

The protection of whistleblowers in South African criminal cases

Jacobus Gerhardus J. Nortje

School of Accounting, North-West University, Potchefstroom, South Africa

1444

Abstract

Purpose – The purpose of this paper is to critically analyse the extent of protection available for whistleblowers in South African criminal cases.

Design/methodology/approach – This paper first provides a brief background of crime in South Africa and argues that the concept of the whistleblower is just a buss word or collective noun. The methodology of this paper consists of a literature review of whistleblowers and relevant laws that can be used to protect whistleblowers in South African criminal cases.

Findings – This paper concludes that the existing law as primarily contained in the Criminal Procedure Act 51 of 1977 provides appropriate protection for whistleblowers in South African criminal cases.

Research limitations/implications – Whistleblowers provide information on criminal, civil and disciplinary wrongdoings. This study focuses on the protection of whistleblowers pursuant to mainly the provisions of the Criminal Procedure Act 51 of 1977.

Originality/value – The originality of this paper lies in the approach to the handling of whistleblowers in South African criminal cases. This is the first research done with the emphasis on the use of mainly the provisions of the Criminal Procedure Act 51 of 1977 to protect whistleblowers in South African criminal cases. The contribution of the study is that, by using this approach, it can provide protection and save lives, and it may enhance the willingness of whistleblowers to blow the whistle, which will be beneficial to the community of South Africa as a whole.

Keywords Informants, Protection, Self-incriminating witness, Whistleblowing, Whistleblowers, Witness

Paper type Literature review

1. Introduction

The article consists of a literature review of whistleblowers and an analysis of the relevant law in South Africa with an emphasis on the [Criminal Procedure Act 51 \(1977\)](#), as the Criminal Procedure Act 51 of 1977 regulates inter alia the procedures to be followed in criminal courts and the duties and power of the Police during criminal investigations ([Van der Merwe, 2020, p. 7](#)).

The logic of the study commenced with a thorough review of the currently available literature, highlighting the current environment in which the whistleblower must blow the whistle.

The missing knowledge is that no such research is known to have been conducted in South Africa. The contribution of the study is that by using this approach in the handling of whistleblowers can provide protection and save lives. It may enhance the willingness of



whistleblowers to blow the whistle on not only corruption but also other criminal cases, which will be beneficial to the whole of South Africa.

The following research question is key in the evaluation of the protection of whistleblowers in criminal cases in South Africa: To what extent are whistleblowers protected in South African criminal cases?

The purpose of this study is to critically analyse the extent of protection available for whistleblowers in criminal cases in South Africa.

Although much has been written on whistleblowers, the Criminal Procedure Act 51 of 1977, and the handling of whistleblowers there have been no known studies that directly assess the handling and protection of whistleblowers in criminal cases.

Only one related study that was found within a South African context that was conducted was that of Wright during 2021, who contended that whistleblower protection in South African law has two aspects. The first relates to witnesses in criminal cases and the second part relates to the [Protected Disclosures Act 26 \(2000\)](#). Furthermore, the protection of witnesses in criminal cases is offered under the [Witness Protection Act 112 \(1998\)](#). This includes relocation, changing of identity and other related assistance. Wright however continued and stated that this protection is limited to people who testify in court and that no protection is given to the family of the witness. Wright stated that no protection is offered to those who report corruption but will not be witnesses in criminal proceedings ([Wright, 2022](#)). The research of Wright did include reference to the Criminal Procedure Act 51 of 1977, which act dictates criminal procedures in South Africa, but unfortunately does not include reference to any section relevant to whistleblowers' protection. This results in various questionable statements made by Wright.

An aspect emanating from the study of Wright that is supported is that whistleblower protection in South African law and policy has two main components that relate to: witnesses in criminal cases and protection that falls under the [Protected Disclosures Act 26 of 2000](#).

The practical implication of this study is that the enforcement of the available relevant provisions of the Criminal Procedure Act 51 van 1977 can protect whistleblowers to such an extent that it may save the lives of whistleblowers in South Africa. It would enhance the quality of forensic investigations and will benefit the whole of South Africa. Another interested stakeholder is the South African Police Service, of whom 70% of the public does not have confidence in [Roberts and Gordon \(2022\)](#).

The remainder of this article is structured as follows. Section 2 provides a background to the study, a conceptual scope of the study, followed by a literature review in Section 3. This is followed by conclusions and recommendations in Sections 4 and 5, respectively.

2. Background

2.1 Relevance of the study

Seen as one of the biggest forms of corruption in South African history, state capture has been a topic on the tongues of everyone since 2016, but the root of this problem dates to about 19 years before 2016 ([Madonsela, 2019:125](#)).

State capture has slowed down the development of South Africa as a country to an enormous extent and even stopped development completely on some levels, as it undermines the overall efficiency of the state by providing poor quality services and appointing people who are clearly not capable ([Bester and Dobovšek, 2021, p. 81](#)). [Cohen and Mbatha \(2017\)](#) contended that "We don't employ the best people; we employ the people we can manipulate and control".

Symbiotic relationships were established by former President Jacob Zuma and his loyalists between the political office and private sector individuals, causing power to shift to the shadow state. In this shadow state “deniability is valued, culpability is distributed through indispensability, which is not even taken for granted, and trust is maintained by mutually binding fear” (Bracking, 2018, p. 170).

