

## SECTION 9B OF THE PROTECTED DISCLOSURES AMENDMENT ACT 5 OF 2017: DISCOURAGING WHISTLEBLOWING IN SOUTH AFRICA?\*

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### ABSTRACT

The Protected Disclosures Act 26 of 2000 provides protection for individuals who blow the whistle on corrupt activities in South Africa. The Protected Disclosures Amendment Act 5 of 2017 widens the scope of the original Act. This article focuses on the provision in the amendment which criminalises the disclosure of false information by a potential whistleblower. It is argued that this provision may operate as a hurdle for those individuals contemplating divulging information related to corruption. Nevertheless, the amendment is an important one, since there have been cases where employees have provided false information concerning corrupt activities. However, at what cost will this amendment prevent future whistleblowers from disclosing valuable information necessary to detect and prosecute economic crimes? It is argued that the amendment could have an undesirable effect on the contribution of whistleblowing to the fight against corruption in South Africa. The amendment will be discussed against the backdrop of the important aims of the original Act and within the context of the prevention of corruption.

### 1 INTRODUCTION

Corruption has become a scourge in South Africa and has had a severe impact upon its economy. However, the revelations of corruption in government ultimately led to the resignation of former South African President Jacob Zuma in 2018, as well as the departure of several members of cabinet. Whistleblowers played a key role in

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\* This is a revised version of a paper read by the author at the *Economic Crime and Cybercrime Conference (ECCC)*, University of the Western Cape, 5 October 2018.

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uncovering the truth about corruption in government and will form a crucial part of the state's case against Zuma<sup>1</sup> who is alleged to have committed a number of economic crimes.<sup>2</sup>

It is especially difficult to address political corruption.<sup>3</sup> Often there are no witnesses willing to testify against corrupt politicians, hampering the efforts of investigators and prosecutors. The importance of whistleblowers is evident here and, because they could be in danger, they ought to be protected adequately. Whereas the protection of whistleblowers becomes paramount in high-profile cases, it is equally important that any person who wishes to disclose corrupt activities be afforded protection.

However, statistics indicate that the number of whistleblowers is dwindling.<sup>4</sup> While there is an abundance of legislation aimed at protecting such individuals, there is also a serious lack of effective implementation of such legislation.<sup>5</sup> The 2018 Global Economic Crime and Fraud Survey conducted by PricewaterhouseCoopers revealed that, globally, only seven per cent of all corrupt activities were reported by whistleblowers.<sup>6</sup> This is a possible indication that whistleblowers are reluctant to report corruption. It is a reluctance which may be

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- 1 Zuma has been charged with 16 counts of money laundering, racketeering, fraud and corruption related to 783 questionable payments made in connection with the arms deal. See Quintal G (2018) "Jacob Zuma Corruption Charges: New Legal 'Dream Team', New Strategy?", available at <https://www.timeslive.co.za/news/south-africa/2018-07-26-jacob-zuma-corruption-charges-new-legal-dream-team-new-strategy/> (visited 18 March 2019).
  - 2 See Umraw A (2018) "Arms Deal Whistleblowers Hopeful Zuma Will (At Last) Be Prosecuted", available at [https://www.huffingtonpost.co.uk/2018/03/16/arms-deal-whistleblowers-hopeful-zuma-will-at-last-be-prosecuted\\_a\\_23387520/](https://www.huffingtonpost.co.uk/2018/03/16/arms-deal-whistleblowers-hopeful-zuma-will-at-last-be-prosecuted_a_23387520/) (visited 18 March 2019).
  - 3 See Vogl F (2012) *Waging War on Corruption: Inside the Movement Fighting the Power of Abuse* Lanham: Rowman & Littlefield Publishers at 79-95.
  - 4 Tilley A (18 November 2016) "New Laws Make Whistle-blowing Riskier" *Mail and Guardian*, available at <https://mg.co.za/article/2016-11-18-00-new-law-makes-whistle-blowing-riskier> (visited 18 March 2019). See also See Uys T (2010) "Speaking Truth to Power: The Whistleblower as Organisational Citizen in South Africa" in Lewis DB A *Global Approach to Public Interest Disclosure: What We Can Learn from Existing Whistleblowing Legislation and Research* Cheltenham: Edward Elgar at 111-112, where she explains that while employers encourage an ethical workplace, once the whistleblowing is directed against the employer, it becomes an act of dissent.
  - 5 Parliamentary Monitoring Group (8 November 2016) "Protected Disclosures Amendment Bill: Deliberations", available at <https://pmg.org.za/committee-meeting/23620/> (visited 18 March 2019).
  - 6 Most corrupt activities (57 per cent) were detected by corporate controls, such as internal audits and suspicious activity monitoring. See PricewaterhouseCoopers (2018) "Global Economic Crime and Fraud Survey 2018" at 26, available at <https://www.pwc.com/gx/en/forensics/global-economic-crime-and-fraud-survey-2018.pdf> (visited 18 March 2019).

attributed largely to their fear of losing their jobs and, in extreme cases, their lives.<sup>7</sup> What is more, employers regularly regard employees who blow the whistle as disloyal and reprisals for such disloyalty often follow.<sup>8</sup> Also, whistleblowers may “find themselves at the receiving end of a claim for defamation as well as disciplinary action”.<sup>9</sup> Often, whistleblowers have to cope with a hostile environment in which they are punished for their bravery.<sup>10</sup>

