

HEROES UNDER FIRE



SOUTH AFRICAN WHISTLEBLOWER STORIES

OPEN DEMOCRACY
ADVICE CENTRE
TRANSPARENCY IN ACTION



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ABSTRACT

When we consider the actual experiences of citizens who blow the whistle in South Africa, it becomes clear that the ambitious constitutional principles that promote transparency are not enough to create a safe environment for those that speak out on wrongdoing. Whistleblowers in South Africa make decisions to blow the whistle based on their strong desire for justice, but because of these acts can become isolated and vulnerable. While their stories should be read and considered as a way of acknowledging these often silenced voices, as an organization the Open Democracy Advice Centre has also been able to use these narratives to identify the key policy and legislative changes necessary to make the environment better for them.

These are the stories of whistleblowers. They are all unique, but similarities emerge that paint a picture of struggle and adversity for people seeking to do the right thing in the public interest. They are stories that have to be heard if we want to make real changes to the South African environment that can lead to improvements for the lived experience of whistleblowers.

The Open Democracy Advice Centre has been providing support directly, and indirectly through policy interventions, to whistleblowers since 2000. But in spite of this, and what is at least a 'good on paper' legislative landscape, the reality of whistleblowing in South Africa is that it can be a high-risk act with a variety of negative and long-lasting challenges for the lives of the whistleblower.

This study comes at a fundamentally important time. In 2014 substantial amendments were proposed to the current law that aims to protect whistleblowers: The Protected Disclosures Act 2 of 2000. But looking at these amendments in the context of the lived experience of our whistleblowers, we are faced with a number of questions, which need answering:

- 1. Are these amendments enough to protect whistleblowers?**
- 2. If not, what amendments could be made to the law, and the environment, considering the lived experience of the whistleblower?**
- 3. Given the reality for whistleblowers, what can be done to promote whistleblowing?**

CASE STUDIES

ODAC approached several whistleblowers to discuss their experience. We did not focus only on the factual background to each case and the legal challenges, but also on the lived experience of actually blowing the whistle, in order to provide a fresh perspective on the problems experienced. Their stories are described through quotes, their own writing and narrative.

These are the stories of whistleblowers. They are all unique, but similarities emerge that paint a picture of struggle and adversity for people seeking to do the right thing in the public interest.

DR PAUL THERON

Dr Theron's story tells us how simple acts taken by public sector employees to try and improve the lives of citizens they serve, can be met with opposition by employers.

HIS STORY

Dr Theron was an employee of the Department of Health, delivering health care services within Pollsmoor prison. Dr. Theron's was suspended in 2007 after he disclosed the poor state of the healthcare system in the facility to Parliament and the Inspecting Judge for Prisons. The then Minister of Correctional Services then sued him for defamation, although those charges were eventually dropped.

ODAC assisted Dr Theron in his quest for reinstatement, though he had struggled for some time to find any organization that would be able

to help him take on his case. Even after he obtained a court order allowing him to return to his post, guards at the prison physically blocked his attempts to re-enter the premises.

A resulting parliamentary committee confirmed his complaints, but even after a long and expensive battle in the Labour Court he was never reinstated at his post at Pollsmoor. He remains a strong promoter of the reform of prison conditions in South Africa, but has been deprived of continuing his dedicated services to the Pollsmoor he had treated so well.

READING IN

In considering Dr. Theron's story, the negative response of the employer is notable. Instead of focusing on the story he was telling, and addressing those concerns, he was the focus of the employer's response. His efforts to stay in his position were also time consuming and expensive. With no access to legal aid, he would not have been able to fight his case without the assistance of a public interest law clinic. In contrast, the state had immense capacity – and employed the State Attorney and private advocates to pursue their case.

If a whistleblower is only advised of a possible claim under the PDA at the Labour Court stage, it may be too late to be of full assistance. Trade union legal advisors are often versed in the Labour Relations Act, but don't know the provisions of the PDA. They again want to keep cases in the CCMA, and advise against raising occupational detriment issues for that reason. The continuing struggle to

find legal support as a whistleblower – throughout the whole of the whistleblowing process – is strongly present.

Dr. Theron's story also reflects the variety of threats he faced – from his suspension, to the threats of defamation, etc. His story describes the full arsenal of acts of victimization that can be meted out by a powerful institution against a whistleblower.

His position as an employee of the Department of Health, but seconded to the Department of Correctional Services, created some confusion as to his legal position. Was the occupational detriment actually perpetrated by the employer, if the employer was the Department of Health? The Court determined that Correctional Services fell into the definition of employer. Without legal representation he would have been in a difficult position.

“The Law is nowhere near meeting this Lawlessness”.

- Dr. Paul Theron

LESSONS LEARNED

Perhaps one of the clearest issues emerging from Dr. Theron’s story is the difficulty in trying to source support for whistleblowers, and also the difficulty in understanding, and seeking to apply, the legislative protections that are available. There is little specialized assistance available to people like him, and useful advice is hard to come by. This just makes the whistleblower feel even lonelier.

Dr. Theron articulates well that the power of large institutions means that victimization occurs in a variety of ways that leaves a whistleblower feeling assaulted from all sides:¹

“It was easy to predict that there was going to be a severe reaction from the Authorities to my disclosures to Parliament and the Inspecting Judge. Much worse were the actual inspections of Pollsmoor by the Judge and Parliament. Worst of all was the small, negative article in the press by the Portfolio Committee of Parliament. Then, in quick succession, my Head Nurse was suspended; I was charged with libel and intimidated by the Minister of Correctional Services (together with and some 30 senior staff of DCS); I was suspended by the Department of Health; I was charged with reporting to the Inspecting Judge and Parliament and faced with dismissal.”

LOOKING TO CHANGES IN THE LAW

Though it is perhaps worth discussing later in the analysis of the case studies, it is worth noting that the proposed amendments to the Protected Disclosures Act (“PDA Amendments”) look to extend its current protection to include civil and criminal liability, as well. When institutions are able to access apparently unlimited resources to threaten whistleblowers with civil claims (such as defamation), protecting whistleblowers from civil and criminal liability provides a direct counter to this risk for whistleblowers. Dr Theron’s story demonstrates the particular vulnerability of whistleblowers that work in the public sector and for large companies.

Dr. Theron experienced serious difficulties in determining whether or not he in fact constituted a whistleblower in terms of the PDA – and while the PDA Amendments do propose a broadening of scope to include temporary workers – the problem

appears broader than that. This is supported by the case of Dr. Brown described later, who in fact felt unable to identify as a whistleblower. So, the problem becomes – who do we consider a whistleblower? If this is broader than the definitions in the law, how do we protect those who fall outside the protection?

And even if you are ‘covered’ by the law, and have found legal assistance to help you figure this out, the whistleblower can still have immense difficulty in accessing the protections available. Direct assistance is required – which means creating a strong, informed and consolidated network of civil society and state actors that can be called upon to assist whistleblowers. We need to be able to extend the sources of support for whistleblowers to seek protection, given the wide range of vulnerabilities they experience.

¹ These experiences echo strongly those of Clinton Redman discussed later on.

IMRAAHN ISMAIL-MUKADDAM

Imraahn's now famous role in exposing price fixing in relation to bread by the country's biggest suppliers shows how one person's brave actions can have significant benefits for a broad range of citizens.

HIS STORY ³

In 2006 Mr Ismail-Mukaddam, a shopkeeper and independent bread distributor, complained (with COSATU) to the Competition Commission about collusion in the baking industry.

His allegation of collusion arose when bakers collectively decided to reduce the discount offered to distributors. As a result of his charges, the Competition Tribunal found Pioneer Foods, Tiger Brands and Foodcorp guilty of breaching the

Competition Act – the eventual fine ordered being for over R90 million.

In spite of the importance of this disclosure, his business eventually failed after producers began withdrawing their business. He now works on a variety of consumer fairness issues and continues to pursue justice on behalf of the public good – but he has suffered personal and emotional setbacks because of his actions.

READING IN

A strong message, clear from the variety of the forums in which Mr. Ismail-Mukaddam's reflects, is the manner in which his act of disclosure has taken over many aspects of his life. In order to vindicate himself, the pursuit of justice in relation to his

disclosure has become a full-time occupation. To call it one 'act' of whistleblowing does not explain the lengthy investment and persistence required by the whistleblower to obtain justice.

