The Protected Disclosures Act 26 of 2000, the Companies Act 71 of 2008 and the Competition Act 89 of 1998 with regard to whistle-blowing protection: is there a link?

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1 *Introduction*

Corruption is a major concern worldwide, because it can not only impede economic growth in a country, but can also be detrimental to democratic principles, stability and trust. It has been said that corruption "undermines confidence in government, diverts public recourses and distorts trade", and it "not only tarnishes the reputation of the company or the industry involved, but it also slows overall economic development, which severely affects the poor."[1] It has also been emphasised that

> "[c]orruption is a systemic and institutional phenomenon involving all sectors of society and undermines democratic processes and corporate governance and erodes social cohesion and values. Measures to combat corruption must deal with both those who corrupt as well as those who are corrupted."[2]

Against this backdrop it is important to note that the perception is that corruption in South Africa has increased over the last five to ten years.[3] If a country's score is 0 it is highly corrupt, whereas a score of a 100 makes a country "very clean".[4] A scale of 0 to 100 is used to indicate the perceived level of public sector corruption.[5] In 2012 South Africa was perceived as one of the most corrupt countries out of 176 countries surveyed, with a score of 69 out of 182 countries surveyed[6] with a score of 4.1 out of 10.[7] The Corruption Perceptions Index ranks territories or countries on "how corrupt their public sector is perceived to be".[8] New Zealand currently

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1 Vega "The Sarbanes-Oxley Act and the culture of bribery: Expanding the scope of private whistleblower suits to overseas employees" 2009 *Harvard Journal on Legislation* 425 427.

2 ANC, 2007. *ANC 52nd National Conference 2007-Resolutions* - http://www.anc.org.za/ancdocs/history/conf/conference52/ (19-11- 2012).

3 Martin *The Status of Whistleblowing in South Africa Taking Stock* (2010) 16 – http://www.docstoc.com/docs/71304073/The-Status-of-Whistleblowing-in-South-Africa (23-06-2011).

4 Transparency International, Corruption Perceptions Index 2012 www.transparency.org (01-08-2013).

5 Transparency International, Corruption Perceptions Index 2012 www.transparency.org (01-08-2013).

6 Transparency International, Corruption Perceptions Index 2012 www.transparency.org (01-08-2013).

7 Transparency International, Corruption Perceptions Index 2011 www.transparency.org (23-10-2012).

8 Transparency International, Corruption Perceptions Index 2011 www.transparency.org (23-10-2012).

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holds the number one position, and Denmark and Finland the number two position. These countries are perceived as the least corrupt countries, with scores of 9.5 and 9.4 respectively.[9]

Whistle-blowing is one of the mechanisms that exist to deter corruption and thus plays an important role in encouraging transparency and high standards of corporate governance not only in companies but other organisations as well. Many definitions of whistle-blowing exist.[10] A guiding definition proposed by Transparency International is as follows: whistle-blowing is "the disclosure of information related to corrupt, illegal, fraudulent or hazardous … which are of concern to or threaten the public interest – to individuals or entities believed to be able to effect action."[11] This definition also covers perceived or potential wrongdoing.[12] A broad definition of whistle-blowing establishes the scope of application and covers "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".[13] Fraudulent financial disclosures made by government agencies/officials and publicly traded corporations as well as possible human rights violations if warranted or appropriate within a national context can be included here.[14]

Quite a number of pieces of legislation and policy documents of regulators contain provisions regarding corruption and whistle-blowing in South Africa. The Protected Disclosures Act[15] forms part of the whistle-blowing framework, together with other legislation such as the constitution,[16] the Labour Relations Act[17] and the Companies Act.[18] The South African Protected Disclosures Act is modelled on the first comprehensive law of its kind passed in the European Union, the United Kingdom's Public Interest Disclosure Act 1998 (PIDA). The Netherlands in 2001, for example, approved protection for public servants, which was followed by a public sector ethics and integrity agency in 2006, the expansion of the national ombudsman's office in 2011 as well as the opening of the whistle-blowing advice centre in 2012. In Belgium for example a Flemish law was passed in 2004 to protect public sector whistle-blowers. Germany, however, still lacks specific legislation regarding the protection of whistle-blowers due to the fact that "a complex set of disparate laws and principles" still exist that are inconsistently interpreted by the

[9] Transparency International, Corruption Perceptions Index 2011 www.transparency.org (23-10-2012).

[10] See *eg* Vinten ("Whistleblowing towards disaster prevention and management" 2000 *Disaster Prevention and Management* 18 19), where a restricted definition is put forward. Whistle-blowing is defined as "the actions through which information is made known that an employee reasonably believes, provides proof of the transgression of any law or rule, mismanagement, corruption, abuse of authority, or that is a threat to public health and safety in the workplace."

[11] *Whistleblowing in Europe Legal Protections for Whistleblowers in the EU* (2013) 1 87 www.transparency.org (07-12-2013).

[12] *Whistleblowing in Europe Legal Protections for Whistleblowers in the EU* (2013) 1 87 www.transparency.org (07-12-2013).

[13] *Whistleblowing in Europe Legal Protections for Whistleblowers in the EU* (2013) 1 87 www.transparency.org (07-12-2013).

[14] *Whistleblowing in Europe Legal Protections for Whistleblowers in the EU* (2013) 1 87 www.transparency.org (07-12-2013).

[15] 26 of 2000.

[16] Constitution of the Republic of South Africa, 1996.

[17] 66 of 1995.

[18] 71 of 2008.

courts, thus making it difficult for whistle-blowers to predict the outcomes.[19] In South Africa the competition commission also encourages "authorised whistle-blowing" by cartel members and has specifically adopted a corporate leniency policy for this purpose. In addition, the Prevention and Combating of Corrupt Activities Act,[20] for example, states that the purpose of the act is to provide for the strengthening of measures to prevent and combat corruption and corrupt activities as well as provide for the offence of corruption and offences relating to corrupt activities and also to place a duty on certain persons holding positions of authority to report certain corrupt transactions.[21]

The purpose of this contribution is to investigate whether the Protected Disclosures Act, Companies Act and corporate leniency policy provide effective whistle-blower protection to whistle-blowers and whether synergy exists between these legislative provisions.[22] Insofar as the Competition Act is concerned, it is not intended to comprehensively traverse the rationale behind leniency programmes and the features of such programmes in this discussion. Rather the focus is to alert the reader to the existence of this tool to combat cartels in statutory competition law and the fact that the South African corporate leniency policy does not provide a remedy for individuals (*ie* not directors or other employees authorised to file a leniency application on behalf of their employer) who blow the whistle on cartel activity by the companies that they work for, thus raising the question whether their whistle-blowing disclosures are protected by the Protected Disclosures Act and/or the Companies Act.

2 *The legislative provisions*

2.1 The scope of the Protected Disclosures Act

The Protected Disclosures Act has been in operation since 2000. The act emphasises *accountability, transparency and corporate governance*.[23] It provides that criminal and other irregular conduct of state and private bodies are detrimental to good, effective, accountable and transparent governance in corporate bodies and organs of state, and also emphasises open and good corporate governance while pointing to criminal and irregular conduct that can endanger the economic stability of the Republic and that has the potential to cause social damage.[24]

The act, however, grants protection only to employees who blow the whistle. This protection is afforded to employees employed in both the private and public sectors. The act contains the same definition for "employee" as the Labour Relations Act and the Basic Conditions of Employment Act.[25] An employee is defined as:

[19] *Whistleblowing in Europe* (n 11) 47.
[20] 12 of 2004.
[21] This act contains quite a number of offences in respect of corruption in ch 2, *eg* the general offence of corruption (s 3); offences relating to public officers, foreign public officials, agents, members of legislative authority, judicial officers and members of the prosecuting authority (s 4-9).
[22] This discussion focuses only on statutory competition law as regulated in terms of the Competition Act 89 of 1998. A discussion of private competition principles and remedies falls outside the scope of this article.
[23] emphasis added. The Promotion of Access to Information Act 2 of 2000 aims to foster a culture of transparency and accountability in both the public and private sphere by giving effect to the right to access to information (preamble of the act).
[24] preamble to the Protected Disclosures Act (n 15).
[25] 75 of 1997.

