


RESEARCH ARTICLE

A Critical Analysis of the Corporate Whistleblowing Provisions of the South African Companies Act

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(Accepted 12 July 2022; first published online 15 February 2023)

Abstract

Section 159 of the South African Companies Act 71 of 2008 regulates corporate whistleblowing in companies registered under the act. This article critically evaluates section 159 to ascertain whether it adequately protects and encourages corporate whistleblowers. It compares this section with the whistleblower provisions in the Australian Corporations Act 2001, which have strongly influenced section 159 and which were recently reformed, and argues that in the light of the distressing levels of corporate corruption, the low reporting rates of wrongdoing and the widespread victimization of whistleblowers, there is a pronounced need to protect corporate whistleblowers in South Africa. It contends that section 159 does not go far enough in protecting and encouraging corporate whistleblowers, and calls for numerous important reforms to be urgently made.

Keywords: Whistleblowing; corporate whistleblowers; protection of whistleblowers; victimization of whistleblowers; financial incentives

Introduction

Corporate misconduct is generally difficult to detect and prove because it can be concealed by a complex web of transactions, misleading corporate records and convoluted company group structures.¹ It is often revealed only because corporate whistleblowers with information that is not readily ascertainable are willing to disclose it, often at much personal and financial risk.² The term “whistleblowing” is not defined in the South African Companies Act 71 of 2008 (the Companies Act). Transparency International states that it means “the disclosure of information related to corrupt, illegal, fraudulent or hazardous activities being committed in or by public or private sector organisations – which are of concern to or threaten the public interest – to individuals or entities believed to be able to effect action”.³ Corporate whistleblowing is regulated in South Africa by section 159 of the Companies Act.

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1 Parliament of the Commonwealth of Australia “Revised Explanatory Memorandum to Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill (2018)”, para 1.2.

2 *Tshishonga v Minister of Justice and Constitutional Development and Another* [2007] (4) SA 135 (LC), para 290; Australian Securities and Investments Commission Regulatory Guide RG 270 Whistleblower Policies (2019), para RG270.1.

3 Transparency International “A best practice guide for whistleblowing legislation” (2018), principle 1 at 7, available at: <https://images.transparencycdn.org/images/2018_GuideForWhistleblowingLegislation_EN.pdf> (last accessed 20 January 2022). Transparency International also provides a “broad definition of whistleblowing”, which is stated to

As stressed by the State Capture Report: Part 1 (the SCR) of the Judicial Commission of Inquiry (also known as the Zondo Commission), whistleblowing is one of the most effective weapons to curb corruption.⁴ This is reinforced by article 4(e) of the Southern African Development Community Protocol against Corruption, which requires member states, including South Africa, to create, maintain and strengthen “systems for protecting individuals who, in good faith, report acts of corruption”.⁵ Whistleblowers play a vital role in exposing corporate crime, corruption, mismanagement and other wrongdoing that threatens the rule of law, financial integrity, human rights, the environment and public health and safety.⁶ Whistleblowing encourages transparency and high standards of corporate governance, which is stated to be one of the purposes of the Companies Act, in section 7(b)(iii).⁷ In *Tshishonga v Minister of Justice*, the court said that whistleblowing is healthy for companies because managers must be alert to their actions being monitored and reported.⁸ Enabling whistleblowing in companies empowers them to manage corruption proactively and mitigate its potential impact.

This article critically evaluates the provisions in section 159 of the Companies Act which regulate corporate whistleblowing in order to ascertain whether they adequately protect and encourage corporate whistleblowers. Where relevant, the article examines the whistleblower provisions of the Australian Corporations Act 2001 (Cth) (the ACA) to ascertain whether it may yield any useful and relevant guidelines for interpreting and applying the corporate whistleblowing provisions in section 159 of the Companies Act. The justification for this comparison is that the corporate whistleblower provisions in the ACA have strongly influenced section 159 of the Companies Act, which is closely modelled on its provisions. Furthermore, Australia recently overhauled its corporate whistleblower provisions in the ACA through the Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 10, 2019 (the Australian Whistleblowers Act, or the AWA), which came into force on 1 July 2019. Prior to this reform, whistleblower protections in Australia were found to have been lagging behind international standards and inadequately protecting whistleblowers.⁹ This comparative approach is reinforced by section 5(2) of the Companies Act,

be “the disclosure or reporting of wrongdoing, including but not limited to corruption; criminal offences; breaches of legal obligation; miscarriages of justice; specific dangers to public health, safety or the environment; abuse of authority; unauthorised use of public funds or property; gross waste or mismanagement; conflict of interest, and acts to cover up of any of these”. Transparency International is a global civil society nongovernmental organization founded in Berlin in 1993 to expose corruption and reduce its harmful effects.

- 4 SCR, para 555, available at: <https://www.statecapture.org.za/site/files/announcements/673/OCR_version_-_State_Capture_Commission_Report_Part_1_Vol_I.pdf> (last accessed 10 February 2022). The Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including organs of state was chaired by Justice Zondo. The six volumes of the State Capture reports were published between January and June 2022. The State Capture reports relate to an investigation into complaints of improper conduct by the former president of South Africa Jacob Zuma and other state functionaries, relating to the influence of the Gupta family in the removal and appointment of cabinet ministers and directors of state-owned companies, the awarding of contracts by certain organs of state linked to the Gupta family and the award of benefits linked to companies related to the Gupta family. The implicated state-owned companies include South African Airways SOC Ltd, Eskom Holdings SOC Ltd, Transnet SOC Ltd, Denel SOC Ltd and the South African Revenue Service. The SCR concludes in Part 1, para 28 that state capture in South Africa has indeed been established. See also *Tshishonga v Minister of Justice*, above at note 2, para 166, where the court said that whistleblowing is an effective and inexpensive measure to curb corruption.
- 5 South Africa signed this protocol on 14 August 2001.
- 6 Transparency International “Best practice guide”, above at note 3 at 1; K Hall and AJ Brown “From symbols to systems: Progress in the reform of Australia’s private sector whistleblowing laws” (2018) 12/1 *Law and Financial Markets Review* 7 at 8.
- 7 This section states that one of the purposes of the act is to promote the development of the South African economy by encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation.
- 8 Above at note 2, para 166.
- 9 J Smith “More opportunities, more concerns: A look at the reactionary nature of whistleblower protections in a growing global economy” (2020) 37/3 *Arizona Journal of International and Comparative Law* 381 at 403.

which provides that, to the extent appropriate, a court interpreting or applying the act may consider foreign law. As observed in *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa and Another v Bestvest 153 (Pty) Ltd*,¹⁰ South African company law has for many decades taken its lead from the relevant English Companies Act and jurisprudence, but section 5(2) now encourages South African courts to look further afield and to have regard in appropriate circumstances to other corporate law jurisdictions, be they American, European, Asian or African, when interpreting the Companies Act. Recommendations are thus made here to enhance and strengthen the corporate whistleblower provisions in section 159.¹¹

The urgent need for reform

South Africa's corporate whistleblower provisions need to be urgently reformed for three reasons. First, the scale of corruption in South Africa has reached staggering proportions in recent years, necessitating a strong legal framework which both encourages whistleblowing and effectively protects whistleblowers.¹² Second, despite some protections given to whistleblowers by section 159, the reporting rates of wrongdoing are low.¹³ The main reasons given for not reporting wrongdoing in companies are the fear of being victimized, a belief that the company will not act on the disclosure, a belief that the disclosure will not be anonymous, fear of losing one's job and lack of knowledge of whom to make the disclosure to.¹⁴ There is also a negative perception of whistleblowers in South Africa, which may stem from the country's political history.¹⁵

Third, the increasing number of reports in South Africa of whistleblowers who have suffered adverse professional or personal consequences is of grave concern. One extreme example is the assassination of the chief director of financial accounting of the Gauteng Department of Health, who exposed corruption linked to Covid-19 personal protective equipment and was gunned down outside her home, after having faced intimidation and fabricated misconduct charges.¹⁶ In another example, a whistleblower who testified at the Zondo Commission about high-level corruption that implicated the management consultancy firm Bain & Co (based in the USA) in the

10 [2012] (5) SA 497 (WCC), para 26. See also *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd and Another* [2017] (4) SA 51 (WCC), para 46.

11 The terms "whistleblower" and "discloser" are used interchangeably in this article as referring to a person who reports wrongdoing.