...their act of disclosure
becomes a full-time
crusade and pursuit of
what is fair.

“The role of each individual in society is to hold society to account...taking forward the struggle for democracy.”² - Imraahn Ismail-Mukkadam

LESSONS LEARNED

The long-term effect of his whistleblowing has led to Mr. Ismail Mukaddam losing his business. Most importantly, his case demonstrates that for many whistleblowers faced with seemingly unending obstacles, their act of disclosure

becomes a full-time crusade and pursuit of what is fair. How can we create an environment conducive to whistleblowing in the face of such challenges?

As a result of his charges, the Competition Tribunal found Pioneer Foods, Tiger Brands and Foodcorp guilty of breaching the Competition Act – the eventual fine ordered being for over R90 million.

LOOKING TO CHANGES IN THE LAW

The extension of the PDA Amendments protection of liability from civil action is of course of assistance in seeking to prevent the varied nature by which victimization can occur. However, Mr. Ismail-Mukkadam himself notes the need to provide assistance to whistleblowers to return the

to their 'status quo'. There is little within the PDA Amendments, which can facilitate this. There is also very little in terms of other possible South African laws that might do this. We can thus see a big gap beginning to emerge.

² Kretzmann (2012).

MOSES PHAKWE

(TOLD BY TLHOLO PHAKWE)

It is a disturbing reality that the physical safety of whistleblowers is at risk in South Africa. Tlholo Phakwe recounts the story of his father, who was assassinated because of his attempts to blow the whistle. The full, and powerful, statement is attached as Appendix B.

HIS STORY

On 14 March 2009 Moss Phakwe, a whistleblower, was assassinated. Phakwe's body was found slumped over the steering wheel of his car in his driveway with two bullet wounds.

Tlholo Phakwe provides a brave, and detailed, account of the impact his assassination had on the family.

Moses was an ANC municipal councillor, who had attempted to expose corruption in the Municipality. He and a colleague Alfred Motsi raised their concerns through a variety of political channels within the ANC in the belief action would eventually be taken. They delivered evidence to ANC secretary-general Gwede Mantashe and to the Office of the President then run by Kgalema Motlanthe.

Another meeting took place with Shiceka in Rustenburg, attended by Phakwe, Motsi and Wolmarans on March 12, 2009. Phakwe had spoken last and handed his dossier to Shiceka. Before he did so, he had looked at Womarans and said: "Hate me, but don't hurt me."

Two days later, early in the evening of 13 March, 2009 Phakwe's body was found slumped over the steering wheel of his car with two bullet wounds.

Matthew Wolmarans and his former bodyguard, Enoch Matshaba, were arrested, charged and sentenced with his murder. The dossier Moses had consolidated had gone missing, but was found in the home of former Intelligence boss Richard Mdluli.

READING IN

The content for Mr. Phakwe's story is provided for by his son, Tlholo.

His portrayal of the nature of his father's disclosure highlights the physical vulnerability of those blowing the whistle. Importantly, he notes that the victimization of whistleblowers results not only in losses for the direct family of the whistleblower, but also in broader social damage to the whistleblower's community.

For the Phakwe family, there is still no sense of resolution. The family experience immense frustration in their lack of voice and the inability of the political structures to answer their questions. Some members of the ruling party express a preference for issues to be raised internally within the party, and it is clear that these creates an environment all the more difficult for whistleblowers to access broader support.

“My father was a brave man to do what he did.”

- Tlholo Phakwe

LESSONS LEARNED

While whistleblowing is the act in most cases of an individual, the negative impacts associated with a disclosure can impact families, and even communities. Those who support whistleblowers must have a realistic perspective of the consequences of whistleblowing, in order to properly advise on disclosures, and advance broad protections.

The story also highlights an important issue – which is very difficult to regulate but must be noted – and that is that the failure to protect whistleblowers, which may even lead to death of whistleblowers, can result in a direct loss of legitimacy for the state.

LOOKING TO CHANGES IN THE LAW

The PDA Amendments making it a positive obligation to both institute complaints procedures, and investigate complaints, is a vital amendment for ensuring action is taken on internal disclosures – which is a fundamental stage at which whistleblowers first become frustrated. Further, the lack of adequate internal procedures forces public disclosures – which could make the whistleblower more in danger from action being taken in retribution. As Tlholo noted:

“Several attempts were made by my father and other comrades to expose corruption but it all felt on deaf ears”.

The PDA Amendments fail to provide any enhanced protections in terms of physical security – this is a significant weakness.

The family of Mr. Phakwe, and those like them, need a stage to be able to voice their ongoing sense of injustice, and concern for other whistleblowers. This highlights the need for a strong network of capacitated organisations to help take up their cause.

...the victimization of whistleblowers results not only in losses for the direct family of the whistleblower, but also in broader social damage to the whistleblower’s community.

MIKE TSHISHONGA

Mr Tshishonga's story began as an attempt to root out corruption that was plaguing the South African justice system in relation to liquidations. It demonstrates though how the act of blowing the whistle can affect all aspects of whistleblowers life, including having direct consequences for their family.

HIS STORY

In 2003, while working in the Master's Office of the Department of Justice, Mike Tshishonga attempted to make disclosures internally, which related to incidences of corruption and nepotism he had uncovered. He had become aware of gross and consistent abuses of liquidations – which were an obvious contradiction to the fairness required within the justice system.

However, there was no adequate action taken on his allegations – and he eventually made his claims more broadly within the media, which included allegations against the then Minister of Justice Penuell Maduna. He was suspended from his job two months later, and was forced to fight his unfair suspension in the Labour Court. Eventually, a settlement was reached – but only after significant hardship was experienced by both Mike and his family.

READING IN

Similarly to many of the other whistleblowers, it becomes clear from Mr. Tshishonga's content that the pursuit of justice in relation to his victimisation continues to play a significant role in his life. He has written and spoken in a variety of forums on the subject. It appears as if he has had to become fully submerged in the world of whistleblowing in order to champion his own cause in the face of hardship. He has since become active in party politics.

His language reflects the frustration at not only a lack of adequate legislative protections being available, but also a failure to adequately implement those protections that are available. These weaknesses demonstrate to him that the law is not able to in fact encourage disclosure. As he notes:

"There is no political will to root out corruption. In the public sector the Prevention of Corrupt Activities Act makes it compulsory for state employees to disclose corruption in the public service to the police yet the police are unaware of the Prevention of Corrupt Activities Act and unaware of what to do with disclosures".⁴

He also speaks of the sense of duty felt by whistleblowers (in a sense reinforced by his quote above). Most interestingly, his story is supplemented by a public interview completed by his wife – which adds depth of understanding to the impact of disclosures on a whistleblowers' entire family. The pursuit of justice for a whistleblower becomes a path for trying to validate, too, the extreme difficulties experienced for the whistleblowers loved ones as a result of their personal crusades.

“There is no political will to root out corruption”.

- Mike Tshishonga

LESSONS LEARNED

The full impact of potential disclosures on the life of a whistleblower is well reflected in the impact that whistleblowing has had on Mr. Tshishonga’s whole family. Though a whistleblower undertakes a personal and difficult moral decision to pursue the act of disclosure, this act can have a devastating affect not only upon the whistleblower. As his wife Cecilia noted:

*“It was very short notice, the kind of situation where you couldn’t even say no. **Mike was resolute, his mind was made up.** There was no turning back” [Emphasis added].*

The disclosure placed enormous pressure on his personal relationships; demonstrating that whistleblowing not only has an employment impact, but a social and personal impact as well. It also

brings into question the physical security of the whistleblowers family – and not just their own person. This raises a very important concern: if physical security cannot be assured, shouldn’t the PDA expressly allow for confidential disclosures? While high profile cases like that of Mr. Tshishonga lend credence to the position of whistleblowers more broadly, it does also highlight the stigma which whistleblowers are forced to confront after disclosure.

Mr. Tshishonga also directly addresses the issue of political will in combatting corruption. Legislative systems instituted to combat corruption mean nothing without the political will to implement them properly.

LOOKING TO CHANGES IN THE LAW

The fact that his internal disclosures were not adequately addressed, supports the call proposed by the current PDA Amendments, which include a positive obligation to acknowledge and investigate the complaints of a whistleblower.