The “cliques” formed within the shadow state have the power to dictate the selective application of laws, protecting faction members from investigations or prosecution and targeting their opponents where they deem necessary (Bracking, 2018, p. 171).

At the start of 2020 the Covid-19 pandemic struck the world and South Africa and brought along new opportunities for commercial crime in both private and public sectors (Madipa and Motseki, 2022). According to Achbedahin (2021), the pandemic created an uprise in commercial crimes and labels individuals trying to profit from the pandemic through commercial crimes as Pandemic profiteers.

President Cyril Ramaphosa (Engel, 2021, p. 274) stated that the looting of the state under the reign of former President Jacob Zuma has cost South Africa an estimated \$34 billion (R507,62bn). Shockingly enough, South Africa is ranked 70th out of 180 countries on the Corruption Perceptions Index (CPI) with an unchanged score of 44% for the last two years (TI, 2021). The CPI measures how corrupt a country’s public sector is perceived to be, based on the opinions of experts and business people (TI, 2022).

Corruption has become so integrated into the systems that it became more and more acceptable by the day, causing fewer law enforcers to even recognise it anymore in their daily routines. Prosecutors have started to view any action against corrupt individuals as a “career-limiting” activity (Hoffman, 2019, p. 28). State institutions either play along with the irregularities taking place or simply act oblivious to what is happening right under their noses (Cohen and Mbatha, 2017).

The control of the criminal justice administration has been taken over by groups of loyalists who are sympathetic to the project of state capture (Hoffman, 2019, p. 28). The success of state capture is completely reliant on the high level of political protection from law enforcement agencies and the people of South Africa (Bester and Dobovšek, 2021, p. 81).

In the event of perpetrators being processed and found guilty, the majority receive suspended sentences and plea bargains, resulting in none of the cases being fully prosecuted through convictions. This means that they all result in “outcomes where corrupt individuals have negotiated their way out of prison” (Bracking, 2018, p. 175).

South Africa is a country that is succumbed to a high wave of crime, more specifically, South Africa has a notably high rate of inter alia assaults, homicides, and other violent crimes. South Africa is ranked as the country with the third-highest crime rate in the world (WPR, 2022).

The South African Police Service, who are in terms of section 205 of the *Constitution of the Republic of South Africa* (1996) responsible for the prevention and investigation of crime recorded a continuous never-ending increase in serious violent crimes in South Africa.

It is in this uncontrolled ever increasing high level of corruption and serious violent crimes that the whistleblower in South Africa must decide whether to blow the whistle. However totally unacceptable it may be, it is not surprising to hear of people who provide information about wrongdoing, who were then murdered. One of the sensational murderers in South Africa is that of Babita Deokaran the Chief Director of Financial Accounting in the Gauteng Department of Health who was gunned down in her car outside her home. She was allegedly part of the many witnesses in the investigation into corruption regarding personal protective equipment in the department of Health (Heywood, 2022). It is however not only witnesses of corruption that is been murdered in South Africa but also police officers

gathering information about corruption as is evident from [Venter \(2007\)](#) that Captain Carrim Alli a policeman of the crime intelligence unit was burned alive while apparently investigating a case involving a network of reportedly corrupt senior police officers, that was revealed as a possible reason for the burning alive of Captain Alli.

Whistleblowers in South Africa once again come under the spotlight in the Report of the Judicial Commission of Inquiry into State Capture: Part 1: Vol. 1 (2022: 851) and more specifically the protection of whistleblowers.

2.2 Conceptual scope of the study

[Groenewald \(2020, pp. 26–27\)](#) contended that a whistleblowing policy must be linked to the values of the organisation and must make the following points regarding whistleblower protection clear:

- A commitment to protection throughout the whistleblowing process.
- A commitment to treat all reports as confidential.
- An explanation of how identity is safeguarded.
- That reports can be made anonymously.
- That whistleblowers will be protected from any form of occupational detriment, victimisation and retaliation.

Most private accounting firms such as [KPMG \(2021\)](#), [Deloitte \(2019\)](#), [EY \(2022\)](#) have whistleblowing policies. [PwC \(2022\)](#) also has a confidential whistle-blowing helpline and website which is only provided to paying organisations for their staff and stakeholders to report. BDO Forensics South Africa recently developed a software solution as a fully integrated whistleblowing mobile application, which included complete anonymity and a continuous method of communication with the whistleblower ([Chetty, 2021](#)). Despite all these private initiatives, no firm provides more protection than anonymity and the protection envisaged in the Protected Disclosure Act 26 of 2000.

Although the persons to whom a protected disclosure can be made in terms of Section 5 to Section 9 of the Protected Disclosure Act 26 of 2000 may follow different processes as the way and/or procedures to address the protected disclosure are not defined in the act. Furthermore, Section 1 of the Protected Disclosure Act 26 of 2000 dictated that information that a criminal offense has been committed, is being committed, or is likely to be committed can be reported to these persons as mentioned in Section 5 to Section 9. This provision is contrary to the provision of Section 34 of the [Prevention and Combatting of Corrupt Activities Act 12 \(2004\)](#) that dictates that certain persons of authority must report certain criminal offenses, as discussed more comprehensively later, to the police official in the Directorate for Priority Crime Investigation the South African Police Service. It is an offense if a person fails to comply with these provisions.