12 The Corruption Perceptions Index published by Transparency International ranks 180 countries according to their perceived levels of public-sector corruption; zero indicates a highly corrupt state, while 100 indicates a very clean state. South Africa scored a fail mark of 44 in both 2020 and 2021. In 2020, South Africa had a ranking of 69 on the global scale in terms of its perceived level of public-sector corruption, but slipped down to a ranking of 70 in 2021. Transparency International "Corruption perceptions index 2021" (2022), available at: <https://images.transparencycdn.org/images/CPI2021_Report_EN-web.pdf> (last accessed 31 January 2022).

13 S Lubisi and H Bezuidenhout "Blowing the whistle for personal gain in the Republic of South Africa: An option for consideration in the fight against fraud?" (2016) 18/1 *Southern African Journal of Accountability and Auditing Research* 49 at 51; L Groenewald *Whistleblowing Management Handbook* (2020, The Ethics Institute) at 39–43.

14 D Lewis "Personal and vicarious liability for the victimisation of whistleblowers" (2007) 36/2 *Industrial Law Journal* 224 at 224; P Martin *The Status of Whistleblowing in South Africa: Taking Stock* (2010, Open Democracy Advice Centre) at 76 and 104; Lubisi and Bezuidenhout "Blowing the whistle", above at note 13 at 56–57; Groenewald *Whistleblowing Management Handbook*, above at note 13 at 39–42.

15 During the apartheid era in South Africa, whistleblowers were associated with informers, known as *impimpis*, a derogatory term reserved for apartheid-era police spies who were used by the regime to draw out the identity and location of political activists seeking to overthrow the illegitimate government (*Tshishonga v Minister of Justice*, above at note 2, para 168; Lubisi and Bezuidenhout "Blowing the whistle", above at note 13 at 56).

16 F Haffajee "SIU confirms Babita Deokaran, mowed down after dropping child at school, was a witness in the R332m PPE scandal" (24 August 2021) *Maverick Citizen*, available at: <<https://www.dailymaverick.co.za/article/2021-08-24-whistle-blower-slain-after-dropping-her-child-at-school-siu-confirms-babita-deokaran-was-a-witness-in-the-r332m-ppe-scandal/>> (last accessed 1 February 2022).

deliberate destructive reorganization of the South African Revenue Service was forced to leave South Africa because he feared for his life.¹⁷ The homes of two whistleblowers who testified at the Zondo Commission about irregularities at the South African Revenue Service were burgled, in what was described as “the result of a bigger conspiracy” and deliberate targeting.¹⁸ Another whistleblower reported that she suffered panic attacks and was diagnosed with depression, post-traumatic stress disorder, anxiety and insomnia after exposing corporate corruption in state-owned companies.¹⁹ These reports indicating the harassment, intimidation and retaliation faced by whistleblowers in South Africa inevitably discourage others from disclosing wrongdoing.²⁰

In the light of the recent attacks on whistleblowers in South Africa, it is “of the highest priority that a *bona fide* whistle blower who reports wrongdoing should receive, as a matter of urgency, effective protection from retaliation”, as the SCR notes.²¹ This recommendation is supported by article 32(2) of the United Nations Convention against Corruption (which South Africa signed), which requires signatory states to establish procedures for the physical protection of witnesses, experts and victims.²² It is further supported by articles 5 and 6 of the African Union Convention on Preventing and Combating Corruption (which South Africa also signed), which require member states to adopt legislative and other measures to protect informants and witnesses in corruption and related offences, including protection of their identities, and to ensure that citizens can report instances of corruption without fear of consequent reprisals.²³

Applicability of Section 159 of the Companies Act

Section 159 governs corporate whistleblowing in all companies registered under the Companies Act: these include private, public, non-profit and state-owned companies, and also external companies.²⁴ The state is the sole shareholder of state-owned companies. Thus section 159 does not apply solely to the disclosure of wrongdoing in companies in the private sector, but also to the disclosure of wrongdoing in state-owned companies in the public sector. Since the state holds its shares in state-owned companies in trust for the nation,²⁵ whistleblowing in such entities is significant for the

17 R Mahlaka “Athol Williams: ‘I will continue whistle-blowing and making the corrupt uncomfortable’” (28 November 2021) *Maverick Citizen*, available at: <<https://www.dailymaverick.co.za/article/2021-11-28-athol-williams-i-will-continue-whistle-blowing-and-making-the-corrupt-uncomfortable/>> (last accessed 1 February 2022). Refer to SCR part I, vol III, chap 3 for a discussion of the testimony given by Williams on state capture of state-owned companies.

18 “Whistleblower Johann Van Loggerenberg burgled” (18 January 2022) *eNews Channel Africa*, available at: <<https://www.enca.com/news/johann-van-loggerenberg-burgled-conspiracy-suspected>> (last accessed 1 February 2022); E Ferreira “SARS whistleblower Van Loggerenberg suffers ‘suspicious’ home invasion” (18 January 2022) *Mail & Guardian*, available at: <<https://mg.co.za/news/2022-01-18-sars-whistleblower-van-loggerenberg-suffers-suspicious-home-invasion/>> (last accessed 1 February 2022).

19 S Shoba “Treated like a leper: Mosilo Mothepu relates the cost of being a whistle-blower” (22 April 2021) *Daily Maverick*, available at: <<https://www.dailymaverick.co.za/article/2021-04-22-treated-like-a-leper-mosilo-mothepu-relates-the-cost-of-being-a-whistle-blower/>> (last accessed 1 February 2022).

20 For further examples of the retaliation and victimization faced by whistleblowers see *Tshishonga v Minister of Justice*, above at note 2 and *Magagane v MTN SA (Pty) Ltd and Another* [2013] 8 BLLR 768 (LC).

21 Para 557.

22 South Africa ratified this convention on 22 November 2004.

23 South Africa ratified this convention on 11 November 2005.

24 A state-owned company is defined in the Companies Act, sec 1 as meaning an enterprise registered in terms of the act as a company and which is either listed as a public entity in sched 2 or 3 of the Public Finance Management Act 1 of 1999 or which is owned by a municipality in terms of the Local Government: Municipal Systems Act 32 of 2000 and is otherwise similar to such an enterprise. On state-owned companies, see further R Cassim *The Removal of Directors and Delinquency Orders under the South African Companies Act* (2020, Juta) at 90–92. An external company is a foreign company carrying on business or non-profit activities in South Africa (Companies Act, sec 1).

25 SCR, para 573.

country as whole. Any provision of a company's constitution, rules or an agreement is void to the extent that it is inconsistent with, or purports to limit, set aside or negate the effect of section 159.²⁶

Section 159 applies concurrently with the protection afforded by the Protected Disclosures Act 26 of 2000 (PDA) governing whistleblowing by employees in the public and private sectors. According to the Memorandum on the Objects of the Companies Bill 2008, section 159 was formulated to harmonize with the protections that were already afforded to employees by the PDA.²⁷ To the extent that section 159 creates a right or establishes any protection for an employee, this is in addition to (and does not replace) the right and protection conferred by the PDA.²⁸ Notably, the PDA applies to a disclosure referred to in section 159 by an employee (as defined in the PDA), irrespective of whether the PDA would otherwise apply to that disclosure.²⁹ Should there be an inconsistency between section 159 and the PDA, both apply concurrently to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second.³⁰ To the extent that this is not possible, the Companies Act prevails.³¹ Consequently, employees in corporate environments must consult both the PDA and the Companies Act when disclosing any wrongdoing. This task may be challenging given the different requirements for disclosures to qualify for protection. Adding to this complexity is the fact that only some, but not all, of the categories of disclosable matters under the PDA are replicated in the Companies Act.³²

In addition to the Companies Act and the PDA, the regulation of whistleblowing is scattered across a number of other statutes.³³ This approach thus presents a confusing web for whistleblowers to navigate, and results in inconsistent protection. The lack of clarity may discourage persons from disclosing wrongdoing in their environment. A consolidated legislative framework governing whistleblowing in the various sectors should be enacted by the South African legislature so as to ensure clarity and a seamless application of the whistleblower framework, provide consistent protection for whistleblowers across various sectors, make the whistleblowing laws more accessible and visible, and encourage persons to make disclosures about wrongdoing. This coherent approach was recently adopted in Australia, which dispensed with having a patchwork of statutes protecting whistleblowers. The AWA consolidated whistleblower protection for the corporate and financial sectors and created a new whistleblower protection regime in the taxation sector through amendments made to the ACA and the Taxation Administration Act 1953.³⁴ The effect of this consolidation

26 Companies Act, sec 159(2).

27 Companies Bill (B61D-2008), para 11.

28 Companies Act, sec 159(1)(a).

29 *Id.*, sec 159(1)(b).