As noted though, the scope of the PDA Amendments has only extended to the nature of employment of the discloser. While protections then expand to civil and criminal liability, there is an obvious gap in relation to the threats posed directly to the whistleblower’s family. This is of course because the PDA is an employment protection. But how can the environment for whistleblowers adequately be provided for, when there are genuine concerns about physical safety of whistleblowers? In looking at Mr. Tshishonga’s own analysis of the environment, he speaks directly to the need for legislative cohesion: there are a variety of laws which might be useful, but they do not seem to be working effectively all together. There seems incongruity in the patchwork attempts

to combat corruption – which in turn results in patchwork attempts to encourage whistleblowing.

A strong network of informed civil society and government actors would go some way to both promoting the cause of the whistleblower – but also to providing guidance on a cohesive legislative environment. Importantly, there is difficulty in trying to encourage political will to combat corruption only through legislative change – and a network would at least provide an avenue for targeted advocacy that encourages whistleblowing in a manner, which removes the stigma sometimes associated with disclosures. The isolated voice of whistleblowers means it is exceptionally difficult for them to change the negative perception of their disclosures that result from the ‘smear’ campaigns often pursued by institutions in the face of a disclosure. Again, this is particularly threatening when the institution in question is a public institution.

TAKALANI MURATHI

A strong and focused man, Mr Murathi's story demonstrates that when corruption is rife within a public institution a common response to a disclosure is attempting to hush the problem up, rather than confront it.

HIS STORY

Takalani Murathi worked as a Senior Manager in Supply Chain for MERSETA (Manufacturing and Engineering Seta). He raised concerns about irregularities in their tender process, and other financial irregularities concerning the CEO of the Seta with the Special Investigating Unit.

As a consequence, he was suspended pending an investigation into misconduct. Then, in May 2014, he was charged with misconduct. He

referred a matter to the Labour Court and asked the chairperson of the Disciplinary Hearing to stay the disciplinary hearing pending the outcome of the Labour Court. The Chairperson has stayed the Disciplinary Hearing until 31 October 2014, stating that the hearing will continue then unless the court grants him an interdict.

Not only are access to justice issues present because of the cost barrier, but they discourage whistleblowers from taking action given their convoluted process.

READING IN

When telling his story, Mr. Murathi presents an account of the frustration of working within institutions where corruption seems embedded into the very fabric of all the systems. In the face of such a pervasive unfairness, the whistleblower is confronted with an insurmountable barrier if their

own moral beliefs cannot support corrupt acts. While Mr. Murathi presents himself as unaffected, he also demonstrates a consistent and unwavering belief in what is morally right as the source for maintaining his energy to pursue his matter.

LESSONS LEARNED

Mr. Murathi's story results in his specific call for an independent body to be established which investigates the disclosures. This demonstrates how whistleblowers feel unable to see legitimate recourse for internally made disclosures.

Mr. Murathi's story also reveals the difficult path for labour disputes through the standard legal

challenges. Not only are access to justice issues present because of the cost barrier, but they discourage whistleblowers from taking action given their convoluted process. It is very difficult for whistleblowers to successfully undertake these forms of action individually – they require both technical, and emotional, support from civil society partners.

LOOKING TO CHANGES IN THE LAW

Expanding on Mr. Murathi's experience, the lack of an adequate independent body seems directly a problem of the law.

The PDA only permits disclosures, under an elevated burden of proof, to two investigative agencies, namely the Public Protector and the Auditor-General. Section 8 of the PDA does indicate that other bodies may be prescribed by regulation. However, as pointed out by the SALRC in 2007, to date no regulations have been issued in terms of the PDA and consequently the list of

qualified recipients remains limited to the Public Protector and Auditor-General.⁵

No institution is identified in the legislation as being the institution that can monitor compliance with the legislation, and ensure that the guidelines and law can be updated. Such an institution could be responsible for a Code of Good Practice, which can provide guidance to private and public bodies on interpretations of the law, implementation of whistleblowing policies, and alternative mechanisms for preventing corruption.

...corruption seems embedded
into the very fabric of all the
systems.

⁵ Protected Disclosures Act, s. 8.

XOLA BANISI

(TOLD BY BERNARD BANISI)

Xola Banisi is another South African whistleblower that lost his life as a result of his brave acts. The account of his story by his family reveals how the abuse of whistleblowers threatens the social fabric of whole communities, and not just individuals.

HIS STORY

Xola Banisi was gunned down in September 2014, after approaching the Hawks and the Public Protector about corruption in relation to two tenders at Bloem Water.

Mr. Banisi worked in the human resources department of Bloem Water and was a member of SAMWU (South African Municipal Workers Union). After trying to raise his concerns about corruption through several avenues, it appeared SAMWU had been trying to investigate and assist him

in relation to the claims. However, he reported receiving death threats and had reported these to the police.

After raising his concerns internally, he had been sidelined at work and transferred to another department. He continued his crusade, but struggled to see results from his disclosures. At the time of writing no arrests had been made in relation to his murder.

READING IN

Mr. Banisi's brother, Bernard, expresses the loss for the family, which has been amplified by the lack of justice and resolution. When a whistleblower is forced to approach a variety of actors to try and find support – and all of them fail – there is the added terror that there is also a broad spectrum of suspects in relation to his murder. Bernard makes it clear that the threat of harm continues to exist for Mr. Banisi's entire family, and the slow passage of justice amplifies their fear.

Bernard, in speaking about the loss of his brother, focused heavily on the political history of the entire family. His uncle was political prisoner on Robben Island. As he stated in a group discussion:

“My uncle told us that on the Island, his fellow prisoners found themselves disorganised. They decided to organise themselves. When he was

deported to Mdantsane, his comrades decided to use a trick learned from the Island. They learned that they must control the island, and not let the island control them...When my nephew asked me what to do [about the corruption he had identified] I told him that the old man, our uncle, said we are living in a world where you have to choose. You tell the truth for your own comfort or you lie for your own benefit. You then choose.”

Cultural influences gave Mr. Banisi a strong sense of what is morally right – but, when justice fails, it creates a crisis of faith for the entire community. There is a severe impact on the social and cultural fabric when a whistleblower is killed or mistreated, as it cuts through shared value systems.

“He was a voice where there was no voice. He was a lone voice. Nobody protected him. There are many people who want to blow the whistle but they are scared”. - Bernard Banisi

LESSONS LEARNED

When considering how to encourage whistleblowing, we must consider the impact crimes against whistleblowers have on the social fabric.

Mr. Banisi's case demonstrates too the strong role trade unions have to play in encouraging whistleblowing – and have to be incorporated

into considerations of establishing a broad network of support for those wishing to make protected disclosures. This is something ODAC itself recognised when in 2014 we published a guide to assist trade union's in this role called "Whistleblowing Manual: A guide for shopstewards to the Protected Disclosures Act".⁶

“...we are living in a world where you have to choose. You tell the truth for your own comfort or you lie for your own benefit. You then choose.”

⁵ Protected Disclosures Act, s. 8.

SEGO SIBAMBATO

Ms. Sibambato used a variety of legal avenues and tools to try and protect herself after disclosing information on corruption in a public institution, but her struggles continue.

HER STORY

Segomoco Sibambato was a manager at the Transport, Education and Training Authority. She was dismissed after raising concerns that her CEO had flouted procurement procedures.

A later investigation by the TETA Internal Auditors vindicated her claims, and demonstrated significant irregular expenditure – yet she was never reinstated to her position.

After approaching ODAC, Segomoco attained a copy of the report which vindicated her using the Promotion of Access to Information Act in the hopes it would assist in approaching the Labour Court – but the road to recourse is proving to be a long one and was continuing at time of publication.

This case highlights the need for whistleblowers to be kept informed of the actions taken in relation to their case

READING IN

Similarly to other whistleblowers that have expressed their stories, there is a formality and detail in the tone by which she explains her experience that demonstrates her long-term struggle in trying to seek adequate justice. The formality in a sense reveals how often she has had to recount the details of her disclosure – also implicating the difficulties she has had in sourcing assistance.

Again, she has had to devote significant energy into her pursuit of justice, stating:

“It would appear to me that the harsh reality is that vested interests usually triumph and the

*devastating effects on the whistle blower and their family particularly my children, perhaps the most painful aspect for most whistle blowers it often seem like there is no end to the story. **The various forms of the harassment never stop**”* [Emphasis added].

