Whistleblowing as an Act of Bravery or Else: The Case of South Africa

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Abstract South Africa have lost hundreds of billions of rands to corruption in the last 20 years, according to the Institute for Accountability, and over R30-billion is stolen every year from the government coffers, through its tendering system.

Despite existing legislation protecting whistle-blowers, who are vital in the fight against corruption in South Africa, they are not protected by the state, its agencies and institutions.

In fact, the experience of whistle-blowers in South Africa abounds of cases of intimidation, threats, redundancies and death.

The present article that is based on primary and secondary documentary and other sources pinpoints the lack of innovation, transparency, accountability and honesty on the part of relevant state organs that are an impediment to the very fight against corruption.

The lack of measures, both legislative and regulatory that encourage citizens to become whistle-blowers without fear or favour is described as a key barrier to the fight against corruption.

The undeniable fact that the personal safety of both whistle-blowers and those close to them is not considered to be a national strategic necessity needs to be prioritized.

The creation of a corrupt-free sustainable and environment for transparency and accountability is based on a solid political will that will consider whistle-blowers as committed and dedicated patriots fighting for the betterment of their country and all its people, especially the most vulnerable sections.

On the other hand, it needs to be ensured by the state and its agencies that the existing protections need to be fully operationalised within organisations.

Further, the political leadership of the country, need to introduce various and creative intervention strategies, instrumental in exploring the possibility, and implementation of financial incentives in both future legislative and regulatory initiatives in South African laws that can encourage acts of whistleblowing.

Key words Whistle-blowing, South Africa, Financial incentives, Political will

1 Introduction

The international struggle against corruption can only be successful when those fighting against this scourge realise that the phenomenon is a problem with multiple causes and effects; a subject of legal, economic, political, psychological and sociological disciplines; it is in the main caused by cultural traits and socio-economic conditions, especially in developing countries, and rooted, determined and attributed to institutional, political, bureaucratic, economic, and social causes. The same is true of whistle-blowing.

Corruption in South Africa and its dire consequences has been covered substantially in a body of research work of the Anti-Corruption Centre for Education and Research of Stellenbosch University [ACCERUS](Mantzaris 2014; Pillay 2014) and despite the existence of comprehensive and wide ranging legislation against corruption and protection of whistle-blowers, empirical realities pinpoint to the ever-increasing cases of intimidation, threats, redundancies and death of "those who dare disclose the truth about corruption".

The article investigates aspects of corruption and whistleblowing in the South African civil service and identifies a number of social and political issues that can be described as a key barrier to the fight against corruption. These include physical security of both whistle-blowers and the lack of a corrupt-free environment based on transparency and accountability.

This is due to the fact that there is evidence of political will on the part of the political leadership of the country and higher echelon managers who, in fact, become the punishing agents of

whistle-blowers.

2 Definitions of whistle-blowing

Although there is no universally agreed upon definition of the concept whistle-blowing the one provided by Nearand Micelli (1985:4) in a seminal article is the most quoted in research and academic literature. They described whistle-blowing as "the disclosure by organisation members (former and current) of illegal, immoral and illegitimate practices under the control of their employees, to persons or organisations that may be able to effect action". This is a simple, yet comprehensive, definition, which in more ways than one was "beefed up" by OECD's (OECD 2000: 5 quoted in Mbatha) that went deeper in respect of key issues. It was described as raising a concern about malpractice within an organisation or through an independent structure associated with it, giving information (usually to the authorities) about illegal or underhand practices, exposing to the press a malpractice or cover-up in a business or government office.

3 The legislation

South Africa has relatively well developed legislation on whistleblowing, starting with country's Constitution, the Protected Disclosures Act 26 of 2000, the Labour Relations Act, and the Companies Act 71 of 2008. The Protected Disclosure Act, no. 26 of 2000 (PDA or The Whistle-blowing Act) is the key act protecting whistle- blowers. Within the context of the country's national anti-corruption terrain and its legal priorities the law is based on the principles of ethical behaviour, transparency and accountability as well as the protection of whistle-blowers.

It outlines key ways and procedures that protect employees who disclose an act of corruption in all its forms that has been committed by politicians, managers at all levels, employees and employers both in the public and private sectors. The use of the term "impropriety" in the act means "a wrongdoing" and anything criminal, illegal or unjust; anything endangering the health and safety of someone, any damage to the environment, any act of discrimination or an attempt to conceal the impropriety. Hence, the versatility and multi-purpose significance of the Act provides the potential whistle-blower with the chance to expose corruption, fraud or wrong-doing that occurred in the past, occurs at present and will occur the future , in South, Africa or elsewhere.