30 *Id.*, sec 5(4)(a).

31 *Id.*, sec 5(4)(b)(ii). See further FHI Cassim "Introduction to the new Companies Act: General overview of the act" in FHI Cassim (ed) *Contemporary Company Law* (3rd ed, 2021, Juta) 1 at 7–8.

32 The categories of disclosable matters under the PDA that are replicated in the Companies Act are that: (i) a person has failed, is failing or is likely to fail to comply with any legal obligation to which they are subject; (ii) the health or safety of an individual has been, is being or is likely to be endangered; (iii) the environment has been, is being or is likely to be damaged; and (iv) there is unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The categories of disclosable matters in the PDA that have not been replicated are that: (i) a criminal offence has been committed, is being committed or is likely to be committed; (ii) a miscarriage of justice has occurred, is occurring or is likely to occur; and (iii) any matter referred to in the above categories has been, is being or is likely to be deliberately concealed.

33 Other statutes relevant to whistleblowing include the Constitution of the Republic of South Africa 1996 (the Constitution) (secs 9, 16 and 23); the Labour Relations Act 66 of 1995 (secs 186(2), 187 and 191(13)); the Prevention and Combating of Corrupt Activities Act 12 of 2004 (sec 34); the National Environmental Management Act 107 of 1998 (sec 31); and the Protection from Harassment Act 17 of 2011 (which allows protection orders against harassment to be issued). The Competition Commission also encourages whistleblowing on cartels involved in, inter alia, price fixing and collusive tendering, and adopted a Corporate Leniency Policy in 2008 (see para 5.8) under sec 49E of the Competition Act 89 of 1998 to regulate this.

34 The AWA consolidates the whistleblower protection under the ACA, the Australian Securities and Investments Commission Act 2001, the Banking Act 1959, the Insurance Act 1973, the Life Insurance Act 1995, the

is that consistent protection is now provided to whistleblowers, and a single concept of a protected disclosure, an eligible whistleblower and an eligible recipient has been introduced.³⁵

Eligible whistleblowers

Section 159 of the Companies Act protects the following categories of whistleblowers: shareholders, directors, company secretaries, prescribed officers,³⁶ employees, registered trade unions that represent employees of the company (or another employee representative) and suppliers of goods or services to a company and their employees.³⁷ This group is not limited to “insiders” in the company, because it includes outsiders with a commercial relationship with companies, such as suppliers of goods and services to the company and their employees. The eligible whistleblowers under section 1317AAA ACA are a similar group to the one in the South African Companies Act, but the Australian group also includes relatives (spouses, parents, grandparents, children, grandchildren and siblings) and dependants of eligible whistleblowers.³⁸ Since relatives and dependants may have useful information about corporate misconduct in relation to the company,³⁹ and are more likely to disclose it if they will receive the protections under section 159, section 159(4) should also be broadened to include such persons.

The protected category of whistleblowers under section 1317AAA ACA commendably includes those persons who were formerly in the relevant position,⁴⁰ whom section 159(4) of the Companies Act does not protect. Former directors in particular may have useful information about wrongdoing in the company, but if they are removed by the board of directors, they will no longer qualify for protection under section 159 and are unlikely to disclose pertinent information about wrongdoing. To encourage disclosures by people after they leave their positions in the company, section 159(4) ought to be broadened to include persons who formerly fell within the category of eligible whistleblowers within the previous three years. Imposing a limit of three years will encourage whistleblowers to disclose the wrongdoing within a reasonable time after leaving their positions and while the relevant evidence is still accessible.

Eligible recipients

To enjoy protection under section 159 of the Companies Act, the disclosure must be made to one of the following: the Companies and Intellectual Property Commission (CIPC), the Companies Tribunal, the Takeover Regulation Panel (TRP), a regulatory authority,⁴¹ an exchange,⁴² a legal

Superannuation Industry (Supervision) Act 1993, the Taxation Administration Act 1953, the National Consumer Credit Protection Act 2009 and the Financial Sector (Collection of Data) Act 2001. Whistleblowing in the public sector in Australia is regulated by the Public Interest Disclosure Act 2013.

35 See Parliament of Australia “Revised Explanatory Memorandum”, above at note 1, para 2.12.

36 A prescribed officer is a person who is not a director of the company but exercises general executive control over and management of the whole or a significant portion of the company’s business and activities, or who regularly participates to a material degree (Companies Act, sec 66(10), read with reg 38 Companies Regulations, 2011). On prescribed officers see further R Cassim “Governance and the board of directors” in Cassim (ed) *Contemporary Company Law*, above at note 31, 535 at 555–56.

37 Companies Act, sec 159(4).

38 ACA, sec 9 and secs 1317AAA(g) and (h).

39 See Parliament of Australia “Revised Explanatory Memorandum”, above at note 1, para 2.47.

40 This is made clear in sec 1317AAA by the inclusion of the words “or has been” in listing the category of eligible whistleblowers.

41 A “regulatory authority” is an entity established in terms of national or provincial legislation responsible for regulating an industry or a sector of an industry (Companies Act, sec 1).

42 An “exchange” is defined in Companies Act, sec 1 as having the meaning set out in the Securities Services Act 36 of 2004, sec 1. This statute has subsequently been repealed and replaced by the Financial Markets Act 19 of 2012, which defines an “exchange” in sec 1 as meaning a person who constitutes, maintains and provides an infrastructure for

adviser, director, prescribed officer, company secretary or auditor, a person performing the function of an internal audit, the board or a committee of the company.⁴³

The AWA introduced two novel categories of eligible recipients to whom disclosures may be made in the public interest and in an emergency: a Member of Parliament and a journalist.⁴⁴ Public disclosures on social media or to self-defined journalists are not protected.⁴⁵ To constitute a public interest disclosure, the whistleblower must have previously disclosed that information; must not have reasonable grounds to believe that action is being, or has been, taken to address the matter to which the disclosure relates; and must have reasonable grounds to believe that making a further disclosure of the information would be in the public interest.⁴⁶ Emergency disclosures are permitted if the discloser previously disclosed the information and had reasonable grounds to believe that it concerns a substantial and imminent danger to the health or safety of one or more persons or to the natural environment.⁴⁷

Although disclosures to the media or to a Member of Parliament may have negative public repercussions for a company, a number of safeguards have been built into the legislative provisions permitting such disclosure. Importantly, both types of disclosures may be made only if the discloser has previously disclosed the information.⁴⁸ With regard to a public interest disclosure, at least 90 days must have passed since the previous disclosure.⁴⁹ In both instances, the discloser must give the body to whom the original disclosure was made a written notification which includes sufficient information to identify the previous disclosure and which states that the discloser intends to make a public interest or emergency disclosure.⁵⁰ The extent of the information disclosed in the public interest must be no greater than is necessary to inform the recipient of the misconduct or the improper state of affairs, while that disclosed in the emergency disclosure must be no greater than is necessary to inform the recipient of the substantial and imminent danger.⁵¹

Internal whistleblowing helpfully enables the company to address the problem before it worsens or else to mitigate the damages.⁵² Nevertheless, studies show that some reasons why whistleblowers disclose wrongdoing to the media are not because their claims are groundless or because they are motivated by revenge, but because of a lack of a meaningful response from the entity to whom the wrongdoing was originally reported, an absence of power within the entity to effect change, a high risk of retaliation and a desire to guarantee their anonymity.⁵³ Given the systemic corporate

bringing together buyers and sellers of securities, matching bids and offers for securities of multiple buyers and sellers, and whereby a matched bid and offer for securities constitutes a contract of purchase and sale of securities.

43 Companies Act, sec 159(3)(a).

44 ACA, sec 1317AAD. Parliamentary privilege affords Members of Parliament the ability to publicize whistleblower disclosures with no risk of defamation action being taken against them. This publicity may, however, prejudice any subsequent investigation into the whistleblower's disclosures. Parliamentary Joint Committee on Corporations and Financial Services "Whistleblower Protections" (September 2017), paras 9.31–9.36, available at: <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections/Report> (last accessed 31 January 2022). A "journalist" is a person who is working in a professional capacity as a journalist for a newspaper or magazine, a radio or television broadcasting service or an electronic service (including one provided through the internet) that is operated on a commercial basis, or by a body that provides a national broadcasting service, and is similar to a newspaper, magazine or television broadcast (ACA, sec 1317AAD(3)).