One of the main problems of whistleblowing is the lack of action against the perpetrators of which the case of Moss Shakwe is evident who reported his suspicion of corruption in terms of the provisions of Section 7 of the Protected Disclosure Act 26 of 2000. From the end of 2008 to March 2009, he and others made several attempts to expose alleged corruption in the Rustenburg municipality. A dossier was compiled and presented on various occasions to: The ANC's regional and provincial leadership in North-West. ANC heavyweights Siphwe Nyanda and Billy Masethla. The offices of ANC secretary general Gumedede Mantashe. The President Kgalema Motlanthe. President Zuma. Zuma, Motlanthe, Masetlha and other senior ANC leaders again. The last time to Sicelo Shiceka, at that time the minister

of Cooperative Governance and Traditional Affairs, during a meeting in the presence of the suspect, just to be gunned down in his car in his home driveway (ODAC, 2015, p. 36).

In contrast with the reports of whistleblowers in terms of the Protected Disclosure Act 26 of 2000, the guidelines to report in terms of Section 34 of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 are published in the *Government Gazette* and provide guidelines on: Duty to report; What to report; Who must report; Where to report; Responsibility of the reporting whistleblower; Responsibility of the South African Police Service members at the Community Service Centre level; Role of the Central Reporting Office within the Directorate for Priority Crime Investigation; Prescribe form to be completed [Department of Police (South Africa), 2012, p. 4].

The prescribed form contains information such as the identity and contact detail of the whistleblower. Description of the alleged offense. A brief description of the suspicion. How did the suspicion or knowledge of the alleged offense come to the attention of the whistleblower? Particulars of the suspect. What are the real or potential losses? Does documentation or evidence in support of the allegations exist and the whereabouts of it? Information provided in the report. Was the matter reported to any other person or authority? What is the nature and extent of the benefit involved? Any information about the standard of living of the suspect. Name and contact details of possible witnesses [Department of Police (South Africa), 2012, p. 5].

3. Literature review

3.1 Whistleblowers and whistleblowing

The Protected Disclosures Act 26 of 2000 does not define a whistleblower as such, but defines it in a disclosure in Section 1 as: “any disclosure of information regarding any conduct of an employer, or of an employee or of a worker of that employer, made by any employee or worker who has reason to believe that the information concerned shows or tends to show” a criminal offense, a failure to comply with a legal obligation, a miscarriage of justice, health or safety damaged or environment, discrimination.

Whistleblowing is the act of “reporting suspected wrongdoing or risk of wrongdoing” (ISO, 2021).

The term whistleblowing is defined as:

A deliberate non-obligatory act of disclosure, which gets onto the public record and is made by a person who has or had privileged access to data or information of an organisation, about non-trivial illegality or other wrongdoing whether actual, suspected or anticipated which implicates and is under the control of that organisation, to an external entity having potential to rectify the wrongdoing (Jubb, 1999, p. 78).

This definition only refers to reporting externally but internal reporting also takes place and external reporting mostly only takes place after internal compliance has failed internal reporting (Sylvia and Stabile, 2016).

A whistleblower is a “person who reports suspected or actual wrongdoing and has reasonable belief that the information is true at the time of reporting” (ISO, 2021).

The Government of South Africa (2022) define whistleblowing on their homepage as: A “term that is used by law enforcement agencies when a person passes on relevant and reliable information concerning wrongdoing, such as fraud and corruption to a person/organisation they trust”.

According to Groenewald (2020, p. 4), the Ethics Institute of South Africa defines whistleblowing as:

The act of organisational stakeholders either former or current, calling attention to wrongdoing that has occurred, is accruing or is about to occur in the organisation. This can be done to internal or external parties who they believe can act. It is aimed at overcoming criminal, irregular, and unethical conduct in organisations, both public and private.

As is evident from the above descriptions of a whistleblower and whistleblowing there is one central theme, namely, providing information of wrongdoing regardless of if it is relevant to civil, disciplinary and/or criminal wrongdoings.

The following people can provide information of a criminal wrongdoing in South Africa, namely: an informant, a person who holds a position of authority, a self-incriminating witness and a witness.

3.1.1 Informer. An informer can be generally defined as a person who provides information regarding criminals, criminal activities and/or specific criminal activities to an investigator for reward or other motives (SAPS, 2009, p. 506).

3.1.2 Person who holds a position of authority. A person who holds a position of authority is mainly persons in management positions as listed in section 34 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 must provide information regarding criminal wrongdoing to the South African Police Service.

3.1.3 Self-incriminating witness. A self-incriminating witness is described in section 204 of the Criminal Procedure Act 51 of 1977 as “any person called as a witness on behalf of the prosecution” that “will be required by the prosecution to answer questions which may incriminate such witness” during a criminal trial.

3.1.4 Witness. A witness is defined in Section 1 of the Witness Protection Act 112 of 1998 as “any person who is or may be required to give evidence, or who has given evidence in any proceedings” that will include criminal proceedings as a State witness.

Emanating from the literature review of the various concepts above it is evident that an informant, a person who holds a position of authority, a self-incriminating witness and a witness are synonyms for a whistleblower. This is confirmed by Lambrechts (2022, p. 68) who stated that the informer is nowadays called a whistleblower who is also called a State witness. The Commission of Inquiry into State Capture (2022, p. 852) also refer to the protection of whistleblowers as the protection of informants.