"*(a)* any person, excluding an independent contractor, who works for any person or for the State and who receives, or is entitled to receive, any remuneration;

(b) any other person who in any manner assists in carrying on or conducting the business of the employer."[26]

The purpose of the Protected Disclosures Act is to create a culture that will facilitate the disclosure of information by employees relating to criminal and other irregular conduct they encounter in the workplace.[27] The objectives of the act are stated as follows:[28] to make provision for procedures in terms of which employees in both the private and public sector may disclose information regarding unlawful or irregular conduct by their employers and/or other employees in the employ of their employers; to provide for the protection of those employees who make disclosures which are protected in terms of the act and to provide for matters connected therewith.[29] The

[26] See s 1 of the Protected Disclosures Act, s 1 of the Basic Conditions of Employment Act, s 1 of the Employment Equity Act 55 of 1998 and s 213 of the Labour Relations Act. Generally labour laws do not define the concept employer. S 1 of the Protected Disclosures Act defines an employer as a person: "*(a)* who employs or provides work for any other person and who remunerates or expressly or tacitly undertakes to remunerate that other person or *(b)* who permits any other person in any manner to assist in the carrying on or conducting of his, her or its business, including any person acting on behalf of or on the authority of such employer." Both definitions were applied and confirmed in *Charlton v Parliament of the Republic of South Africa* 2007 *ILJ* 2263 (LC). This case was taken on appeal as *Parliament of the Republic of South Africa v Charlton* 2010 *ILJ* 2353 (LAC). In the labour appeal court a different approach was used, and the court (par 27-28) concluded that members of parliament are not employees and agreed with parliament's submission that the legislature intended to create a single statutory scheme through the use of the same definition of "employee" in both the Labour Relations Act and the Protected Disclosures Act (par 29). The labour appeal court also stated that if MPs are excluded from the Labour Relations Act, then logically they are also excluded from the provisions of the Protected Disclosures Act (par 31). See also Smit and Botha "Is the Protected Disclosures Act 26 of 2000 applicable to members of parliament?" 2011 *TSAR* 815-829 for a discussion.

[27] preamble to the Protected Disclosures Act and *Grieve v Denel (Pty) Ltd* 2003 4 BLLR 366 (LC) 368g. See also *Engineering Council of SA v City of Tshwane Metropolitan Municipality* 2008 *ILJ* 899 (T) where the court stressed that "[o]n the construction contended by Mr Pauw [for the appellant] the threat of disciplinary action can be held as a sword of Damocles over the heads of employees to prevent them from expressing honestly held opinions to those entitled to know of those opinions. *A culture of silence rather than one of openness would prevail. The purpose of the PDA is precisely the opposite*" (par 42; emphasis added).

[28] s 2 of the Protected Disclosures Act.

[29] The PIDA (UK), for example, provides for the protection of workers in non-profit, private and government sectors and covers a wide range of employment categories who blow the whistle such as employees; contractors, trainees and even UK workers based abroad. The PIDA inserted part IVA of the Employment Rights Act 1996 (ERA), which enables workers to make a "protected disclosure" –defined by s 43A of ERA as "a qualifying disclosure". A "qualifying disclosure" is "any disclosure of information which, in reasonable belief of the worker making the disclosure, is made in the public interest" and tends to show for example that a criminal offence has been committed, is being committed or is likely to be committed. It also includes failure of a legal obligation, miscarriage of justice etc. PIDA also provides, similarly to the Protected Disclosures Act, for internal as well as external disclosures. In April 2013 the "public interest" test was included in order to govern instances where workers reasonably believe that the disclosure was made in the public interest. These workers are protected against retaliation for making such a disclosure. Government removed the good faith requirement. It is no longer applicable to disclosures made on or after 25 June 2013. Where a disclosure was made with an ulterior motive and is thus made in bad faith (see s 43A-43F of ERA as well as *Whistleblowing in Europe* (n 11) 83). In Germany the position is quite different. The country is faced by many challenges, such as that employees who expose wrongdoing potentially face dismissal as well as civil liability or criminal prosecution, because the courts work on a case-by-case basis. The act of whistle-blowing, especially when it is an external disclosure, can be seen as a "breach of contractual obligation of loyalty employees owe their employer, including, for example, an obligation to keep confidential any business internal information" and the justification

act also gives due recognition to the bill of rights and affirms the democratic values of human dignity, equality and freedom.[30]

2.2 The scope of the Companies Act

The Companies Act became operational on 1 May 2011. It was a result of the department of trade and industry's policy paper,[31] which envisaged the development of a "clear, facilitating, predictable and consistently enforced governing law". The Companies Act also aims to promote the development of the South African economy by "encouraging transparency and high standards of corporate governance".[32] This is extremely important given the significant role of enterprises in the social and economic life of the nation.[33] The constitution recognises the importance of good governance by making provision for values and principles governing public administration and by providing for the promotion and maintenance of high standards of professional ethics.[34] The latter principles apply to organs of state[35] and public enterprises, including state-owned companies[36] and government departments. There is, however, no generally accepted definition of the concept "corporate governance". Corporate governance can in broad terms be defined as "the collection of law and practices, grounded in fiduciary duties and their application, that regulates the conduct of those in control of the corporation, and the means through which a variety of countries provide a legal basis for corporations while preserving, to some extent, authority to control abuses of these business organizations".[37] Corporate governance

of dismissal of the whistle-blower can be found in §626 of the German Civil Code (*BGB*) due to the behaviour of the employee (see Rauhofer "Blowing the whistle on Sarbanes-Oxley: Anonymous hotline and the historical stigma of denunciation in modern Germany" 2007 BILETA Annual Conference Hertfordshire 16-17 April 1 12 and *Whistleblowing in Europe* (n 11) 47). According to §37 of the *Beamptenstatusgesetz*, German public service employees have since 2008 had the right to report suspicions of criminal offence such as corruption directly to law enforcement authorities and will be protected if they have made the disclosure in good faith and their actions are not considered to be disproportionate (Vanderckhove "European whistleblower protection: tiers or tears?" in Lewis (ed) *A Global Approach to Public Interest Disclosure* (2010) 27).

30 preamble to the Protected Disclosures Act.

31 *South African Company Law for the 21st Century – Guidelines for Corporate Law Reform* (*GG* 26493 of 23-06-2004).

32 s 7 of the Companies Act.

33 s 7 of the Companies Act.

34 s 195 of the constitution.

35 S 239 of the constitution defines an organ of state as: "(a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution – s (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer."

36 See *Goodman Bros (Pty) Ltd v Transnet Ltd* 1998 4 SA 989 (W) for the applicability of the provisions of the constitution to state-owned enterprises. S 1 of the Companies Act defines a state-owned company as "an enterprise that is registered in terms of this Act as a company, and either (*a)* is listed as a public entity in sch 2 or 3 of the Public Finance Management Act, 1999 (1 of 1999) or *(b)* is owned by a municipality, as contemplated in the Local Government: Municipal Systems Act 2000 (Act No, 32 of 2000), and is otherwise similar to an enterprise referred to in paragraph *(a).*" The object of the Public Finance Management Act is to secure "*transparency, accountability and management* of the revenue, expenditure, assets and liabilities of the institutions to which this Act applies" (s 2). Departments, public entities (listed in sch 2 or 3), constitutional institutions as well as parliament and the provincial legislatures are all subject to the provisions of s 2 of the PFMA (see s 3 of the PFMA).

37 Aka "Corporate governance in South Africa: analyzing the dynamics of corporate governance reforms in the 'Rainbow Nation'" 2007 *North Carolina Journal of International Law and Commercial Regulation* 219 238.

has also been defined as "the way in which companies are directed and controlled or the principles and practices which are regarded as appropriate conduct by directors and managers".[38]

The purpose of the Companies Act is, *inter alia*, to promote compliance with the bill of rights in the constitution in the application of company law as well as the provision of "a predictable and effective regulatory environment for the efficient regulation of companies". Furthermore, the Companies Act aims to balance the "rights and obligations of shareholders and directors" within companies and encourage the "efficient and responsible management of companies".[39] It must be noted that the *King Report on Corporate Governance in South Africa* (2009)[40] provides

> "the board is responsible for corporate governance and has two main functions: first it is responsible for determining the company's *strategic direction* (and, consequently, its ultimate performance); and second, it is responsible for the *control* of the company. The board requires management to execute strategic decisions effectively and according to laws and the legitimate interests and expectations of stakeholders."[41]

The Companies Act places important obligations and responsibilities on directors and companies that extend beyond the creation of shareholder wealth. The duties of directors, even though contentious, are important because they play a role in ensuring the promotion of corporate governance. Good governance is in essence about effective leadership which should be based on four ethical values namely responsibility, accountability, fairness and transparency as well as five moral duties, namely, conscience, care, competence, commitment, and courage.[42] The practising of sound corporate governance is essential for the well-being of companies (and other organisations) and is in the best interest of the growth of South Africa's economy when the attraction of new investments is at stake.[43] In *South African Broadcasting Corporation Ltd v Mpofu*[44] the court emphasised the fact that integrity is a key principle underpinning good corporate governance. In this regard the court held as follows:

> "Put clearly, good corporate governance is based on a clear code of ethical behaviour and personal integrity exercised by the board, where communications are shared openly. There are no opportunities in this environment for cloaks and daggers. Such important decisions are not made in haste or in anger. There must be ethical behaviour in the exercise of dealings with board members. These dealings must be dealt with in such a manner as to ensure due process and sensitivity."[45]

[38] King "The synergies and interaction between King III and the Companies Act 71 of 2008" 2010 *Acta Juridica* 446 447.

[39] s 7 of the Companies Act.

[40] *King III*.

[41] *King III* (n 40) 20.

[42] *King III* (n 40) 21.

[43] *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 5 SA 333 (W) par 16.7.