45 Parliament of Australia "Revised Explanatory Memorandum", above at note 1, para 2.70.

46 ACA, sec 1317AAD(1).

47 Id, sec 1317AAD(2).

48 Id, secs 1317AAD(1)(a) and (2)(a).

49 Id, sec 1317AAD(1)(b).

50 Id, secs 1317AAD(1)(e) and (2)(c).

51 Id, secs 1317AAD(1)(g) and 1317AAD(2)(e).

52 S Lombard "Regulatory policies and practices to optimize corporate whistleblowing: A comparative analysis" in S Lombard, V Brand and J Austin (eds) *Corporate Whistleblowing Regulation: Theory, Practice, and Design* (2020, Springer) 3 at 16.

53 See TM Dworkin and AJ Brown "The money or the media? Lessons from contrasting developments in US and Australian whistleblowing laws" (2013) 11/2 *Seattle Journal for Social Justice* 653 at 682.

corruption in South Africa, the Companies Act should follow the example of the ACA and permit both public interest and emergency disclosures to be made to the media and a Member of Parliament, with the appropriate safeguards implemented, as adopted under section 1317AAD(1) and (2) of that statute. In *Tshishonga v Minister of Justice*, the court stressed that the media is one of the pillars that promotes and upholds democracy, while corruption undermines democracy;⁵⁴ thus disclosures to the media that are in the public interest and the media's exposure of corruption are good for democracy. Notably, section 159 does not impose any obligation on a whistleblower to disclose wrongdoing internally or to exhaust internal remedies before disclosing the wrongdoing to an external recipient. Permitting public interest and emergency disclosures will also be an incentive for companies to act on the disclosure in a timely and meaningful way, and will encourage corporate whistleblowers to disclose wrongdoing.

Conditions to qualify for whistleblower protection

To qualify for protection, the disclosure of wrongdoing by a corporate whistleblower must comply with three requirements, as discussed below.

Good faith

The first requirement to qualify for protection is that, under section 159(3)(a) of the Companies Act, the whistleblower must act in good faith in making the disclosure to an eligible recipient. In *Tshishonga v Minister of Justice*, the court said that good faith is a finding of fact, and that a court must consider all the evidence cumulatively to determine whether there is good faith, an ulterior motive or, if there are mixed motives, what the dominant motive is.⁵⁵ In *Radebe and Another v Premier, Free State and Others*, the court said that some factors that could lead to a conclusion of a lack of good faith by the discloser are malice, an ulterior motive aimed at self-advancement or revenge, and reliance on fabricated information known by the discloser to be false.⁵⁶ The absence of these elements is a strong indicator that the discloser is acting in good faith and honestly made the disclosure wishing for action to be taken to investigate it.⁵⁷

The good faith requirement is controversial. It was originally incorporated in the ACA as a safeguard against vexatious claims⁵⁸ but was abandoned when the AWA was promulgated, on the basis that the motivation for making a disclosure is not relevant to the policy reasons for protecting whistleblowers.⁵⁹ The good faith requirement has been described as an "additional ethical high jump" imposed on whistleblowers in return for protection,⁶⁰ and may well serve as a deterrent.

54 Above at note 2, para 252.

55 Id, para 205. On the meaning of "good faith" in the context of a protected disclosure, see *Street v Derbyshire Unemployed Workers' Centre* [2004] 4 All ER 839, paras 41–48 and *Chowan v Associated Motor Holdings (Pty) Ltd and Others* [2018] (4) SA 145 (GJ), para 49.

56 [2012] (5) SA 100 (LAC), para 35. The Labour Appeal Court made these statements in regard to a protected disclosure under sec 6 PDA, but arguably the same factors would apply to the equivalent requirement of good faith under the Companies Act, sec 159(3)(a). See further *South African Municipal Workers Union National Fund v Arbutnott* [2014] 35 ILJ 2434 (LAC), para 23, where the Labour Appeal Court agreed with these sentiments on the meaning of "good faith".

57 *Radebe v Premier, Free State*, above at note 56, para 35.

58 See Parliamentary Joint Committee Report, above at note 44, para 6.49. The good faith requirement was embodied in what was previously ACA, sec 1317AA(1)(e).

59 Parliament of Australia "Revised Explanatory Memorandum", above at note 1, para 2.5. It is noteworthy that in the USA, the Sarbanes–Oxley Act 2002, sec 1514A(a)(1), does not incorporate a good faith requirement in regard to whistleblowing either, and protects employees who reasonably believe that there was a violation of federal securities law or of the rules of the Securities and Exchange Commission (SEC).

60 W De Maria "Common law – common mistakes? Protecting whistleblowers in Australia, New Zealand, South Africa and the United Kingdom" (2006) 19/7 *International Journal of Public Sector Management* 643 at 649.

Companies accused of whistleblowing commonly allege that the whistleblower acted with a subjective or collateral reason, which consequently exposes whistleblowers to investigations and personal attacks about their motives.⁶¹ It is contended that the good faith requirement undermines the protections given to whistleblowers who have multiple motives for making disclosures,⁶² and, further, that the veracity of the disclosure should be the overriding consideration and that the discloser's motive should not cloud the matter.⁶³ The good faith requirement in section 159(3)(a) should be rescinded for two reasons: first, the motive of the whistleblower should not disqualify the disclosure if the information is sound, because the consequence would be that a disclosure would be unprotected even if it benefits society;⁶⁴ and second, as discussed below, the reasonable belief requirement in section 159(3)(b) already acts as a safeguard against vexatious disclosures.

Reasonable belief

The second requirement to qualify for protection is that under section 159(3)(b), the whistleblower must reasonably believe at the time of making the disclosure that the information showed or tended to show that the company (or an external company, a director or a prescribed officer of the company acting in that capacity) had committed one of the types of wrongdoing listed in section 159(3)(b). The phrase "reasonably believed" indicates that the test is an objective one in that the belief must be reasonable.⁶⁵ A whistleblower's subjective belief that one of the grounds listed in section 159(3)(b) has been contravened will not qualify for protection.⁶⁶ Whether the belief is reasonable or not is a finding of fact based on what is believed by the whistleblower.⁶⁷ Relevant factors to be considered in this regard are the whistleblower's experience, background and access to information.⁶⁸ Notably, the enquiry is not about the reasonableness of the information but about the reasonableness of the *belief* in relation to the truthfulness of the information.⁶⁹ Thus a belief can still be reasonable even if the information turns out to be inaccurate.⁷⁰

Under section 1317AA(4) ACA, a discloser will receive protection if s/he has "reasonable grounds to suspect" that the information concerns misconduct or an improper state of affairs or circumstances. A reasonable ground of suspicion does not involve certainty as to the truth (for otherwise it ceases to be a suspicion and becomes a fact); is based on conjecture or surmise where proof is lacking; can never point unerringly and exclusively in a particular direction only; and cannot result in a definite and unequivocal state of mind which excludes any other possible answer.⁷¹ The threshold under section 159(3)(b) of the Companies Act for a disclosure to be protected is thus higher compared to the threshold under section 1317AA(4) ACA, where a reasonable suspicion of wrongdoing suffices for a disclosure to be protected. As a reasonable belief requires more certainty about the truth of the wrongdoing compared to a reasonable suspicion, the

61 Ibid; Parliament of Australia "Revised Explanatory Memorandum", above at note 1, para 2.42; Transparency International "Best practice guide", above at note 3 at 15.

62 Parliament of Australia "Revised Explanatory Memorandum", above at note 1, para 2.5; Smith "More opportunities, more concerns", above at note 9 at 404.

63 Parliamentary Joint Committee Report, above at note 44, para 6.58.

64 See *Tshishonga v Minister of Justice*, above at note 2, para 207.

65 Id, para 185.

66 P Delpont *Henochsberg on the Companies Act 71 of 2008* (vol 1, 2011, LexisNexis) at 560(21).

67 *Tshishonga v Minister of Justice*, above at note 2, para 185.

68 Lombard "Regulatory policies", above at note 52 at 19.

69 *South African Municipal Workers v Arbuthnot*, above at note 56, para 15.