3.2 Commission of inquiry into state capture: protection for whistleblowers

According to the Commission of Inquiry into State Capture (2022, pp. 851–852) the first recommendation with regard to protection for whistleblowers is that the government must introduce legislation or amend existing legislation:

- to provide protection from potential retaliation or intimidation;
- to establish procedures for physical protection, relocating them, and non-disclosure of information concerning the identity and whereabouts of such persons;
- to provide evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons;
- to enter into agreements to give rewards for information; and
- to offer immunity from criminal and civil proceedings.

3.3 Legislative framework

3.3.1 The Protected Disclosure Act 26 of 2000. In South Africa, the Protected Disclosures Act 26 of 2000 deals with whistleblowing and refers to it as protected disclosures. According

to the Protected Disclosures Act 26 of 2000, an employee needs to disclose information about the conduct of their employer or an employee of their employer. The information regarding the conduct must include allegations or an attempt of a criminal offense, noncompliance of a legal obligation, miscarriage of justice, endangerment of health and safety, harm to the environment and unfair discrimination.

For a whistleblower to get protection in terms of Section 4 of the Protected Disclosures Act 26 of 2000 the information must be disclosed to one of the following persons or bodies: a legal advisor in terms of the provisions of Section 5, the employer as dictated by Section 6, members of cabinet, or of the executive council of a province in accordance with Section 7, persons or body pursuant to Section 8 and other persons or body as per Section 9 designated by the act. None of these mentioned persons are ostensibly trained in the handling of informers in criminal cases.

Section 4 of the Protected Disclosures Act 26 of 2000 makes provisions for the protection of the whistleblower in that Section 4 stipulates that an employee who is dismissed or has been subject to occupational detriment may seek relief through a court with the necessary jurisdiction. This remedy has been problematic as the relief falls under the [Labour Relations Act 66 \(1995\)](#), which states that relief must be sought exclusively through the Labour Court. However, in the case of [Young v Coega Development Corporation \(Pty\) Ltd \(699/2009\)](#) (2009), it was found that the Labour Court does not have exclusive jurisdiction over matters regarding the Protected Disclosures Act 26 of 2000. This alleged remedy for a whistleblower becomes more problematic for an employee, to remedy the detriment suffered, the employee must initiate quite expensive litigation against the employer. It is obvious that organisations have more resources than whistleblowers to employ lawyers to defend them, and the Protected Disclosures Act 26 of 2000 has various technical terms that must be met in order for the disclosure to be protected, it can defeat the purpose of the Act ([LeRoux, 2010](#), p. 526). Instead of investigating the actions of whistleblowers, employers tend to attack whistleblowers ([Daile and Holtzhausen, 2005](#), p. 17). This leads to the discouragement of whistleblowing and creates a lack of prosecution of the perpetrator ([LeRoux, 2010](#), p. 526).

The Protected Disclosures Act 26 of 2000 is based on the UK's Public Interest Disclosure Act ([De Maria, 2006](#), p. 645). [Daile and Holtzhausen \(2005\)](#) state that the Protected Disclosures Act 26 of 2000 does not successfully protect whistleblowers, as it is a duplicate of the Act of the UK that does not take into consideration various situations in South Africa.

Apart from job security, there is a need for the physical security of whistleblowers as many whistleblowers have been assaulted, tortured and killed ([Pillay et al., 2012](#), p. 2530). It is not reasonable to expect whistleblowers to come forward if their safety cannot be ensured ([Kenny and Fotaki, 2021](#), p. 4). The Protected Disclosures Act 26 of 2000 provides no physical and or other protection than that for an employee who has been subject to occupational detriment which relief may be sought through a court even if the disclosure is relevant to a criminal offense.

The danger of other people than the South African Police Service involved in criminal cases is evident from the unreported case of [S v Van der Vyver \(2007\)](#) where Judge Deon van Zyl was of the opinion that it would appear that ineffective and sometimes clumsy investigative work took place in the initial stages of the case. Judge Deon van Zyl mentioned in an obiter dictum during the trial that the moment that private investigators engage in a police investigation or where a police investigation is underway, it is extremely easy to change in defeating the end of justice.

Apart from the moral reasoning for blowing the whistle, there is no other reward for blowing the whistle. Financial rewards may be a viable option, but this is prohibited by the

Protected Disclosures Act 26 of 2000, as Section 9 states that it may not be done for personal gain [Lubisi and Bezuidenhout \(2016, p. 55\)](#).

3.3.2 Prevention and combatting of Corrupt Activities Act 12 of 2004. In terms of the provision of section 34 of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 any person who holds a position of authority (whistleblower) and who knows or ought reasonably to have known or suspected that any other person has committed an offense of corruption, theft, fraud, extortion, forgery or uttering a forged document has a duty to report such offenses to the police official in the Directorate for Priority Crime Investigation the South African Police Service.

Section 34 of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 afford no protection for the person providing the information regarding the mentioned offences but place a legal duty upon such a person to provide same. It is an offence if a person who holds a position of authority fails to comply with this provision within a reasonable time. As this legal duty is relevant to the reporting of criminal offences the protection as set out in the Criminal Procedure Act 51 of 1977 will be relevant to persons who hold a position of authority being:

- The Director-General or head, or equivalent officer, of a national or provincial department.
- The municipal manager.
- Public officer in the Senior Management Service of a public body.
- Head, rector or principal of a tertiary institution.
- Manager, secretary or a director of a company and a member of a close corporation.
- Executive manager of any bank or other financial institution.
- Partner in a partnership.
- Chief executive officer or an equivalent officer.
- Any other person who is responsible for the overall management and control of the business of an employer.
- Any person as mentioned above who has been appointed in an acting or temporary capacity.