[44] 2009 4 All SA 169 (GSJ). The court referred to "ubuntu" and held that "ubuntu" "speaks to our interconnectedness, our common humanity and the responsibility to each that flows from the connection" and it is "a culture which places some emphasis on the commonality and on the interdependence of the members of the community". The court then added that "ubuntu" must become a notion with particular resonance in the building of our constitutional democracy and that all directors in state-owned companies must take cognisance of this when they exercise their duties (par 63).

[45] the *Mpofu* case (n 44) par 64.

Section 159 of the Companies Act, like the Protected Disclosures Act, also provides for the protection of employees who blow the whistle.[46] It provides additional protection and does not substitute protection as provided for by the Protected Disclosures Act.[47] The Companies Act further applies to a disclosure by an employee, as defined in the Protected Disclosures Act irrespective of whether the Protected Disclosures Act would otherwise apply to that disclosure.[48] Any provision in a company's memorandum of incorporation or 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 of the Companies Act.[49] It is evident from the aforementioned that the prevention and detection of misconduct for example through whistle-blowing is considered to be an important aspect of corporate leadership. It is thus important for directors to promote good corporate governance principles, including the promotion of whistle-blowing, in the fight against corrupt behaviour when they exercise their duties and promote good corporate governance in their company.

3 *Protection of whistle-blowers*

3.1 The Protected Disclosures Act and the 2008 Companies Act

3.1.1 The disclosures and process/procedure

In terms of section 1 of the Protected Disclosures Act "disclosure" means:

> "any disclosure of information regarding any conduct of an *employer,* or an *employee* of that *employer,* made by any *employee* who has reason to believe that the information concerned shows or tends to show one or more of the following:
> (a) that a criminal offence has been committed, is being committed or is likely to be committed;
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
> (d) that the health or safety of an individual has been, is being or is likely to be endangered;
> (e) that the environment has been, is being or is likely to be damaged;
> (f) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No, 4 of 2000);[50] or
> (g) that any matter referred to in paragraphs *(a)* to *(f)* has been, is being or is likely to be deliberately concealed."[51]

[46] s 159(1)-(3) of the Companies Act.
[47] s 159(1)(*a*) of the Companies Act.
[48] s 159(1)(*b*) of the Companies Act.
[49] s 159(2) of the Companies Act.
[50] Hereafter referred to as "PEPUDA".
[51] S 1 of the Protected Disclosures Act defines an impropriety as "any conduct which falls within any of the categories referred to in paragraphs *(a)* to *(g)* of the definition of '*disclosure*', irrespective of whether or not – (a) the impropriety occurs in the Republic of South Africa or elsewhere; (b) the law applying to the impropriety is that of the Republic of South Africa or of another country". In *CWU v Mobile Telephone Networks (Pty) Ltd* 2003 BLLR 741 (LC) the labour court confirmed that the definition of "disclosure" clearly contemplates that it is only the disclosure of information that either discloses or tends to disclose forms of criminal or other misconduct that is the subject of protection under the Protected Disclosures Act (747a-b).

A "protected disclosure" includes a disclosure made to a legal adviser,[52] an employer,[53] a member of cabinet or of the executive council of a province,[54] or any other person or body.[55] Protected disclosures can also be made to the public protector or auditor-general.[56] A disclosure in respect of which the employee commits an offence by making the disclosure, or a disclosure made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in terms of section 5 of the act, is specifically excluded from the definition of protected disclosure. *Randles v Chemical Specialities Ltd*[57] specifically dealt with whether a disclosure by a legal adviser of information disclosed to him by a whistle-blower in the course of obtaining legal advice is excluded from the protection granted in section 5 of the Protected Disclosures Act. The applicant (Randles) was the group legal counsel and a director of the respondent company. The applicant claimed that he made a protected disclosure and that he was subjected to a disciplinary enquiry, which qualified as an "occupational detriment"[58] after having made the protected disclosure. The court noted specifically with regard to legal advisers that they appear in the Protected Disclosures Act in two contexts, namely:[59]

> "(i) The first is a disclosure made by an employee (the whistleblower) 'to' a legal adviser. It is clear from the definition of what constitutes a protected disclosure that a disclosure made 'to' a legal adviser (in terms of s 5 of the PDA) may be considered to be a 'protected' disclosure.
>
> (ii) The second is a disclosure 'by' a legal adviser of certain information. If regard is had to the definition of a 'protected disclosure' it appears that what is *not* protected in terms of the PDA is a disclosure 'by' a legal adviser of the information that was disclosed to him or her by an employee 'in the course of obtaining legal advice in accordance with section 5'. The person who will therefore not be able to claim the protection afforded by the PDA is firstly, the person whose occupation involves the giving of legal advice (s 5*(a)* of the PDA) *and* secondly, the person (in his capacity as legal adviser) who receives the disclosed information from someone (the whistleblower) who disclosed the information with the object of and in the course of obtaining legal advice (s 5*(b)* of the PDA). Once these two requirements have been met, the disclosures (*by* the legal adviser) will not be protected in terms of the PDA. What therefore appears to be specifically excluded from the protection of the PDA is that information disclosed to a legal adviser which normally falls within the parameters of what is referred to as 'legal privilege'."

[52] s 5 of the Protected Disclosures Act. This definition specifically excludes a disclosure in respect of which the employee commits an offence by making the disclosure, or disclosures made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in terms of s 5 of the Protected Disclosures Act. The court in *Roos v Commissioner Stone NO* 2007 10 BLLR 972 (LC) found that the applicant did not make a protected disclosure in terms of the Protected Disclosures Act and would not be protected by the act. The applicant was found guilty of insolence at a disciplinary hearing for misconduct. The applicant alleged that she made a protected disclosure and was subsequently unfairly dismissed for making this disclosure. The court found that the disclosure that she had made was not *bona fide*, because she turned down an opportunity to have the disclosure clarified. The court was also of the view that "it is not the purpose of the Act to give licence to employees to make unsubstantiated and disparaging remarks about their employers and later hide behind the Act" (976a-c).

[53] s 6 of the Protected Disclosures Act.

[54] s 7 of the Protected Disclosures Act.

[55] s 8 and 9 of the Protected Disclosures Act.

[56] s 8 of the Protected Disclosures Act.

[57] 2011 *ILJ* 1397 (LC).

[58] See discussion under 3.1.2 below.

[59] the *Randles* case (n 57) par 22.

An employee must therefore firstly make a disclosure that falls within the ambit of a disclosure as defined by the Protected Disclosures Act, secondly make a disclosure to a set category of persons and thirdly make the disclosure in *good faith* and in accordance with a procedure authorised by his or her employer. It appears that when an employee makes a disclosure to a person who has an interest in the matter it will meet the requirements set in terms of the act. Such a person would include a *shareholder*.[60] A closer look at section 159(3)(*a*) of the Companies Act provides clarity on the extension of protection to, for example, different role players in companies. The latter section provides that a disclosure can also be made in good faith by a shareholder, director, company secretary, prescribed officer, registered trade union representatives of the employees or any other representative of employees, a supplier of goods and services to the company or even employees of a supplier when they make a disclosure[61] to the companies and intellectual property commission, the companies tribunal, the takeover regulation panel, a regulatory authority,[62] an exchange,[63] a legal adviser, a director, prescribed officer, company secretary, auditor, a person performing the function of internal audit and the board or committee of the company concerned. Section 6 of the Protected Disclosures Act emphasises that an employee must make a disclosure in line with an authorised procedure[64] and provides that:

> "(1) Any disclosure made in good faith –
>
> *(a)* and substantially in accordance with any procedure prescribed, or authorised by the employee's employer for reporting or otherwise remedying the impropriety concerned; or
>
> *(b)* to the employer of the employee, where there is no procedure as contemplated in paragraph *(a)*, is a protected disclosure.
>
> (2) Any employee who, in accordance with a procedure authorised by his or her employer, makes a disclosure to a person other than his or her employer, is deemed, for purposes of this Act, to be making the disclosure to his or her employer."

In this context it is important to take note of *CWU v Mobile Telephone Networks (Pty) Ltd*,[65] where the court held that if an employee makes a disclosure to an employer in terms of section 6, a number of conditions must be met before the disclosure can be regarded as a protected disclosure. These conditions are: (i) the person claiming the protection must be an employee; (ii) the employee must have reason to believe that information in his or her possession shows, or tends to show, the range of conduct that forms the basis of the definition of disclosure; (iii) the employee must make the disclosure in good faith; (iv) if there is a prescribed procedure or a procedure

[60] See *H and M Ltd* 2005 *ILJ* 1737 (CCMA) 1791h where it was stated that although information was confidential it was disclosed to a shareholder who had an interest in the matter.

[61] s 159(4) of the Companies Act.

[62] A regulatory authority is defined by s 1 of the Companies Act as "an entity established in terms of national or provincial legislation responsible for regulating an industry, or sector of an industry".

[63] S 1 of the Companies Act provides that "exchange" when used as a noun has the meaning set out in s 1 of the Securities Services Act 36 of 2004.