70 Ibid; *Radebe v Premier, Free State*, above at note 56, para 36.

71 *R v Van Heerden* [1958] (3) SA 150 (T) at 152; *S v Ganyu* [1977] (4) SA 810 (RA) at 813; *Attorney-General v Blumears and Another* [1991] (1) ZLR 118 (S) at 123; *Muzonda v Minister of Home Affairs and Another* [1993] (1) ZLR 92 (S) at 96; *Mananga and Others v Minister of Police* [2021] (2) SACR 225 (SCA), para 7.

reasonable belief threshold in section 159(3)(b) is preferable because it would discourage vexatious disclosures.

Categories of disclosable matters

The third requirement to qualify for protection is that under section 159(3)(b) of the Companies Act, the wrongdoing must relate to one of the following:

- (i) a contravention of the Companies Act or any law mentioned in Schedule 4 of the act;⁷²
- (ii) a failure to comply with any statutory obligation to which the company is subject;
- (iii) engaging in conduct that endangers or is likely to endanger the health or safety of any individual or has harmed or is likely to harm the environment;
- (iv) unfairly discriminating or condoning unfair discrimination against any person, as contemplated in section 9 of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; or
- (v) contravening any other legislation in a manner that could expose the company to an actual or contingent risk of liability or is inherently prejudicial to the company's interests.⁷³

Save for the third category listed above, the disclosable matters under section 159(3)(b) relate to contravening a statutory provision. By contrast, the disclosable matters set out in section 1317AA(4) ACA are much broader, in that a disclosure will be protected if the discloser had reasonable grounds to suspect misconduct or an improper state of affairs or circumstances in relation to the company.⁷⁴ The references to "misconduct" and an "improper state of affairs" make it clear that the disclosable matters need not relate to a contravention of particular legislation. Nevertheless, in my view, section 159(3)(b) is sufficiently wide-ranging; in particular, the fifth category listed above is open-ended and far-reaching.

Protections for whistleblowers

The three types of protection provided to corporate whistleblowers by the Companies Act are discussed below, followed by a discussion of two types of protection that have been omitted.

Qualified privilege

Under section 159(4)(a) Companies Act, a whistleblower making a protected disclosure will acquire qualified privilege in respect of the disclosure. This term is not defined in the Companies Act. Under South African common law, "qualified privilege" is a provisional defence open to the publisher of a defamatory statement, under which the publication of defamatory words is regarded as being in the interest of public policy and therefore lawful.⁷⁵ Although there is no closed list of occasions that enjoy qualified privilege, because the categorization of a particular instance as privileged depends on public-policy considerations and involves a value judgment,⁷⁶ the basis of the qualified privilege here is that a whistleblower makes a

72 Schedule 4 sets out a list of legislation that may be enforced by the CIPC. This list includes the Close Corporations Act 69 of 1984, the Counterfeit Goods Act 37 of 1977 and the Protection of Businesses Act 99 of 1978.

73 Companies Act, secs 159(3)(b)(i) to (v).

74 Parliament of Australia "Revised Explanatory Memorandum", above at note 1, para 2.33. "Misconduct" includes fraud, negligence, default, breach of trust and breach of duty (ACA, sec 9).

75 *Borgin v De Villiers and Another* [1980] 2 All SA 261 (A) at 274; *McPhee v Hazelhurst and Others* [1989] (4) SA 551 (N) at 555; *Tuch and Others NNO v Myerson and Others NNO* [2010] (2) SA 462 (SCA), para 10.

76 *NEHAWU v Tsatsi* [2006] (6) SA 327 (SCA), paras 10 and 12; *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others* [2001] 1 All SA 425, para 26.

disclosure in discharge of a duty or protection of a right or a legitimate interest to an eligible recipient who has a duty to receive or interest in receiving the disclosure.⁷⁷ The qualified privilege protection ensures that whistleblowers will not be intimidated into silence by a threat of defamation proceedings.⁷⁸

The qualified privilege defence may be relied on only if the publisher of the information did not act with malice or with an improper motive.⁷⁹ The defence is forfeited if a whistleblower makes a disclosure not out of a sense of duty or a desire to protect an interest but because of an improper motive. Since section 159(3) currently requires a whistleblower to make a disclosure in good faith and to reasonably believe that the information showed wrongdoing, this provision will presumably entail that the whistleblower did not act with malice or an improper motive in making the disclosure. Nevertheless, for the sake of certainty and precision, section 159(4)(a) should clarify both the meaning and the parameters of the protection of qualified privilege in the corporate whistleblowing context. This position is commendably clarified in the ACA, where section 1317AB(2) similarly confers qualified privilege on a whistleblower who makes a protected disclosure. The term “qualified privilege” is explained in section 89 ACA as meaning that the person has qualified privilege in proceedings for defamation and that, in the absence of malice, this person is not liable to an action for defamation in respect of that matter. “Malice” is defined in section 89(2) as including “ill will to the person concerned or any other improper motive”.

Immunity from liability

The second protection conferred on a whistleblower who makes a protected disclosure is that s/he will be immune from any civil, criminal or administrative liability for that disclosure.⁸⁰ For example, with regard to immunity from civil liability, this could mean that a contract to which the whistleblower is a party may not be terminated on the basis that the disclosure is a breach of the contract, such as a breach of a confidentiality clause.⁸¹ No immunity is provided to a whistleblower under section 159 from any civil, criminal or administrative liability that is revealed by the disclosure – the protection from liability extends only to the making of the disclosure itself. Section 1317AB(1)(c) ACA, which adopts a similar position, expressly makes this clear by stating that the protections afforded to a whistleblower do not prevent them from being subject to any civil, criminal or administrative liability for their conduct that is revealed by the disclosure. But this provision is subject to an exception in section 1317AB(1)(c) that if a disclosure qualifies for protection, the information is not admissible in evidence against the whistleblower in criminal proceedings or in proceedings for the imposition of a penalty, save for proceedings in respect of the falsity of the information.

The SCR recommends that if there has been an honest disclosure of information which might otherwise render the whistleblower liable to prosecution or litigation, s/he should be offered immunity from criminal or civil proceedings.⁸² While such an approach would encourage whistleblowers to disclose information, blanket immunity from criminal and civil proceedings should not be granted to them, but this question should be determined on a case-by-case basis. But section 159 ought to incorporate a provision similar to 1317AB(1)(c) ACA so as to limit the prospects of whistleblowers being subject to prosecution for their involvement in the wrongdoing.

77 On this category that is recognized as enjoying qualified privilege, see *Borgin v De Villiers*, above at note 75 at 274, and *NEHAWU v Tsatsi*, above at note 76, para 11.

78 De Maria “Common law – common mistakes?”, above at note 60 at 652.

79 *Basner v Trigger* [1946] AD 83 at 95; *Joubert and Others v Venter* [1985] (1) SA 654 (A) at 704; *Van der Berg v Coopers*, above at note 76, para 17; *NEHAWU v Tsatsi*, above at note 76, para 10; *Tuch v Myerson*, above at note 75, para 11.

80 Companies Act, sec 159(4)(b).

81 This is explicitly stated in ACA, sec 1317AB(1)(b), the equivalent provision to the Companies Act, sec 159(4)(b).

82 SCR, para 690.4.

Compensation for damages caused by victimization

Under section 159(5)(a) of the Companies Act, whistleblowers may claim compensation for any damages they may suffer if, as a result of an actual or even a possible disclosure that they are entitled to make, any person engages in conduct with the intent to cause detriment to them and the conduct causes such detriment. The victimizer need not be a person in the company or connected to the company to which the disclosure relates. To claim compensation, the claimant must show that the other person *intended* to cause detriment – detriment caused by reckless behaviour is not sufficient as the element of intention will be missing.⁸³

Whistleblowers may also claim compensation for damages suffered, under section 159(5)(b), if as a result of an actual or a possible disclosure that they are entitled to make, a person makes a threat to cause detriment to them or to “another person”, and either intends them to fear that the threat will be carried out or is reckless as to causing them to fear that the threat will be carried out. The threat may be made directly or indirectly, and may be express, implied, conditional or unconditional.⁸⁴ It is irrelevant whether the claimant actually fears or feared that the threat will or would be carried out.⁸⁵ While section 159(5)(a) restricts the right to claim compensation to the whistleblower, section 159(5)(b) extends this right to “another person” (who may be, for example, a family member, friend, colleague or person investigating the disclosure). The protection for detriment should also be extended in section 159(5)(a) to a third party.

