

Constitutional Litigation Unit

16th Floor Bram Fischer Towers • 20 Albert Street • Marshalltown • Johannesburg 2001 • South Africa
PO Box 9495 • Johannesburg 2000 • South Africa
Tel: (011) 838 9831 • Fax: (011) 838 4273 • Website www.lrc.org.za
PBO No. 930003292
NPO No. 023-004



LEGAL RESOURCES CENTRE

**SUBMISSION TO THE SPECIAL RAPONTEUR ON FREEDOM OF OPINION AND
EXPRESSION**

**THE SOUTH AFRICAN LEGAL FRAMEWORK GOVERNING THE PROTECTION OF
SOURCES AND WHISTLE-BLOWERS**

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Abbreviations

BCCSA	Broadcasting and Complaints Commission of South Africa
LRC	Legal Resources Centre
PAIA	Promotion of Access to Information Act 2 of 2000
PAJA	Promotion of Administrative Justice Act 3 of 2000
PDA	Protected Disclosures Act 26 of 2000
POCA	Prevention and Combating of Corrupt Activities Act 12 of 2004
POSIB	Protection of State Information Bill
SAMWU	South African Metal Workers Union
SARS	South African Revenue Services

Introduction

1. This is a submission prepared by the Legal Resources Centre (“LRC”) for consideration by the Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression (“the Special Rapporteur”). This submission is in response to a call for information from the Special Rapporteur on existing national laws, jurisprudence and practices as well as references to concrete situations which exemplify the challenges faced by sources and whistle-blowers.
2. The LRC is one of South Africa’s oldest public interest law firms, focussing on human rights and constitutional law. The goals of the LRC are to promote justice, build respect for the rule of law, and contribute to socio-economic transformation in South Africa and beyond. In this regard, the LRC’s clients are predominantly vulnerable and marginalised, including people who are poor, homeless and landless. The LRC is committed to assisting communities through strengthening knowledge, skills and experience, in order to assist communities to claim their fundamental economic, social and environmental rights.
3. The LRC has been involved in a number of landmark freedom of expression and access to information cases in South Africa. In making this submission, the LRC does not purport to hold a mandate on behalf of all affected persons. However, as will be seen from what is contained below, the focus of this submission is to provide the Special Rapporteur with the relevant South African legal framework that may be of assistance when preparing his report.
4. In these submissions, we discuss the following issues:
 - 4.1. Firstly, we set out the constitutional framework of the right to freedom of expression, including the right to freedom of the media and other relevant constitutional rights;

- 4.2. Secondly, we set out the relevant legislative framework governing the protection of whistleblowers and sources in South Africa;
 - 4.3. Thirdly, we examine some of the relevant case law on these issues;
 - 4.4. Fourthly, we highlight certain cases involving whistleblowers that highlight the need for greater protections; and
 - 4.5. Lastly, we outline our recommendations for suggested law reform.
5. We deal with each of these in turn below.

Constitutional framework

6. The Constitution of the Republic of South Africa, 1996 (“the Constitution”) does not include provisions specific to the protection of whistleblowers or sources, but its spirit supports such protection. We note that section 1 of the Constitution identifies openness and accountability as two of the founding values of our democracy, which is achievable in part by the important role that whistleblowers and sources play. The relevant constitutional provisions include:

- 6.1. Section 9(1) of the Constitution:

Everyone is equal before the law and has the right to equal protection and benefit of the law.

- 6.2. Section 16(1) of the Constitution:

Everyone has the right to freedom of expression, which includes:

(a) freedom of the press and other media;

(b) freedom to receive or impart information or ideas;

(c) freedom of artistic creativity; and

(d) academic freedom and freedom of scientific research.

6.3. Section 23(1) of the Constitution:

Everyone has the right to fair labour practices.

7. With this in mind, we turn next to consider the relevant legislation and case law that are pertinent to these issues.

Legislative framework

The protection of whistleblowers

*The Protected Disclosures Act*¹

8. The Protected Disclosures Act (“PDA”) makes provision for employees to report unlawful or irregular conduct by employers and fellow employees, while providing for the protection of employees who blow the whistle. A copy of the full text of the PDA is enclosed together with this submission.
9. A disclosure for the purposes of the PDA constitutes:²

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 No, 4 of 2000); or*

¹ Act 26 of 2000.

² The relevant definitions are contained in section 1 of the PDA.

(g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed.

10. Section 9 of the PDA sets out the following requirements for a general 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 [see below] 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 [see below],

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.