One of the weak points of the Act is that it only apples to employees and to employers but to no other group of people. In short the act clearly excludes "people outside the entity", in either sector, but only to employees in a permanent, temporary or casual position within the workplace (KwaZulu-Natal Provincial Treasury 2009: 7). In order for an employee to guarantee the protection of the PDA it is obligatory for him/her to follow a legally-bound route by making the disclosure to well defined person/ under the correct conditions. If the "correct route" is not utilised, the PDA does not protect the whistle-blower. In a reported 9 out of 10 cases, people suffered and were even dismissed simply because they did not follow the correct route (Levy 2010:5).

There are five routes:

- The "legal inquiry route" refers to a person's approach to a legal representative (e.g. a trade union representative or a lawyer) that is utilised by a whistle-blower when he/she seeks legal advice on how to make a disclosure in terms of PDA.
- The "normal organisational route" denotes the employee's following the procedures laid down by your employer in order to report act of corruption.
- The "political minister route" which is associated with producing evidence of corruption to a national minister or a provincial MEC can only be used in case where the employer is appointed by the minister or when the employer is responsible to the minister. It can be understood that this applies only to public sector employees.
- The "independent Chapter 9 route" denotes the reporting of corrupt acts to the auditor- general or the public protector. This route can be seen as applying only if the corrupt act take place in the public sector environment.
- The "final route" is associated with reporting to other persons or institutions such as the as the police, press or anti-corruption group and is followed in instances of very serious cases. These are

cases where the employee did report it to the employer before without appropriate actions or/and results/outcomes taking place, leading to the fear of harassment, punitive measures taken, and demotion or even retrenchment on the part of the employer against the employee (Le Roux, 2003:21).

It can be gauged that the three routes available to employees of any sector are the legal enquiry route, the normal route and the final route. The law dictates that whistle-blower acts against all disclosures must be "made in good faith", devoid of professional or personal vendettas or animosities, performance grievances, libels, innuendos and even lies, individual or professional motives. The whistle-blower must ascertain that the disclosure information is substantially true and well documented. This means that "office gossip and hearsay are not allowed to pass as" "hard evidence (Levy 2010: 6)." Although the whistle-blowing might lead to a claim for a legal reward on occasions, generally the disclosure does not lead to personal gain.

There is no protection for whistle-blowers producing disclosures in social media, but the act protects them even in the case of the existence of a possible confidentiality clause in employment contract, because the PDA overrides any confidentiality clause or agreement. The Act also protects potential whistle-blowers from what is described as "occupational detriment" that is punishment by the employer for an employee's anti-corruption disclosure.

It is stipulated that an employee who discloses corrupt, unethical or fraudulent acts cannot be disciplined, dismissed, suspended, demoted, harassed or intimidated or transferred against his/her will, refused a transfer or promotion or subjected to a condition of work or retirement that is changed to his her disadvantaged (Smit and Van Eck, 2010).

It is added that the employee cannot be refused a reference or be given a negative reference, denied continuous employment, threatened or be subject to anything that will negatively affect his/her employment opportunities or job security.

In addition, section 159 (4) of the Companies Act No. 71 of 2008 widens the group of people in the private sector who can make disclosures of corruption and fraud. Included in the expanded group that are protected by the law in terms of disclosures are shareholders, directors, company secretaries, employees at all occupational levels, trade union representatives, representatives of the employees of that company, a supplier of goods or services to a company, or an employee of such a supplier. This means that independent contractors are included in the Companies Act.

4 The research methods

The research methods utilised included the study of both primary and secondary material such as interviews, journal and newspaper articles, government and court documents, and commissioned and independent reports of South African and international NGOs, CBOs and government departments.

5 The typical South African public sector organisation and the realities of whistle-blowing

The typical South African public service organisation (government at all three layers and parastatals) is characterised by a highly bureaucratic structure, steeped in most cases in an authoritarian structure with managers and supervisors having absolute control of employees. This leads to the existence of power relations that are rooted on rigid rules, regulations, outdated Codes of Conducts, and a wide variety of manuals released by an assortment of Departments that are instrumental in centralising all layers of organisational structures, functions and development. In such an environment of an embedded traditional managerial authority whistle-blowers are seen and treated like the epitome of organisational dissent in the sphere of organisational management, outcasts within the entity and society, individuals against state power and authority.