The Protected Disclosures Act 26 of 2000 (PDA) provides protection for individuals who blow the whistle on corrupt activities in South Africa.<sup>11</sup> The Protected Disclosures Amendment Act 5 of 2017 (PDAA) broadens the scope of the PDA.<sup>12</sup> This paper will examine Section 9B of the PDAA, which criminalises the intentional false disclosure of information by any employee or worker. This provision serves as an additional hurdle for people contemplating divulging information related to corruption. A potential whistleblower might think twice before disclosing information that might be regarded as false. Radack & McClellan refer to the criminalisation of false disclosures of corrupt activities as “a disturbing new trend” which exploded onto the scene in the United States of America (USA) in 2009.<sup>13</sup>

In South Africa, too, there have been calls for the criminalisation of individuals who disclose corruption, given that there have been cases where employees have provided false information concerning corrupt activities and have been let off the hook.<sup>14</sup> However, at what cost will the PDAA prevent future whistleblowers from disclosing information needed to investigate and prosecute economic crimes? It is arguable that criminalising the disclosure of false information in South Africa could negate the overarching aim of the PDA, which is to protect whistleblowers and not to expose them to criminal prosecution. The idea is not that individuals receive a free pass for giving false information, but

7 See Yeoh P (2014) “Whistleblowing: Motivations, Corporate Self-regulation, and the Law” 56 *International Journal of Law and Management* 459-474 at 462.

8 Carr I (2007) “Corruption, Legal Solutions and Limits of Law” 3(3) *International Journal of Law in Context* 227-255 at 241; Bowers J, Mitchell J & Lewis J (1999) *Whistleblowing: The New Law* London: Sweet and Maxwell at 1.

9 Bowers, Mitchell & Lewis (1999) at 114.

10 See Tilley A & Stober L (2004) “South Africa: Open Democracy Advice Centre” in Calland R & Dehn G (eds) *Whistleblowing Around the World: Law, Culture and Practice* Cape Town: The Open Democracy Advice Centre/London: Public Concern at Work at 193.

11 The PDA was enacted on 16 February 2001.

12 The PDAA was enacted on 2 August 2017.

13 Radack J & McClellan K (2011) “The Criminalisation of Whistleblowing” 2 *The Labor and Employment Law Forum* 57-77 at 57.

14 See Parliamentary Monitoring Group (8 November 2016).

rather than other measures be adopted to address the problem, including civil remedies.

This article considers whether the current provisions on the criminalisation of false disclosures are in the best interests of whistleblowers. It is important, therefore, to examine why criminalisation was considered by Parliament in the first place in order to determine the purpose of the amendment. The discussion will commence with an analysis of the meaning of whistleblowing and go on to examine the criminalisation of false disclosures at the international and regional levels. Thereafter, section 9B of the PDAA will be analysed critically. Some attention will be given to possible alternatives to criminal prosecution.

## 2 WHISTLEBLOWING IN CONTEXT

While corruption persists, so do efforts to root it out.<sup>15</sup> A plethora of mechanisms to address it include increased criminal prosecution of private and public corruption, increased transparency and improved governance.<sup>16</sup> Whistleblowing has emerged as one of the most effective anti-corruption tools because “[i]n the whistleblower, companies and public bodies alike possess a valuable resource to discover and uncover risk”.<sup>17</sup> However, it is submitted that individuals who disclose false information should not be regarded as whistleblowers, since the disclosure does not expose corrupt activities. Rather, it is aimed at harming the employer. Hence, the definition of whistleblowing and whistleblower need to be examined in order to determine the differences between whistleblowing and the making of false disclosures.

### 2.1 Definitional Matters

The term “whistleblowing” has become commonplace and often is used by journalists in relation to corrupt activities.<sup>18</sup> Ralph Nader, an American political

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15 Schultz D & Harutyunyan K (2015) “Combating Corruption: The Development of Whistleblowing Laws in the United States, Europe, and Armenia” 1 *International Comparative Jurisprudence* 87-97 at 88.

16 Schultz & Harutyunyan (2015) at 88.

17 Bowers, Mitchell & Lewis (1999) at 1.

18 Jubb PB (1999) “Whistleblowing: A Restrictive Definition and Interpretation” *Journal of Business Ethics* 77-97 at 77. For an inclusive discussion of the relationship between the whistleblower and the media, see Calland R & Dehn G (2004) “Whistleblowing Around the World: The State of the Art” in Calland R & Dehn G (eds) *Whistleblowing Around the World: Law, Culture and Practice* Cape Town: The Open Democracy Advice Centre at 11-15.

activist, sometimes is credited with having coined the term in the early 1970s.<sup>19</sup> As with corruption, there is no universally accepted legal definition of “whistleblowing” or “whistleblower”.<sup>20</sup> Scholars and governments alike all differ in their interpretation of the meaning of whistleblowing.<sup>21</sup> Additionally, there are no globally recognised instruments that provide for a definition of whistleblowing or whistleblower. A representative selection of definitions follows.

One of the most acceptable definitions of whistleblower is that of the Council of Europe, which says that the term means:

any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector.<sup>22</sup>

This definition expressly includes public and private sector corruption. It is also suitably broad in that it refers to any person who discloses corrupt activities and not just an employee.

