

South Africa

Summary

South Africa's whistleblowing legislation is considered, at least in some respects, to be among the strongest in Africa. The complementary Protected Disclosures Act (PDA) and the Companies Act (CA) each meet international standards in several respects, but significant gaps in protections leave whistleblowers vulnerable to retribution.

Citizen whistleblowers enjoy few protections, while public and private employees are subject to varying degrees of protection depending on the status of the organization for which they work.

Protected disclosures can be made through a variety of channels. Two investigative bodies are authorized to receive disclosures, but disclosures can only be made to the media under exceptional circumstances.

Though legislation offers protection from retaliation in the workplace, external retribution for whistleblowing is common. Whistleblowers routinely risk defamation, financial ruin, death threats and even assassination.

A bill addressing several weaknesses of the PDA is being considered in parliament, but has not yet been passed into law.

The government has announced that it plans to decriminalize defamation and the courts have signalled that they will support journalists' efforts to protect sources. However, media freedoms face several threats from recent and pending legislation, and criminal and civil cases against journalists may result in self-censorship.

Legal and Policy Framework

Potential whistleblowers in South Africa should first carefully consider which, if either, of the two primary laws protecting whistleblowers applies to their situations. The PDA is appropriate for public and private sector employees in specific relationships with an employer, but excludes groups such as independent contractors, agency workers, former and prospective employees and volunteers.¹ The CA supplements the PDA and extends protections to a broader range of employees in profit and non-profit companies, in addition to shareholders and suppliers of goods and services to companies.²

Information (including opinions)³ on the "misconduct" of an employer or colleague is protected speech under the PDA. Disclosable misconduct includes criminal offenses, failure to comply with legal obligations, miscarriage of justice, endangerment of health and safety,

¹ South African Law Reform Commission, Report on Protected Disclosures, November 2007

² Companies Act (2008), Chapter 7, 159 (4)

³ In 2009 the Supreme Court of Appeal found that a subjective opinion can be considered information (and therefore constitute a protected disclosure), following the contestation by employers that employees' opinions (for example on the competence of new senior appointees) did not amount to "information"

damage to the environment, and unfair discrimination.⁴ The CA protects a wider range of information, including acting in a manner that could pose a liability risk to the company”⁵.

Disclosures under the PDA can be made “in good faith” to a range of people, institutions and organizations, including the employer, members of the Cabinet, the Executive Council, the Public Protector, and the Auditor General⁶. The Act specifies that the appropriate recipient of information depends on the type of information and the nature of the discloser’s employment. Those under the jurisdiction of the CA can make protected disclosures to a broader range of internal and external offices and structures, including the Companies Tribunal and the board of the company concerned⁷. Only in exceptional circumstances can disclosures be made to individuals or groups not listed in either Act, including the media.

The PDA protects whistleblowers from reprisal in the form of “occupational detriment”, such as job loss, disciplinary action, or other specified work-place reprisals.⁸ In addition to these protections, employees covered by the CA are immune from “civil, criminal or administrative liability” resulting from a protected disclosure.^{9,10}

Victimized whistleblowers are eligible to receive compensation of up to 24 months’ salary in the case of dismissal¹¹ and 12 months’ salary in the case of other unfair practices.¹² Employees reporting under the auspices of the CA may seek unspecified compensation from any person who deliberately causes or threatens to cause detriment because of a disclosure. No further penalties for people or organizations who retaliate against whistleblowers are delineated.

Although there are dozens of structures mandated to receive and act on complaints of irregularities¹³, the only investigative agencies to which protected disclosures can be made are the Public Protector and the Auditor General. The PDA does not specify the time frame or the manner in which an investigation should take place.

Whistleblowers who believe they have suffered undue retaliation can approach “any court having jurisdiction”¹⁴. The High Court, the Labour Court and the Commission for Conciliation, Mediation and Arbitration are generally the most appropriate avenues¹⁵.

Legal, Legislative, and Policy Gaps

South Africa’s whistleblowing legislation falls short of international standards in several key aspects, including:

⁴ Protected Disclosures Act (2000), Section 1

⁵ Companies Act (2008), Chapter 7, 159 (3)(b)(v)

⁶ Ibid, Section 5-8

⁷ Companies Act (2008), Chapter 7, 159 (3)(a)

⁸ Ibid, Section 3

⁹ Companies Act (2008), Chapter 7, 159 (4)(b)

¹⁰ The Labour Relations Act provides further protection to whistleblowers in protecting job seekers from prejudice for “disclosure of information that the employee is lawfully entitled or required to give to another person”.