Her last sentence also reiterates the point that a disclosure is a long-term act – with consequences continuing far beyond the immediate period of disclosure. She has noted the impact her disclosure has had on her family life – distracting her and making it difficult for her to provide for her children.

“The various forms of the harassment never stop”.

- Sego Sibambato

LESSONS LEARNED

Ms. Sibambato experienced a continuing run around when she attempted to seek assistance even after her disclosure was made internally. She notes:

“In February 2011, I addressed my concerns to the National Anti-Corruption Hotline for the Public Service where I was subsequently during a follow up...informed that the matter was referred to Department of Labour.

When I enquired with the Depart of Labour, I was informed that the matter was referred back to the National Anti-Corruption, and then later to Public Protector Office in Pretoria. When I approached

the Public Protector’s office, I was informed that they do not have any record of the complaint.

I then out of frustration in March 2011, escalated the matter higher to the level of the Political Head and Executive Authority of SETAs, the Department of Higher Education”.

One positive lesson, however, is demonstrated by the effective relationship between access to information and justice. Ms. Sibambato, through ODAC, was able to successfully use the Promotion of Access to Information Act 2 of 2000 to gain direct access to the report, which vindicated her claims.

LOOKING TO CHANGES IN THE LAW

This case highlights the need for whistleblowers to be kept informed of the actions taken in relation to their case, as is proposed in the current PDA Amendments. This eases the frustration and alienation they experience, and increases their faith in the implementation of PDA systems.

In the case of Ms. Sibambato, she noted the need to advance implementation (assisted in part by an

invigorated whistleblowers network). Vitaly she specifically noted the need to:

- “...support, respect and not politicize the Public Protector’s office;
- blacklist corrupt public servant; [and]
- provide specific training and education to support the fraud hotline staff, ordinary staff and the institution boards”.

...disclosure is a long-term act – with consequences continuing far beyond the immediate period of disclosure.

CLINTON REDMAN

Clinton Redman's revelations about the gambling board show how even significant public exposure may not be enough to ensure proper recourse after corruption is uncovered.

HIS STORY

Clinton Redman was a Compliance Licensing Official at the Eastern Cape gambling board. He revealed irregularities in the appointment of the Chief Executive Officer, but these revelations resulted in him being forced to leave his job. While an investigation was instituted in 2013 by the Public Protector, which then confirmed his claims, the CEO remained in his position. The support of the Public Protector continued, even after Clinton was forced to resign.

Clinton has suffered direct and severe financial consequences after the loss of his job, exacerbated by his continuing battle with authorities. His resignation followed threats he received about disciplinary proceedings against him in 2010 on the accusation of 'leaking' information to a local newspaper.

READING IN

In Clinton's accounts of his ordeal, a strong need materialises: the need to directly identify his victimiser's, and his quest to see them held liable for their mistreatment. Prevention of further abuse or detriment is not enough; he demonstrates the strong need for identifying the perpetrators so he can fully deal with his own mistreatment.

He also contextualizes well the decision-making process a whistleblower is forced to take when he states:

"Whistleblowing is extremely stressful as the whistle-blower must make the ethical decision to act in what they believe to be the best interests of the organisation while knowing that they will face occupational detriment and that this will affect

their families and that they will be 'responsible' for any detriment suffered by their families while equally believing themselves to have a duty to act in the best interest of the organisation concerned".

The rolling manner of the script by which Clinton reflects on his story, provides a real sense of the wavering confidence experienced by the whistleblower – the ethical and moral motivations which inspire a need to say something; countered by the frustrations and diminished convictions in the face of resistance and personal sacrifice. This experience links to the conditions noted by FAIR when they speak of a whistleblower's "decision of conscience".⁷

LESSONS LEARNED

The content of Clinton's story is able to shed light on the difficult decision-making a whistleblower undertakes. More practically, Clinton notes the dominant nature of the perpetrator. This is an important focus. Whistleblowers are victimised by individuals, but these are individuals who form part of an institution. As he notes, the nature of the 'institution' as your victimizer means that the entity that you seek retribution against has significantly

greater pooled assets than the whistleblower, as an individual. Further to this, though, is that institutional bullying against the whistleblower makes identifying the direct perpetrator of the bullying difficult. The perspective raises an important focus: how can the law appropriately sanction the victimising behavior after it has occurred?

Clinton has suffered direct and severe financial consequences...

LOOKING TO CHANGES IN THE LAW

Clinton's story adds depth to concerns about legislative gaps. The joint liability created by the PDA Amendments go some way to trying to individually sanction all the potential perpetrators of victimisation, but that liability is compensation for employment detriment. There is no direct offense created for the act of victimizing. This may require exploration through other legislative avenues.

Regardless, a positive obligation is at least created to ensure a disclosure is investigated. It is clear, though, that this would not be enough to remedy victimization experienced by a whistleblower after it has in fact occurred as a result of such disclosure. Instead, a criminal offence is created for the potential whistleblower who discloses false information without a concurrent criminalisation of either the false claims laid against the whistleblower, or as Clinton notes for victimising the whistleblower.

The assistance provided by the Public Protector in this instance is noteworthy. It supports the call to have an efficient network of a variety of actors that can be turned to lend support to the potential whistleblower.

There remains the issue of financial resources of the whistleblower and the direct financial consequences of undertaking a legitimate act of whistleblowing. It implicates the need to consider *qui tam* provisions (explored more in the analysis later), but also, to lift the cap off the current compensation framework under the PDA (which limits compensation to that as available under the Labour Relations Act). This lift on the cap of compensation becomes imperative when we begin to see the multi-faceted, and peculiarly impactful, way in which whistleblowers can be victimized.

DR. BASIL BROWN

Dr. Brown's story relates the frustration of well-intentioned public servants that try and make a system more effective, may nevertheless be met by resistance.

HIS STORY

Dr. Basil Brown's whistleblowing case related to incidences that arose in 2011. An employee of the Eastern Cape Department of Health (ECDOH), he and two other doctors held a media conference to bring light to a looming crisis within the Port Elizabeth Health Complex they believed to be resulting from the moratorium placed on the hiring of a new specialist. The newly commissioned Emergency & Accident (E&A) unit at Livingstone Hospital could not be commissioned because of insufficient numbers of medical and nursing staff to run the unit. As recounted by Dr. Brown, the department of Surgery subsequently made a public announcement to the effect that it was withdrawing its staff from the E&A unit and would no longer

take any responsibility for running the unit until additional staff was provided. However, Treasury's decision to withdraw funding in January 2012 meant no new staff could be appointed.

The three doctor's held the conference, when their repeated calls for help and assistance from a variety of agencies to intervene in the crisis fell on deaf ears. However, they were then threatened with disciplinary action for their attempts to draw attention to the emergency.

Dr. Brown's contract was suspended, which did result in financial loss.

Dr. Brown's complaints were continually ignored...

READING IN

Dr. Brown does not self-identify as a whistleblower, though his experiences echo the experiences of many whistleblowers in South Africa. He notes: *"I don't think that our action should be construed as whistle blowing in the sense that we did not expose wrongdoing as such but rather ineptitude and shortsightedness on the part of officials of the ECDOH".*

He provides a detailed breakdown of all the actions he took prior to the press conference,

which reflects on the repeated re-tellings whistleblowers are required to make when disclosing whistleblowing stories. From a personal perspective, it seems to reflect on the lack of support he felt when blowing the whistle on the original crisis. His incredible frustration at the various stages at which no action was taken is apparent.

[We exposed] ineptitude and shortsightedness”.

- Dr. Basil Brown

LESSONS LEARNED

An important lesson highlighted by Dr. Brown's case is the importance of the language used by those that victimize whistleblowers to dismiss their act. Dr. Brown notes that they were referred to as “ring leaders”, with the negative connotations of that message to the public being clear. The

power of institutions, and the breadth of their voice, means that the language used to refer to a whistleblower can significantly contribute to the stigma attached to whistleblowers by the public, but also other persons internal to the whistleblower's organisation.

LOOKING TO CHANGES IN THE LAW

Dr. Brown's complaints were continually ignored; this highlights the importance of the positive obligation to investigate disclosures contained in the new PDA Amendments.