11. Section 1 of the PDA defines an occupational detriment as including the following conduct:
- 11.1. Being subjected to any disciplinary action;
 - 11.2. Being dismissed, suspended, demoted, harassed or intimidated;
 - 11.3. Being transferred against his or her will; being refused transfer or promotion;
 - 11.4. Being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;
 - 11.5. Being refused a reference, or being provided with an adverse reference, from his or her employer;
 - 11.6. Being denied appointment to any employment, profession or office;
 - 11.7. Being threatened with any of the actions referred to above; or
 - 11.8. Being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security.
12. The PDA further indicates that the disclosure is protected if made to certain persons, such as a legal advisor, employer, member of cabinet, the Public Protector or Auditor-General where the employer is a public body, or any person prescribed in certain circumstances.³
13. The Labour Court provided the following analysis of the relationship between the PDA and Constitution:⁴

The PDA takes its cue from the [Constitution]. It affirms the “democratic values of human dignity, equality and freedom”. In this respect its constitutional underpinning is not

³ Ss 5-8 of the PDA.

⁴ *Tshishonga v Minister of Justice and Constitutional Development and Another* [2006] ZALC 104 at para 106.

confined to particular sections of the Constitution such as free speech or rights to personal security, privacy and property. Although each of these rights can be invoked by whistle-blowers, the analysis in this case is from the perspective of the overarching objective of affirming values of democracy, of which the particular rights form a part. Democracy embraces accountability as one of its core values. Accountability, dignity and equality are the main themes flowing through the analysis that follows.

Proposed amendments to the PDA: The Protected Disclosures Amendment Bill⁵

14. The Protected Disclosures Amendment Bill (“the Bill”) has a number of amendments that will help extend protection for whistle-blowers in the workplace. Firstly, it will widen the definition of who can receive protection for blowing the whistle, by extending ‘employee’ to mean former employees of the State or corporate entities, and including ‘temporary employment services’ and ‘independent contractors’.⁶ It also aims to protect whistleblowers from some forms of ‘retribution’ that were not envisaged in the existing Act, including civil claims made against those who disclose criminal offences.⁷
15. Furthermore, it obliges those who receive whistleblower disclosures to investigate or refer the matter elsewhere within a certain time period, and to keep the whistleblower updated on the matter.⁸ It also allows any worker subjected to an occupational detriment to approach a court directly for appropriate relief, including the specification of appropriate remedies to be administered by a competent court.⁹
16. Further the amendments will allow for liability to be extended to the clients of employees,¹⁰ and it obliges employers to authorise appropriate internal procedures for receiving and dealing with information about improprieties as well as a duty to

⁵ [B – 2014].

⁶ S 1 of the Bill.

⁷ S 10 of the Bill.

⁸ S 2.4 of the Bill.

⁹ S 2.5 of the Bill.

¹⁰ S 4 of the Bill.

take reasonable steps to bring the internal procedures to the attention of all employees or workers.¹¹

17. At this stage, however, we do not know when – or if at all – the Bill will be signed into law.

*The Companies Act*¹²

18. Section 159 of the Companies Act applies to a disclosure made by an employee in good faith to certain specified entities, including a regulatory authority, a legal adviser, a director, an auditor or the company secretary.
19. To the extent that section 159 creates any right of, or establishes any protection for, an employee as defined in the PDA, that right or protection is in addition to, and not in substitution of, any right or protection established by the PDA.¹³ In other words, any protections under the Companies Act can only offer greater protection than the PDA, but cannot offer less.
20. The person making the disclosure must have reasonably believed at the time of the disclosure that the information showed or tended to show that a company, director or prescribed officer of a company acting in that capacity, had:

(i) contravened this Act, or a law mentioned in Schedule 4;

(ii) failed or was failing to comply with any statutory obligation to which the company was subject;

(iii) engaged in conduct that had endangered, or was likely to endanger, the health or safety of any individual, or had harmed or was likely to harm the environment;

(iv) unfairly discriminated, or condoned unfair discrimination, against any person ...

¹¹ S 2.3 of the Bill.

¹² Act 71 of 2008.

¹³ S 159(1)(a) of the Companies Act.

(v) contravened any other legislation in a manner that could expose the company to an actual or contingent risk of liability, or is inherently prejudicial to the interests of the company.