Jubb describes whistleblowing as:

a deliberate non-obligatory act of disclosure, which gets onto public record and is made by a person who has or had privileged access to data or information of an organisation, about non-trivial illegality or other wrongdoings whether actual, suspected or anticipated which implicates and is under the control of that organisation, to an external entity having potential to rectify the wrongdoing.<sup>23</sup>

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- 19 Rapp GG (2013) “Four Signal Moments in Whistleblower Law: 1983-2013” 30 *Hofstra Labor and Employment Law Journal* 389-403 at 389. See also Glazer MP & Glazer PM (1989) *The Whistleblowers: Exposing Corruption in Government and Industry* New York: Basic Books at 7. The term “whistleblower” also refers to the English Bobbies who blew their whistle upon discovering evidence of the commission of an offence. See Freckelton I (2016) *Scholarly Misconduct: Law, Regulation and Practice* Oxford: Oxford University Press at 455.
- 20 G20 (2011) “Anti-Corruption Action Plan Protection of Whistleblowers: Study on G20 Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation” at 7, available at <https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf> (visited 18 March 2019).
- 21 Martin P (2010) “The Status of Whistleblowing in South Africa: Taking Stock” at 21, available at [https://openjournalismworkshop.files.wordpress.com/2013/03/odac\\_whistleblowing\\_report\\_web.pdf](https://openjournalismworkshop.files.wordpress.com/2013/03/odac_whistleblowing_report_web.pdf) (visited 18 March 2019). See Freckelton (2016) at 458-459 for an overview of various definitions of whistleblowing.
- 22 Council of Europe “Recommendation CM/Rec (2014) 7 of the Committee of Ministers to Member States on the Protection of Whistleblowers” at 6, available at <https://rm.coe.int/16807096c7> (visited 18 March 2019). Article 22 of the Council of Europe Criminal Law Convention on Corruption regulates the protection of those who report criminal offences as contained in the Convention.
- 23 Jubb (1999) at 78.

From this definition, it follows that whistleblowing may be regarded also as a tool to promote and increase integrity and accountability and to serve the anti-corruption cause. In this context, whistleblowing is understood primarily as an act of disclosing information in the public interest.

De Maria defines a whistleblower as:

a concerned citizen, totally, or predominantly motivated by notions of public interest, who initiates of her or his own free will, an open disclosure about significant wrongdoing directly perceived in a particular occupational role, to a person or agency capable of investigating the complaint and facilitating the correction of wrongdoing.<sup>24</sup>

This definition is to be preferred, not only because it is instructive but also because it specifically includes an important reference to the authorities who should be investigating whistleblowing. The whistleblower will not feel safe if he or she discloses information to a person or agency that possibly is involved in the corrupt activities or who cannot be trusted. It is submitted that whistleblowers should be afforded the highest degree of protection. Protecting the whistleblower as well as the information that is at stake is pivotal to deterring corruption effectively.

The perception of whistleblowers varies. They often are portrayed as either saviours or snitchers.<sup>25</sup> Glazer & Glazer refer to whistleblowers as “ethical resisters” since they expose and disclose unethical and illegal practices.<sup>26</sup> The public perception of whistleblowers is mostly positive, especially since the revelations by whistleblowers during the infamous 1972 USA Watergate Scandal, which led to the resignation of President Richard Nixon.<sup>27</sup> The United Kingdom and the USA have gone so far as to implement effective compensation programmes for whistleblowers.<sup>28</sup> Conversely, Edward Snowden’s disclosure of the USA National

24 De Maria W (1994) *Unshielding the Shadow Culture* Brisbane: University of Queensland, Department of Social Work and Social Policy at 3. See also Jubb (1999) at 84.

25 Campbell G (2013) “Snitch or Savior? How the Modern Cultural Acceptance of Pharmaceutical Company Employee External Whistleblowing is Reflected in Dodd-Frank and the Affordable Care Act” 15 *University of Pennsylvania Journal of Business Law* 565-597 at 567; Yeoh (2014) at 460.

26 Glazer & Glazer (1989) at 4. See also Freckelton (2016) at 455.

27 Vogl (2012) at 159 states that the “single most important development in changing the anticorruption landscape, indeed in initiating the international anticorruption effort, was due to Richard Milhous Nixon, the thirty-seventh president of the United States”. See also Yeoh (2014) at 460; Rapp (2013) 389.

28 See Francis RD, Armstrong AF & Foxley I (2015) “Whistleblowing: A Three Part View” 22 *Journal of Financial Crime* 208-218 at 211. See also Arnone M & Borlini LS (2014) *Corruption: Economic Analysis and International Law* Cheltenham: Edward Elgar at 215-216.

Security Agency's domestic surveillance programme stirred positive and negative reactions across the board, including social media.<sup>29</sup>

Whistleblowers tend to be brave people who have to pit themselves against massive companies and organisations eager to stifle any reports of corrupt activities. Also, the law generally does not impose an obligation on any person to disclose corrupt activities.<sup>30</sup> Whistleblowers are often people who work for a company or an organisation and are closest to the source of the corrupt activity.<sup>31</sup> This may lead to their being bullied in the workplace and being subjected to victimisation.<sup>32</sup> De Maria explains: "The only person who acts individually is the whistleblower. Against her or him is the might of the organisation".<sup>33</sup> Needless to say, whistleblowers face a central dilemma, one of divided loyalties, juxtaposing the whistleblower's intention to expose corrupt activities with loyalty to the employer.<sup>34</sup>

## 2.2 The Good Faith Requirement

It is accepted generally that any disclosure purporting to expose corruption should be made in good faith.<sup>35</sup> It is disappointing that the term "good faith" in relation to whistleblowers is not defined under international law.<sup>36</sup> It is left to individual