His case also provides an interesting insight into the financial implications of whistleblowers.

While the proposal of qui tam provision to help assist whistleblowers that suffer financial loss is only addressed later, Dr. Brown's example demonstrates an exception to such provisions application. This will be reflected on in the analysis.

...they were then threatened
with disciplinary action for their
attempts to draw attention to the
emergency.

ROBERTA NATION

The case of Roberta Nation shows the difficulty of trying to expose corruption within an institution that is powerful, and the long path the normal legal channels might take when pursuing justice.

HER STORY

Roberta Nation worked for the State Security Agency's medical aid scheme, and reported on fraudulent activities made in relation to claims in 2010. Her claims, however, resulted in victimisation and harassment by her superiors.

This victimisation and harassment resulted in severe stress, and she was forced to take sick leave. While on sick leave, she was eventually dismissed. She had attempted to raise her grievances internally but, when these efforts were

frustrated, she was forced to seek help from legal counsel outside of the organization.

Ms. Nation had attempted to pursue the matter in court, but has been impeded by inaccurate affidavits submitted by the State Security Agency. A submission she made to the Office of the Inspector General has been awaiting a response since March 2014, and her attempts to approach the Joint Standing Committee on Intelligence have also yet to see any results.

READING IN

Reflecting on Ms. Nation's story, the extensive details reflect not only on her path being frustrated, but also the failure of a multiple of institutional agents to take responsibility for the disclosure.

The detailed manner, by which she describes the multiplicity of failings in dealing with her request, again highlights the need for whistleblowers to continually justify their disclosures – and repeat them over and over again to different agents, before seeing action taken. There is also a sense

of distrust in the agencies meant to provide assistance – which is an obvious result of the lack of action taken at all stages.

Ms. Nation was the victim of a variety of acts of victimisation, but is notably affected in particular by the actions taken to smear her name. Efforts by institutions to suppress corruption accusations often result in attempts to discredit the discloser – which adds to the sense of alienation and frustration experienced by the whistleblower.

Denial of access to information
can be yet another form of
victimization...

“I became [an] enemy of the State with nowhere to turn inside”

- Roberta Nation

LESSONS LEARNED

Institutional distrust from whistleblowers seems to be borne directly from the failure of to have the disclosures adequately investigated internally. Ms. Nation’s full description is attached as Appendix B to demonstrate the full scale of this experience. In spite of policies being in place, they were not implemented.

She demonstrates well the variety of threats that may be perpetrated against a whistleblower, such as: threats of civil suits; an over loading of work within the workplace; dismissal, etc. These also can have a variety of impacts on the individual; in Ms. Nation’s case, she suffered illness as a direct result of work-related stress.

Also noteworthy were the threats made through a letter from the State Security Agency to her and her attorney’s, ODAC, which inaccurately claimed she was violating the Protection of Information Act of 1982 – in spite of the fact she had been disclosing information under attorney-client privilege. The letter is attached as Appendix C.

Ms. Nation also importantly notes the intersection between access to information and whistleblowing – whistleblowers are an agent of access to information for the public on corruption, but also require access to information in order to properly ventilate their cases. Denial of access to information can be yet another form of victimization that a whistleblower can experience.

There is also a sense of distrust in the agencies meant to provide assistance...

LOOKING TO CHANGES IN THE LAW

Ms. Nation’s case supports the attempts in the PDA Amendments to positively oblige institution of policies, and investigation of disclosures.

However, her continuing legal problems again raise the question of costs – and probably more directly, the need to have the cap lifted on the compensation available under the PDA (currently capped to be consistent with compensation available under the Labour Relations Act), as

currently being considered through the PDA Amendments. This is necessitated by the extreme acts of victimization typically meted out against the whistleblower.

While the need for a strong network is highlighted by her difficulty in finding assistance – such a network would also be vital in ensuring a clarity of the roles of the different agencies and civil society actors for providing support to whistleblowers.

ANALYSIS

The case studies are of value in reading the learned experience of the whistleblower. It provides the whistleblowers with a channel to express their frustration and seek support, and provides us with direct evidence of possible steps we can take to both encourage whistleblowers, but also protect those who have already blown the whistle. ODAC will turn now to a more analytical consideration of the cases in order properly inform policy work.

...the failure of those in power to adequately care for – and encourage – whistleblower results in a diminution of the trust of citizens in the state. Whistleblowers in South Africa are heroes under fire...

Background

METHODOLOGY

This is an explorative and qualitative investigation into the lived experience of the whistleblower, with the analysis strongly supported by ODAC's ten years of experience in fighting for the rights of whistleblower. While there is some content analysis of the text and discourse used by whistleblowers in telling their story, there are limitations to using this as the only method of insight as some interviews were telephonic and not transcribed in detail.

This methodology was influenced by the work undertaken in 2013, which outlined the typical ordeal experienced by the whistleblower when seeking to make a disclosure⁸. When ODAC observed these typical experiences, their applicability to the South African context was noticeable – but it also helped to strongly highlight that the factual lived experience of a typical disclosure was not adequately met by the mere provision of labour protections. Though we will reflect on this through out the research, a summary of the eight stages can be summarised as⁹:

1. Awareness

At this point the whistleblower is first alerted to the difficulty and complexity of their situation.

2. Decision of conscience

The potential whistleblower is then forced to grapple with the decision as to how to move forward – they may at this point seek advice. This then becomes one of the first avenues for possible direct intervention with the whistleblower. Some may, at this point, chose to take no action at all.

3. Raising concerns internally

Many whistleblowers would then seek to try and raise their issue within their organisation, on the belief that action would be taken. The first might be to senior persons in their chain of command, and only after to those at the 'top' of the organisation.

This stage unfortunately sometimes has the consequence of lulling the whistleblower into the false belief that action is being taken, when in fact actions might be being taken to try and conceal the wrongdoing.

4. Facing initial reprisals

The whistleblower begins to experience negative feedback at work, such as receiving poor work reviews, or being moved to meaningless tasks, or being relocated. They might even just be told to their face that they have unnecessarily 'rocked the boat'.

More insidiously, they may be victims of 'smear campaigns' perpetrated by senior people to discredit and isolate them. There is also often a significant sense of being 'shunned', or ostracised within their work environment (and even social environment).

This is a period of significant difficulty and suffering for the whistleblower, who begins to feel despondent at their lack of recourse.

5. The decision to commit fully

Some people at this stage give up on the process. However, others might feel even more determined to take the matter further. They then would reassess how to move forward.

At this point, some may chose to move forward anonymously – such as through providing a leak to the media. This anonymity could allow them more time to investigate internally without experiencing discrimination.

⁸ Federal Accountability Initiative for Reform (1994).

⁹ We have taken this summary directly from our previous research, at Razzano (2014).

6. Going public and the consequences

Going public is often the step taken when the whistleblower feels nothing is being done about their complaint internally. However, this will usually escalate the detriments they have been exposed to so far. The smear campaign might be accelerated, and most often the credibility of the whistleblower will be the first thing that is attacked.

This also often means the whistleblower has only the media to represent their case, which can be an inconsistent storyteller and may not be motivated by the whistleblowers interests.

If the identity of the whistleblower was not known before this point, there will be accelerated attempts within the organisation implicated to now uncover them as the source.

7. The war of attrition

The position of the whistleblower is now becoming exceedingly difficult – the wrongdoers will often have significant financial support to assist them with legal advice, public relations concerns, and even possibly for intimidation. Conversely, the whistleblower is now often isolated and discredited, probably unemployed and slowly losing social support as well.

Unions may be an avenue for support here, though also may have reasons for not being able to fully assist the whistleblower in certain situations.

This can be a time of negative emotional consequences for the whistleblowers, with some experiencing severe effects such as depression or even, tragically, suicide. At this stage there are very few whistleblowers who are well equipped enough to deal with the demands of any associated legal process. They may not be able to even afford the associated legal fees.

If the transgressing organisation is a government, they may even abuse their power to prevent further disclosure – such as through the exploitation of concepts like 'national security'.

Documents may be shredded, and the whistleblower may even receive harassment from different government agents such as the police.

A whistleblower may even receive death threats, or have attempts taken on their lives.

8. The Endgame

Unfortunately, the wrongdoers often triumph at the end of the process rather than the normal whistleblower. Some may be successful and their reputations later restored to a degree, with recognition for their efforts.