21. The whistleblower then has qualified privilege in respect of the disclosure, and is immune from any civil, criminal or administrative liability for that disclosure.
22. A public company or a state-owned company must also establish and maintain a system to confidentially receive and act on disclosures contemplated in section 159.¹⁴ Such a company is also required to routinely publicise the availability of that system.
23. Section 159 therefore expands on the protections contained in the PDA, including the types of information that warrant protection. Additionally, it expands on the lists of persons to whom a whistle-blower can make a disclosure. It also extends the means for protection far beyond those labour protections in the PDA through section 159(4), with regards to civil, criminal and administrative liability for a disclosure.¹⁵

The Prevention and Combating of Corrupt Activities Act¹⁶

24. The Prevention and Combating of Corrupt Activities Act (“POCA”) was enacted pursuant to the United Nations Convention against Corruption and the African Union Convention on Preventing and Combating Corruption. POCA criminalises corruption, creating penalties and offences.¹⁷ However, effect can only be given to POCA if people come forward with information about corruption that is taking place. The criminalisation of corruption thus provides a mechanism to resolve the issues whistleblowers are disclosing.

¹⁴ S 159(7) of the Companies Act.

¹⁵ See K Malunga “Whistle-Blowing in South Africa” (2015) <http://www.pprotect.org/news/Whistle-blowing%20in%20South%20Africa27%20Jan%202015.pdf> (accessed 06-07-15).

¹⁶ Act 12 of 2004.

¹⁷ Ss 3 and 26 of POCA.

*Protection from Harassment Act*¹⁸

25. The Protection from Harassment Act provides potential whistleblowers with a civil remedy for protection. In the event that a whistleblower may be targeted for the actions that he or she has taken, such person can apply for a protection order from harassment.¹⁹ An appropriate court can order the respondent to refrain from harassing the applicant or enlisting the help of another person to harass the applicant. They may include other provisions to ensure the protection of the applicant in the circumstances.²⁰ If the protection order is breached, the applicant can notify the police and have the perpetrator arrested.²¹

*Witness Protection Act*²²

26. The Witness Protection Act provides protection for *inter alia* people who have witnessed corrupt activities. If a witness to corruption has agreed to make an affidavit in court against the accused and has reason to believe that their safety or the safety of a related person is threatened, they may apply for protection under this Act.²³ This Act applies to civil as well as criminal proceedings.²⁴ However, it is only available for witnesses acting in court proceedings.

¹⁸ Act 17 of 2011.

¹⁹ Ss 2 and 9 of the Protection from Harassment Act.

²⁰ S 10 of the Protection from Harassment Act.

²¹ S 11 of the Protection from Harassment Act.

²² Act 112 of 1998.

²³ S 7 of the Witness Protection Act.

²⁴ S 15 of the Witness Protection Act.

The Promotion of Access to Information Act²⁵

27. The Promotion of Access to Information Act (“PAIA”) creates a mechanism for whistleblowers to access information. Whistleblowers requiring further information to substantiate their claims can request information under PAIA. Public bodies, with some exceptions, are required to provide the information to the requestor. Requests may also be made to private bodies if the record is required to exercise the protection of any right.²⁶ Although there are mandatory and discretionary exceptions for a public or private body being required to provide the requested information, PAIA also contains a public interest override that may trump the refusal in appropriate circumstances.

The Protection of State Information Bill

28. The Protection of State Information Bill (“POSIB”) aims to regulate the classification of state information, but has been subject to widespread criticism within South Africa. It has not yet been signed into law, and is likely to face widespread opposition by numerous organisations if it ever is. There are a number of concerns with POSIB; particularly in relation to the protection of whistleblowers, we note the following:

28.1. The provisions of POSIB may fall foul of the Constitution insofar as it constitutes an unjustifiable limitation on the right to freedom of expression and access to information. The framework for rights assertion as it is contained in POSIB severely impedes the right to access justice for the citizenry, and through further limitations on time frames for responses, will limit the right to

²⁵ Act 2 of 2002.

²⁶ S 50 of PAIA.

freedom of expression and access to information.²⁷ The criminalisation of speech – including disclosures that may be made by whistleblowers and sources – will have a chilling effect on the rights guaranteed in the Constitution and the effectiveness with which our democracy is able to operate.

28.2. The definition of “national security” within section 1 of POSIB is overbroad and may be subject to over-classification and state manipulation. In its present form, it reads as follows:

“[N]ational security” includes the protection of the people of the Republic and the territorial integrity of the Republic against –

(a) the threat of use of force or the use of force;

(b) the following acts:

(i) Hostile acts of foreign intervention directed at undermining the constitutional order of the Republic;

(ii) terrorism or terrorist related activities;

(iii) espionage;

(iv) exposure of a state security matter with the intention of undermining the constitutional order of the Republic;

(v) exposure of economic, scientific or technological secrets vital to the Republic;

(vi) sabotage; and

(vii) serious violence directed at overthrowing the constitutional order of the Republic;

(c) acts directed at undermining the capacity of the Republic to respond to the use of, or the threat of the use of, force and carrying out of the Republic’s responsibilities to any foreign country and international organisations in relation to any of the matters referred to in this definition, whether directed from, or committed within, the Republic or not, but does not include lawful political activity, advocacy, protest or dissent.