29 See Yeoh (2014) at 460. See also Delorantis D & Kalkanis C (2016) "Can You Blow My Whistle: A Harmonious Marriage of State Legislation and Federal Protections to Create a More Perfect Union of Private Whistleblower Rights" 34 *Hofstra Labor and Employment Law Journal* 161-206 at 161; Francis, Armstrong & Foxley (2015) at 209. For a comprehensive discussion of the revelations by WikiLeaks, see generally Coleman G *Hacker, Hoaxer, Whistleblower, Spy: The Many Faces of Anonymous* (2014) London: Verso. See also Brown AJ, Vandekerckhove W & Dreyfus S (2014) "The Relationship between Transparency, Whistleblowing, and Public Trust" in Ala'I P & Vaughn RG (eds) *Research Handbook on Transparency* Cheltenham: Edward Elgar at 33.

30 See Bowers, Mitchell & Lewis (1999) at 89.

31 See UNODC (2015) "The United Nations Convention against Corruption: Resource Guide on Good Practices in the Protection of Reporting Persons" at 9, available at [https://www.unodc.org/documents/corruption/Publications/2015/15-04741\\_Person\\_Guide\\_eBook.pdf](https://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf) (visited 18 March 2019).

32 See Bjørkelo B (2013) "Workplace Bullying after Whistleblowing: Future Research and Implications" 28 *Journal of Managerial Psychology* 306-323 at 314.

33 De Maria W (2006) "Common Law—Common Mistakes?: Protecting Whistleblowers in Australia, New Zealand, South Africa and the United Kingdom" 19 *International Journal of Public Sector Management* 643-658 at 650.

34 Jubb (1999) at 82.

35 Hatchard (2014) at 53 & 56.

36 See Transparency International (2013) "Whistleblower Protection and the UN Convention against Corruption" at 14, available at [https://www.transparency.org/whatwedo/publication/whistleblower\\_protection\\_and\\_the\\_un\\_convention\\_against\\_corruption](https://www.transparency.org/whatwedo/publication/whistleblower_protection_and_the_un_convention_against_corruption) (visited 18 March 2019).

states to determine the meaning of “good faith”.<sup>37</sup> The question arises: what if such a good faith disclosure turns out to be a false disclosure? Babu states that “it should be made clear that false and malicious reporting in ‘good faith’ will not be punishable”.<sup>38</sup> More should be done at the international and domestic levels to define the relevance of “good faith” in the anti-corruption legal discourse, otherwise judges alone will decide whether a disclosure is made in good faith or not. It is submitted that a whistleblower who makes a disclosure to an anti-corruption body should be under no pressure, given that it is a huge step in itself to talk about the situation. The criminalisation of false disclosures in any anti-corruption statute creates a doubt in the minds of potential whistleblowers as to whether their version of events might be manipulated into a false disclosure. It must be stressed again that the idea is not that false disclosures should be protected. Rather, the scope of what a “good faith” disclosure entails should be explored and included in anti-corruption laws.

It has been documented that one of the primary reasons for whistleblowers to disclose corruption is self-protection and the protection of his or her colleagues.<sup>39</sup> Criminalising false disclosures thus raises a red flag for prospective whistleblowers considering crossing the whistleblower bridge. Be that as it may, it is important to address how, under transnational anti-corruption law, the whistleblower is protected and the criminalisation of false disclosures is regulated.

### **3 WHISTLEBLOWERS UNDER INTERNATIONAL AND REGIONAL LAWS**

International and regional laws are rooted firmly within the South African anti-corruption discourse.<sup>40</sup> This article will look briefly at the whistleblowing regulations contained in three anti-corruption instruments which South has ratified, namely, the United Nations Convention against Corruption (UNCAC), the African Union Convention on Preventing and Combating Corruption (AU Convention) and the Southern African Development Community Protocol against Corruption (SADC Protocol). Amongst other things, it will consider whether these instruments include the criminalisation of individuals for disclosing false information.

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37 Transparency International (2013) at 17.

38 Babu RR (2006) “The United Nations Convention against Corruption: A Critical Overview” *Social Science Research Network* 1-32 at 17.

39 See Baltaci A & Balci A (2017) “Reasons for Whistleblowing: A Qualitative Study” 7 *Journal of Educational Sciences Research* 37-51 at 45.

40 See Parliamentary Monitoring Group (8 November 2016).

### 3.1 United Nations Convention against Corruption

UNCAC is the most far-reaching and comprehensive international anti-corruption instrument in the world.<sup>41</sup> It is also the only legally binding international anti-corruption instrument and does provide, in Article 33, for the protection of whistleblowers.

Article 33 stipulates that States Parties have the duty to protect any reporter against any unjustified treatment, provided that such person reports corrupt activities in good faith and on reasonable grounds.<sup>42</sup> Article 33 needs to be distinguished from Article 32 which deals with the protection of witnesses, experts and victims.<sup>43</sup> The Convention refers to the protection of “reporters” instead of whistleblowers.<sup>44</sup> By doing so, it avoids the more colloquial term “whistleblower” and confines itself to people who “report” corrupt activities.<sup>45</sup> That being said, the application of Article 33 actually is quite broad. Even though it does not refer to whistleblowers *per se*, its wide scope is one of the strengths.<sup>46</sup> By alluding to whistleblowers as reporters, it manages to widen the scope of people who report corrupt activities, since whistleblowing is a term which traditionally is reserved for insiders.<sup>47</sup>

Significantly, no mention is made in Article 33 of the criminalisation of reporters.<sup>48</sup> Was it done on purpose or does UNCAC simply leave the decision to prosecute reporters for giving false information to States Parties? The latter may be true, but it is submitted that UNCAC does not support the idea of prosecuting whistleblowers for giving false information.<sup>49</sup> What constitutes good faith by

41 Schultz & Harutyunyan (2015) at 94; Vlassis D (2012) “The United Nations Convention against Corruption: A Successful Example of International Action against Economic Crime” *TEMIDA* 61-70 at 63.