Some may try and start a new life, in a new place, with a new job in an effort to keep the social impact to a minimum. However, many are damaged permanently in some way – even through psychological after effects such as depression. FAIR notes most importantly that the most painful aspect for most whistleblowers is that there:

“...is no end to the story. For most, the harassment in various forms never stops. Most are never vindicated: usually their allegations remain unproven or clouded in doubt and controversy. And most never receive justice: the problems that they sought to uncover are not corrected, and no-one is called to account”.¹⁰

This is tragically, and literally, confirmed by the very words of South African whistleblower Roberta Nation:

“...there is no end to the story. The various forms of the harassment never stop”.

CURRENT ENVIRONMENT

The main form of legislative protection for whistleblowers in South Africa is contained in the Protected Disclosures Act 2 of 2000. The Act currently provides protection for the employment of a person who is shown to make a 'protected disclosure' through the described processes. The law aims to:

- I. Create a culture that facilitates whistleblowing; and
- II. Promote the eradication of criminal and other irregular conduct in organs of state.

While there is no specific constitutional provision directed at whistleblowing, the general governance frameworks lend support, such as Section 9(1), which reads:

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

In addition, section 16(1)(b) provides:

Everyone has the right to freedom of expression, which includes freedom to receive or impart information or ideas.

Also, section 23(1) states:

Everyone has the right to fair labour practices.

CURRENT IDENTIFIED GAPS

In 2013-2014 ODAC expanded on its previous research to explore the current status of whistleblowing in South Africa. Through this work, we were able to identify a 7-Point Whistleblowing Test that summarises the key needs by which to assess the environment for whistleblowing in South Africa:¹¹

1. A Code of Good Practice is established which can provide guidance to private and public bodies on interpretations of the law, implementation of whistleblowing policies, and alternative mechanisms for preventing corruption.
2. A whistleblowing network of civil society organisations is established to assist with the provision of advice and support, awareness-raising, and parliamentary advocacy on whistleblowing issues.
3. Whistleblowers are actively encouraged to come forward through financial incentives, the provision of security, and other alternative mechanisms aimed directly at the needs of the different types of whistleblower.
4. The forums that exist for whistleblowers are implemented effectively, which includes the agencies charged to deal with whistleblowers.
5. All new laws passed support and encourage whistleblowers, rather than detract from any of their existing rights. Laws are consistent and the full spectrum of possible statutory protections made clear and cohesive.
6. Whistleblowers are protected from civil, criminal and administrative liability for legitimate public interest disclosures.
7. The Protected Disclosures Act is amended for maximum benefit by inter alia:
 - a.) Extending protection to independent contractors and former employees.
 - b.) Extending the number of agencies to whom a protected disclosure can be made as far as reasonably possible.
 - c.) Allowing for confidential disclosures.

- d.) Create positive obligations to create whistleblowing policies.
- e.) Create positive obligations for annual reporting on policies and actions taken in terms of policies.
- f.) Lifting the cap on compensation.

ODAC views these as the main, current gaps in the whistleblowing environment. However, two questions remain:

1. Do the direct experiences of our case studies confirm these gaps, or are there additional gaps to be noted?
2. Do the current Amendments proposed adequately deal with all concerns?

As can be seen from the test, there are amendments proposed directly to the PDA, but also suggestions on ways to create a supportive environment that will facilitate whistleblowing more broadly.

PDA AMENDMENTS

In June of 2014, proposed amendments to the PDA were published for comment by the Department of Justice. While the full Amendments can be viewed online¹², the core changes proposed presented some interesting developments. There are five main changes.

a) Extension of the scope of the Act to include workers

The definition of an employee has been extended to include workers and temporary employees (attempts are then made through out the Amendment Bill to make this consistent).

b) Joint liability

This provision has been included to extend liability to the client of an employer where applicable. So, in an instance where a client can be shown to have been exerting an influence over the employer to cause a whistleblower occupation detriment, they too can be held liable for that detriment.

c) Positive duty to investigate and keep whistleblower informed

This creates a duty on a person to whom a complaint has been made to take action on that complaint. The action is described as:

3B. Any person or body to whom a protected disclosure has been made in terms of section 6, 7 or 8, respectively, must —

- (a) in writing and within 14 days after the protected disclosure has been made acknowledge receipt of the disclosure and notify the employee or worker of the steps to be taken in order to investigate the matter and, where possible, the timeframe within which the investigation will be completed; and
- (b) investigate such disclosure or, where necessary, refer the disclosure to another person or body if that disclosure could be more appropriately investigated or dealt with by that other person or body and such other person or body must, upon referral of such disclosure, notify the employee or worker of the steps to be taken in order to investigate the matter and, where possible, the timeframe within which the investigation will be completed.

d) Positive obligation to create procedures

In terms of 6(2)(1), positive obligations are created on the employer to authorise appropriate internal procedures for receiving and dealing with information about improprieties (or disclosures), and then take reasonable steps to bring the internal procedures to the attention of employees.

e) Civil and criminal liability

A significant change has been proposed through the extension of the protection of liability. If an employee is shown to have made a protected disclosure, they are not merely protected from occupational detriment – but from any possible related civil and criminal liability as well.

f) Creation of an offence for knowingly transmitting false information

This new clause makes it an offence for an employee or worker to knowingly transmit false information (essentially, to lie) when making a disclosure.

APPLICATION OF CASE STUDIES

The specific experience, and feelings, of whistleblowers reveals that the act of whistleblowing has a significant variety of affects – that far outlast the timing of the actual disclosure. And our environmental scan has demonstrated the current laws and policies – which need to be tested fully for their efficacy in light of actual experience.

Attempts to directly discredit whistleblowers results in social stigma that negatively impact a whistleblowers life experience. The language used by those in power to describe whistleblowers does not assist this problem. As Dr. Paul Theron noted:

“...I had become a Dangerous Criminal rather than a whistle-blower.”

It is clear that, outside of mere legislative amendments, if whistleblowers are to be encouraged there must be significant activity devoted to improving the positive portrayal of whistleblowers and their actions. If we hope to improve the public perception of whistleblowers, those in positions of political power must be encouraged to carefully consider the language they use to describe these acts. This is particularly important when we consider that, as Tiholo Phakwe noted, the failure of those in power to adequately care for – and encourage – whistleblower results in a diminution of the trust of citizens in the state. Whistleblowers in South Africa are heroes under fire – and advocacy must be directly targeted to considering this reality.

Application to PDA Amendments

As we noted, there have been several Amendments proposed to the PDA. A close look at the actual experience of whistleblowers provides evidence for assessing whether these Amendments are enough to create a South African legislative environment that is conducive to whistleblowing.

The frequent refrain of whistleblowers of incredible frustrations, lends direct support to the call for the positive obligations to both institute whistleblowing policies – and also to investigate disclosures once made. These are clearly welcome and timely amendments to the law. However, given the incredible importance of these changes – there should concurrently be offence clauses instituted to make these positive obligations of any real affect, possibly through financial penalty for the failure to create procedures.

The PDA Amendments that require that a whistleblower remains informed of the action being taken on their disclosure may go a small way to meeting Mr. Murathi's concerns for an independent disclosure entity. While there are independent institutions for reporting different issues – such as the Auditor-General's Office or the Public Protector's Office - the different remit of these reporting structures are unclear, and it is apparent from these case studies that many do not find them accessible. There are clearly therefore still not enough agencies that a whistleblower can report to in a sequenced and simple manner. And once a PDA case reaches the courts, a whistleblower will need the technical support of a strong network of civil society actors.

The additional positive obligation to inform whistleblowers of the actions being taken goes some way to enhancing the perception of support and action so vital to ensuring that the whistleblower stays motivated to continue along the path of a disclosure. Access to information is absolutely essential to enhancing the efficacy and trust within such a procedure.

The extension of liability for civil and criminal actions is an important step to trying to combat the significant variety of actions that may be used to victimise a whistleblower. Claims of defamation, etc. are not uncommon in the case studies we have seen – and the financial power of institutions means that these claims may be easily abused to try and silence legitimate acts of disclosure.

The whistleblower stories reveal that the inability to see recourse against their perpetrator is an incredible frustration; a concern not fully addressed by the amendments. However, the introduction of joint liability for businesses encouraging victimisation is a step in the right direction. More offenses for those that violate the rights of whistleblowers in terms of the PDA must be created – which relates directly to the concerns about the scope of the positive obligations created above.