Any such conduct or threat referred to in sections 159(5)(a) and (b) is presumed to have occurred as a result of an actual or possible disclosure, unless the person who engaged in the conduct or made the threat can show satisfactory evidence in support of another reason for doing so.⁸⁶ This rebuttable presumption recognizes the tendency of persons accused of victimizing a whistleblower to cite reasons other than the disclosure of the wrongdoing for their actions and the fact that the reasons for any detrimental conduct will generally lie solely with the defendant in such cases.⁸⁷

A weakness of section 159(5) is that it does not clarify the parameters of the term “detriment”. While section 1 PDA defines the term “occupational detriment” in relation to an employee, this definition is too narrow for the purposes of section 159, which protects not only employees but a much broader category of whistleblowers. Since section 159(5) is modelled on and worded very similarly to the former section 1317AC ACA (now section 1317ADA), it is useful to consult the definition of “detriment” in section 1317ADA, which defines this term as including, without limitation: (i) dismissal of an employee; (ii) injury of an employee in his / her employment; (iii) alteration of an employee’s position or duties to his / her disadvantage; (iv) discrimination between an employee and other employees of the same employer; (v) harassment or intimidation of a person; (vi) harm or injury to a person, including psychological harm; (vii) damage to a person’s property, reputation, business or financial position; and (viii) any other damage to a person.

It is noteworthy that the definition of “occupational detriment” in section 1 PDA does not include psychological harm or damage to a person’s property, reputation, business or financial position. As mentioned earlier, recent reports from whistleblowers in South Africa show that they have suffered a wide range of detriment, including psychological harm and damage to their property. A similar definition of the term “detriment” as appears in section 1317ADA ACA must be incorporated into section 159 of the Companies Act in order to ensure that whistleblowers may claim compensation for an extensive range of detriment. Such a provision would thus afford whistleblowers more effective protection.

83 Delpont *Henocheberg*, above at note 66 at 560(21).

84 Companies Act, sec 159(5)(b).

85 *Ibid.* ACA, sec 1317AC(5) contains a similar provision, to the effect that it is not necessary to prove that the person threatened actually feared that the threat would be carried out.

86 Companies Act, sec 159(6).

87 See Parliament of Australia “Revised Explanatory Memorandum”, above at note 1, para 2.127.

The AWA enacted a number of new remedies for victimized whistleblowers. The most important of these is that the victimizer may now be criminally prosecuted for causing detriment or threatening to do so (which may result in a two-year imprisonment term) or have a civil penalty imposed.⁸⁸ A court may also order the victimizer and / or the victimizer's employer (jointly and severally) to compensate the victim for loss, damage or injury suffered as a result of the detrimental conduct.⁸⁹ Under section 1317AE(1) ACA, the orders that a court may make in instances of the victimization of a whistleblower who suffers loss, damage or injury as a result of detrimental conduct have also been substantially expanded, and comprise the following: (i) an order granting an injunction to prevent, stop or remedy the effects of the detrimental conduct; (ii) an order requiring the offender to apologize to the victim for engaging in the detrimental conduct; (iii) an order reinstating the victim if his / her employment was terminated as a result of the detrimental conduct; (iv) an order requiring the offender to pay exemplary (punitive) damages to the victim; and (v) any other order the court thinks appropriate.⁹⁰ To enhance the protection conferred on whistleblowers, section 159 (5) of the Companies Act should be amended to make victimization a criminal offence, and the statutory range of orders that courts may issue in instances of victimization of whistleblowers should be expanded, in line with section 1317AE(1) ACA.

Under section 1317AH(2) ACA, a whistleblower seeking compensation for victimization may not be ordered by a court to pay costs incurred by another party to the proceedings. The only circumstances in which this may be done are if the court is satisfied that the claimant instituted the proceedings vexatiously or without reasonable cause, or if the claimant's unreasonable act or omission caused the other party to incur the costs.⁹¹ So as not to deter whistleblowers from claiming compensation for victimization by the possibility of an adverse costs order, a provision similar to section 1317AH(2) should be introduced into section 159 of the Companies Act.

No mechanisms to safeguard physical safety

It is vital in South Africa to provide physical protection to whistleblowers so that they feel safe when making disclosures, particularly in the light of recent incidents of intimidation and even the assassination of a whistleblower, as discussed earlier. The SCR suggests that once a whistleblower discloses their identity, it should be compulsory for adequate physical protection to be provided to them at their reasonable request, and in the absence of such a request, on the assessment of the designated authority as to whether the whistleblower or their family may be in danger.⁹² Section 159 of the Companies Act must be amended in accordance with this recommendation of the SCR, and such protective measures should be extended to the whistleblower's family members.

No financial incentives provided

The Companies Act does not provide any financial incentives to whistleblowers for making disclosures that lead to successful resolutions of matters.⁹³ Despite a recommendation by the

88 ACA, sec 1317AC(1) and sched 3. A civil penalty is a pecuniary penalty imposed by a civil court under the rules of civil procedure, in which the civil standard of proof applies (see ACA, sec 1317E on civil penalty provisions).

89 Id, secs 1317AE(1)(a) and 1317AE(1)(b). In deciding whether to make such an order against the victim's employer, courts have regard to whether the employer took reasonable precautions to avoid the detrimental conduct, the extent to which they gave effect to any whistleblowing policy and any duty that they were under to prevent the detrimental conduct or to take reasonable steps to ensure that it was not engaged in (id, sec 1317AE(3)).

90 Id, secs 1317AE(1)(c) to (g).

91 Id, sec 1317AH(3).

92 SCR, para 563.

93 Notably, PDA, sec 9(1) explicitly excludes protection for a person who makes a disclosure for purposes of personal gain, unless any reward is payable in terms of any law.

Parliamentary Joint Committee on Corporations and Financial Services to enact a limited system of discretionary rewards for whistleblowers,⁹⁴ Australia did not do this but instead improved the compensation for aggrieved whistleblowers in section 1317AE ACA.⁹⁵

It is highly controversial whether whistleblowers should be rewarded financially for making disclosures. On the one hand, financial rewards may encourage whistleblowers to speak up about corruption and come forward with high-quality information.⁹⁶ It may also reduce the financial risks faced by whistleblowers, since they may recover sufficient funds to compensate them if they lose their jobs.⁹⁷ Moreover, the funds paid to whistleblowers generally offset the costs they incur.⁹⁸ On the other hand, financial rewards for whistleblowing raise moral and ethical concerns,⁹⁹ and may encourage malicious reporting and false claims.¹⁰⁰

Financial rewards for whistleblowing have been used in the USA under the False Claims Act of 1986 (the FCA)¹⁰¹ and the Dodd–Frank Wall Street Reform and Consumer Protection Act, which amended the Securities Exchange Act of 1934 by adopting section 240.21F-1 entitled “Securities Whistleblower Incentives and Protection” (Section 21F).¹⁰² Under the FCA, whistleblowers are given a percentage of the monies recovered following a disclosure of fraud perpetrated against the US government.¹⁰³ Private persons (relators) may file suits for violations of the FCA on behalf of the government (referred to as a *qui tam* action).¹⁰⁴ The *qui tam* complaint is sealed for 60 days, during which the government must investigate the complaint.¹⁰⁵ If the government decides to intervene in the action, it has the primary responsibility for prosecuting it, in which event the relator is entitled to receive between 15 and 25 per cent of the proceeds of the action or settlement of the claim, depending on the quality of the information provided and the extent to which s/he substantially contributed to the prosecution of the action.¹⁰⁶ If the government declines to take over the action, the relator may proceed with the action, in which event his / her share increases to between 25 to 30 per cent of the proceeds of the action or settlement of the claim.¹⁰⁷ Section 21F requires the Securities and Exchange Commission (SEC) to pay awards to whistleblowers who provide it with original information about violations of federal securities laws,¹⁰⁸ which range from 10 to 30 per cent of the monetary sanctions collected.¹⁰⁹

94 See Parliamentary Joint Committee Report, above at note 44, recommendation 11.2, para 11.59.

95 See further Lombard “Regulatory policies”, above at note 52 at 26.

96 Parliamentary Joint Committee Report, above at note 44, para 11.55.

97 Lubisi and Bezuidenhout “Blowing the whistle”, above at note 13 at 52.

98 Ibid.

99 Id at 53; Dworkin and Brown “The money or the media?”, above at note 53 at 702; Parliamentary Joint Committee Report, above at note 44, para 11.26.