42 See Arnone & Borlini (2014) at 429.

43 See UNODC (2015) at 9. See also Snider TR & Kidane W (2007) “Combating Corruption through International Law in Africa: A Comparative Analysis” 40 *Cornell International Law Journal* 691-748 at 709.

44 See UNODC (2015) at 9. However, see UNODC (2010) *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption* at 285, in which the term “whistleblowers” was used in relation to Article 33 of UNCAC.

45 See UNODC (2009) *Technical Guide for the Implementation of the United Nations Convention against Corruption* at 105, available at [https://www.unodc.org/documents/corruption/Technical\\_Guide\\_UNCAC.pdf](https://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf) (visited 18 March 2019).

46 Arnone & Borlini (2014) at 432.

47 Arnone & Borlini (2014) at 432; Transparency International (2013) at 6-7.

48 See Babu (2006) at 17.

49 Whistleblowing International Network (2017) “Letter to the Portfolio Committee: In Respect of Including Criminal Sanctions for False Disclosures within the Protected Disclosures Act of South Africa” at 6, available at <https://www.corruptionwatch.org.za/wp-content/uploads/2017/02/03-WIN-letterFINAL.24.01.2017-1.pdf> (visited 18 March 2019).

reporters also is not defined by UNCAC, which leaves the door open for States Parties to do so. However, the 2015 UNCAC Resource Guide on Good Practices in the Protection of Reporting Persons does state:

If ... someone reports information that they know to be untrue, then clearly there should be safeguards, meaning that the individual would not be able to seek protection from the law and could be sanctioned if harm was caused.<sup>50</sup>

It is difficult to conceive that a whistleblower would disclose, knowingly and with intent, false information which might cost him his position at his work. What is important, however, is that employers or any person harmed by a *mala fide* false disclosure should be protected by the law.<sup>51</sup> Moreover, it is not clear what sanctions should be imposed on those who make false disclosures. This also is left to States Parties to determine.

### **3.2 African Union Convention on Preventing and Combating Corruption**

The AU Convention contains several provisions related to whistleblowers. Article 5(5) of the Convention provides that it is imperative to adopt laws that will protect informants and witnesses in relation to corruption, which includes protecting their identities.<sup>52</sup> The Article does not refer to whistleblowers, but uses the term “informants” instead. Article 5(6) states that States Parties undertake to: “Adopt measures that ensure citizens report instances of corruption without fear of consequent reprisals”.<sup>53</sup> Here, whistleblowers are referred to as citizens which broadens the scope of those who may be regarded as whistleblowers under the Convention. Importantly, the Article importantly provides that whistleblowers should be allowed to report corruption without fear and without being concerned about any negative consequences following their disclosure.

However, this is where the provisions on whistleblowing in the AU Convention take a radical turn. Article 5(7) provides that persons who make false and malicious reports against innocent persons in corruption and related offences should be punished.<sup>54</sup> The nature of the punishment is not defined but it could include both civil and criminal sanctions. Article 5(7) thus criminalises disclosures if it is deemed that the disclosures were false and malicious. That South Africa has decided to include the criminalisation of whistleblowing in the PDAA does not

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50 UNODC (2015) at 25.

51 See Freckelton (2016) at 498.

52 See Olaniyan K (2004) “The African Union Convention on Preventing and Combating Corruption: Critical Appraisal” 4 *African Human Rights Law Journal* 74-92 at 80.

53 See also Hatchard (2014) 54.

54 See Olaniyan (2004) at 80.

come as a surprise, given the AU Convention's stance on the matter. That said, the fact that the AU Convention regulates the protection of whistleblowers as well as the criminalisation of the disclosure of false information is contradictory and debatable. It is contended that the protection of whistleblowers should be separated from the criminalisation of false disclosures. They should not be mentioned in the same context owing to the sensitive nature of and emotional considerations that come with the disclosure of corrupt activities. Be that as it may, it is clear that UNCAC and the AU Convention differ in their approaches to the matter of criminalisation.

### **3.3 Southern African Development Community Protocol against Corruption**

The SADC Protocol shares the views of the AU Convention on the criminalisation of false disclosures. Article 4(1)(e) provides that States Parties to the Protocol undertake to adopt measures that will "create, maintain and strengthen systems for protecting individuals who, in good faith, report acts of corruption". This is an expansive provision in that it refers to whistleblowers as any "individuals" who report corrupt activities.

Conversely, Article 4(1)(f) provides that States Parties undertake to "create, maintain and strengthen laws that punish those who make false and malicious reports against innocent persons". The provisions of the SADC Protocol and the AU Convention concerning criminalisation are almost identical. Thus, while the global Convention (UNCAC) does not provide for criminalisation of false disclosures, both the continental (AU Convention) and the inter-governmental instrument (SADC Protocol) do. South Africa, which is a party to all three instruments, may consider the provisions contained in all of them. In this connection, South Africa has chosen to ignore the omission of the criminalisation of false disclosures from UNCAC and has opted instead to implement the criminalisation provisions of the AU Convention and the SADC Protocol. This is disappointing considering the expectation which the PDA has created regarding the protection of whistleblowers in a society where corruption is rife. However, there will be individuals who provide false and malicious information with intent, and such persons should not be allowed to do so with impunity. The discussion now turns to the criminalisation of false disclosures in South Africa.