Remaining concerns

The current South African whistleblowing environment is clearly not fostering of proactive and considered protected disclosures. We have seen proposed Amendments, but there are shortcomings to those proposed. Further still – our whistleblower case studies demonstrate that there are other gaps in the environment, which remain from “**7-Point Whistleblowing Test**” described above.

Many gaps still remain when we consider the test, and this not only a result of the fact this test is a reflection on the broader environment for whistleblowers, and not the employment context only. Our case studies are able to demonstrate that there are still important amendments that remain specifically in relation to the PDA – and some amendments, which have to be spoken of immediately in order to ensure a sustainable environment for whistleblowers. As Dr. Theron aptly notes:

“The Law is nowhere near meeting this Lawlessness”.

A re-occurring theme is that whistleblowing becomes an almost full-time occupation for many – and there are significant financial costs for the whistleblower, and their family – both directly as a result of loss of employment, but then also arising from attempts to pursue recourse for their victimisation through legal channels. This directly implicates the need to lift the cap on the compensation available for whistleblowers through actions arising from the PDA. But further to this, the need for financial incentives must be explored

in the South African context. While ODAC has more detailed research available in this regard,¹³ the prospect of *qui tam*¹⁴ provisions would go along way to providing support to South African whistleblowers.

It is clear from the stories we have described, that it is not just gaps to the PDA that create a problem – it is also that the PDA itself is not actively promoted and properly operationalised. Whistleblowers are vulnerable when disclosing within their employment environment (which was the first path selected by most of those who elected to tell their stories): so must find ways of ensuring that what we do have works, while promoting changes and additions as well. An important step forward in this regard would be the development of a “Code of Good Practice”¹⁵ that could provide full and considered guidance to both private and public bodies on interpretations of the law, implementation of whistleblowing policies, and alternative mechanisms for preventing corruption.

It is worth noting here too that our case studies have contributed to revealing gaps in the usefulness of *qui tam* provisions as well. In cases where impropriety or incompetence is revealed – such as in the case of Dr. Basil Brown or Clinton Redman – there are no costs to be recovered that would be able to be the subject of an incentive scheme.

Physical security remains an immense concern for individual whistleblowers and their families, especially as we reflect on the tragic story of Moses Phakwe. Allowing for confidential disclosures to be made through the PDA would reduce the security risk for whistleblowers. And the establishment of a sound network of both government and civil society actors to assist whistleblowers would allow for a certain amount of additional support. But these concerns remain the most worrying – and difficult to combat without full political support for whistleblowers being demonstrated.

The current South African whistleblowing environment is clearly not fostering of proactive and considered protected disclosures.

¹³ Not currently available.

¹⁴ An example of *qui tam* provisions is seen in the American False Claims Act. The law seeks to encourage private citizens to act on behalf of the state in matters related to fraud. Thus, if citizens uncovered fraud, they could act on behalf of the state to recover money and would then receive a reward for ‘their troubles’. This led to The Dodd-Frank Wall Street Reform and Consumer Protection Act, signed into law in 2010 in the United States of America, which creates a version of financial incentives: a whistleblower can receive up to 30% of any fines, penalties or repayments of loss from their reporting (whilst also allowing whistleblowers to bypass internal mechanisms for reporting).

¹⁵ This has been a long-standing recommendation of ODAC, see for instance Martins

CONCLUSION

The experience of whistleblowers in South Africa is harrowing. We cannot move forward if these experiences are not given full consideration – and innovative solutions then explored to ensure a transparent South Africa that encourages citizens to blow the whistle safely, and effectively. The physical security of both whistleblowers and their families must be considered a national strategic priority. In order to create a sustainable environment for transparency, we also need a political and social change that speaks of whistleblowing as a positive act, taken by individuals as a demonstration of their commitment to the prosperity of their country. At the same time as the PDA Amendments are encouraged, there are further amendments which could be to that law – as well as the creation of a “Code of Good Practice” that can ensure what protections do exist in that law, can be fully operationalised within organisations. Further, in order for real social change to be ensured through various and creative intervention strategies, more must be done by the South African Parliament to explore the possibility, and applicability, of qui tam and financial incentive provisions in South African laws that can encourage acts of whistleblowing.

The physical security of both whistleblowers and their families must be considered a national strategic priority.

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APPENDIX A: ROBERTA NATION'S STORY

"Below is a summary of what happened in the workplace:

1. When I tried to voice my concerns to my managers regarding poor control measures in the system and submission of irregular claims by doctors, it was not taken seriously and I found that personal attacks were made against me by the Principal Officer.
2. I first went to Labour Relations to get advice and was told by the Labour Relations manager that I was hired to do a job and not to complain as the Principal officer has the right to do anything. I said according to the PFMA I have the right to report if I notice mismanagement or irregularities. The manager told me that the PFMA does not apply to me, as I am not an Auditor or in Finance. I stated that I was referring to the section in the PFMA that relates to "all officials" and was told that I should just do my job and if I am not happy, I should resign. I asked the Labour Relations manager how the Agency operates. I was excused.
3. Since then I was called into the office of the Principal officer a number of times where she made personal comments about me. In September 2010 I then lodged a formal grievance to the DDG: SSA who was the immediate supervisor of the Principal officer. Whilst waiting on a grievance meeting, there were other incidents that I then reported to the office manager of the DDG, expecting that these would be added to my grievance as ongoing incidents.
4. According to internal procedures they had 14 days to resolve the grievance but it took about a month and a half for our grievance meeting. The office manager of the DDG never included the other incidents I reported. In the grievance meeting, I was not given the opportunity to give the full story of where the problems started. All the issues in my grievance were not addressed.
5. In the grievance meeting, the Principal officer told lies about me and it was considered to be true. The DDG said that all Agency members are vetted and screened and therefore unethical behavior is not possible. It was concluded that me and the Principal officer have personal issues and we would have to mend relations. When I asked if there would be anyone to facilitate this, I was told we have to do it ourselves.
6. It worried me that the PO made false statements against my character so I did not accept the outcome of the grievance meeting. I then went to the Legal department to ask advice on what to do.
7. I was advised to write to the DG about the conduct of the PO and then to write a second letter to voice my concerns about the fraud. In my letter I asked to be moved to another department. That was in Dec 2010. My grievance was circulated between Labour, the DDG and the DG and nothing happened. I was left to remain in Oped while having problems with Mr Brown and the PO and then became ill.

8. In Dec 2010 I went to the OIGI (Office of the Inspector General of Intelligence) for advice. I was advised not to resign but to refer it to the minister as that's the correct procedure. I waited about 3 and a half months just to get the response from the minister that I should utilize the internal resources. What I noticed is that meetings were held with the PO and Mr Brown, but I was never called for any further meetings with anyone. Later I became too ill to do any further follow-ups on my grievance and I then turned to ODAC. At that time I was also hospitalized at Vista clinic. Back at work, I submitted the reports of the doctors to HR as well as the office of the PO. I was surprised that it was just ignored. I consulted with my doctors as out patient.

In 2011 ODAC received a response that they are looking for a suitable position for me, but that never happened. The new DG came (Dlomo). The only other meeting I had regarding problems at Opmmed was in March 2012 where the DG told me that moving me would mess up my career in the Agency as no one would want to touch me with a stick. I was told to stay at Opmmed and to wait for a suitable post to apply for.

At that stage my condition worsened and the doctor had to increase the dosage of my medication. At the same time the Opmmed management became more aggressive and Mr Brown told me that I don't want to work and am bringing down the moral of the other staff members. He would come into my office every time shouting that my performance is poor.

I was also given a new contract to sign (2012 until 2014) at Opmmed. I didn't want to sign it and was told that it will be reported to the HR manager and I will be charged with misconduct. That was around April 2012. After that I was off sick continuously until I was discharged in June 2012.