South Africa has not produced whistle-blowers that made international headlines such as an Assange, Manning, or Snowden, but has produced a number of citizens who through their actions have increased social-awareness exposed the fraud of the powerful, thus exposing a social and national consciousness underpinning the relationships between power and truth, authority and bad governance.

The BATHO PELE (PEOPLE FIRST) principles (RSA 1997) that ought to be the overcharging foundations of efficiency, transparency, and integrity in public institutions have all but disappeared

even from the very vocabulary of those in power within the hierarchy, leading not only to an absence of motivation on the part of civil servants to report corrupt practices, but also the perpetuation of a culture of fear (Mavuso and Balia 1999).

Adding to such organisational attitudes are political priorities, nepotism, departmental and sectional dis-functionality and rigidity (De Maria 2008:867). Thus, whistle-blowing, described as "the powerless disclosing the misconduct of the powerful" as described by DeMaria (1999: 32) does not occur often in the South African civil service. This does not mean that there are no courageous people in the country who become whistle-blowers. However, the deep motivation for someone to be ethical, honest and a person of integrity is dissipated in the ocean of greed corruption and opportunism of both administrative and political leaders in what is known as the "political/administrative conundrum" (Mantzaris and Pillay 2014). A bureaucratically rigid system such as the South African one is rooted in a fundamentally flawed cultural, organisational and institutional understanding of systems, functions, as well as political and ethical meanings (French, 2007; Minogue et al., 1998).

If one judges the power relationship in the classical sociological/social psychological tradition epitomized by the classic "The Bases of Social Power," (French and Raven 1959) within the context of South African civil service, it can be said it will fit into the description of "coercive power", which is derived from a person's ability to influence others via threats, punishments, isolation, discipline or sanctions. Coercive power in this sense is a manager's or politician's ability to punish, retrench or reprimand a public servant. Coercive power helps control the behaviour of employees by ensuring that they adhere to the organization's policies and norms even against their own will. Hence, it does not fit with the rest of powers, i.e. referent, legitimate, expert and reward power.

As the case studies below conclusive show, political interference victimization, intimidation and even death paints a grim picture of the existing power relations against whistle blowers and underline the irrefutable truth that existing legislation cannot and will not protect the whistle-blower. It is within this context that the Public Services Commission has indicated that one of the most significant factors negatively affecting government initiatives to curb corruption were the reports that: "…whistle-blowers are sometimes intimidated by senior officials and executive authorities when reporting corrupt activities" (Public Service Commission 2011:3).

Power relations within the organisation leads to potential whistle–blowers fear of intimidation, which coupled with the lack of knowledge of existing protecting legal frameworks, and the possibility of them "exposed as 'spies' keeps them back." These realities point to the concern and fear of potential whistle-blowers regarding the impact of a future, their worries of been side-lined inside the organistion and society at large and loss of trust in them (Martin 2010).

Such existing circumstances point to the irrefutable fact that the constitutional and legal imperatives related to the protection of whistle-blowers advocating the noble principle of ethical behaviour, accountability and transparency are unable to create a "safe environment" for those who are prepared to disclose fraud and corruption. The whistle-blowers desire to fight against corruption is thus dissipated because of the potential for vulnerability and isolation in the workplace. This reality is exacerbated by the potential whistle-blowers realisation that that the existing legislation does not guarantee their safety because there is an absence of thorough implementation and enforcement within their organisation.

Added to the above, which falls into the sociological and psychological domain, a closer study of the frameworks that exist pinpoint to a number of weaknesses of the legal and regulatory instruments when compared to international laws and standards. For example there are no clauses in the PDA obliging public or private entities to initiative pro-active measures that encourage and facilitate whistleblowing within a specific organisation, or to investigate claims that are made by whistle-blowers (Van Rooyen 2004).

On the other hand, although the Companies Act includes an assortment of positive obligations on private sector, as well as state parastatals and companies to establish, plan and implement whistleblowing, and internal rules and regulations policies facilitating whistle-blowing, there is no guidance on how this could be achieved. It has been opined that the protective scope of the framework is too narrow, while the protection and remedies provided by the PDA are not clear or strong enough to

create confidence to potential whistle-blowers regarding future legal protection(U4 Expert Answer 2009: 3).