## **4 FALSE DISCLOSURES IN SOUTH AFRICA**

Whistleblowers should be afforded the highest level of protection before and after exposing corrupt activities. However, the AU Convention and the SADC Protocol make it clear that individuals may be prosecuted for disclosing false and malicious

information. This possibility might put added pressure on the whistleblower before he or she discloses any information. If the disclosure is made honestly and frankly and the witness has credibility, there should not be any fear of prosecution. However, in practice, it is not that easy, as whistleblowers inherently are afraid to disclose information.<sup>55</sup> It may be accepted that persons should not be protected if they give false information, as this may be akin to the crime of perjury.

It is argued here that whistleblowers deserve a fair degree of latitude, but not necessarily preferential treatment. Whistleblowers are unique witnesses since their disclosures can have a monumental impact on a company, good governance and various other matters. They are extremely vulnerable and should be afforded the highest level of protection. Comparing whistleblowers to any other witnesses in a criminal justice system is misplaced. Moreover, the criminalisation of false disclosures by any witness already was a criminal offence under the common law of South Africa before it was included in the PDAA.<sup>56</sup> Including it in a statute dedicated to the protection of whistleblowers is questionable.

The remainder of this section will look at the PDA and its importance for South African whistleblowers. Then it will examine how Parliament came to decide to criminalise false disclosures in section 9B of the PDAA and whether this is in the best interests of whistleblowers.

#### 4.1 Protected Disclosures Act 26 of 2000

Prior to 2000, neither the South African common law nor statutory law made provision for the protection of whistleblowers.<sup>57</sup> The enactment of the PDA therefore brought significant relief to whistleblowers.<sup>58</sup> The preamble to the PDA refers to the creation of a culture that will facilitate whistleblowing and affirms the

55 See Arnone & Borlini (2014) at 429 who, referring to UNCAC, state that “unless people feel free to testify and communicate their expertise, experience or knowledge to the authorities, all objectives of the Convention could be undermined”.

56 Whistleblowing International Network (2017) at 6.

57 See Preamble to the PDA.

58 See Stelzner *et al* (2013) “Protection of Whistleblowers Claims” in Del Rey S & Mignin RJ (eds) *International Labour and Employment Compliance Handbook: Labour and Employment Compliance in South Africa* Alphen aan den Rijn: Kluwer Law International at 60-61. For a comprehensive discussion of witness protection in South Africa, see Mahony C (2010) *The Justice Sector Afterthought: Witness Protection in Africa* Pretoria: Institute for Security Studies at 95-110. See also Smit N & Botha MM (2011) “Is the Protected Disclosures Act 26 of 2000 Applicable to Members of Parliament?” 4 *Tydskrif vir die Suid-Afrikaanse Reg* 815-829 at 817-821.

concept of whistleblowing as an anti-corruption tool.<sup>59</sup> That was the position until 2016, when the PDAA Act was tabled in Parliament and included a section on the criminalisation of false disclosures by whistleblowers.

This section prompts the central question of the article: Will the criminalisation of false disclosures deter potential whistleblowers from disclosing vital information necessary to expose corrupt activities? This issue can be addressed only by examining section 9B of the PDAA.

#### 4.2 Section 9B of the Protected Disclosures Amendment Act of 2017

The enactment of the PDAA signifies an unpredictable turn in the South African anti-corruption discourse. Section 9B, which criminalises false disclosures, needs to be analysed critically. However, it is perhaps helpful first to examine some of main points of debate during the parliamentary deliberations leading to the enactment of the PDAA.

Opinion was divided in the Parliamentary Committee established to address the PDAA, with African National Congress (ANC) members supporting it and Democratic Alliance (DA) and African Christian Democratic Party members opposing it.<sup>60</sup> Those against the PDAA argued that criminalisation would discourage whistleblowers because of the high unemployment rate, job insecurity, and unequal power relations accompanying institutionalised corruption.<sup>61</sup> They further stated that “if the burden of ascertaining the correctness of disclosed information is placed on whistleblowers, it will defeat the purpose of the Bill, thereby discouraging disclosure”.<sup>62</sup> Alternatives to criminalisation were proposed, which included civil law remedies and internal disciplinary measures for reputational damage.<sup>63</sup> It was contended also that whistleblowing goes beyond corruption to issues such as unfair discrimination and sexual harassment.<sup>64</sup> Whistleblowers include working class people who live from hand to mouth and criminalisation would impose an additional fear on such people.<sup>65</sup> The DA added

59 See Lubisi S & Bezuidenhout H (2016) “Blowing the Whistle for Personal Gain in the Republic of South Africa: An Option for Consideration in the Fight against Fraud?” 18 *Southern African Journal of Accountability and Auditing Research* 49-62 at 50; Smit & Botha (2011) 815-816.