28.3. In order for the classification regime²⁸ contained in the POSIB to comply with constitutional requirements, including the limitations clause in section 36 of the Constitution, the classification regime must be restricted. The ultimate question in the context of POSIB is whether it indicates with reasonable

²⁷ The South African Human Rights Commission “Submission on the Protection of State Information Bill” (2012) <http://www.sahrc.org.za/home/index.php?ipkContentID=72> (accessed 14-07-2015).

²⁸ Chapter 5 of POSIB.

certainty to those who are bound by it what is required of them. If not, POSIB may not comply with the principle of legality.²⁹

28.4. Further concerns include the fact that although only the security cluster and cabinet will obtain classification powers, the Minister of State Security can extend this function to any other organ of state except municipalities. Classification decisions do not need to be public, creating a high risk of over-classification. Lastly, POSIB retroactively protects all documents classified under the previous legislation, including apartheid-era records, with no deadline for declassification.³⁰

28.5. In criticising POSIB, many have called for a public interest override is needed within the Bill and would constitute a "reasonable publication" defence in terms of South African law. This would dilute the harmful effects created by the provisions of chapter 11 of POSIB.

28.6. Additionally, the harsh sanctions imposed by the Bill,³¹ ranging all the way to a maximum imposition of 25 years, will have sombre consequences for a vigorous democracy bolstered by an unhindered press and academic sector.³² Notably, POSIB makes it a crime not only to leak classified information, but merely to possess it.³³ This means that even if the information is already in the public domain, it would be a crime to have access to it.³⁴ This is an absurd consequence. This would undoubtedly be a serious deterrent to sources or

²⁹ The South African Human Rights Commission "Submission on the Protection of State Information Bill".

³⁰ Right 2 Know "What's STILL Wrong with the Secrecy Bill?" (11-09-2014) <http://www.r2k.org.za/2014/09/11/whats-still-wrong-with-the-secrecy-bill/> (accessed 06-07-2015).

³¹ Chapter 11 of POSIB.

³² The South African Human Rights Commission "Submission on the Protection of State Information Bill".

³³ Ss 15, 40 and 44 of POSIB.

³⁴ Right 2 Know "What's still Wrong with the Secrecy Bill?".

whistleblowers who may otherwise have sought to divulge the material in the public interest.

29. It should be noted that section 41(c) of POSIB states that a person will not be in violation of POSIB when disclosing information that reveals criminal activity, including any criminal activity regarding the improper classification of information. However, this does not extend to someone who exposes conduct that is wrongful but not necessarily criminal in an effort to promote transparency and accountability.³⁵
30. The provisions of POSIB are also relevant to the protection of sources, which we turn to consider in more detail below in relation to the laws that are specifically applicable thereto.

*The Tax Administration Act*³⁶

31. Chapter 6 of the Act regulates confidentiality and disclosure. Notably, when tax payer information or SARS confidential information is shared with an individual, that individual may not disclose or publish the information.³⁷
32. The information considered confidential by section 68 is very broad:

[I]nformation, the disclosure of which could reasonably be expected to prejudice the economic interests or financial welfare of the Republic or the ability of the government to manage the economy of the Republic effectively in the best interests of the Republic, including a contemplated change or decision to change a tax or a duty, levy, penalty, interest and similar moneys imposed under a tax Act or the Customs and Excise Act.

³⁵ Human Rights Watch “South Africa: ‘Secrecy Bill’ Improved But Still Flawed”.

³⁶ Act 28 of 2011.

³⁷ S 67(3).

33. Disclosures may only be demanded by recognised governmental bodies. Members of the general public may only compel disclosure of confidential information through an order of the high court.³⁸
34. To strengthen the above provisions of the Tax Administration Act, South African Revenue Service (“SARS”) officials are required to take an oath of secrecy. This is aimed at preserving the secrecy of taxpayer information; SARS officials are thus not to disclose taxpayer information or SARS confidential information to a person who is not a SARS official or not an official authorised to have access to such information.
35. SARS employees must further not disclose trader information that may come to their knowledge in the performance of any duty or power under the provisions of any tax Acts, except to the extent that disclosure is permitted by law.
36. Criminal prosecution will result for commencing duties or exercising any powers under the tax legislation before taking this prescribed oath or affirmation and for any of the above prohibited disclosures. There is no public interest override for the disclosure of this information even in situations where it may be manifestly in the public interest to do so.