The existence of a multiplicity of laws that demand different obligations to public and private organisations and a wide variety of protection for different categories of whistle-blowers leads to unequal protection for different whistle-blowers. On the other hand the lack of a public body with the responsibility and duty to provide education to the citizens, monitor and review whistleblowing rules, regulations and laws and to promote public awareness adds to the problems (Mischke, 2007).

The same is true of the non-existence of a dedicated monitoring body regarding whistle-blowing as there is an absence or well researched data in regard to whistle-blowing activities, achievements or failure of whistle-blowing actions within organisations (Levy 2010:11).

In general it can be said that a combination of social, individual and group reasons as well as legal implementation gaps point to the fact that the existence of a culture of disclosure in South Africa can be described as minimal. Most likely the cases presented below can provide a vivid explanation of life and death dilemmas facing South African whistle-blowers.

6 The case of Moss Phakoe

On the 14th March 2009, Moss Phakoe, a ruling party municipal councillor in Rustenburg, North West Province was assassinated in cold blood in his driveway. He was a committed cadre of the African National Congress. Phakoe attempted to expose corruption in the municipality without success, by reporting fraudulent tender awards to relatives and political friends of the then Mayor as well as the stealing of land and municipal vehicles. He prepared a well-documented dossier of these activities and was delivered to all levels of the ANC leadership, both national and local of the ANC. It was ignored. It was delivered to two senior ANC National Executive Committee members Siphiwe Nyanda and Billy Masethla. It was ignored. It was finally delivered to the office of the ANC's national secretary and the then President Kgalema Motlanthe. It was ignored. Finally, it was delivered to the new President Jacob Zuma both at his Johannesburg and Nkandla homes. The President was briefed on the issues to the finer detail on two occasions, in one of which he was accompanied by Motlanthe, Masetltha and other senior ANC leaders. Phakoe met the then minister of Cooperative Governance and Traditional Affairs in March 2009 and handed over presented the evidence. Rustenburg's Mayor, the perpetrator was also present at the meeting. Two days later Phakoe was shot dead outside his home. The city's Mayor and his bodyguard were found guilty of the murder in July 2012. In Feb 2015 - The Appeal bench in the North West High Court set aside the conviction and sentence of both accused for the murder.The police is still searching for the killer.

(Sowetan 2012; Sowetan 2015; City Press 2012; Mail and Guardian 2011a; 2011b; 2011c)

7 The case of Mike Tshishonga

Mike Tshishonga used the internal channels of communication in the Department of Justice in the Northern Cape to report corrupt practices. He was the Managing Director in the Master's Office, and acted following the dictates of the Protected Disclosures Act. After a number of months and no response to the disclosures, he reported his findings to the newspapers, where he announced that the then Minister had instructed him to work with a hand-picked liquidator in a case involving a major retail company. Such an instruction was illegal under the strict policies and procedures of the department that dictated that liquidators were obligated to bid for contracts with the Masters Office, which selects the preferred one. Following the whistle-blowing act, he was suspended but spent two years contesting this suspension through the Labour Court. The Court ruled in early 2004 that he be reinstated. The then director-general of the Department Vusi Pikoli refused to follow the judgement and the department's attempt to appeal the Court's ruling also failed. Tshishonga decided to sign a settlement agreement and received a generous compensation package. This decision stemmed from the fact that despite the fact that he was deployed in the office, he was virtually dormant as his key performance tasks were taken away from him. He realised that securing another job in government was unrealisable. He was a whistle-blower. His wife was chief of staff in another ministry and immediately after the case hit the papers, she was moved to another department six levels below her previous one

and was given no responsibilities. These acts were followed by a barrage of death threats, changed house for security reasons and accompanied their children to school for protection. She too eventually reached an agreement over her departure. Despite her high qualifications she has still not secure a government job. She is still married to a whistle-blower. Tshishonga is present the leader and one of the two members of Parliament of AGANG.

(Moneyweb 2007; Mail and Guardian 2007; Kuente 2011)

8 The case of Mathloko Motingoe

Mathloko Motingoe is a legal adviser in the Northern Cape Department of Infrastructure and Public Works and his "professional fault" was that he reported an "irregular" tender awarded for the repair of Theekloof Pass in the Northern Cape in 2013. He was suspended by the Provincial Minister the same year and he immediately he won the case against the Department in the bargaining council. The verdict meant that the department should uplift the suspension immediately. The same verdict was reached by the Labour Court in a concurrent action in which Motingoe challenged both the suspension and the disciplinary enquiry.