According to the [Commission of Inquiry into State Capture \(2022, p. 854\)](#) recommendation 8 suggested an amendment of Section 34 of the Prevention and Combatting of Corrupt Activities Act 12 of 2004. However, promoters of laws, as in the case of the Commission, are completely sincere but sincerity cannot ensure that the South African Police Service will enforce the law. Furthermore, no evidence could be found that section 34 of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 was ever enforced since the commencement of the act, 18 years ago.

As mentioned before the provisions of the Protected Disclosure Act 26 of 2000 regarding information of a criminal offence is contrary to the provision of Section 34 of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 if the information is relevant to corruption, theft, fraud, extortion, forgery or uttering a forged document.

On first observation it may seem that these two sections appear to be mutually destructive, as it dictates different persons to whom the offenses should be reported. However, following the logical rules of the interpretation of Acts, the following can be noted:

Regard must be had, not only for the intention of the Legislator in respect of both Acts, but also the specific wording used in same. In this regard, Section 1 of the Protected Disclosure Act 26 of 2000 records the word “can” be reported, while Section 34 of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 records that offenses “must” be reported as such.

The latent differences between the wording in the two sections as such, by applying the normal or usual definition of the wording, suggest the latter, Section 34 of the Prevention and Combatting of Corrupt Activities Act 12 of 2004, to be explicit, and to enjoy precedence in the event of an ambiguity between the two sections.

Therefore, it is important for the whistleblower, who is a person of authority, when reporting information regarding corruption, theft, fraud, extortion, forgery or uttering a forged document, to comply with the provisions of Section 34 of the Prevention and Combatting of Corrupt Activities Act 12 of 2004.

3.3.3 Criminal Procedure Act 51 of 1977. Section 153 of the Criminal Procedure Act 51 of 1977 states the circumstances in which criminal proceedings shall not take place in open court. Section 153(2) stipulates that if it appears that there is a possibility that harm might result to a witness (whistleblower) the court may order that the proceedings continue behind closed doors and that the identity of the witness shall not be revealed.

In terms of the provisions of Section 154 of the Criminal Procedure Act 51 of 1977 publication of information relating to criminal proceedings in terms of the provisions of Section 153 of the Criminal Procedure Act 51 of 1977 can be prohibited.

Section 158 of the Criminal Procedure Act 51 of 1977 dictates that all criminal proceedings shall take place in the presence of the accused. A court may however, subject to Section 153, order that a witness, may give evidence by means of closed circuit television or similar electronic media.

During the Marikana Commission a secret witness testifies as Mr X. Mr X was one of the striking miners and is testifying through a video link for his own safety [Anon \(2014\)](#). Former SAA chair Dudu Myeni was found guilty in the Johannesburg Magistrate’s Court to a charge of obstruction of justice for naming a protected witness who also testify as Mr X at the Judicial Commission of Inquiry into State Capture ([Khumalo, 2022](#)).

Section 202 of the Criminal Procedure Act 51 of 1977 make provision for privilege from disclosure on ground of public policy or public interest. This section inter alia stipulates that no witness (whistleblower):

In criminal proceedings shall be compellable or permitted to give evidence as to any fact, matter or thing or as to any communication made to or by such witness, on the grounds of public policy or from regard to public interest, be disclosed, and that it is privileged from disclosure.

This is confirmed in the case of [Rex Appellant v Van Schalkwyk Respondent \(1938\)](#) where the Court support the view that:

It may, therefore, be said generally that upon grounds of public policy an informer is protected from a disclosure in a court of law of the fact that he is an informer, and that the rule applies both in criminal and civil proceedings.

This view was supported by the court in [Suliman v Hansa \(1971\)](#) and the court was of the opinion that nothing disclosed in the evidence indicated that there where special circumstances which justify a departure from the general rule of protecting an informant from disclosure.

According to [Kruger \(2010, p. 538\)](#) public interest include informer (whistleblower) privilege that protect the disclosure of the name of the informant and the information provided by the informant. In [Rex v Van Schalkwyk \(1938\)](#) A description of an informer is:

First, one who gives information of a kind prejudicial to others whose enmity he may thereby provoke; secondly, that information must be of a kind which is (or may be) the cause of a criminal prosecution, and lastly, it must be given to the officers of justice.

Although the identity of an informer can be protected by the South African Police Service, it must always be kept in mind that the use of a whistleblower as an undercover agent may compromise a criminal investigation ([S v Brooks and Others, 2019](#); [S v Corns, 1993](#)). There is always the possibility that the informer can be identified by the information revealed by the informer.

Informants paid or unpaid are covert human intelligence sources who covertly provide information to the police about criminal activities ([Harfield and Harfield, 2013](#), p. 132). [Bila \(2018, p. 309\)](#) contended that by the using of informants' valuable information can be collected but stated that it must be done very carefully and that acting indiscriminately can put the informant at risk. [Bila \(2018, p. 319\)](#) continues and emphasises the importance of the training of information collectors.

Section 204 of the Criminal Procedure Act 51 of 1977 make provisions for a witness to testify over incriminating evidence for the prosecution. If this witness (whistleblower) answers frankly and honestly all questions put to the witness, the witness shall be discharged from prosecution.

It is however not a blank offer of indemnity, and must the witness testify frankly, and honestly which testimony subjected to cross examination is. Only then will the court at the end of the trial indemnify the witness.