¹¹ Labour Relations Act (1995), Chapter VII, 194 (3)

¹² Labour Relations Act (1995), Chapter VII, 194 (4)

¹³ Martin, P., The Status of Whistleblowing in South Africa

¹⁴ Protected Disclosures Act (2000), Section 4

¹⁵ Martin, P., The Status of Whistleblowing in South Africa

- There is no single legal standard for whistleblowing. Employees are entitled to different levels of protection, depending on the type of organization for which the whistleblower works.
- Only those in current formal relationships with an employer are eligible for protection, and disclosures must relate to misconduct by the employer or others connected to the employer. Citizen whistleblowers are not protected and few protections are available to those wishing to make anonymous disclosures.
- Disclosures may only be made to a select group of people and offices. Disclosures to the media fall under the umbrella of “general disclosures” and can only be made under exceptional circumstances.
- The PDA does not offer immunity from criminal or civil suits.
- Prohibited retaliation is limited to “occupational detriment” in the PDA. Whistleblowers remain vulnerable to reprisal through defamation, as well as civil and criminal lawsuits.
- Victimized whistleblowers seeking justice must go through lengthy and expensive court proceedings.

A 2015 Protected Disclosures Amendment Bill sought to address some of these issues, including extending protections to a broader range of current and former employees and offering civil and criminal immunity for disclosures that show that a criminal offense has occurred. The bill also sought to create an offense for the disclosure of false information and to set out requirements for the investigation of information disclosed. To date, these changes have not been enacted.

Secrecy Laws and National Security Exemptions

Although South Africa does not have specific legislation devoted to protecting trade secrets, common law protects this information from acquisition, use, and publication by competitors and current or former employees¹⁶. Similarly, although there are no specific bank secrecy laws on the books, the precedent was set in case law. In a 2008 judgement, a judge found that “the relationship between a bank and its client must be of a confidential nature”, while noting that this privilege is “subject to being overridden by a greater public interest”.¹⁷

The 1982 Protection of Information Act (POIA) restricts access to state information deemed to be related to national security and provides for hefty fines and lengthy prison sentences for the disclosure or publication of such information. This Act is cited in many refusals of requests for information under the Promotion of Access to Information Act. A controversial replacement for the POIA, the Protection of State Information Bill (POSIB) was passed by the National Assembly, but returned for reconsideration by President Zuma in 2013. It has not been re-presented. Critics argue that the POSIB would restrict publication of sensitive documents and expose journalists to the possibility of draconian prison sentences, including up to 25 years for the publication of classified information.¹⁸

Laws and Policies Governing Freedoms of Speech and Press

¹⁶ Law Library of Congress, Protection of Trade Secrets: Brazil, China, India, Russian Federation, South Africa

¹⁷ Firstrand Bank Limited v Chaucer Publications (PTY) Limited and Another, (2007/12645), www.saflii.org/za/cases/ZAWCHC/2007/59.pdf

¹⁸ Reporters Without Borders, Will secrecy law approved by parliament end investigative journalism?, <https://rsf.org/en/news/will-secrecy-law-approved-parliament-end-investigative-journalism>

The South African Constitution's Bill of Rights¹⁹ guarantees that “everyone has the right to freedom of expression”, including freedom of the press and other media and freedom to receive or impart information or ideas.²⁰ These rights do not extend to propaganda for war; incitement of imminent violence; or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Civil defamation cases involving large fines are occasionally brought against members of the press²¹. This may become increasingly common, as the ANC has announced its intention to decriminalize defamation despite the rarity of criminal prosecution for it. All forms of defamation will be regarded as civil matters under the changes, although the relevant bill has not yet been introduced into parliament.