*The National Prosecuting Authority Act*³⁹

37. Section 41 of the Act contains all offences and penalties for contravention of the National Prosecuting Authority Act, extending all the way to maximum imprisonment of 25 years.

³⁸ Ss 71 and 69(1)(c).

³⁹ Act 32 of 1998.

38. Offences include hindrance, obstruction or interference of the duties of prosecuting authority by any organ of state, employee thereof or other person (which is self-evidently extremely broad);⁴⁰ failure to appear, produce an item or answer fully when summoned to court;⁴¹ and gaining or allowing access to a computer of the prosecuting authority if not allowed such access.⁴²
39. The following two subsections of section 41 are the most broad and harmful to potential whistle-blowers:

(5) Any person who, in connection with any activity carried on by him or her, in a fraudulent manner takes, assumes, uses or publishes any name, description, title or symbol indicating or conveying or purporting to indicate or convey or which is calculated or is likely to lead other persons to believe or to infer that such activity is carried on under or by virtue of the provisions of this Act or under the patronage of the prosecuting authority, or is in any manner associated or connected with the prosecuting authority, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 25 years or to both such fine and such imprisonment.

(6) Notwithstanding any other law, no person shall without the permission of the National Director or a person authorised in writing by the National Director disclose to any other person-

(a) any information which came to his or her knowledge in the performance of his or her functions in terms of this Act or any other law;

(b) the contents of any book or document or any other item in the possession of the prosecuting authority; or

(c) the record of any evidence given at an investigation as contemplated in section 28(1), except -

(i) for the purpose of performing his or her functions in terms of this Act or any other law; or

(ii) when required to do so by order of a court of law.

⁴⁰ S 32(1)(b) and 29(12).

⁴¹ S 28(10).

⁴² S 40A(2).

The protection of sources

40. The legislation mentioned above is in large part equally applicable to the protection of sources as it is to the protection of whistleblowers, as in both instances we are considering the disclosure of information. In the paragraphs below, we set out certain provisions in our law that deal specifically with the protection of sources.

The South African Press Code

41. The South African Press Council, the Ombudsman and the Press Appeals Panel are an independent co-regulatory mechanism set up by the print media to provide impartial, expeditious and cost-effective adjudication to settle disputes between newspapers and magazines, on the one hand, and members of the public, on the other, over the editorial content of publications. The mechanism is based on two pillars: a commitment to freedom of expression, including freedom of the press, and to excellence in journalistic practice and ethics.⁴³
42. The Council has adopted the South African Press Code to guide journalists in their daily practice of gathering and distributing news and opinion and to guide the Ombudsman and the Appeals Panel to reach decisions on complaints from the public. More than 640 publications, mainly members of Print Media South Africa, subscribe to the Code. The Press Code applies by means of a voluntary agreement by the media to be bound to it.⁴⁴
43. The Press Code makes provision for the protection of sources. It goes so far as to place an obligation on the press to protect confidential sources of information.⁴⁵

⁴³ Press Council "About Us" (2015) <http://www.presscouncil.org.za/> (accessed 14-07-2015).

⁴⁴ Press Council "About Us".

⁴⁵ Clause 11.1 of the Press Code.

However, the Press Code provides that the press should avoid the use of anonymous sources unless there is no other way to deal with a story.⁴⁶ Even when relying on confidential sources, the Press Code still enjoins the press to take care to corroborate the information.⁴⁷ Furthermore, the press may not publish information that constitutes a breach of confidence, unless a legitimate public interest dictates otherwise.⁴⁸ The identity of rape victims and the HIV/AIDS status of persons may not be disclosed in relation to sources.⁴⁹

The Code of the Broadcasting Complaints Commission of South Africa

44. The Broadcasting Complaints Commission of South Africa (“BCCSA”) is an independent judicial tribunal which must reach its decisions on the Broadcasting Code independently and in line with the precepts of administrative justice, as required by the Constitution and legislation that governs fair administrative justice. Although initially set up by the broadcasting industry, it is entirely independent from that industry and it would be in conflict with its corporate independence to be called an “*industry body*”.⁵⁰
45. The only reference to the protection of the identity of sources within the Broadcasting Code of the BCCSA can be found in clause 34.6 which states: “*The identity of rape victims and other victims of sexual violence shall not be divulged in any broadcast without the prior consent of the victim concerned*”.

⁴⁶ Clause 11.2 of the Press Code.