[64] An example of such a procedure will be a corruption and fraud hotline. If an employee makes a disclosure of corrupt activities to such a hotline it will render such disclosure a protected disclosure in terms of the Protected Disclosures Act. The Companies Act also makes provision for such a system. S 159(7) of the Companies Act provides that "[a] public company or state-owned company must directly or indirectly- (a) establish and maintain a system to receive disclosures contemplated in this section confidentially, and act on them; and (b) routinely publicise the availability of that system to the categories of persons in subsection (4)".

[65] the *CWU* case (n 51).

authorised by the employer for reporting or remedying any impropriety, then there must be substantial compliance with that procedure; (v) if there is no procedure that is either prescribed or authorised, then the disclosure must be made to the employer; (vi) if any procedure authorised by the employer permits the making of a disclosure to a person who is not the employer, the employer is deemed to have made the disclosure; and (vii) there ought to be some nexus between the disclosure and the detriment.[66]

The Protected Disclosures Act does not differentiate between the public and private sectors when it comes to disclosures. The Companies Act is obviously applicable only to companies, including state-owned companies. A distinction is however drawn in the Protected Disclosures Act between an internal and external disclosure. It is clear that if an employee made a disclosure internally and any of the parties to whom he made the disclosure (in terms of the Protected Disclosures Act or Companies Act) failed to take any action regarding the disclosure, such an employee can then repeat the disclosure to an external party. It is apparent that an external disclosure is dependent on the internal one, because it must be established if an employee blew the whistle internally before going externally. This would obviously also impact directly on directors if they failed to take any steps after a disclosure was made to them by an employee.

Section 9 affords similar protection to South African whistle-blowers who make external disclosures under the general disclosure provision.[67] The latter protection is subject to the employee meeting some conditions first, as the court in *Tshishonga v Minister of Justice and Constitutional Development* pointed out. These conditions are:[68] (i) the disclosure must be made in good faith; (ii) the employee must have a reasonable belief that the information is substantially true and (iii) the disclosure should not be for personal gain. In the context of determining whether an external disclosure is protected the test is more stringent. The reasonableness of the belief must relate to the information being substantially true.[69] Similarly, section 159(3) *(b)* of the Companies Act provides that the person (including an employee) making the disclosure must reasonably have believed at the time of the disclosure that the information showed or tended to show that a company or external company, or a director or prescribed officer of a company acting in that capacity, has contravened the Companies Act or a law mentioned in Schedule 4 of the Companies Act. This provision is also applicable when a company or external company, or a director or prescribed officer of a company acting in that capacity, has failed or is failing to

[66] the *CWU* case (n 51) 746c-e.

[67] See *Tshishonga v Minister of Justice & Constitutional Development* 2007 4 BLLR 327 (LC) and *Engineering Council of SA v City of Tshwane Metropolitan Municipality* (n 27), which dealt with general protected disclosures. Both cases went on appeal as *Minister for Justice and Constitutional Development v Tshishonga* 2009 9 BLLR 862 (LAC) and *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa* 2010 3 BLLR 229 (SCA). In the *Engineering Council* case the court found that the second applicant (Weyers) made a general-protected disclosure and that he reasonably believed that the information and allegation that he disclosed were substantially true. The court added that he had previously made a disclosure of substantially the same information to his employer, but no action was taken within a reasonable time after the disclosure had been made (935b-e). See also *Radebe v Mashoff, Premier of Freestate Province* 2009 6 BLLR 564 (LC), where the court found that the disclosure does not meet the requirements of s 9 of the Protected Disclosures Act, because the information was not substantially true (par 89).

[68] the *Tshishonga* case (n 67) 362g-364f; and s 9 of the Protected Disclosures Act.

[69] See also the *Radebe* case (n 67), where the court was of the view that "clearly speculations and opinions does not amount to facts upon which a reason to believe can be based" and that the word "reason" "means basis, in a form of facts and not baseless speculations or opinion" (par 50).

comply with any statutory obligation to which the company is subject, or engaged in conduct that has endangered or is likely to endanger the health or safety of any individual, or damage the environment; or unfairly discriminated, or condoned unfair discrimination, against any person, as contemplated in section 9 of the constitution and the PEPUDA or contravened 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 interests of the company. It is clear from the above that in the context of public institutions the Protected Disclosures Act specifically emphasises public interest,[70] whereas the Companies Act places an emphasis on the best interests of the company. This is evident from the provisions of the respective acts. What is also evident is the fact that disclosures can be made in terms of both acts to a legal adviser, whereas the other categories of persons clearly differ. It appears, however, that a disclosure *by* a legal adviser of the information that was disclosed to him or her by an employee in the course of obtaining legal advice in accordance with section 5 of the Protected Disclosures Act is *not* protected in terms of the Protected Disclosures Act.[71]

Neither the Protected Disclosures Act nor the Companies Act apply to protect disclosures made by the general public about corruption or any other criminal activities. What is clear is that the Protected Disclosures Act, although applicable to the public and private sector, mainly provides for disclosures in the public domain, whereas the Competition Act (see discussion later) and Companies Act provide mainly for disclosures of improprieties in companies (including state-owned companies) in the private sector. A closer look at the Protected Disclosures Act, for example, will show that the legal adviser and employer categories are applicable to both private and public sectors, whereas the provisions pertaining to a member of cabinet or of the executive council of a province, or any other person or body, public protector or auditor-general are applicable only to public institutions. Similarly, disclosures in terms of the Companies Act can only be made in a company law context to the companies and intellectual property commission, the companies tribunal, takeover regulation panel, a regulatory authority, an exchange, a legal adviser, a director, prescribed officer, company secretary, auditor, a person performing the function of internal audit and the board or committee of the company concerned. Directors must act in the interests of the company by not only following up on allegations made by employees (to them in their capacity as employer) in terms of both the Protected Disclosures Act and the Companies Act, but also have the responsibility to blow the whistle if there are improprieties in the company. This will obviously be the case where one or more directors' or the board's conduct amounts to an impropriety or some irregularity. It is clear that the whistle-blower director can blow the whistle to the board, auditor or any internal auditor or any of the persons mentioned in section 159(3) of the Companies Act. It would obviously not be advisable to make a disclosure to the other members of the board if their conduct amounts to an impropriety. The designated person in such an instance could be the chairperson of the audit committee. It seems that when a disclosure is made to an external auditor the same protection will be granted as if it was made to the internal audit function. Section 94(4)(*b*)(i) of the Companies Act, for example, provides that a member of an audit committee must "not be involved in the day-to-day management

[70] In the *Engineering Council* case (n 27) the court was also of the view that the impropriety was of an "exceptionally serious nature", and that when the reasonableness of the disclosure was tested against the provisions of s 9(3) of the Protected Disclosures Act, it was manifest that it was in the public interest (935e).

[71] the *Randles* case (n 57) par 22.

of the company's business or have been so involved at any time during the previous financial year". This clearly indicates that a member of the audit committee cannot be an executive director and must thus be a non-executive director. This enhances the independence and objectivity of the audit committee. If the audit committee does not want to investigate or take action then a director would be within his right to make the disclosure to any other person mentioned in section 159(3) of the Companies Act.

3.1.2 Detriments and remedies

Section 3 of the Protected Disclosures Act provides that no employee may be subjected to any occupational detriment by his or her employer on account of having made a protected disclosure. It is clear that there must be "some demonstrable *nexus* between making of the disclosure and the occupational detriment threatened or applied by the employer" for the protection of the Protected Disclosures Act to apply.[72] In terms of the Companies Act:

> "[a]ny conduct or threat contemplated in subsection (5) is *presumed* to have occurred as a result of a possible or actual disclosure that a person is entitled to make, or has made, *unless the person who engaged in the conduct or made the threat can show satisfactory evidence in support of another reason for engaging in the conduct or making the threat*".[73]

It is clear from the latter provision that the onus of proof is not on the whistle-blower but on the person victimising the whistle-blower for making the disclosure. In *Theron v Minister of Correctional Services*[74] the court noted with regard to the "balance of convenience" that the applicant had been a "sessional" doctor at the prison for over 20 years and that the only inconvenience that the department of correctional services would suffer if the applicant returned to the prison was the fact that some officials who had taken exception to the applicant's protected disclosures would have to work with him. The court found that the balance of convenience favours the applicant because he suffered an occupational detriment and granted *interim relief* in his favour.[75]

The Protected Disclosures Act thus protects an employee from being subjected to "occupational detriment" because the employee blew the whistle by making a "protected disclosure".[76] In terms of section 186(2) and section 187(1) of the Labour Relations Act it is similarly provided that an employee who makes a protected disclosure in terms of the Protected Disclosures Act is protected against any

[72] the *CWU* case (n 51) 746g.

[73] s 159(6) of the Companies Act – emphasis added.

[74] 2008 BLLR 458 (LC). In the *Theron* case the court had to investigate whether the disclosure was a protected disclosure, because it was not made to the employer, a member of cabinet or executive council or a body envisaged by s 8 of the Protected Disclosures Act. The court was left with the task of assessing if it was protected by s 9 of the Protected Disclosures Act. The court was satisfied that the conditions in s 9 were met and that the applicant suffered an occupational detriment by being transferred against his will (466a-467h).