South African journalists can be compelled to disclose their journalistic sources under the Criminal Procedure Act, although their code of ethics and conduct requires that they protect them.²² An important legal precedent was set in a 2013 court case when a judge declared that journalists should have the right to protect their sources.²³

The 2018 Freedom House *Freedom of the Press* report ranked South Africa's press as "free". The report applauds recent improvements in journalists' right to access information and reductions in restrictions on publishing information in the public interest. However, the report cautions that some media freedoms are threatened by proposed legislation, including a Cybercrimes and Cybersecurity Bill which would permit the seizure of computers and digital information without a court order; and a draft set of regulations on internet content that would require many bloggers to register with the Film and Publications Board or face criminal penalties.

South Africa ranks 28th out of 180 countries surveyed in Reporters Without Borders (RWB) 2018 World Press Freedom Index. This represents an improvement of 24 places in four years.

Whistleblower cases

In addition to civil and criminal prosecution, whistleblowers risk job-loss, defamation, financial ruin, and in the past, even death threats and assassination²⁴.

Among the most highly publicized cases of whistleblowing in South Africa is the 2009 assassination of Moss Phakoe. Phakoe, an African National Congress attorney, was murdered after making allegations of fraud to the Cooperative Governance Minister²⁵. Former Rustenburg mayor Matthew Wolmarans, who was implicated in the allegations, was

¹⁹ Constitution of the Republic of South Africa, 1996 - Chapter 2: Bill of Rights, <http://www.gov.za/documents/constitution/chapter-2-bill-rights>

²⁰ Constitution of the Republic of South Africa, 1996 - Chapter 2: Bill of Rights, Section 16. <http://www.gov.za/documents/constitution/chapter-2-bill-rights>

²¹ Freedom House *Freedom of the Press 2016, South Africa*, <https://freedomhouse.org/report/freedom-press/2016/south-africa>

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²³ *Bosasa Operation (Pty) Ltd v Basson and Another*, <http://www.saflii.org/za/cases/ZAGPJHC/2012/71.pdf>

²⁴ ODAC (Open Democracy Advice Centre). (2015). Heroes under fire: South African whistle-blowers stories. March 2015,

²⁵ Right to Know, *Blow the Whistle*, <http://www.r2k.org.za/blow-the-whistle/>

found guilty of orchestrating the murder²⁶. Wolmarans was sentenced to 20 years in prison²⁷ but acquitted two years later when the High Court ruled that two key prosecution witnesses were not credible²⁸. Phakoe's allegations have yielded no charges, and the murder remains unsolved.

There are, however, examples of the effective use of whistleblowing protection. When Deputy Director General Mike Tshishonga alleged ministerial corruption in the appointment of liquidators, he was frustrated that no action followed his disclosures to the Director General, Public Protector or Auditor General. He contacted the media, and his claims headlined national news. Tshishonga was forced to resign and charged with misconduct as a direct consequence of his whistleblowing. He brought the case to the Labour Court, which ruled that the impropriety raised in the disclosures was "exceptionally serious"²⁹ and thus eligible to be given to the media³⁰. His forced resignation was found to amount to unfair practice, and he was awarded 12 months' salary plus legal costs³¹.

Relevant legislation

- Protected Disclosures Act 26 of 2000
- Companies Act 71 of 2008
- Labour Relations Act 66 of 1995
- Prevention and Combatting of Corrupt Activities Act 4 of 2012
- Protection of Information Act
- Protection of State Information Bill
- Criminal Procedure Act 51 of 1977
- National Key Points Act of 1980
- Constitution of the Republic of South Africa, 1996
- Prevention of Corrupt Activities Act of 2003

Organizations of Interest

Corruption Watch

Corruption Watch aims to ensure that the custodians of public resources act responsibly to advance the interests of the public, and to ensure that opportunities for entering into corrupt relationships are reduced. All forms of corruption at all levels of government or in the private sector can be reported to CW, and the organization promises that they will "not share any details or identifying information with anyone else without permission"

Address: info@corruptionwatch.org.za

Tel: 0800 023 456, 011 242 3900 or SMS "CALLME" TO 44 666 and CW will phone you back

²⁶ *Judgment today in trial over death of whistle-blower*, The Star, <http://www.iol.co.za/the-star/judgment-today-in-trial-over-death-of-whistle-blower-1341651>

²⁷ Killer mayor Matthew Wolmarans still receives a salary, <http://mg.co.za/article/2012-09-14-00-killer-mayor-matthew-wolmarans-still-receives-a-salary>, September 2012