⁴⁷ Clause 11.2 of the Press Code.

⁴⁸ Clause 11.3 of the Press Code.

⁴⁹ Clauses 4.8 and 4.9 of the Press Code.

⁵⁰ The Broadcasting Complaints Commission of South Africa “About the BCCSA” (2014) http://www.bccsa.co.za/index.php?option=com_content&view=article&id=907 (accessed 14-07-2015).

46. Having set out the legislative framework, we turn next to consider some of the relevant case law in relation to whistleblowers and sources.

Relevant case law

*Whistle-blowers: Tshishonga v Minister of Justice and Constitutional Development and Another*⁵¹

47. *Tshishonga* examines whether disclosures to the media are protected under the PDA. The applicant was Managing Director of the Masters' of Business office, responsible for eradicating the corruption involved in the administration of insolvent estates.⁵² When he realised another individual was using his relationship with the Minister for his personal gain, he brought the matter to the attention of his superior and refused to act in accordance with the Minister's demands.⁵³ He was removed from his position and given a new position; however, he was not given any work.⁵⁴
48. Reports had been prepared about corruption in the Department, which were not acted upon. The applicant then took copies of the report to the Public Protector's office.⁵⁵ After receiving no response from the Public Protector, the applicant took the report to the Auditor-General. They acknowledged receipt of the complaint, but sent no further response.⁵⁶ Shortly after, he met with someone from the Public Protector's office. She referred his complaint about his treatment to the Public Service Commission while the Public Protector would handle the procedural issues.⁵⁷ He

⁵¹ *Tshishonga v Minister of Justice and Constitutional Development and Another* [2006] ZALC 104.

⁵² Para 3-4.

⁵³ Para 5-26.

⁵⁴ Para 29.

⁵⁵ Para 30-31.

⁵⁶ Para 32.

⁵⁷ Para 33.

requested a meeting with the Minister and his former superior, which did not occur.⁵⁸ He followed up with the Public Prosecutor months later. They informed him that no progress had been made because there was no official complaint.

49. Frustrated by the lack of progress, the applicant met with an investigative journalist and subsequently held a press conference.⁵⁹ After much publicity, the Minister responded with a public attack on the applicant's character. In response, the applicant filed charges of criminal defamation against the Minister. The Director of Public Prosecutions would not prosecute the charge and recommended he pursue a civil claim.⁶⁰ The applicant was then suspended from work and later charged with misconduct.⁶¹ The Labour Court overturned his suspension; however, the Department would not comply with the order.⁶²
50. The Court found the applicant was justified in disclosing to the media because of the other attempts he made to bring the situation to light; consequently, his disclosure was protected by section 9 of the PDA.⁶³ The Court found he had experienced occupational detriment due to his disclosure. Therefore, the Court ordered he receive the maximum amount of compensation, 12 months remuneration at the current rate of pay as well as his legal costs.⁶⁴

⁵⁸ Para 35.

⁵⁹ Para 36-37.

⁶⁰ Para 40-46.

⁶¹ Para 47 and 53.

⁶² Para 54-55.

⁶³ Para 251 and 279.

⁶⁴ Para 291 and 310.

51. The case concerned a defamation suit whereby Bosasa claimed that Basson, a journalist for the Mail and Guardian newspaper, had defamed him by means of exposing a supposedly corrupt relationship between the plaintiff and the Department of Correctional Services.
52. During discovery, the plaintiff filed a request for further particulars to which Basson responded with a redacted discovery affidavit, so as to not expose his sources. The main issue therefore became the plaintiff's contention that his right to a fair trial had been infringed weighed against the defendants' contentions that the identities of his sources were not relevant to the case, to compel them to disclose their sources would be an infringement of their right to freedom of the press (as contained in section 16 of the Constitution), and the fact that the defendants had given an undertaking to their sources that their identities would not be disclosed.
53. The court reasoned as follows:⁶⁶

[J]ournalists, subject to certain limitations, are not expected to reveal the identity of their sources. If indeed freedom of the press is fundamental and sine qua non for democracy, it is essential that in carrying out this public duty for the public good, the identity of their sources should not be revealed, particularly, when the information so revealed, would not have been publicly known. This essential and critical role of the media, which is more pronounced in our nascent democracy, founded on openness, where corruption has become cancerous, needs to be fostered rather than denuded.

54. The court found that the plaintiff is expected to deal with the correctness or otherwise of the contents of the article, not the identity of the defendants' sources. Therefore, the plaintiff had failed to prove that its right to a fair trial has been infringed and to order the defendants to reveal their sources would infringe their freedom of the press and would not serve the public interest.