[75] the *Theron* case (n 74) 470b-f.

[76] *Rand Water Staff Association obo Snyman/Rand Water* 2001 6 BALR 543 (P) 547c; and s 3 of the Protected Disclosures Act.

occupational detriment.[77] An occupational detriment includes an employee being subjected to any disciplinary action,[78] dismissal, suspension, demotion, harassment, intimidation, transfer and threats. Section 186(2)(*d*) of the Labour Relations Act specifically makes provision for the protection of an employee against the wrongful suffering of an occupational detriment, short of dismissal, for making a protected disclosure. The Labour Relations Act has been amended since the promulgation of the Protected Disclosures Act to make provision for the right of an employee not to be subjected to an unfair labour practice. This provision implies that the provision in section 23(1) of the constitution that everyone has the right to fair labour practices is guaranteed to an employee who makes a protected disclosure. Section 187(1)(*h*) of the Labour Relations Act provides that the dismissal of an employee is automatically unfair if the reason for his or her dismissal is a contravention by the employer of the Protected Disclosures Act because an employee has made a protected disclosure in terms of the latter act.

In *Tshishonga v Minister of Justice and Constitutional Development* the court emphasised that unfair labour practices and unfair dismissals are occupational detriments and that the employer ultimately bears the burden of proving that it did not commit an unfair labour practice or dismissed the employee unfairly.[79] The court in the *Tshishonga* case held that the applicant was subjected to occupational detriment regardless of being paid during his suspension and being assured of remuneration until he reached the retirement age of 65. As a result of the settlement, he had been denied the dignity of employment.[80] When looking at the remedies for suffering an "occupational detriment", the purpose of compensation is to provide redress for patrimonial and non-patrimonial losses.[81] Although the court in *Tshishonga v Minister of Justice and Constitutional Development* held that an employee who suffers an "occupational detriment" is in a position similar to one who is victimised or discriminated against and that compensation awards for discrimination are therefore guidelines for these claims, it must be stressed that in the case of an unfair labour practice the employee would be entitled to a maximum of 12 months' compensation and in the case of automatically unfair dismissal to a maximum of 24 months' compensation.[82] The compensation of 24 months is

[77] See *Pedzinski v Andisa Securities (Pty) Ltd (formerly SCMB Securities (Pty) Ltd)* 2006 *ILJ* 362 (LC) 378a, where the court held that the only reasonable inference to be drawn is that the applicant was dismissed because of the protected disclosure made and that the decision to retrench was not genuine but a sham and that the applicant's dismissal was therefore automatically unfair, as contemplated by s 187(1)(*h*) of the Labour Relations Act.

[78] Although the term "disciplinary action" in the definition of an occupational detriment is not defined, it is wide enough to include a disciplinary enquiry as there is considerable prejudice in being faced with such an enquiry. See also the *Grieve* case (n 27), where the court held that the applicant established a link between the charges that had been brought against him and the fact that he made the disclosures. This revealed a breach of legal obligations and possible criminal conduct (377i). Thus the disciplinary enquiry that the applicant had faced was a disciplinary action as contemplated by the Protected Disclosures Act (377c-d).

[79] (n 67) 365f. See also the *Randles* case (n 57), where the court was of the view "that there are persuasive policy considerations in not placing an unnecessary onus on the person seeking the protection of the PDA [Protected Disclosures Act]. By doing so it may have the effect of preventing or deterring a legitimate whistleblower from claiming the protection afforded to him or her by the PDA" (par 33).

[80] (n 67) 375d.

[81] See the *Tshishonga case* (n 67); *Minister for Justice and Constitutional Development v Tshishonga* (n 67) as well as Botha and Siegert "*Minister for Justice and Constitutional Development v Tshishonga* 2009 9 BLLR 862 (LAC)" 2011 *De Jure* 479-489 for a discussion of just and equitable compensation for non-patrimonial loss.

[82] s 193 and 194 of the Labour Relations Act.

different from cases where the employer did not prove that the reason for dismissal was a fair reason related to the employee's conduct, capacity or the employer's operational requirements or because the employer did not follow a fair procedure or both. In these instances the compensation must be "just and equitable", but not more than the equivalent of 12 months' remuneration.[83] When determining the amount of compensation that is reasonable, fair and equitable, particular criteria must be taken into account.[84] To reach the remedy stage means that the applicant must successfully prove that he had made a protected disclosure and that he was subjected to an "occupational detriment".[85] It will also be within the court's power to grant an order of reinstatement if the employee was dismissed. In terms of section 193(2) of the Labour Relations Act an order for reinstatement would also be available to dismissed employees unless the dismissed employee does not wish to be reinstated or the continuation of the employment relationship would be intolerable or it is not reasonably practicable for the employer to reinstate an employee or the dismissal was procedurally unfair.[86]

The protection granted in the Companies Act goes beyond that of the protection in the Protected Disclosures Act, and thus clearly underwrites the "stakeholder-inclusive" approach in *King III*, which recognises not only employees as important stakeholders, but also other stakeholders such as customers, suppliers, creditors and the government. It is further clear that unlike the Protected Disclosures Act the Companies Act is also applicable to independent contractors, because suppliers, for example, can also blow the whistle. Smit and Botha are of the view that it is clear that although the intended purpose of the Protected Disclosures Act is to protect employees from occupational detriments, the need for wider protection exists and is addressed only to some extent by the current definition(s) and even those contained in the Companies Act. They submit that:

> "Act 26 of 2000 ["the PDA"] must be amended not only to make provision for disclosures regarding any conduct 'of an *employer,* or an *employee* of that *employer*, made by any *employee*', but also to include a wider scope analogous to that provided for by the Companies Act."[87]

[83] s 194 of the Labour Relations Act.

[84] In terms of s 194(1) of the Labour Relations Act the amount of compensation should be "just and equitable". When awarding compensation, the court or arbitrator must use its discretion and take guidance from the purposes of the act together with the constitution in order to calculate the amount fairly (see *Victor and Picardi Rebel* 2005 *ILJ* 2469 (CCMA) in this regard). In *Transnet Ltd v Commission for Conciliation, Mediation and Arbitration* (2008 *ILJ* 1289 (LC) 1300d-e) the court noted that s 194(1) applies in circumstances where compensation is awarded for a procedurally unfair dismissal and held that "the compensation must be 'just and equitable' in all circumstances". In calculating the compensation, the court will be required to make a "rational assessment of facts that are relevant and have been properly tendered in evidence" (Brassey III *Employment and Labour Law* (1999) A8:73).

[85] See the *Tshishonga* case (n 67) 375e-f as well as the *Radebe* case (n 67) par 82.

[86] See *Young v Coega Development Corporation (Pty) Ltd (2)* 2009 *ILJ* 1786 (ECP), where the court held that the objects of the Protected Disclosures Act would also be frustrated if the applicant was not reinstated, because once an employee has on a *prima facie* basis established that he or she suffered an occupational detriment, then he or she is entitled to the full protection of the court. This protection includes reinstatement (1798a-c). In *Sekgobela v State Information Technology Agency (Pty) Ltd* 2008 *ILJ* 1995 (LC) the court found that the applicant was dismissed for an impermissible reason, namely for making a protected disclosure and that it was the primary reason for his dismissal. The dismissal of the applicant was found to be automatically unfair. This case is a good illustration of a case where the applicant did not seek reinstatement and the court was left granting the only other remedy, that of being "just and equitable", in the event remuneration not more than the equivalent of 24 months' remuneration (2009f-j).

[87] Smit and Botha (n 26) 829.

The Protected Disclosures Act protects employees from suffering "occupational detriments", whereas section 159(4) of the Companies Act provides that a shareholder, director, company secretary, prescribed officer or employee of a company, a registered trade union that represents employees of the company or another representative of the employees of that company, a supplier of goods or services to a company, or an employee of such a blows the whistle has a "qualified privilege" in respect of the disclosure.[88] It also protects these whistle-blowers from criminal, civil as well as administrative liability for making such a disclosure.[89] Section 159(5) of the Protected Disclosures Act provides that such a person is entitled to compensation from another person for any damages suffered if the first person is entitled to make, or has made, a disclosure contemplated in this section and, because of that possible or actual disclosure, the second person –

> "*(a)* engages in conduct with the intent to cause detriment to the first person, and the conduct causes such detriment; or
> *(b)* directly or indirectly makes an express or implied threat, whether conditional or unconditional, to cause any detriment to the first person or to another person, and –
> (i) intends the first person to fear that the threat will be carried out; or
> (ii) reckless as to causing the first person to fear that the threat will be carried out, irrespective of whether the first person actually feared that the threat would be carried out".

"Detriment" in this context, unlike "occupational detriment" in the Protected Disclosures Act, is not defined by the Companies Act. The Companies Act does not specify the amount of compensation as in the case where an employee blows the whistle. This will obviously create problems with regard to whether it is fair to limit the amount of compensation in the case of an employee compared to that of other whistle-blowers. If a director is removed for blowing the whistle he will be entitled to take action against the company. Section 71(1) of the Companies Act provides that:

> "[d]espite anything to the contrary in a company's Memorandum of Incorporation or rules, or any agreement between the company and a director, or between any shareholders and a director, a director may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director, subject to subsection (2)."