The judge opined that: "Whistle-blowers,when they comply with the PDA, are an integral element of the fight against corruption…People, like the applicant [Mr Motingoe] who have the courage to stand by their convictions and speak out not only entitled to protection, they ought to be commended".

These verdicts in their stunning similarity unmask the conspiracy, but when Motingoe returned to his duties, the department issued a "fresh" suspension order, with exactly the same wording as the previous one. In a proper legal understanding of the process it becomes evident that an instrument of the state throws the order of court in the "dustbin of history". Motingoe immediately brought an urgent contempt of court order against the administrative and political leadership of the Department. If successful it will result in imprisonment or a fine.

(RSA Labour Court 2014a; RSA Labour 2014b; Financial Mail 2015)

9 The analysis

These cases have been chosen carefully from an almost impossible to believe gamut of stories of whistle-blowers for a number of reasons, and not only to provide "empirical evidence" of the theoretical foundations of the article.

They demonstrate the abuse of power and abundance of financial resources, the impetus of non-winnable legal wrangles for the sake of "revenge", the inexcusable waste of citizens' money and the complete disregard of laws, rules, regulations and procedures, the continuous vulnerability of whistle-blowers because of harassment, even brutal deaths. It becomes abundantly clear is that whistle-blowers face the social, psychological and financial burden of their brave through loss of employment, even their own lives. The case studies pointed the reality of whistle-blowing in South Africa, a bleak picture where power relations masquerade as a "national priority" ahead of transparency, accountability and ethical behaviour

As the cases show conclusively whistle-blowing is not considered "positive action", on the contrary, in most cases the whistle-blower becomes the victim of circumstances and those guilty are promoted to a higher position. This is precisely because legal protections indeed exist for whistle-blowers, but the law is in most cases against them. They are obligated to use the law to defend themselves against the culprits. There is an urgent need for amending the laws so the operationalisation of whistle-blowing can becomes a fundamental legal, political, social and cultural necessity embedded in a desire for social and individual change. This because as shown earlier the legal framework does not encourage pro-active whistle-blowing. The current South African whistleblowing environment is inimical to pro-active disclosure due to the arrogance of power and legal gaps and the un-willingness of both political and administrative leaderships to operationalise and promote the letter and significance of existing legislation.

Only those who have suffered the vulnerability, exclusion and victimisation as whistle-blowers in their workplace and outside it can testify the history of their ordeals, when they see and feel their own physical security threatened.

10 Conclusions

Despite the fact that the key legislative framework for whistle-blowers in South Africa, the Protected Disclosures Act 2 of 2000 guarantees protection for "protected disclosure" through well-designed processes and aims to establish a facilitating culture for such an act, life's realities are different. This because the abuse of power relationships in the workplace destroy a culture that facilitates whistleblowing instead of creating and nurturing it. The result is the relentless perpetuation of corruption, fraud and criminal conducts by known, unknown or unspecified culprits. These culprits and their co-conspirators are most likely ignorant of the most comprehensive, clear-cut and powerful legal and humanistic clauses of the country's constitution that "everyone is equal before the law and has the right to equal protection and benefit of the law" (RSA 1996) 9(1), that "everyone has the right to freedom of expression, which includes freedom to receive or impart information or ideas"(RSA 1996) 16(1)(b)and that "everyone has the right to fair labour practices" 23(1) (RSA 1996).

The bravery of whistle-blowers in South Africa very seldom leads to justice, because despite the legislation the balance of forces is against them. Some survive to tell their stories, others do not. A few are able to pick up the pieces and carry on with their lives, and many have the scars of their experience following them to the grave.

The case of whistle-blowers who take the brave step of going public almost always lead them to face public and legal abuse , full frontal smear and legal attacks and , if they are lucky enough financial compensation and virtually no chance to work for the public sector again. It is indeed a heroic act of bravery to be a seeker of truth and an anti-corruption fighter in South Africa. You are perceived by most, but not all, sections of the public sector as a Don Quixote at best or a mindless imbecile, or a "traitor" at worst. In many ways you might be a hero in your family and community's eyes like Moss Phakoe, but is it worth it to die for a 'lost cause? This is the question that all would-be whistle-blowers face.

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