²⁸ *Rustenburg mayor: I was framed for murder of councillor*, <http://mg.co.za/article/2014-06-26-rustenburg-mayor-i-was-framed-for-murder-of-councillor>, June 2014

²⁹ *Tshishonga v Minister of Justice and Constitutional Development and another (JS898/04) [2006] ZALC 104 (26 December 2006)*, paras 249

³⁰ *Tshishonga v Minister of Justice and Constitutional Development and another (JS898/04) [2006] ZALC 104 (26 December 2006)*, para 279

³¹ *Tshishonga v Minister of Justice and Constitutional Development and another (JS898/04) [2006] ZALC 104 (26 December 2006)*, paras 309-310

Fax: 011 403 2392

website: <http://www.corruptionwatch.org.za>

E-mail: info@corruptionwatch.org.za or submit information through their website

OUTA (Organization Undoing Tax Abuse)

OUTA investigates and exposes “the squandering, maladministration and corrupt use of taxes” in South Africa. Submissions can be made anonymously and OUTA claims that confidentiality is guaranteed through a secure, off-shore third party application.

Address: 318 Oak Avenue, Randburg

Tel: +27 (87) 170 0639

website: <http://www.oua.co.za/>

E-mail: info@oua.co.za or submit information through their website

National Anti-Corruption Hotline

The National Anti-Corruption Hotline is a Division of the Public Service Commission designed to receive fraud corruption or maladministration in the public service. The hotline is open 24 hours a day and callers may use any of the 11 South African official languages.

Address: Cnr Hamilton & Ziervogel Streets, Arcadia, Pretoria

Tel: 0800 701 701

Fax: 0800 204 965

Website: http://www.psc.gov.za/anti_corruption/anti_corruption.asp

E-mail: publicservicecorruptionhotline.org.za or

Integrity@publicservicecorruptionhotline.org.za

Open Democracy Advice Centre

ODAC are leading experts in relation to access to information and freedom of expression in South Africa and position themselves at the forefront of parliamentary advocacy on laws relating to transparency and good governance. Their toll-free whistleblowing hotline provides advice and assistance on utilising the Protected Disclosures Act to effectively shield whistleblowers from employment-based discrimination.

Address: Springtime Studios, 1 Scott Road, Observatory

Tel: +27-21-447 1177; whistleblower hotline: 0800-52 53 52

Fax: +21-21-447 1191

Website: <https://www.opendemocracy.org.za>

E-mail: helpline@odac.org.za; info@odac.org.za

Keeping Score: South Africa versus International Standards

The following standards for whistleblower laws are derived from guidelines developed by the OECD, Council of Europe, Government Accountability Project, Blueprint for Free Speech and Transparency International.

Key

1 = National law is recognized as consistent with international standards

2 = National law is partially recognized as consistent with international standards

3 = No national law or national law is not recognized as consistent with international standards

	Standard	Public Sector	Private Sector
1.	A broad range of organisations and workplaces are covered	1	1
2.	A broad range of offenses may be reported as whistleblowing	2	2
3.	The definition of who may qualify as a whistleblower is broad	2	1
4.	A range of disclosure channels to report internally or to regulators is in place	1	1
5.	People who make disclosures to external organizations, the media or the public are protected ³²	2	2
6.	The threshold for protection is a reasonable belief that the information disclosed is true	2	2
7.	There are opportunities and protections for anonymous disclosures	3	2
8.	Whistleblower confidentiality is protected unless expressly waived	3	2
9.	Organizations are required to establish internal disclosure procedures	3	1
10.	Whistleblowers are protected from a broad range of retaliatory acts ³³	2	1
11.	Victimized whistleblowers have access to a full range of remedies and compensation	2	1

³² Note that protected disclosures can only be made to the media under exceptional circumstances, such as “exceptionally serious” information or the belief that the information will be concealed or destroyed if reported through the usual channels. This contributed to a score of 2.

³³ Note that the PDA (the protection available in the public sector) only offers protection from a fairly narrowly defined set of “occupational detriments”. Hence a score of 2.

12.	Those who retaliate against a whistleblower are subject to sanctions	3	3
13.	A whistleblower oversight or regulatory agency has been designated	3	3
14.	Whistleblower laws are administered and reviewed transparently	2	2