It is clear that where a director blows the whistle and he suffers a detriment because of it, like removal from the office of director, that section 71 of the Companies Act protects him. The latter section provides that he will retain his common law right (or any other right) to sue for breach of contract in which he can sue for damages or compensation as a result of loss of office as a director; or loss of any other office as a consequence of being removed as a director.[90] A director will also be able to make use of the oppression remedy in section 163 of the Companies Act.

4 *Do the Protected Disclosures Act and the Companies Act offer protection in the sphere of competition law?*

Competition law seeks to optimise consumer welfare through providing consumers with better prices and product choices.[91] In the context of public competition law,

[88] It seems that the qualified privilege will protect the identity of the whistle-blower subject to him providing proof or information that will substantiate the claims.
[89] s 159 of the Companies Act.
[90] s 71(9) of the Companies Act.
[91] Sutherland and Kemp *Competition Law in South Africa* (2000 *et seq* service issue 15) 1-1.

cartel[92] formation for the purposes of price fixing, market division and collusive tendering is regarded as the "most egregious"[93] of competition contraventions, as it has a severely negative impact on consumer welfare. Enforcement against cartels, being a top priority for competition authorities, is however constrained by the fact that cartels are notoriously secretive and therefore difficult to detect and prosecute.[94] This has had the result that competition jurisdictions have had to look beyond competition law enforcement tools such as legislative provisions and administrative, civil and criminal penalties to other innovative and efficient methods of dealing with cartels. This has led to the introduction of leniency programs into the realm of competition enforcement.[95] In essence a leniency programme entails a form of amnesty and in some instances lead to an opportunity for plea-bargaining[96] based on a game theory modelled on the so-called prisoner's dilemma.[97] Its objective is to incentivise cartel members to self-report and to destabilise the cartel, and to enable detection and prosecution thereof.[98]

[92] Zingales "European and American leniency programmes: two models towards convergence?" 2008 *The Competition Law Review* 5 7 describes a cartel as an organisation of businesses (*ie* competitors) that is usually hard to detect, but at the same time maintainable in the long run, provided that some strong assumptions exist among the cartel's members about their reciprocal behaviour. See further Fletcher "The lure of leniency: maximising cartel deterrence in light of *La Roche v Empagran* and the Antitrust Criminal Penalty Enhancement and Reform Act of 2004" 2005 *Transnational Law and Contemporary Problems* 341-362.

[93] Scormagdalia "Cartel proof, imputation and sanctioning in European Competition Law: reconciling effective enforcement and adequate protection of procedural guarantees" 2010 *Competition Law Review* 7.

[94] Zingales (n 92) 6.

[95] Zingales (n 92) 7 points out that cartels are suitable for a leniency programme because they are continuous wrongdoings that involve prohibited behaviour repeated over time and because of the involvement of more than one culpable party. See also Aubert, Rey and Kovacic "The impact of leniency and whistle-blowing programs on cartels'" 2006 *International Journal of Industrial Organization* 1241-1266; Apesteguia, Dufwenberg and Selten "Blowing the whistle" 2007 *Economic Theory* 143-166.

[96] Adelstein "The plea bargain in theory: a behavioral model of the negotiated guilty plea" 1978 *Southern Economic Law Journal* 488-503; Becker "Crime and punishment: an economic approach" 1968 *Journal of Political Economy* 169.

[97] For a succinct explanation of the prisoner's dilemma see Leslie "Antitrust amnesty, game theory and cartel stability" 2006 *Journal of Corporation Law* 453; Wils "Leniency in antitrust enforcement: theory and practice" 2007 *World Competition Law and Economics Review* 42; Zingales (n 92) 9-11. See further Leslie "Trust, distrust and antitrust'" 2004 *Texas Law Review* 515-680; Spratling "Detection and deterrence: rewarding informants for reporting violations" 2000 *George Washington Law Review* 798-823. Motta and Polo "Leniency programs and cartel prosecution" 2003 *International Journal of Industrial Organization* 347-379 indicate that "a leniency program defines a set of rules for granting reductions in penalties to firms or individuals involved in cartels, in exchange for discontinuing participation in the practice and for providing active co-operation in the investigation of the enforcement authorities". See further OECD *Hard Core Cartels- Recent Progress and Challenges Ahead* (2003) 22 http://www1.oecd.org/publications/e-book/2403011E.PDF (30-11-2013); International Competition Network (ICN) *Drafting and Implementing an Effective Leniency Program* (2006) http://www.internationalcompetitionnetwork.org/capetown2006/FinalFormattedChapter2-modres.pdf (30-11-2013) and Innes "Remediation and self-reporting in optimal law enforcement" 1999 *Journal of Public Economics* 379-393.

[98] The granting of immunity is subject to various conditions, such as that the self-reporting cartel member is expected to co-operate fully with the competition authority and to cease its cartel activity unless ordered by the authority to proceed with same so as not to arouse the suspicion of the other cartel members (see Brenner "An empirical study of the European corporate leniency program" (2005) www.fep.up.pt/conferences/earie2005.cd_rom/…/vii/brenner.pdf (01-12-2013) indicates that leniency policies are supposed to serve two broad purposes: in the short run to facilitate the detection of cartels and thereby to reduce the cost of legal enforcement, and in the long run to deter firms from antitrust abuse. See also Kaplow and Shavell "Optimal law enforcement with

The United States of America took the lead in the "war against cartels" by introducing a corporate leniency programme in 1978 which provided amnesty to the first member of a cartel to self-report.[99] The United States corporate leniency programme, which has proved to be very successful,[100] was revised in 1993.[101] In 1994 the Antitrust Division of the United States department of justice took the leniency reform one step further by also introducing a leniency policy for individuals.[102] The European Union followed suit[103] in 1996 with a corporate leniency policy that offered a 75-100% reduction of administrative fines to the first firm which self-reported on cartel activity and co-operated with the European commission before the commission itself had initiated a cartel investigation.[104] Where an investigation by the commission was already initiated, a 50-75% reduction was offered to the first firm that fully co-operated. Further confessing firms were eligible for reductions of 10-50%.[105] The European Union leniency policy was revised in 2002 to allow *inter alia* a firm to apply for full immunity from administrative fines even after an investigation had commenced, if the firm could provide evidence sufficient to convict the cartel.[106] In 2006 the leniency policy was further revised to allow for corporate statements to be made orally and to limit access to corporate statements.[107] The United States leniency programme covers only amnesty and reductions in sentences and fines for applicants who subsequently report are granted through plea bargaining.[108] In contrast, the European Union leniency programme covers immunity for the first applicant and reductions in fines for subsequent applicants.[109] It should be noted that

self-reporting of behaviour" 1994 *Journal of Public Economics* 583-606. Spagnolo "*Divide et Impera* optimal leniency programs" (2003) (http://ftp.zew.de/pub/zewdocs/veranstaltungen/rnic/papers/GiancarloSpagnolo.pdf (01-12-2013)) identifies the following three reasons why cartels may be less stable facing a leniency programme: first, it changes the cost/benefit ratio of collusion, since deviating and reporting yields lower costs/higher benefits than absent a leniency programme; secondly, considering stick-and-carrot punishment strategies punishment of second-time deviators is less efficient with the possibility of immunity; thirdly, the perceived risk of a collusive agreement is higher to firms facing a leniency programme.

99 Kobayashi "Antitrust, agency and amnesty: an economic analysis of the criminal enforcement of the antitrust laws against corporations" (2002) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=305260 (30-11-2013).

100 Hammond "The modern leniency programme after 10 years" (2003) http:www.usdoj.gov/atr/public/speeches/201477.htm (30-11-2013).

101 See US Department of Justice, Antitrust Division, Corporate Leniency Policy (1993) http://www.usdoj.gov/atr/public/guidelines/0091.htm (30-11-2013).

102 See US Department of Justice, Antitrust Division, Leniency Policy for Individuals (1994) http//www.usdoj.gov/atr/public/guidelines/0092.htm (30-11-2013).

103 For an overview of the similarities and differences between the US and the EU leniency programs see Bloch, Schmidt, Winters and Driscoll *Leniency and Cartel Investigations in the United States and Europe* (2008) 21-23 ww.mayerbrown.com/public_docs/Leniency_PleaBargaining_CartelInvestigations.pdf (02-12-2013). See also Zingales (n 92).

104 European Commission Notice on the non-imposition or reduction of fines in cartel cases, OJ C 207 1996. See further Bloch *et al* (n 103) 27. See also Bloom "Despite its great success, the EC leniency program faces great challenges" 2006 *European Competition Law Annual Enforcement of Prohibition of Cartels* 174.

105 See n 104.

106 See n 104. The key elements of the revised 2002 policy were summarised in the European Commission (2002) *XXXIInd Report on Competition Policy* 29 http://europa.eu.int/comm/competition/annual_reports/2002/em.pdf (02-12-2013).