60 Parliamentary Monitoring Group (8 November 2016).

61 Parliamentary Monitoring Group (8 November 2016).

62 Parliamentary Monitoring Group (8 November 2016).

63 Parliamentary Monitoring Group (8 November 2016).

64 Parliamentary Monitoring Group (8 November 2016).

65 Parliamentary Monitoring Group (8 November 2016). See also Yeoh (2014) at 462, who notes that “there are those in workplaces noticing or suspecting wrongdoings going on but electing to remain silent”.

that no evidence of the impact of false disclosures was presented at the Committee meetings.<sup>66</sup>

The ANC responded by stating that an absence of widespread false disclosures should not deter the Committee from criminalising them and that there must be a deterrent against false disclosures.<sup>67</sup> They furthermore argued that “liars must not be protected because lying is a moral and secular offence”.<sup>68</sup> The ANC gave an example of newspapers publishing reckless and false stories about corrupt activities.<sup>69</sup>

Firstly, it is submitted that civil remedies should be regarded as sufficient a deterrent in a false disclosure case, except where the false disclosure was made with gross bad faith and with a clear intention to harm the victim. Secondly, the ANC’s complaint about the false newspaper articles was nothing more than a reference to its own internal problems and the alleged corruption offences committed by President Jacob Zuma which were highly publicised at the time. The criminalisation of false disclosures was at the top of the ANC’s agenda and, after much deliberation, was included in the PDAA.

Section 9B of the PDAA headed “Disclosure of False Information” and provides that:

- (1) An employee or worker who intentionally discloses false information —
  - (a) knowing that information to be false or who ought reasonably to have known that the information is false; and
  - (b) with the intention to cause harm to the affected party and where the affected party has suffered harm as a result of such disclosure, is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment.
- (2) (a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the Director of Public Prosecutions.
- (b) The Director of Public Prosecutions concerned may delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.

The section widens the scope of whistleblowers to include both employees and workers. The PDA referred only to employees, hence the broader definition of whistleblowers is to be welcomed. Section 9B(1) limits a false disclosure to one

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66 Parliamentary Monitoring Group (8 November 2016).

67 Parliamentary Monitoring Group (8 November 2016).

68 Parliamentary Monitoring Group (8 November 2016).

69 Parliamentary Monitoring Group (8 November 2016).

that is made with intent. This means that it will have to be proved that the whistleblower intended to cause damage to the reputation of the employer and/or the organisation. The burden of proof is heavy since the state will have to prove beyond a reasonable doubt that the accused fabricated his or her disclosure with the necessary intent. Section 9B(1)(a) requires that the discloser knows or ought reasonably to have known that the disclosure is false. It is puzzling, though, to consider that a whistleblower will make such a false disclosure knowing that it will may be tested in court by the affected party, with the help of the best legal services,<sup>70</sup> thereby reducing the chances of conviction. Also, many employees will be well aware of the risks involved in making a false disclosure, including being suspended.

Section 9B does not deal with the problem of a disclosure which was made in good faith turning out to be a false one. Are the individuals who make such disclosures protected or are they also liable to prosecution under the section? This is an important question, as the majority of whistleblowers make disclosures with in good faith. Perhaps it will be necessary to include a further provision in the PDAA to the effect that false disclosures made in good faith will not be investigated as false disclosures, and that such disclosures will be susceptible to civil claims if needs be.

Another criticism of the section, as noted above, is that, well before the enactment of the PDAA, it already was a criminal offence for any person to make a false disclosure. For example, a person may be found guilty of fraud if his false disclosure results in his receiving a benefit.<sup>71</sup> Thus, Kenya<sup>72</sup> and Namibia<sup>73</sup> have not included the criminalisation of false disclosures in their whistleblowing laws since they have been criminalised under various other laws already.<sup>74</sup> The criminalisation of false disclosures undermines the primary aim of the PDA, that is, to protect whistleblowers and to create a culture which will facilitate the effective disclosure of information pivotal to exposing corrupt activities.<sup>75</sup>

There exist alternatives to criminal prosecution. During the Parliamentary Deliberations, the Whistleblowers International Network submitted a letter to the Parliamentary Committee in which it emphasised that criminalisation:

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70 Uys (2010) at 115-116.

71 See Whistleblowing International Network (2017) at 3.

72 See Section 66 of the Anti-Corruption and Economic Crimes Act 3 of 2003.

73 See Section 29 of the Anti-Corruption Act of 2003.

74 According to the Whistleblowing International Network (2017) at 8-11, countries such as Korea, India, the UK, New Zealand, Australia, Ireland and Ghana do not include the criminalisation of false disclosures in their whistleblowing laws.

75 See Preamble to the PDA.

would seriously undermine the important steps you are taking to ensure the Protected Disclosures Act is a more effective anti-corruption and good governance mechanism. It sends a signal throughout Africa, and to countries just embarking on such legislation around the world, that is both counterproductive and potentially harmful.<sup>76</sup>

The Whistleblowers International Network also informed the Committee that there already exist various civil measures to hold those accountable who disclose false information. These measures include dismissals and other workplace sanctions, defamation and *crimen iniuria*.<sup>77</sup> It is submitted that civil measures should be adopted instead of resorting to criminal sanctions when individuals make false disclosures.

Section 9B(1)(b) requires that the affected party (for example, the whistleblower's employer) must have suffered harm as a result of the false disclosure made with intent and knowledge. This requirement may be regarded as a safeguard for whistleblowers, since those who make a false disclosure still may escape prosecution if the affected party did not suffer harm as a result of their actions. However, the affected party more often than not contends that it has suffered harm as a result of the "false" disclosure.<sup>78</sup>

Section 9B(1)(b) further stipulates that any whistleblower who is found guilty of having made a false disclosure may be liable to a fine or a maximum of two years' imprisonment or both. Hitherto, there have not been any cases where whistleblowers have been prosecuted for disclosing false information, which means either that there have not been any substantial cases of false disclosure or that the National Prosecuting Authority, on behalf of the Director of Public Prosecutions,<sup>79</sup> is yet to encounter a *prima facie* case of false disclosure.

