of the actions mentioned above; or
- Being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security.

Section 3 of the Protected Disclosure Act States that

“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.”

Section 4 of the Protected Disclosures Act provides the following remedies should an employee suspect in any way that he/ she is being victimised in their workplace:-

- 1) Section 4 deems any dismissal in breach of Section 3 to be an automatically unfair dismissal as contemplated in terms of section 187 of the Labour Relations Act, and any other occupational detriment is deemed to be an unfair labour practise as contemplated in Part B of Schedule 7 of the Labour Relations Act, 1995.
- 2) In terms Section 4(3) the terms and conditions of employment of the whistleblower transferred at his or her request, cannot be altered to be less favourable than the terms and conditions applicable to him or her before the transfer

If any Occupational detriment still takes place despite this protection, the Act advises the employee to:-

- Approach any Court having jurisdiction including Labour Court for appropriate relief; and or

- Pursue any other process allowed by any law to enforce his/ her legal rights.

Quick overview of the potential gaps in the effectiveness and implementation of the PDA⁹

- *The Act only applies to employees and protects them from “occupational detriment”.*¹⁰
- *There is no express obligation in terms of the PDA on organisations, both public and private, to take proactive steps to encourage and facilitate whistleblowing in the organisation, or to investigate claims that are made by whistleblowers.*
- *The protection and remedies provided by the PDA are not strong enough to engender confidence in the ability of the law to protect whistleblowers.*
- *The fora for the resolution of disputes related to whistleblowing are court-based. This is expensive and allows for delaying tactics by employers which amount to an abuse of process.*
- *The protection that is provided by the PDA is limited to protection against occupational detriment only.*
- *The PDA provides no immunity against civil and criminal liability arising out of the disclosure.*
- *There is no express obligation on organisations in terms of the PDA to protect a whistleblower’s identity.*
- *The remedies that are available in the case of a transgression of a whistleblower’s rights are insufficient. For example, damages are limited to the damages that may be awarded in terms of the LRA.*
- *There is no public body dedicated and able to provide regular advice to the public, to monitor and review whistleblowing laws and practices and to promote public awareness and acceptance of whistleblowing.*

⁹ With acknowledgment to *The Status of Whistleblowing in South Africa, Tacking stock, Patricia Martin, ODAC, June 2010*

¹⁰ With acknowledgement to Lorraine Martin (ODAC) **A quick overview of the Protected Disclosures Act**, Whistleblowers Implementers’ Forum, 2010

5. THE ROLE OF THE PUBLIC PROTECTOR

5.1 Introduction

The Public Protector as a Constitutional institution mandated to receive complaints regarding improper conduct by the state, investigates these and takes measures to remedy the issue. It is guided by 16 pieces of legislation including the Executive Members Ethics Act, the Promotion of Access to Information Act, the Protected Disclosures Act. It is also guided by a number of international laws such as the UN conventions, OECD, AU and SADC instruments. Within this framework, the Public Protector seeks to protect Whistleblowers and to actively promote a culture of disclosure.

As indicated earlier, and also mentioned by the Public Protector on occasion, there are two essential aspects in building integrity within a system and a society namely

- Anti-corruption initiatives, and
- Promotion of ethical behaviour

The Public Protector forms part of the national integrity framework, together with other oversight and accountability bodies that include the Legislature, Auditor-General, Public Service Commission, the Judiciary, Financial Intelligence Centre, , media and society. These bodies play an important role in enforcing Democratic values of good governance, the Rule of Law and quality of life.

In working towards these aims, the Public Protector strongly relies heavily on whistleblowing and protected disclosures. The Public Protector's approach is broader than just protected disclosures under the Act; it includes also anonymous reporting. Currently the number of reports received this way significantly exceeds the cases of protected disclosures reported to the Public Protector¹¹.

5.2 Constitutional mandate of the Public Protector

¹¹ The PPSA is currently reviewing 16 cases.

Established under chapter 9 of the Constitution, the Public Protector has the power under section 182 of the Constitution to strengthen and support constitutional democracy by:

- a) investigating any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
- b) to report on that conduct; and
- c) to take appropriate remedial action.

The Public Protector's mandate covers all organs of state at national, provincial and local levels, including local government and extends to state owned enterprises, statutory bodies and public institutions. Court decisions are excluded.

Section 182(4) enjoins the Public Protector to be accessible to all persons and communities

The Constitution anticipates mandate expansion through legislation, and legislation passed since establishment 15 years ago has resulted in the Public Protector being a multiple mandate agency with the following 6 key mandate areas:

- a) Maladministration and appropriate resolution of dispute the Public Protector Act 23 of 1994(PPA). The maladministration jurisdiction transcends the classical public complaints investigation and includes investigating without a complaint and redressing public wrongs(Core);
- b) Enforcement of Executive ethics under by the Executive Members' Ethics Act of 1998(EMEA) and the Executive Ethics Code (Exclusive):
- c) Anti-corruption as conferred by the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PCCAA) read with the PPA(Shared);
- d) Whistle-blower protection under the Protected Disclosures Act 26 of 2000. (Shared with the Auditor General and to be named others;
- e) Regulation of information under the Promotion of Access to Information Act 2 of 2000;(PAIA) and
- f) Review of decisions of the Home Builders Registration Council under the Housing Protection Measures Act 95 of 1998.

Except under the EMEA, anyone may lodge a complaint with the Public Protector against any organ of state and the service is free. The complainant need not be a

victim of the alleged improper conduct or maladministration. The Public Protector may institute an investigation on own initiative and does not need to receive a complaint.

The Constitutional mandate of the Public Protector to investigate and report on improper conduct or improprieties in state affairs translates to a multi-pronged approach to handling complaints to ensure

- a) correction of transgressions by organs of State,
- b) a proper diagnosis and correction of any administrative inadequacies, including systemic failures
- c) that proper redress is provided in cases requiring remedial action.