107 Commission Notice (2006/C 298/11) on immunity from fines and reduction of fines in cartel cases, OJC 298 [2006] http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=Celex:5006XC1208(04)EN: NOT (01-12-2013).

108 Bloom (n 104). See further Bloch *et al* (n 103) 26-29.

109 Bloom (n 104).

in addition to the leniency programme, various European Union member states have introduced their own leniency programmes.[110] Germany, for instance, has a leniency programme that *inter alia* guarantees immunity for the first applicant that enables the *Bundeskartellamt* to obtain a search warrant, subject to various conditions, and it also provides the opportunity to obtain immunity *after* a search, provided the applicant is the first to report and satisfies various conditions.[111]

Prosecution of cartels is also a top priority for the South African competition authorities.[112] The South African Competition Act[113] prohibits cartels *per se*[114] in terms of section 4, which provides as follows:

> "An agreement between, or concerted practice by, firms, or a decision by an association of firms is prohibited if it is between parties in a horizontal relationship and if … (b) it involves any of the following restrictive horizontal practices: (i) directly or indirectly fixing a purchase or selling price or any other trading condition; (ii) dividing markets by allocating customers, suppliers, territories or specific types of goods or services; or (iii) collusive tendering."

If a company is found to be involved in cartel activity the competition tribunal may in terms of section 59(2) of the Competition Act impose an administrative penalty that may not exceed ten per cent of the company's annual turnover in the Republic and its exports from the Republic during the company's preceding financial year.[115] It is clear that such a fine can reach astronomical amounts where the cartelist is a large, lucrative company.

Sutherland and Kemp emphasise that amnesty and whistle-blowing programmes are essential to the detection and prosecution of cartel behaviour, as they may provide information about collusion in the "smoke-filled" rooms where collusion is achieved.[116] In order to combat cartel activity effectively, the South African competition commission, in line with other international jurisdictions, introduced a corporate leniency policy in 2004, and has subsequently revised the corporate leniency policy in an attempt to increase its effectiveness.[117] In brief, the South African corporate leniency policy outlines the process through which the commission will grant a self-confessing cartel member who is first to report on cartel involvement

[110] Bloch *et al* (n 103) 27 provides a list of the member states that currently have leniency programmes.

[111] *Bundeskartellamt* (2006) notice no 9/2006 of the *Bundeskartellamt* on the immunity from and reduction of fines in cartel cases http://www.bundeskartellamt.de/wEnglisch/download/pdf/06_Bonusregelung_e.pdf (02-12-2013).

[112] Moodaliyar "Are cartels skating on thin ice? An insight into the South African corporate leniency policy" 2008 *SALJ* 157-177.

[113] 89 of 1998.

[114] Sutherland and Kemp (n 91) point out that, once established, *per se* prohibited conduct will be condemned without proof that the concerting parties have market power. In terms of s 4(20)(*a*) and (*b*) a cartel agreement is presumed to exist between two or more firms if any one of those firms owns a significant interest in the other, or they all have at least one director or substantial shareholder in common and any combination of those firms engage in that restrictive horizontal practice.

[115] S 59 of the act sets out a number of factors that the Tribunal may take into account to determine an appropriate penalty. See further *Southern Pipeline Contractors v Competition Commission* (105/CAC/Dec 10, 106/CAC/Dec 10) [2011] ZACAC 6 (1-08-2011).

[116] Sutherland and Kemp (n 91) 5-80.

[117] Corporate leniency policy ("CLP") published under GN 628 in *GG* 31604 of 23-05-2008. This policy, which was issued in terms of s 79 of the act, is not itself contained in the Competition Act but is set out in a separate policy document and thus does not have the status of legislation. For a detailed discussion of the CLP see Moodaliyar (n 112) 157-177 and Lavoie "South Africa's corporate leniency policy: a five year review" http:www.compcom.co.za/assets/uploads/events/10- year-review/parallel-3b/clp-paper-conference-Chantal-Lavoie.docx (08-07-2013). See further par 2.2 and 2.3 of the CLP-document.

immunity for its participation in such cartel activity, subject to the cartel member fulfilling specific requirements and conditions.[118] Immunity in this context means that the commission will not subject the successful applicant to adjudication before the tribunal for its involvement in the cartel activity, which is part of the application under consideration.[119] Furthermore, the commission will not propose to have any fines imposed on the successful leniency applicant.[120]

It is important to note, however, that the corporate leniency policy specifically states that reporting of cartel activity by individual employees of a company or by a person not authorised to act for such a firm will amount to whistle-blowing only and not to an application for immunity under the corporate leniency policy.[121] Thus, what the corporate leniency policy gives protection for are authorised disclosures with the specific objective of obtaining leniency from the competition commission from prosecution for cartel conduct. Mere whistle-blowing by employees regarding cartel involvement of their employing firm is expressly stated to fall outside the scope of such protection, as its purpose is merely to expose cartel activity and not to obtain immunity under the corporate leniency policy for the company so involved. Therefore, where a company itself decides to authorise a person, *eg* a director on behalf of the company, to blow the whistle on its participation in cartel activity in an attempt to gain immunity under the corporate leniency policy, the company is afforded an opportunity to be treated leniently in accordance with the corporate leniency policy. Clearly in such instance the company itself will impose no ill consequences upon the director authorised to make the disclosure on behalf of the company to the competition commission. However, where an employee on his/her own initiative and without being so authorised by his employer, decides to blow the whistle on the cartel activities of the company that employs him/her, it can be expected that he/she will not find favour with his employer, especially if the employee is able to provide the commission with sufficient information to prosecute the company for its cartel involvement. This then raises the question what, if any, protection is afforded to an ordinary employee of a company that participates in cartel activity who decides on his/her own initiative to blow the whistle on such cartel activity by reporting it to the competition commission? Although the corporate leniency policy facilitates detection of cartels by encouraging authorised whistle-blowing, the contribution of non-authorised disclosures by employees of cartel

[118] par 3.1 of the CLP document (n 117). Thus, a firm involved, implicated or suspecting that it is involved in cartel activity would be able to come forward of its own accord and confess to the commission in return for immunity. This means that if a cartel member realises that such conduct may be a contravention of the act, it could of its own free will, without waiting for the commission to do an investigation, report the cartel activity to the commission under the CLP (par 3.5). The CLP therefore serves as an aid for the efficient detection and investigation of cartels, as well as the effective prosecution of firms involved in cartel operations. It envisages not only a situation that the applicant alerts the commission of the existence of cartel activity, but also one that would culminate in a referral, and ultimately in a final determination made by the tribunal, of such reported cartel activity, with the applicant co-operating against the other members of the cartel (par 3.6). It is to be noted, however, that paragraph 3.10 of the CLP indicates that subject to relevant provisions of the CLP, the existence of the CLP, shall not preclude the commission from deciding to exercise its powers to investigate a cartel in terms of the Competition Act. The CLP provides for three forms of immunity, namely conditional immunity, total immunity and no immunity, which are set out in detail in par 5 of the CLP-document.

[119] par 3.3 of the CLP-document (n 117).

[120] (n 118).

[121] par 5.9 of the CLP-document (n 117). It is stated, however, that the competition commission also encourages whistle-blowing, as it would also assist the commission in detecting anti-competitive behaviour.

members should not be underrated as a tool in combating cartel activity. Companies participating in some cartels may forever go undetected if the company as a cartel member, in keeping with the "clandestine cartel tradition", never decides to "split" on the rest of the cartel for fear of not qualifying for immunity. In such an instance the cartel may however still be detected and investigated if for instance an employee of a cartel member reports the cartel activity to the competition commission, and especially if the employee provides the commission with sufficient information and evidence to facilitate an investigation and prosecution. Clearly employees of companies involved in cartels will not volunteer such information if there is no protection for them, and in the end the public at large stand to suffer due to high prices and limited product choice as a result of the cartel activity. Public interest thus requires that a whistle-blowing employee be protected from detrimental conduct by the cartel member in whose employ he/she is. It is therefore necessary to consider whether such an employee would be able to rely on the Protected Disclosures Act and/or the Companies Act in respect of the whistle-blowing information on cartel activity divulged to the competition commission.

