

Blowing the whistle for personal gain in the Republic of South Africa: An option for consideration in the fight against fraud?

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ABSTRACT

Financially rewarding whistleblowers for information that has led to recovery of fraud losses suffered by government is common practice under the United States of America's False Claims Act of 1986. However, a whistleblower in the Republic of South Africa is not afforded similar treatment in terms of section 9(1)(b) of the Protected Disclosures Act (26 of 2000) of the Republic of South Africa. In certain circumstances, whistleblowers may not even be protected against occupational detriment resulting from the disclosure. Similar principles of the Protected Disclosures Act in terms of rewarding whistleblowers also apply in the United Kingdom. The objective of this article is to establish whether rewarding whistleblowers should be considered in the fight against fraud in the Republic of South Africa with a similar view of the United States of America's False Claims Act. In order to address the research objective, the adopted methodology can be described as a conceptual review of whistleblowing policies and regulations in the public sector, specifically focusing on rewarding whistleblowers. This article, therefore, evaluates available literature to determine whether the Republic of South Africa should consider the False Claims Act route by reviewing its legal position, United States of America and the United Kingdom. It further considers whistleblowing as a fraud risk management tool and raises the question whether the current legal obligations on public officials to report fraud are effective in curbing it.

Key words

Whistleblowing; whistleblower rewards; Protected Disclosures Act 26 of 2000; fraud risk management; False Claims Act

1 INTRODUCTION AND BACKGROUND

The pandemic of fraud and corruption is problematic; it obstructs economic growth, public trust, and undermines the values of democracy (Botha & Van Heerden 2014:Online; Diale 2005:Online). It also brings with it political instability and suffering (Acquaah-Gasie 2001:Online).

The 2014 PricewaterhouseCoopers Global Economic Crime Survey (2014:Online) indicated that 69% of South African respondents experienced fraud in 2012 and 2013 (37% globally) – an increase from 60% in 2009 (33% globally). In the 2013 Corruption Perception Index, the Republic of South Africa scored 42 on a scale of 0 to 100 (0 highly corrupt and 100 very clean). According to the index, 69% of the countries ranked below 50 revealed a serious fraud problem (Transparency International 2013:Online). Moreover, the Republic of South Africa was one of the four African countries that made up 74% of the fraud cases reported in Africa according to the KPMG Africa Fraud Barometer (2012:Online).

Given the current state of fraud, governments and corporates agree that fraud is bad for humanity and business, and action is required to mitigate this pandemic (Ernst & Young 2014:Online).

One of the challenges of fraud is that its impact is equivalent to that of a financial iceberg; some of the direct losses are plainly visible, while others are not easily detected and may include massive losses (Association of Certified Fraud Examiners 2014:Online). However, the level and impact of fraud can only be assessed based on known fraud (Carson, Verdu & Wokutch 2008). According to a KPMG survey (2013:Online), approximately 72% of uncovered fraud was perpetrated over a period of one to five years, which implies that fraud not reported timeously, the consequences may be unpleasant.

2 MEASURES TO CURB FRAUD

With the constantly changing nature of fraud, organisations need to be proactive in the identification of fraud and its perpetrators in order to enhance their anti-

fraud controls (KPMG 2013:Online). Whistleblowing as a measure to curb fraud will be the primary discussion in this article. However, a high-level overview of certain anti-fraud measures implemented in the public sector, such as, fraud risk management strategies, fraud risk assessments, and oversight bodies is also provided.

2.1 Fraud risk management strategies

Fraud risk management strategies (including fraud prevention plans) set the tone at the top, highlight an organisation's fraud tolerance level and set responsibilities for fraud prevention and anti-fraud controls. Section 38 of the Public Finance Management Act (29 of 1999), as amended, and regulation 3.2.2 of the Treasury Regulations issued in terms of the Public Finance Management Act require government departments to implement fraud prevention plans in the fight against fraud.

2.2 Fraud risk assessments

Risk assessment is "a systematic process adopted in order to quantify or qualify the level of risk associated with identified risks, to enrich the risk intelligence available to the institution" (Mafunisa 2014: 1240: Online). It also includes an element of fraud awareness which cautions employees to be on the look-out for fraud incidents - which also encourages whistleblowing. According to the PricewaterhouseCoopers survey (2014:Online), fraud risk management including fraud risk assessment has proven to be an effective method to detect fraud in the Republic of South Africa (17%).

2.3 Other oversight/regulatory bodies

In the public sector, the Public Service Commission, Office of the Public Protector and the Auditor-General are three of the government oversight bodies that provide for initiatives that fight fraud. Public officials are required to report any fraudulent activities to these and other related authorities in terms of section 4.4.1 of the Code of Conduct for the Public Service.

2.4 Whistleblowing

In terms of section 2 of the Protected Disclosures Act, its objective is to offer protection from occupational detriment to employees making a protected disclosure, and also to promote a positive culture for whistleblowing. The Protected Disclosures Act sets certain requirements which have to be met before a disclosure may be protected. The requirements vary and depend on the recipient of disclosure. The focus of this research will be on Section 9(1)(b) which sets a strict requirement for protection.