3.3.4 Witness Protection Act 112 of 1998. In terms of Section 1 of the Witness Protection Act 112 of 1998 a witness means "any person who is or may be required to give evidence, or who has given evidence in any proceedings". In accordance with Section 7 of the Witness Protection Act 112 of 1998 any witness who has reason to believe that the safety or the safety of any related person of the witness is or may be threatened, by reason of the witness being a witness, may apply for protection.

It is evident that the Witness Protection Act 112 of 1998 provide protection for a witness and related person as used by the South African Police Service and can contribute to the issue of protection of whistleblowers ([Daile and Holtzhausen, 2005](#), p. 17).

4. Conclusions

Whistleblower protection in South African law and policy has two main components. The first relates to witnesses in criminal offences and the second relates to protection under the Protected Disclosures Act of 2000.

The reporting of wrongdoings by whistleblowers as stipulated by the Protective Disclosure Act 26 of 2000 only provide protection against an occupational detriment and no other protection. Furthermore, none of the persons or bodies that information must be reported to are ostensibly trained in the handling of informers in criminal cases that may contribute towards increasing the risks for whistleblowers. Furthermore, the provisions of reporting criminal cases is contrary to the provisions of section 34 of the Prevention and Combatting of Corrupt Activities Act 12 of 2004.

The following recommendations made by Zondo to introduce legislation or amend existing legislation to provide for the protection from potential retaliation or intimidation, establishing procedures for the physical protection, relocating, non-disclosure of information concerning the identity and whereabouts of such persons, providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, to offer immunity from criminal proceedings and to enter into agreements to give rewards for information are already included in existing legislation regarding criminal cases.

The South African Police Service must inter alia enforce the law, investigate alleged criminal offences and ensure the safety of all the citizens in South Africa to comply with their Constitutional duties as set out in section 205 of the [Constitution of the Republic of South Africa \(1996\)](#).

Although the conceptional framework of the South African Police Services regarding reports in terms of the provisions of Section 34 of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 are in place, it makes no provision to be informed of any threats against the whistleblower and specific guidance to the handling of the information in an overt or covert manner. Furthermore, there is no indication that the South African Police Service enforce the provisions of this section. However, it cannot be expected from the South African Police Service to ensure the safety of whistleblowers if whistleblowers and recipients of reports in terms of the Protective Disclosure Act 26 of 2000 do not provide the reports to the South African Police Service.

5. Recommendations

It is recommended that there must be a clear distinction made between civil Protective Disclosure Act 26 of 2000 and criminal disclosures in terms of not only the Prevention and Combatting of Corrupt Activities Act 12 of 2004 but for all criminal allegations as it is the constitutional duty of the South African Police Service to investigate alleged criminal offences.

Although it cannot be expected from an employer not to inform the employee of criminal wrongdoings in the organisation of the employee it is recommended that if the whistleblower prefer to do so, that the whistleblower also informed them that the information is also going to be provided to the South African Police Service. Furthermore, it is recommended that when the whistleblower is threatened or feels threaten in any manner, that information of criminal wrongdoing, must only be reported to the South African Police Service and or that the person or body who receive the report in terms of the provisions of the Protective Disclosure Act 26 of 2000 must immediately report same to the South African Police Service.

The South African Police Service may include a portion in the report of suspicion transactions that deals with the safety of the whistleblower. The South African Police Service can investigate alleged criminal offences covertly where there is safety risk for the whistleblower up to a stage for example where the Police is able to execute a search and seizure warrant obtained, based on the investigation done by the investigating officer, without revealing the identity of the whistleblower. Even if the whistleblower is identified as a state witness during the subsequent overt investigation of the South African Police Service, it will still be possible for the South African Police Service to rely on whistleblower privilege and protect the identity and the information revealed by the whistleblower in terms of the provisions of Section 202 of the Criminal Procedure Act 51 of 1977.

It is concluded that the existing law as primarily contained in the Criminal Procedure Act 51 of 1977 provide appropriate protection for whistleblowers in South African criminal cases. To ensure the protection of whistleblower in criminal cases, it is necessary that the following research need to be done regarding:

Procedures to be followed by the recipients of information regarding a criminal offence in terms of the provisions of Protective Disclosure Act 26 of 2000.

The structures and policy of the South African Police Service to enable the covert investigation of the information received in terms of section 34 of the Prevention and