The Competition Act in section 4 expressly prohibits cartel activity, and it can thus be argued that there is a legal obligation on companies not to engage in cartel conduct. It is submitted that a whistle-blowing disclosure to the competition commission by an employee of a company allegedly involved in cartel activity will in the first instance qualify as a "disclosure" as contemplated in section 1(*b*) of the Protected Disclosures Act, namely that the cartelist has "failed, is failing or is likely to fail to comply with any legal obligation" to which it is subject. Furthermore it appears that section 5 of the Protected Disclosures Act does not contain a closed list of entities to which protected disclosures may be made. Thus a protected disclosure can in principle also be made to the competition commission, although it is clear that such disclosure will not be entertained as an authorised disclosure for purposes of immunity in terms of the corporate leniency policy, but will be regarded as mere whistle-blowing by an employee, which takes the matter out of the scope of the corporate leniency policy. Where an employee, who is acting in good faith, based on a reasonable belief that the information he is divulging is substantially true and who does not seek any personal gain from such disclosure, thus blows the whistle to the competition commission on the cartel activity of his employer, it is submitted that such whistle-blowing will qualify as a protected external disclosure under section 9 of the Protected Disclosures Act. In this context cognisance must be taken of *Tshishonga v Minister of Justice and Constitutional Development*, where the court emphasised that:

> "[b]y setting good faith as a specific requirement, the legislature must have intended that it should include something more than reasonable belief and the absence of personal gain. An employee may reasonably believe in the truth of the disclosures and may gain nothing from making them, but his good faith or motive would be questionable if the information does not disclose an impropriety or if the disclosure is not aimed at remedying a wrong. A whistle-blower, who is overwhelmed by an ulterior motive, that is, a motive other than to prevent or stop wrongdoing, may not claim the protection under the PDA. The requirement of good faith therefore invokes a proportionality test to determine the dominant motive. Good faith is required to test the quality of the information. A malicious motive cannot disqualify the information if the information is substantial. A malicious motive could affect the remedy awarded to the whistle-blower."[122]

[122] the *Tshishonga* case (n 67) 362g-364f.

Clearly, good-faith whistle-blowing in respect of cartel activity such as price fixing, market allocation and collusive tendering serves the public interest in striving to ensure affordable prices and wider product choice. It further appears that the whistle-blowing employee of a company that participates in cartel activity additionally has the protection of section 159(3)(*b*) of the Companies Act to his/her avail.

As indicated, section 3 of the Protected Disclosures Act offers protection in respect of disclosures as contemplated in section 1 thereof by providing that the whistle-blowing employee may not be subjected to any "occupational detriment" by his or her employer on account of having made a protected disclosure. It is submitted that such an "occupational detriment" has to be interpreted widely as contemplated in section 5 of the Protected Disclosures Act, so that it will include any conduct or threat that can be demonstrably linked to the making of the disclosure by the employee. In practice, however, it is most likely that a whistle-blowing employee could be dismissed by the company whose cartel activities he or she exposed. Although it may technically happen that such employee can insist on reinstatement, it is submitted, in the context of whistle-blowing on cartel activity by unauthorised employees, that reinstatement may not be appropriate, because the continuation of an employment relationship between the parties would be intolerable. This will inevitably be due to the ill consequences that the whistle-blowing could have for the cartelist company, namely that it may be investigated for cartel involvement, may in some instances where the whistle-blower provides sufficient information to the commission even be foreclosed from obtaining immunity or other lenient treatment under the corporate leniency policy and that if successfully prosecuted, it will likely face a hefty fine under section 59 of the Competition Act. It appears that such an employee's protection would in most instances where he or she blew the whistle be limited to remuneration of 24 months (should the employer's conduct be held to constitute automatically unfair dismissal), if one argues on the basis that sections 186(2) and 187 of the Labour Relations Act serve as a *lex specialis* to section 3 of the Protected Disclosures Act. The courts have not, however, hesitated in the past also to grant in addition to patrimonial loss an order for the payment of non-patrimonial loss to the employee whistle-blower who had suffered an "occupational detriment".[123]

[123] See in this regard *Minister for Justice and Constitutional Development v Tshishonga* (n 67), where the labour appeal court was faced with the question what is just and equitable in circumstances where the compensation is for non-patrimonial loss. The court stated that assistance can be gained from the *actio injuriarum* which is granted for a *solatium* where the court said that in cases of *solatium* "the award is, subject to one of exception of a non-patrimonial nature, and is in satisfaction of the person who has suffered an attack on their dignity and reputation or an onslaught on their humanity" (par 18) The court added that the exception is for the amount relating to the costs of R177 000, which were incurred by the respondent when he had to defend himself, and which are patrimonial in nature. The court also stated that the respondent must be compensated for the R177 000, because he had to defend himself "against the wholly unwarranted onslaught launched against him" (par 19). The court held that the following factors could be taken into account when quantifying compensation: (i) the embarrassment and humiliation the respondent had suffered by being summarily removed from his post without any reason given and thereafter being subjected to a suspension and subsequent disciplinary hearing, (ii) his being called a "dunderhead" by the minister of justice on national television and that the respondent was rapped over the knuckles for poor work performance (which was not true), (iii) gross humiliation by being moved to a position which was non-existent at the time and being thereafter for long periods without any work or without work instructions, (iv) the undisputed evidence of the respondent was that, because of all the humiliation, victimisation and harassment by the appellant, he had to receive trauma counselling as a result of the way in which he

5 *Concluding remarks*

In a country where it is trite that corruption is rife and where the public at large stand to be prejudiced by the crippling effect of corrupt activities especially in the corporate sector, legislative provisions such as those contained in the Protected Disclosures Act and section 159(3) the Companies Act are necessities. As indicated in this discussion, the whistle-blowing protection offered by the aforementioned statutes have an extended reach to other areas of law, such as competition law, where it may supplement the corporate leniency policy in the detection and deterrence of cartel activity. Instead of viewing whistle-blowing as tainted disclosure, it is submitted that whistle-blowing should be seen for its true character, namely a mechanism that operates in the public interest. It is therefore imperative in instances of merit that bona fide whistle-blowers be afforded the protection they deserve.

SAMEVATTING

DIE WET OP BESKERMDE BEKENDMAKINGS 26 VAN 2000, DIE MAATSKAPPYWET 71 VAN 2008, DIE WET OP MEDEDINGING 89 VAN 1998 MET BETREKKING TOT KLOKLUIERS: IS DAAR 'N SKAKEL?

Korrupsie is 'n wêreldwye probleem wat nie net 'n hindernis vir ekonomiese groei in 'n land kan wees nie, maar wat ook demokratiese beginsels, stabiliteit en vertroue in só 'n land in gedrang kan bring. Klokluiers speel 'n baie belangrike rol om kriminele en ongewenste handelinge en gedrag sowel as ander ongerymdhede in beide openbare- en die privaat sektore bekend te maak. Die Wet op Beskermde Bekendmakings 26 van 2000 beskerm werknemers wat binne werksverband sodanige handelinge, gedrag en ongerymdhede bekend maak. Hierdie wet verleen beskerming teen viktimisering van klokluiers sowel as onbillike arbeidspraktyke kort voor ontslag en daadwerklike ontslag. Klokluiers se belangrikheid word egter nie slegs beperk tot situasies binne werksverband nie. Klokluiers, in die algemeen, dra by tot die bevordering van deursigtigheid en korporatiewe bestuur in maatskappye en ander organisasies. 'n Hele aantal wette sowel as beleidsdokumente bevat deesdae bepalings rondom korrupsie en die rol van klokluiers. Die Wet op Beskermde Bekendmakings sowel as ander wetgewing soos die Grondwet van die Republiek van Suid-Afrika, 1996, die Wet op Arbeidsverhoudinge 66 van 1995 en die Maatskappywet 71 van 2008 vorm deel van hierdie raamwerk wat te doen het met klokluiers. Die Maatskappywet verleen nie net beskerming aan werknemers wat die klokke lui nie maar gaan verder as die Wet op Beskermde Bekendmakings. Die Maatskappywet verbreed die beskermingsraamwerk om ook direkteure, aandeelhouers, verskaffers, werknemers van verskaffers ensovoorts in te sluit. Die Suid-Afrikaanse mededingingsowerhede moedig ook openbaarmaking deur klokluiers ten aansien van kartèlaktiwiteite aan. Die laasgenoemde owerhede het spesifiek die korporatiewe verslappingsbeleid in plek gestel om die posisie van klokluiers ten aansien van die openbaarmaking van kartèlaktiwiteite te reguleer. Aansluitend hierby is daar ook die Wet op Voorkoming en Bestryding van Korrupte Bedrywighede 12 van 2004 wat korrupsie 'n misdaad maak en voorsiening maak vir die voorkoming en bestryding van korrupsie. Hierdie wet plaas ook 'n verpligting op persone in gesaghebbende posisies om sekere korrupte aktiwiteite aan te meld.

Hierdie artikel fokus op die bepalings van die Wet op Beskermde Bekendmakings, die Maatskappywet sowel as die Wet op Mededinging en die gepaardgaande korporatiewe verslappingsbeleid ten aansien van die effektiewe voorsiening van beskermingsmaatreëls vir klokluiers asook of daar sinergie bestaan tussen hierdie wetgewende bepalings met betrekking tot die beskerming van klokluiers.

was treated after the disclosures had been made to the media, (v) the respondent had to employ an attorney to defend him at the disciplinary hearing (where he was found not guilty), which cost him R77 000 and R100 000 to protect his interests and rights at the inquiry, to mention only a few (par 16 and 19). The court then held that "a far more significant sum, should be awarded as compensation for the indignity suffered, the extent of the publication of attack on the respondent (publication being on national television) and the persistent, egregious nature of the attacks upon respondent which have been triggered because he had acted in the national interest" (par 22). See also Botha and Siegert (n 81) 479-489.