100 Id, para 11.14.

101 FCA, 31 USC, secs 3279–733.

102 A system of rewarding whistleblowers has also been introduced in Ontario under the Ontario Securities Commission, OSC Policy 15-601, Whistleblower Program (July 2016). See further OSC Notice of Policy Amendment to OSC Policy 15-601 Whistleblower Program (October 2018); Notice of Consequential Amendments and Changes to Ontario Securities Commission Rules and Policies (January 2022); B Neal “Ontario Securities Commission whistleblower protection program” (2016) 22/3 *Law and Business Review of the Americas* 271; and J Austin and S Lombard “The impact of whistleblowing awards programs on corporate governance” (2019) 36 *Windsor Yearbook of Access to Justice* 63.

103 FCA, secs 3729 and 3730.

104 Id, sec 3730(b)(1).

105 Id, sec 3720(b)(2).

106 Id, secs 3730(c)(1) and 3730(d)(1).

107 Id, secs 3730(c)(3) and 3730(d)(2). In certain instances relators may not file *qui tam* actions, such as where they were convicted of criminal conduct arising from their role in the violation of the FCA (sec 3730(d)(3)) or where the *qui tam* action is based on information that has already been publicly disclosed (sec 3730(e)(4)(A)).

108 The federal securities laws include the Securities Act 1933, the Securities Exchange Act 1934, the Investment Company Act 1940, the Investment Advisers Act 1940, the Sarbanes–Oxley Act, the Gramm–Leach–Bliley Act, the Bank Secrecy Act and the rules adopted under these statutes by the SEC or the Department of Treasury.

109 Sec 240.21F5(b). See further Dworkin and Brown “The money or the media?”, above at note 53 at 672–80.

Reports indicate that the financial incentive programme under the FCA has enjoyed much success.¹¹⁰ For example, statistics show that in 2019, 72 per cent of fraud recoveries in the USA were triggered by whistleblower disclosures. By the end of 2019, the US government was able to recover USD 17.3 billion in cases for which there were no whistleblowers, but USD 44.7 billion in cases triggered by whistleblowers.¹¹¹ According to the SEC 2021 Annual Report to Congress on its Whistleblower Program, 2021 was a record-breaking year for the whistleblower programme as the SEC made more whistleblower awards in that year than in all prior years combined.¹¹² The two largest awards to date are of USD 114 million to a whistleblower in October 2020 and a combined USD 114 million to two whistleblowers in September 2021.¹¹³

The SCR does not recommend that *qui tam* provisions should be adopted in South Africa to empower whistleblowers to bring civil claims for the recovery of damages suffered by the state as a result of procurement fraud and corruption because of potential complications which may arise when private individuals are empowered to litigate for personal financial reward in the state's name.¹¹⁴ Instead, it recommends that a fixed percentage of the monies recovered should be awarded to whistleblowers, provided that the information disclosed was material in the obtaining of the award.¹¹⁵ Whether *qui tam* provisions are adopted in South Africa or whether whistleblowers are rewarded with a fixed percentage of monies recovered, section 159 of the Companies Act should urgently implement a system to reward corporate whistleblowers for disclosures which lead to successful resolutions. In South Africa the benefits of such a system may outweigh the possible misgivings about it, in view of the distressingly high level of corporate corruption, particularly in state-owned companies, as documented in the SCR. There is an urgent need not only to encourage corporate whistleblowers to come forward with high-quality information to curb corruption, fraud, bribery, tax evasion and money laundering in companies, but also to compensate these whistleblowers for the risks they may face.

Internal whistleblower systems

Section 159(7)(a) of the Companies Act requires public and state-owned companies to directly or indirectly establish and maintain a system to receive disclosures confidentially and to act on them. These companies are also required under section 159(7)(b) to routinely publicize this system to the eligible class of whistleblowers. Regulation 131 of the Companies Regulations 2011 requires public and state-owned companies to display conspicuously a notice about this system at the company's registered office, the principal places of conducting business, any place where its employees work, on its website, and, if it is a listed company, on any applicable electronic system of the relevant exchange for the communication and interchange of information among companies listed on that exchange.

110 See SM Kohn "The rise of international whistleblowers: Qui Tam rewards for non-US citizens" (3 February 2020) *Mondaq*, available at: <<https://www.mondaq.com/unitedstates/Employment-and-HR/889468/The-Rise-Of-International-Whistleblowers-Qui-Tam-Rewards-For-Non-US-Citizens>> (last accessed 21 January 2022).

111 *Ibid.*

112 SEC 2021 Annual Report to Congress "Whistleblower Program" (2021) at 1, available at: <<http://sec.gov/files/owb-2021-annual-report.pdf>> (last accessed 21 January 2022).

113 See Order Determining Whistleblower Award, Exchange Act Release No 90247, File No 2021-2 (Oct 22, 2020) and Order Determining Whistleblower Award, Exchange Act Release No 92985, File No 2021-91 (Sept 15, 2021). For further discussion of whistleblower rewards in the USA see MR Stock "Dodd-Frank Whistleblower Statute: Determining who qualifies as a 'whistleblower'" (2017) 16 *Florida State University Business Review* 131; and DJ Hurson "Sarbanes-Oxley, Dodd-Frank, retaliation, and reward: Representing clients in the age of the whistleblower" (2017) 32/3 *ABA Journal of Labor and Employment Law* 381.

114 SCR, para 568.

115 *Id.*, para 569.

It is submitted that section 159(7) is inadequate in three respects. The first weakness is that this section requires only public and state-owned companies to establish and publicize a system to receive disclosures confidentially and to act on them. This position is questionable since the provisions regulating whistleblowing in section 159 apply to all companies and are not restricted to public and state-owned ones. It is notable that the King IV Report on Corporate Governance for South Africa 2016 requires the board of directors of all companies to exercise ongoing oversight of the management of ethics in the company,¹¹⁶ and in particular to ensure that this oversight results in the use of protected disclosure or whistleblowing mechanisms to detect breaches of ethical standards and deal with such disclosures appropriately.¹¹⁷ It is suggested that the obligations in section 159(7) must be expressly extended to all companies registered under the Companies Act, including external companies.

A second weakness of section 159(7) is that no mention is made of establishing a system to receive disclosures anonymously. A confidential disclosure is one where the recipient knows the identity of the discloser but does not make it known to third parties without the discloser's permission (save where there is an overriding legal obligation to do so),¹¹⁸ while an anonymous disclosure is one where the discloser does not provide his / her name when making the disclosure. As mentioned earlier, one of the main reasons given in South Africa for not reporting wrongdoing in companies is the belief that the disclosure will not be anonymous.¹¹⁹ Anonymous disclosures may present challenges for the investigator (to follow up on the disclosure) and for the discloser (to follow up on the investigation). It is thus necessary to balance the need to protect the whistleblower's identity against the need to properly investigate the disclosure.

Section 159 does not indicate whether whistleblowers may report wrongdoing anonymously or whether this may only be done confidentially. Nor does the recipient have an express duty of confidentiality to protect the whistleblower's identity. The extent of the confidentiality of the whistleblower's identity is therefore determined by the internal system implemented by public and state-owned companies, and may vary between companies. But with disclosures made to the CIPC and the TRP, under regulation 176(2)(b)(i) of the Companies Regulations 2011 a person who provides information under section 159 may request the CIPC and TRP treat their identity as restricted information. They may not, however, be a complainant in the matter unless they subsequently waive this request in writing.

In sharp contrast to these South African provisions, section 1317AA(5) ACA now expressly states that there is no requirement for disclosers to identify themselves in order for a disclosure to qualify for protection. In instances of a protected disclosure, section 1317AAE makes it both a criminal and a civil offence in certain circumstances for the whistleblower's identity, or information likely to lead

116 Institute of Directors Southern Africa "King IV Report on Corporate Governance for South Africa 2016" (2016), available at: <https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/684B68A7-B768-465C-8214-E3A007F15A5A/IoDSA_King_IV_Report_-_WebVersion.pdf> (last accessed 18 January 2023). The King IV Report aspires to apply to all organizations, regardless of their form of incorporation (see id at 35).