Nonetheless, there have been numerous cases where South African courts have had to deal with the testimony of whistleblowers. These cases are important for providing us with the needed interpretation of the law. One such case is *Motingoe v Head of the Department: Northern Cape Department of Infrastructure and Public Works and Another*. Motingoe, the applicant, was head of legal services of the Northern Cape Department of Infrastructure And Public Works<sup>80</sup> and disclosed vital information regarding the irregular awarding of tenders by the

76 Whistleblowing International Network (2017) at 3.

77 Whistleblowing International Network (2017) at 2-3.

78 See, for example, *Charlton v Parliament of the Republic of South Africa* 2012 (1) SA 472 (SCA).

79 See section 9B(2)(a)-(b) of the PDAA.

80 *Motingoe v Head of the Department: Northern Cape Department of Infrastructure & Public Works & Another* (C373/2014) [2014] ZALCCT 71 (12 December 2014) (Unreported) para 5.

Department.<sup>81</sup> He blew the whistle in August 2013 and was summoned to appear before a disciplinary tribunal in November 2013 for alleged misconduct and misbehaviour and was suspended.<sup>82</sup> He sought relief from the Kimberley Labour Court which had to determine whether his disclosure fell within the ambit of section 6 of the PDA and whether it was made in good faith.<sup>83</sup> The Department contended that the disclosure should not be protected under the PDA because it was made in bad faith.

The Court noted that the applicant made a very good impression during his testimony and during cross-examination.<sup>84</sup> It observed also that the applicant wrote the disclosure report with clarity, and that he regarded himself as a whistleblower.<sup>85</sup> These were indications that his report was not made with any intent to disclose false information. The applicant succeeded in the Kimberley Labour Court in 2014 and likely would be protected by section 9B(1) of the PDAA today. Indeed, it will be interesting to see how future courts deal with such matters. Radack & McClellan argue that “protecting whistleblowers rather than targeting them for criminal investigation would more surely protect national security”.<sup>86</sup> Their postulate affirms the thesis of this article: that the criminalisation of false disclosures might nullify the effect that whistleblowing has on the prevention and combating of corruption in South Africa — and either should be deleted from the PDAA or should be amended to include a detailed distinction between disclosures made in good faith and those made in bad faith.

## 5 CONCLUSION

In the last ten years the global practice of criminalising the disclosure of false information has become a sad reality. Criminalisation provisions in the context of whistleblowing laws are multiplying. For example, in Australia whistleblowers and, in particular, media reporters are being targeted for their involvement in the disclosure of corrupt activities.<sup>87</sup> At this rate, whistleblowers will become rare, as already may be observed in the declining number of whistleblowing reports.

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81 *Motingoe* paras 11-12.

82 *Motingoe* para 24.

83 Section 6 of the PDA essentially provides that a protected disclosure is one that is made in good faith and complies with the applicable procedures. See *Motingoe* paras 28-29.

84 *Motingoe* para 26.

85 *Motingoe* para 33.

86 Radack & McClellan (2011) at 59.

87 See Newhouse G & Barns G (2015) “New Laws Criminalise Recording of Information and Whistleblowing” 40 *Alternative Law Journal* 150-152 at 150.

Promisingly, UNCAC remains the international standard for anti-corruption law and the omission of the criminalisation of false disclosing from its provisions is significant. The drafters of UNCAC were fully aware of the important role that whistleblowers play in the combating of corruption and understood that they should therefore not be subjected to criminalisation for false disclosures made in good faith.<sup>88</sup> However, if a false disclosure is made with intent and in bad faith, then the “whistleblower” ought to face civil liability. Criminal liability should be a possibility also, but only in those cases where the disclosure was made with a clear intent to damage the reputation of the affected party.<sup>89</sup> Whistleblowers are unique, and so should be the laws that protect them.

More research is required into the national, regional and global trends of the criminalisation of false disclosures. More time should be given to the protection of whistleblowers and their role in the prevention of corruption. There is a need for a trustworthy, independent and transparent authority which deals solely with whistleblower disclosures, and which consists of impartial experts whose only responsibility would be to listen to the disclosure and to write a report.<sup>90</sup> The report could be vetted by way of a preliminary analysis to determine whether the disclosure indeed is one made in good faith or whether it is a false disclosure. The investigating team, appointed to conduct the analysis, has to be independent and impartial and small, in order to prevent outside interference to which both state agencies and whistleblower organisations remain susceptible.

The problem is clearly a global one. However, South Africa provides us with a country study where the criminalisation of false disclosures is in full force and not likely to lose traction soon. The result is that South African whistleblowers face uncertainty again, as did prior to the enactment of the PDA in 2000. In a country where corruption is rife, surely Parliament must reconsider its stance on the criminalisation of false disclosures in the PDAA and spare the few people brave enough to speak up the detrimental effects of possible criminal prosecution.

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88 See Hatchard (2014) at 56.

89 See Hatchard (2014) at 56; Freckelton (2016) at 498.

90 See Francis, Armstrong & Foxley (2015) at 217.