References

- Achbedahin, K. (2021), "Covid-preneurship and the imperative return to ubuntu", *Peace Review: A Journal of Social Justice*, Vol. 33 No. 1, pp. 80-87, doi: [10.1080/10402659.2021.1956133](https://doi.org/10.1080/10402659.2021.1956133).
- Anon (2014), "Mr X's Gory Marikana testimony draws tears", Mail and Guardian, 26 June, available at: <https://mg.co.za/article/2014-06-26-mr-xs-gory-testimony-draws-tears/> (accessed 15 September 2022).
- Bester, D. and Dobovšek, B. (2021), "State capture: case of South Africa", *Nauka, Bezbednost, Policija*, Vol. 26 No. 1, pp. 73-87, doi: [10.5937/nabepo26-32346](https://doi.org/10.5937/nabepo26-32346).
- Bila, H.P. (Ed.) (2018), *Policing in South Africa Past and Present*, LexisNexis, Durban.
- Bracking, S. (2018), "Corruption and state capture: what can citizens Do?", *Dædalus*, Vol. 147 No. 3, pp. 169-193, doi: [10.1162/DAED_a_00509](https://doi.org/10.1162/DAED_a_00509).
- Chetty, R. (2021), "BDO launches tipoffs app for whistleblowers to report corruption anonymously", available at: <https://htxt.co.za/2021/11/bdo-launches-tipoffs-app-for-whistleblowers-to-report-corruption-anonymously/> (accessed 20 September 2022).
- Cohen, M. and Mbatha, A. (2017), "Zuma's graft scandal lays bare chaos in South African police", available at: www.bloombergquint.com/politics/zuma-s-graft-scandal-lays-bare-chaos-in-south-african-police (accessed 18 March 2022).
- Commission of Inquiry into State Capture (2022), "Judicial commission into state capture report: part 1", available at: https://cdn.aerotelegraph.com/production/uploads/2022/01/Judicial-Commission-of-Inquiry-into-State-Capture-Report_Part-1_compressed.pdf (accessed 28 February 2022).
- Constitution of the Republic of South Africa (1996), *Constitution of the Republic of South Africa* 1996.
- Criminal Procedure Act 51 (1977), *Criminal Procedure Act 51* of 1977.
- Daile, A.J. and Holtzhausen, N. (2005), "Public or protected disclosure? The fallacy of whistleblower protection in South Africa", *Journal of Public Administration*, Vol. 10 No. 1, pp. 10-19, doi: [10.10520/EJC51233](https://doi.org/10.10520/EJC51233).
- De Maria, W. (2006), "Common law – common mistakes? Protecting whistleblowers in Australia, New Zealand, South Africa and the United Kingdom", *International Journal of Public Sector Management*, Vol. 19 No. 7, pp. 643-658, doi: [10.1108/09513550610704671](https://doi.org/10.1108/09513550610704671).
- Deloitte (2019), "Whistleblower policy", *Deloitte Touche Tohmatsu*, available at: www2.deloitte.com/content/dam/Deloitte/au/Documents/about-deloitte/deloitte-au-about-whistleblower-policy-201219.pdf (accessed 19 September 2022).
- Department of Police (South Africa) (2012), Prevention and Combatting of Corrupt Activities Act, 2004 (Act no. 12 of 2004): directions by the national head of the directorate for priority crime investigation (DPCI) within the South African Police Service in terms of section 34(3) of the Prevention and Combating of Corrupt Activities Act, 2004 (Notice 1028). Government Gazette, 35949: 4, 7 Dec.
- Engel, U. (2021), "State capture in South Africa", *Comparativ: Zeitschrift Für Globalgeschichte Und Vergleichende Gesellschaftsforschung*, Vol. 31 art. #2, pp. 267-274, doi: [10.26014/j.comp.2021.02.10](https://doi.org/10.26014/j.comp.2021.02.10).
- Ernst and Young (EY) (2022), "EY whistleblowing policy", available at: https://assets.ey.com/content/dam/ey-sites/ey-com/en_au/topics/whistleblowers/ey-whistleblowing-policy.pdf (accessed 19 September 2022).
- Government of South Africa (2022), "Whistleblowing", available at: www.gov.za/anti-corruption/whistle-blowing (accessed 19 September 2022).
- Groenewald, L. (2020), *Whistleblowing Management Handbook*, Ethics Institute, Pretoria, available at: www.tei.org.za/wp-content/uploads/2020/09/Whistleblowing-Management-Handbook_Final-for-Web.pdf (accessed 28 February 2022).