⁶⁵ *Bosasa Operation (Pty) Ltd v Basson and Another* 2013 (2) SA 570 (GSJ).

⁶⁶ Para 38.

55. The facts may be summarised as follows: the SABC sought an order compelling the Sunday Times to hand over a copy of a confidential internal SABC audit report which the Sunday Times had obtained from a confidential source. The internal audit was conducted following allegations of corruption and mismanagement. An employee of the SABC gave a copy of the report to the chief reporter of the Sunday Times. The source did so under an agreement of strict confidentiality. The chief reporter agreed that he would not disclose the source's identity and would not reveal any information which could lead to the source's identification. The Sunday Times subsequently published an article with regards to the report, which received wide publicity. This was mainly due to the fact that following the internal audit report, the SABC's Audit and Finance Committee had done nothing about the findings of the report. The main concern of the respondents was the disclosure of the identity of their source by means of handing over the report.
56. The court agreed with the respondents in saying that "*any right which the SABC may have to privacy in regard to the report was trumped by the public interest in the disclosure of its contents. Counsel for the SABC did not dispute the submissions of the respondents in regard to the SABC's public accountability and its duty to manage its resources properly*".⁶⁸ With regards to the disclosure of their source, the court acknowledged the sanctity of confidentiality in this regard: "*Sources enable journalists to provide accurate and reliable information. Sources are often in possession of sensitive facts which they would be unwilling to disclose without a guarantee that their identities will not be revealed. The protection of journalists'*

⁶⁷ *South African Broadcasting Corporation v Avusa Limited and Another* 2010 (1) SA 280 (GSJ).

⁶⁸ Para 25.

sources is therefore fundamental to the protection of press freedom".⁶⁹ The application was thus dismissed.

Examples of whistleblower incidents

Zola Banisi

57. Xola Banisi worked in the human resources department at Bloem Water. He approached the Hawks and the Public Protector about corruption in relation to two tenders. He also approached the South African Municipal Workers Union ("SAMWU"), who appeared to be helping him with an investigation into the allegations. After raising his concerns internally, Mr. Banisi did not see any changes coming from his disclosures. He was sidelined at work and transferred to another department. Mr. Banisi also reported receiving death threats to the police, but no action was taken. In September 2014, Mr. Banisi was murdered. The fact that Mr. Banisi had to reach out to a number of organisations for assistance has led to there being many suspects in his murder, but no arrests made.⁷⁰ In our view, Mr. Banisi's story lends support to the suggestion that an independent body should be established to investigate the claims of whistleblowers.⁷¹

Roberta Nation

58. Through her employment at the State Security Agency's medical aid, Roberta Nation learned of fraudulent claims being processed in 2010. She reported these issues to

⁶⁹ Para 30.

⁷⁰ Open Democracy Advice Centre "Heroes Under Fire" (March 2015) <http://www.opendemocracy.org.za/index.php/blog/119-heroesunderfire> (accessed 14-07-2015) 13.

⁷¹ Open Democracy Advice Centre "Heroes Under Fire" 12.

her superiors, who responded with harassment and victimisation. Due to this environment, Ms. Nation was forced to take a stress leave and was subsequently dismissed. After raising the concerns internally did not result in the desired outcome, Ms. Nation had to seek outside legal counsel. The state has frustrated the legal process, drawing out the case and increasing Ms. Nation's costs. Her story highlights the need to lift the cap on compensation available under the PDA to whistleblowers. Currently, the cap is in line with compensation available under the Labour Relations Act. However, as the whistleblowing process often leads to drawn out legal battles and loss of employment, whistle-blowers often suffer financial insecurity.⁷²

Recommendations

59. Despite the existence of legislation protecting whistleblowers, the legal framework remains inadequate as highlighted by the above examples. The PDA is faulted in that it only applies in a limited employment setting. Furthermore, the PDA does not contain a positive obligation for companies to take steps to facilitate whistleblowing and investigate claims made by whistle-blowers.⁷³ Dispute resolution under the PDA is also limited to court-based processes. This creates barriers for whistleblowers as court procedures can be lengthy and costly.⁷⁴ This allows companies to exploit the weaknesses of the court system and use their financial resources to employ procedural delay tactics. To receive protection under the PDA, whistleblowers must make their disclosures in the manner prescribed by sections 5 to 9 of the PDA.⁷⁵

⁷² Open Democracy Advice Centre "Heroes Under Fire" 21-22 & 29.