117 Id at 45, para 9c. See further R Cassim "Corporate Governance" in Cassim (ed) *Contemporary Company Law*, above at note 31, 641 at 649. The legal status of the King IV Report is that of a set of voluntary principles and leading practices (King IV Report at 35). Compliance with certain provisions of the report is mandatory for companies listed on the Johannesburg Stock Exchange (see paras 7.F.8 to 7.F.9 and para 8.63(a) of the Johannesburg Stock Exchange Listings Requirements, available at: <<https://www.jse.co.za/sites/default/files/media/documents/2019-04/JSE%20Listings%20Requirements.pdf>> (last accessed 18 January 2023)). For all other entities there is no statutory obligation to comply with the report, but its corporate governance practices are highly recommended and have considerable persuasive force. The approach adopted under the report is "apply and explain", under which the application of the principles is assumed, and companies must explain the practices they applied in order to achieve the principles (King IV Report at 37).

118 Groenewald *Whistleblowing Management Handbook*, above at note 13 at 12.

119 A study conducted in 2019 revealed that 13 per cent of employees in South Africa said that they did not report wrongdoing in the company because they did not believe that they could do so anonymously (id at 40).

to their identification, to be disclosed.¹²⁰ The ACA also protects whistleblowers' identities in court proceedings in that they are not required to disclose their identity, or information that is likely to lead to their identification, to a court or tribunal, nor may they be required to produce to a court or tribunal a document containing their identity or information that is likely to lead to their identification.¹²¹ The only exceptions are where it is necessary to do so to give effect to the whistleblower regime or where the court or tribunal thinks it is necessary in the interests of justice to do so.¹²²

So as to encourage disclosures of wrongdoing, whistleblowers should have the option of making disclosures confidentially or anonymously under section 159. Companies should implement internal systems to enable this choice. For example, a system to receive disclosures anonymously would entail the company guaranteeing that whistleblowers cannot be identified by their personal attributes, such as their Internet Protocol (IP) address, voice or telephone number, and that all data transferred by whistleblowers be processed and stored in an encrypted manner.¹²³ One method of guaranteeing anonymity is to implement an independent anonymous whistleblowing hotline system, which is managed by a third party. Another method is to implement an electronic reporting system which protects and guarantees the anonymity of the whistleblower.¹²⁴ This system could provide a reference number to whistleblowers, enabling them to follow up on the investigation while still remaining anonymous.

Furthermore, a duty of confidentiality must be introduced into section 159, in line with that embodied in section 1317AAE ACA, as this amendment will encourage disclosures, protect whistleblowers and enhance their trust. To balance the need to protect the whistleblower's identity against the need to properly investigate the disclosure, exceptions should be carved out when an identity may be disclosed without this constituting a breach of confidentiality, such as when it is reasonably necessary to disclose the whistleblower's identity in order to investigate the disclosure further and if reasonable steps are taken to protect whistleblowers once their identity is disclosed.¹²⁵ Provision should also be made in section 159 to protect the identity of whistleblowers in court proceedings.

A third weakness of section 159(7) is that the provision fails to address the consequences of a failure of public and state-owned companies to comply with their obligations in this provision.¹²⁶

120 A contravention of sec 1317AAE may lead to imprisonment for up to six months (ACA, sec 1317AAE(1), read with sched 3).

121 Id, secs 1317AG(a) and (b). The purpose of this exception is to ensure that the protection of a whistleblower's identity afforded by the law cannot be extinguished by the discovery of documents or other processes in the context of court proceedings (see Parliament of Australia "Revised Explanatory Memorandum", above at note 1, para 2.135). ACA, sec 1317AG ensures that the identity of corporate whistleblowers is aligned with those for public-sector whistleblowers (see Public Interest Disclosure Act 2018 (Cth), sec 21). The SCR, para 690.1, recommends that the South African government introduce legislation or amend existing legislation to ensure that any person disclosing information to reveal corruption, fraud or undue influence in public procurement activity be accorded the protections stipulated in art 32(2) of the United Nations Convention against Corruption. These protections include providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures their safety, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.

122 ACA, secs 1317AD(c) and (d).

123 See Groenewald *Whistleblowing Management Handbook*, above at note 13 at 40.

124 SCR, para 563.

125 See ACA, sec 1317AAE(4), which carves out exceptions when the disclosure of the identity of a whistleblower will not constitute a breach of confidentiality. In protecting the whistleblower's identity, it is important to consider the South African Protection of Personal Information Act 4 of 2013, which came into effect on 1 July 2020. Its purpose is to give effect to the constitutional right to privacy enshrined in sec 14 of the Constitution by safeguarding personal information when processed by a public or private body, subject to justifiable limitations aimed at balancing the right to privacy against other rights and protecting important interests (sec 2). Exemptions may be granted, subject to reasonable conditions, to a public or private body to process personal information if the public interest in doing so substantially outweighs an interference with the privacy of the relevant person, such as in regard to the prevention, detection and prosecution of offences (sec 37).

126 If the CIPC knows of a company's failure to comply with these requirements, it could probably issue a compliance notice under the Companies Act, sec 171(1), requesting the company to comply. In general, failure to comply with

The consequences of such failure must be expressly addressed and stringent penalties must be imposed for such a failure. These steps will create a culture of accountability and transparency, deter wrongdoing in the company and convince whistleblowers that the company is committed to acting ethically and eradicating corruption. Under sections 13171AI(1), (2) and (3) ACA, a failure to have a whistleblowing policy that complies with the requirements of section 1317(5) ACA constitutes a strict liability offence which results in a penalty of 60 penalty units.¹²⁷

Conclusion

Whistleblowers are not “traitors” but people with courage who choose to take action against abuses they come across, rather than taking the easy route and remaining silent.¹²⁸ There is a pronounced need to protect corporate whistleblowers in South Africa, amid the escalating levels of corruption in companies, the low reporting rates of wrongdoing and the widespread victimization of whistleblowers. Section 159 of the Companies Act does not go far enough in protecting and encouraging corporate whistleblowers and must be urgently reviewed by the legislature. The following series of submissions to reform section 159 are suggested.

The eligible whistleblowers in section 159(4) must be broadened to include relatives and dependants of whistleblowers and persons who were formerly eligible whistleblowers within the previous three years. The eligible recipients in section 159(3)(a) must be expanded to permit public interest disclosures and emergency disclosures to be made to the media and Members of Parliament, with appropriate safeguards implemented. In addition, the good faith requirement in section 159(3)(a) should be abolished.

With regard to the protections conferred on whistleblowers, section 159(4)(a) should clarify the meaning and scope of “qualified privilege”, the immunities provided to whistleblowers must be strengthened and information disclosed by whistleblowers should not be admissible in evidence against them in criminal proceedings, save for proceedings in respect of the falsity of the information. The protection conferred on whistleblowers for victimization under the Companies Act is inadequate and must be enhanced. A broad definition of “detriment” must be incorporated in section 159; the protection for detriment must be extended to third parties; victimization must be a criminal offence; courts should be statutorily empowered to issue a broader range of orders in instances of the victimization of a whistleblower; and claimants must be exempted from paying the costs of legal proceedings for victimization, subject to necessary exceptions. It is imperative that provision be made in section 159 for mandating physical protection to whistleblowers and their families once they disclose their identity, at their reasonable request or on the assessment of the designated authority. Provision should also be made to incorporate a system of rewarding corporate whistleblowers for disclosures made which lead to successful resolutions.

The obligations in section 159(7) to establish, maintain and publicize a system to receive disclosures confidentially and to act on them must be expressly extended to all companies registered under the Companies Act, including external companies. Whistleblowers should have the option of making disclosures confidentially or anonymously under section 159 (subject to necessary exceptions), and companies should implement internal systems to enable this choice. A duty of confidentiality to protect the whistleblower’s identity must be introduced into section 159, and provision

a compliance notice could result in an administrative fine being imposed on the company, or a criminal prosecution if the CIPC refers the matter for prosecution (sec 171(7)).

127 As of 1 July 2020 the value of one penalty unit is AUD 222 (Notice of Indexation of the Penalty Unit Amount (14 May 2020)). Sixty penalty units would thus be AUD 13,320. Sec 1317(5) sets out the matters that must be addressed in a whistleblower policy, such as how the company will support whistleblowers and investigate disclosures.

128 United Nations Office on Drugs and Crime “The United Nations Convention Against Corruption: Resource Guide on Good Practices in the Protection of Reporting Persons” (2015, United Nations Office on Drugs and Crime) at 12.

should also be made to protect their identity in court proceedings. Finally, section 159 must expressly address the consequences of a failure to maintain an internal whistleblower system.

The recommendations above will strengthen the regulation of corporate whistleblowing in South African companies and will promote a culture of accountability and integrity, which is sorely lacking at the moment.

Competing interests. None