- Harfield, C. and Harfield, K. (2013), *Covert Investigation*, 3rd ed., Oxford University Press, Oxford.
- Heywood, M. (2022), "Activists gather to remember Babita Deokoran and demand a protection action plan", *Daily Maverick*, 31 Jul., available at: www.dailymaverick.co.za/article/2022-07-31-activists-gather-to-remember-babita-deokoran-and-demand-a-protection-action-plan/ (accessed 23 September 2022).
- Hoffman, P. (2019), "Why is nobody going to jail?", *New Agenda: South African Journal of Social and Economic Policy*, Vol. 72 No. 2019, pp. 28-29.
- International Organization for Standardization (ISO) (2021), "Whistleblowing management systems – guidelines", available at: www.iso.org/obp/ui/#iso:std:iso:37002:ed-1:v1:en (accessed 23 September 2022).
- Jubb, P.B. (1999), "Whistleblowing: a restrictive definition and interpretation", *Journal of Business Ethics*, Vol. 21 No. 1, pp. 77-94, available at: www.jstor-org.nwulib.nwu.ac.za/stable/25074156
- Kenny, K. and Fotaki, M. (2021), "The costs and labour of whistleblowing: bodily vulnerability and post-disclosure survival", *Journal of Business Ethics*, pp. 1-24, doi: [10.1007/s10551-021-05012-x](https://doi.org/10.1007/s10551-021-05012-x).
- Khumalo, S. (2022), "Dudu Myeni pleads guilty, fined for naming Mr X at Zondo commission", *News24*, 27 Jul., available at: www.news24.com/fin24/companies/dudu-myeni-pleads-guilty-to-obstruction-of-justice-for-naming-protected-witness-20220727 (accessed 19 September 2022).
- KPMG (2021), "Whistleblowing monitoring as a service", available at: <https://assets.kpmg/content/dam/kpmg/cy/pdf/2021/whistleblowing-directive%20brochure.pdf> (accessed 19 September 2022).
- Kruger, A. (2010), *Hiemstra Suid-Afrikaanse Straffproses*, 7th ed., LexisNexis, Durban.
- Labour Relations Act 66 (1995), *Labour Relations Act 66* of 1995.
- Lambrechts, D. (2022), "Whistle-blowers", *Servamus*, Vol. 115 No. 5, p. 68.
- LeRoux, R. (2010), "The protected disclosures act 26 of 2000: is this as good as it is going to get for whistleblowers – a review of some recent jurisprudence", *Stellenbosch Law Review*, Vol. 21 No. 3, pp. 508-527.
- Lubisi, S. and Bezuidenhout, H. (2016), "Blowing the whistle for personal gain in the republic of South Africa: an option for consideration in the fight against fraud?", *Southern African Journal of Accountability and Auditing Research*, Vol. 18 No. 1, pp. 49-62, doi: [10.10520/EJC198172](https://doi.org/10.10520/EJC198172).
- Madipa, M. and Motseki, M. (2022), "The nexus between corruption and opportunistic crimes during covid-19 in South Africa", *Technium Social Sciences Journal*, Vol. 27, pp. 980-994, art. #94, doi: [10.47577/tssj.v27i1.5117](https://doi.org/10.47577/tssj.v27i1.5117).
- Madonsela, S. (2019), "Critical reflections on state capture in South Africa", *Insight on Africa*, Vol. 11 No. 1, pp. 113-130.
- Open Democracy Advice Centre (ODAC) (2015), "Heroes Under fire", available at: www.africanplatform.org/fileadmin/Content/PDF/Resources/Publications/HeroesUnderFire.pdf (accessed 5 April 2022).
- Pillay, S., Dorasamy, N. and Vranic, V. (2012), "Exploring whistle blowing intentions in South Africa: a quantitative analysis", *African Journal of Business Management*, Vol. 6 No. 7, pp. 2529-2548, doi: [10.5897/AJBM11.148](https://doi.org/10.5897/AJBM11.148).
- Prevention and Combatting of Corrupt Activities Act 12 (2004), *Prevention and Combatting of Corrupt Activities Act 12* of 2004.
- Protected Disclosures Act 26 (2000), *Protected Disclosures Act 26* of 2000.
- PwC (2022), "Do you have a concern you wish to report?", *Speak up*, available at: www.pwc.com/im/en/about-us/speak-up-pwc-whistleblowing-helpline.html (accessed 19 September 2022).
- Rex Appellant v Van Schalkwyk Respondent (1938), A.D. 543.
- Roberts, B. and Gordon, S. (2022), "South Africans have low trust in their police: here's why", *The Conversation*, 28 March, available at: <https://theconversation.com/south-africans-have-low-trust-in-their-police-heres-why-178821> (accessed 23 September 2022).
- S v Brooks and Others* (2019), (1) SACR 103 (NCK).

-
- S v Coms* (1993), (2) SACR 350 (NCD).
- S v Van der Vyver* (2007), (SS 190/06) ZA WCHC 69.
- South African Police Services (SAPS) (2009), "Resolving of crime learnership: learner's guide module 11 to module 20", Skills programme 1: Detective learning programme, South African Police Services, Pretoria.
- Suliman v Hansa* (1971), (2) SA 437 (D).
- Sylvia, C. and Stabile, E. (2016), "Rethinking compliance: the role of whistleblowers", *University of Cincinnati Law Review*, Vol. 84 No. 2, pp. 451-474, available at: <https://heinonlineorg.nwulib.nwu.ac.za/HOL/Page?handle=hein.journals/ucinlr84&div=20>
- Transparency International (TI) (2021), "Corruption perceptions index", available at: www.transparency.org/en/cpi/2021 (accessed 17 March 2022).
- Transparency International (TI) (2022), "The ABCs of the CPI: how the Corruption Perceptions index is calculated", available at: www.transparency.org/en/news/how-cpi-scores-are-calculated (accessed 17 March 2022).
- Van der Merwe, S.E. (Ed.) (2020), *A Basic Introduction to Criminal Procedure*, 13th ed., Juta, Claremont.
- Venter, Z. (2007), "Officer named his killer in last breath", *Pretoria News*, Feb. 23, available at: www.iol.co.za/news/south-africa/officer-named-his-killer-in-last-breath-316354 (accessed 23 September 2022).
- Witness Protection Act 112 (1998), *Witness Protection Act 112* of 1998.
- World Population Review (WPR) (2022), "Crime rate by country 2022", available at: <https://worldpopulationreview.com/country-rankings/crime-rate-by-country> (accessed 22 August 2022).
- Wright, J. (2022), "Whistleblowers in South Africa have some protection but gaps need fixing", *The Conversation*, June 15, available at: <https://theconversation.com/whistleblowers-in-south-africa-have-some-protection-but-gaps-need-fixing-183992> (accessed 14 September 2022).
- Young v Coega Development Corporation (Pty) Ltd* (699/2009) (2009), ZAECPHC 9; [2009] 6 BLLR 597 (ECP); 2009 (6) SA 118 (ECP) (20 March 2009).

Corresponding author

Jacobus Gerhardus J. Nortje can be contacted at: Koos.Nortje@nwu.ac.za

For instructions on how to order reprints of this article, please visit our website:

www.emeraldgroupublishing.com/licensing/reprints.htm

Or contact us for further details: permissions@emeraldinsight.com