Where things went wrong"

1. I was never given a proper hearing when I lodged my grievance.
2. The Agency did not adhere to internal guidelines regarding the time-frames to resolve grievances.
3. When I reported other incidences, it was ignored, instead on viewing it as ongoing incidents.
4. The Agency does not have a platform where members can report fraud or irregularities. All the Internal security guys knew about my problem, but they could do nothing.
5. There is no Union or body to help members who are experiencing Labour related problems. (The staff council and staff representatives are not effective. They were involved in my case but couldn't do anything).
6. When I was dismissed, the Agency failed to follow the internal guidelines for dismissal.
7. The Agency made false claims in the affidavits in an effort to weaken my case.
8. I was not given proper representation. The time I had the meeting with the DG, I was notified about that meeting in the afternoon, the day before the meeting. I was not informed that it was with the PO to resolve the grievance. I was not provided with any minutes of the meeting. This lead to the denial of things said to me verbally (eg. that moving me would have a negative effect on my career).
9. The overall conduct of Labour Relations officials was very hostile and at the end it felt as though I became the enemy of the State with nowhere to turn inside.

APPENDIX B: TLHOLO PHAKWE'S STATEMENT

This statement was provided to ODAC during consultations with whistleblowers 18 November 2014. No edits have been made to the substance of the statement.

On the 14th March 2009, Moss Phakwe, my father, a former ANC councillor and union organiser in the North West town of Rustenburg, was gunned down in his car in his home driveway after putting up posters for the ANC in March 2009. This happened while he was campaigning for the 2009 National Elections in the North West Province in theregion.

Born and bred in the North West Province, Moss Phakwe was always at the forefront of every campaign of the African Nation Congress. He became active in politics after and during the forced removal in the 1980's.

Several attempts were made by my father Moss Phakwe and other comrades to expose corruption in the Rustenburg municipality, but they fell on deaf ears. What upsets me most about my father's story is how he desperately tried without success to expose alleged corruption in the municipalities. The corruption allegations were that of awarding of tenders to friends and allies of Wolmarans, the outsourcing of the Rustenburg...management, and the stealing of land and municipal vehicles.

The dossier was compiled by my father and other comrades namely, Alfred Motsi. They presented it to the party's regional and provincial leadership in North West without any effect. They then had a meeting with ANC heavyweights Siphwe Nyanda and Billy Masetlha. Nothing positive came from the efforts. Towards the end of 2008 they delivered their dossier to the offices of ANC secretary general Gumede Mantashe and the President Kgalema Motlanthe. After not receiving any response-again-they decided to approach Zuma himself and delivered their evidence to his Johannesburg home.

President Zuma invited them to his Nkandla homestead over the 2008 Christmas period. They addressed the president for almost the whole night to explain the case against Wolmarans.

They departed and a month later met Zuma, Motlanthe, Masetlha and other senior ANC Leaders in Potchefstroom. They again presented their dossier and were told that the case would be handled by Sicele Shiceka [the late former minister of Cooperative Governance and Traditional Affairs]. Eventually Moss Phakwe was offered the opportunity to address Shiceka at a meeting held in March 2009 in Rustenburg. He presented his dossier in the presence of the man he accused of corruption. Two days later, he was shot dead in cold blood. I believe he was shot by Enock Matshaba, the mayor's bodyguard.

Leaders who failed to act decisively against corruption failed my father who served in the African National Congress for many years. He was ambushed for his stance against corruption in the Rustenburg Municipality. I'm of the view that any sensitive information that my father had in his position (i.e. the dossier) could have been treated with the courtesy and sensitivity to safeguard his wellbeing and his life.

He became a target because he did not have a bodyguard. My father could have been assisted by his ANC that he loved dearly, and died for. I'm concerned with the silence on this matter. This clearly shows that some criminal elements within the revolutionary movement had failed my father.

This case has left my family in a devastating state of trauma. I can't explain the pain that comes along with my father's tragic story. This type of killing leaves families and society in total shock and further discourages communities in the whistleblowing and anti-corruption drive.

Political assassinations are on a rise in South Africa and communities are left without assertive leadership and ambassadors of development as they are gunned down in numbers. Emotionally, financially, socially we were badly affected because our father was our breadwinner and very supportive in his role as the head of the family.

It is clear that whistleblowing in our country is a very dangerous game: it leaves families without fathers and we definitely can't continue to have such situations in our country.

This case is so stressful to us as children as we took it upon ourselves to stand up and fight for the legacy of our brave father. Financially we are not coping with all that our father has left in his untimely death. I'm not afraid or sorry to say it's difficult. This is the most harrowing example of the breakdown of moral leadership in the ANC, a sad tale of the assassination of a man who gave his whole life and being part of the ANC movement. Here was a whistleblower who put his life literally on the line to give effect to President Zuma's plea in his 2009 State of Nation Address for citizens to report crime and assist the police with information to catch wrongdoers.

Apart from such challenges, society sees opulent life styles as promoted by corrupt activities as a shortcut to development and sustainable alternatives. Whilst all this is happening there are no proper gatekeepers to corruption and no system to protect whistle blowers.

Moss Phakwe's loyalty and bravery should unite us and not divide us.

As we draw examples and lessons learnt from political martyrs and other whistleblowers from Ken Sarowiwa [Nigerian Whistleblower] to the beheading of Denan Kemati of Kenya, testimonies can be drawn from the families of the challenges that followed after the death of their fathers and the support drawn from such initiatives as they impacted on community development and repositioning families in the path of reconciliation towards a better Africa

In South Africa families still struggle to make ends meet due to the nature of our democracy and to those who ascend to political power through palace politics that leaves families, with no regard to their sustainability.

I wish to say my expression of my views...in celebrating 20th year of democracy. Please allow me to say that my father died for an uncaring ANC. He was murdered by his rivals in the African National Congress, whom he had accused of corruption. Moss Phakwe's death has taken factional infighting in North West to a new level. Divisions continue to deepen, and struggles for the control of government resources are way out of hand.

I'm very disappointed with the reluctance of ANC at all levels because they dragged their feet. Officials in the ANC should have said something but they kept quiet and remained distant.

It is clear now that Moss was killed by criminal element within the ANC and people who call themselves comrades. This is a warning to the ANC: the restless spirit of Moss Phakwe will haunt this movement if it's leaders continue to keep silent on this matter and don't recognise his part/role in the struggle for liberation of our people. This is the man who led masses to the better future. The ANC has always been his life, future and his home. I've never known my father to be member of any other political party, his blood has

always been black, green and yellow and unfortunately he had to pay the price with his life serving the ANC.

As his family we remain committed to the principles, ethics and values our father bestowed upon us. Moss taught us that this movement was not found on a silver platter and that blood was shed by and comrades who never lived to see freedom they fought for. We are against political killings by individuals who want to be seen as messiahs of the revolutionary movement.

He was a true whistle blower who believed we could be better. This is an occasion, which allows us to voice out our frustrations when things are not accounted for and not transparent.

If ever the ANC needed a reason corruption should be dealt with by the criminal justice system and not through some comradely political solution behind closed doors- the dead body of Moss Phakwe is that reason.

I thank you.

APPENDIX C: STATE SECURITY LETTER

6-FEB-2012 10:19 FROM 0124274123

TO 00214613021

P.01/07



state security

State Security Agency
REPUBLIC OF SOUTH AFRICA

Private Bag X87, PRETORIA, 0001 NIA Headquarters, Musanda, Delmas Road, PRETORIA
Tel: (012) 427 4000, Fax: (012) 427 4651, www.nia.gov.za

SSA/DG01(HC11)/4/14/3

Office of the Director-General

06 February 2012

Alison Tilley
ODAC

Grievance: Ms RU Nation

1. Your letter titled *Robert Ursula Nation: Breach of the PROTECTED DISCLOSURES ACT 26 of 2000 ("PDA")* dated 16 September 2011, refers.
2. Your attention is drawn to Chapter XVII of the Intelligence Services Regulations, 2003, which regulates the formal grievance procedure available to members of the Civilian Intelligence Community. In terms of Paragraph 3(1) of the Regulation, a member may be represented by a fellow member of the Intelligence Services.
3. In the light of the fact that Ms Nation's grievance has not been finalised, I would be acting beyond the scope of the Regulation to engage you on the merits of her matter.
4. You are advised that your engagement with her on her grievance without the required security clearance may amount to a contravention of, amongst others, the Protection of Information Act, 1982 and the Intelligence Services Act, 2002. You are kindly requested to refrain from doing so until you have followed the correct procedures as prescribed by law.
5. Thank you for your attention.

Dennis T Dlomo
Acting Director-General



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