⁷³ Razzano "Empowering Our Whistleblowers" (2014) <http://www.r2k.org.za/wp-content/uploads/WhistleblowingBook.pdf> (accessed 14-07-2015) 32.

⁷⁴ 24.

⁷⁵ 14.

Finally, the PDA places a cap on compensation, which does not necessarily recognise the financial consequences of whistle-blowing in South Africa.

60. We acknowledge that the proposed amendments seek to address some of these concerns, although it is unclear when the proposed amendments will be signed into law. For example, one proposed amendment is the creation of a positive obligation to institute complaint procedures and investigate complaints. However, the amendments also create an offence for persons who knowingly transmit false information.⁷⁶ It has been proposed that this clause should be deleted entirely. The clause assumes that a consequence of the protections afforded in the PDA is that false, frivolous or vexatious disclosures will be made, and instead of safeguarding against potential abuse may instead achieve the opposite effect: of further chilling the will to blow the whistle.⁷⁷

61. The South African Law Reform Commission stated the following in this regard:⁷⁸

The Commission confirms its preliminary recommendations that where an employee or a worker knowingly makes a false disclosure such disclosure should not be criminalised. A person who deliberately or recklessly discloses false information does not qualify as a whistle-blower (except under section 5 of the PDA in its present form) and might also be guilty of criminal defamation, crimen injuria or fraud at common law.

62. Arguably, there are other remedies available in the event of intentionally false disclosures being such, such as the protections under the law of civil defamation.

63. The Companies Act is also faulted in that it provides for the protection of whistleblowers acting with companies in South Africa, but does not cover those acting with companies incorporated outside of South Africa⁷⁹ or for other entities.

⁷⁶ S 10 of the Bill.

⁷⁷ Right 2 Know "Submission on Draft Protected Disclosures Amendment Bill".

⁷⁸ South African Law Reform Commission Report: Protected Disclosures (2007)

http://www.justice.gov.za/salrc/reports/r_pr123_protected-disclosures_2007.pdf (accessed 07-07-2015) Clause 5.10.

64. After conducting research on whistleblowers in South Africa, a group of civil society organisations came up with the following list of proposed changes to the current protection environment:⁸⁰
- 64.1. Public and private bodies adopt a Code of Good Practice to protect and promote whistleblowing;
 - 64.2. Civil society set up a network to support whistleblowing;
 - 64.3. Whistleblowers are given financial and physical security and other alternative mechanisms of support – including development of financial incentives for whistleblowers;
 - 64.4. The existing forums for whistleblowers are secure and effective;
 - 64.5. All new laws passed support and encourage whistleblowers, and the laws are consistent, clear and cohesive;
 - 64.6. Whistleblowers are legally protected when they speak out in the public interest; and
 - 64.7. The PDA is amended to fix its gaps.
65. With regard to the protection of sources, one of our main concerns is that this has not been codified in South African law beyond the freedom of the press guaranteed by the Bill of Rights. While there is strong jurisprudence affirming that the freedom of the press can cover the protection of sources,⁸¹ there remains the possibility of such cases being tested in the appeal courts. It would be preferable to have greater certainty in relation to this protection.

⁷⁹ Malunga “Whistle-Blowing in South Africa”.

⁸⁰ Razzano “Empowering Our Whistleblowers” 43.

⁸¹ *Bosasa Operation (Pty) Ltd v Basson and Another* 2013 (2) SA 570 (GSJ) and *South African Broadcasting Corporation v Avusa Limited and Another* 2010 (1) SA 280 (GSJ).

66. The South African Press Code, while of use to the context in which it operates, has limited application outside the scope of jurisdiction of the Press Ombudsman.

Conclusion

67. South Africa has some progressive legislation aimed at eliminating corruption and protecting whistleblowers. However, the current framework of legislation is inadequate both in the ambit of its protection and the practical application thereof. Transparency International recommends a “*single comprehensive legal framework for whistleblower protection*”,⁸² which we would endorse both in relation to whistleblowers and sources. South Africa is marred with paradoxes when it comes to whistleblower and source protection as it is simultaneously amending the PDA to increase the protection offered to whistleblowers, while enacting POSIB which can be used to stifle and punish whistle-blowers speaking against the state.

68. We thank you for the opportunity to make this submission. Please feel free to contact us at avani@lrc.org.za should you have any questions or require any clarifications on what has been set out above. We note that we have no objection to this submission being placed on the website or reference being made to it.

**CONSTITUTIONAL LITIGATION UNIT
LEGAL RESOURCES CENTRE
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⁸² Transparency International *Alternative to Silence: Whistleblowing in 10 European Countries* (2009) Germany: Transparency International 23.