The Companies Act (71 of 2008) of the Republic of South Africa governs a number of public and private entities and also addresses the importance of whistleblowing. Section 159 of the Companies Act stipulates persons entitled to make a disclosure, disclosure requirements, and whistleblower compensation. Section 159(5) of the Companies Act prescribes that those who blow the whistle should be entitled to compensation from another person only when they suffer any detriment, and direct or indirect

threats caused by another as a result of their disclosure. However, the form of compensation is not defined (Botha & Van Heerden 2014:Online).

Defining disclosure/whistleblowing

In terms of section 1 of the Protected Disclosures Bill, a "disclosure means 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 one or more of the following: criminal offences; failure to comply with certain legal obligations; miscarriages of justice; endangering of the health or safety of individuals; damage to the environment; and unfair discrimination".

Diale (2005:Online) describes whistleblowing as publicly raising an alarm on fraud committed privately – which is likely to raise possible hostility. Binikos (2008: Online) defines it as a form of pro-social behavior when an employee reports fraud for corrective action. According to Jubb (1999:Online), the elements of whistleblowing include the act of reporting, the potential/actual fraud, the organisation in question, the receiver of reported information, and the outcome or corrective action. Holtzhausen (2007:Online) concurs with Jubb that the concept of whistleblowing involves the presence of certain actions by individuals in a specific process. A whistleblower ('relator') is an individual who reports information relating to criminal, unlawful or irregular conduct (Bosch & Le Roux 2011: Online). It involves citizens, employees and managers/directors – with the aim of terminating fraud (Holtzhausen 2007). A whistleblower can be anyone, including current and former employees of the company/organisation or agency defrauding the government, competitors, employees of the state or local government, subcontractors and corporations (Vandekerckhove 2011).

Statistics on whistleblowing

Different fraud-related surveys published by accounting firms include the 2009 and 2014 Global Economic Crime Survey by PricewaterhouseCoopers, the 13th Global Fraud Survey by Ernst & Young in 2014, and the Global Profiles of the Fraudster by KPMG in 2013.

The PricewaterhouseCoopers survey revealed (2014: Online) that globally, 5% of all surveyed frauds were reported through formal whistleblowing systems in 2013 – a 2% decrease from the 7% in 2009. In the Republic of South Africa, 6% of all surveyed fraud was detected through formal whistleblowing in 2013 (PricewaterhouseCoopers 2014:Online). The Ernst & Young survey (2014:Online) revealed that globally, 45% of the respondents did not have whistleblowing mechanisms available to them in terms of mitigating the risk of fraud. The report by KPMG (2013:Online) revealed that of the 41% surveyed cases of collusion detected globally, 22% were detected through anonymous tip-offs and 19% through formal whistleblowing.

Unlike the surveys conducted by the afore-mentioned accounting firms, the Association of Certified Fraud Examiner's Report to the Nations (2014:Online) was

limited to occupational fraud, which included asset misappropriation, corruption, and financial statement fraud. The collected data revealed that: (i) organisations with hotlines detected fraud 50% faster than those without them; (ii) tips were the most common and effective fraud detection method; (iii) over 40% of all fraud cases were detected by tips; and (iv) the rate of tips as a detection method was more than twice that compared to other detection methods. The term "tips" seems to include whistleblowing by internal as well as external parties, and include information received on a hotline. Furthermore, includes anonymous communications, as well as communications from parties whose identities are known to the organisation. (Association of Certified Fraud Examiner 2014:Online). Occupational fraud occurs when employees (including directors) defraud their employer/organisation using a variety of methods (Lord 2010:Online). In simple terms, this refers to fraud perpetrated internally. Tips are a form of whistleblowing systems.

The Association of Certified Fraud Examiner's Report to the Nations (2014:Online) further revealed that 49% of tips on occupational fraud were reported by employees, (the highest detection method) followed by customers at 21.6%. This suggests that where reporting systems are enhanced and used effectively, employees are more likely to report fraud.

The importance of whistleblowing

Researchers consider that there is no better source of good information than an organisation's employees (Association of Certified Fraud Examiners 2014: Online; Martin 2010:Online; Crook 2000:Online). The best way to harness this information is to establish good, confidential whistleblowing systems with the objective of preventing and detecting fraud in the workplace (Crook 2000:Online; Martin 2010:Online). Employees are seen to be in the best position to detect and report fraud, as they are close to business processes (Sinzdak 2008:Online). Fraud is like a cancer; most people know who has it, those likely to have it, and it has become common in society (Cascarino 2013). It is, therefore, no surprise that section 159 of the Companies Act requires certain companies to have confidential reporting structures.

Whistleblowing is seen as being one of the most effective and least expensive measures to protect organisations' resources (Dworkin 1997:Online). Lewis (2006:Online) stresses that whistleblowing is a good practice and the costs associated with implementation are insignificant. Whistleblowing promotes and enhances good corporate governance in organisations (Botha & Van Heerden 2014:Online; Maroun & Wainer 2013: Online). An organisation with a culture that encourages whistleblowing would serve as an indirect deterrent to fraud, as employees considering fraud will know that their acts can be reported (Dworkin 1997:Online).

Legal obligation to report fraud

There are various legal obligations imposed on public officials to report fraud. These include, amongst others:

- Sections 32(6), 32(7) and 102(2) of the Municipal Finance and Management Act (56 of 2003), which requires the Accounting Officer, Council and the

board of directors of municipalities to report to the South African Police Services instances of fraud, theft, irregular expenditure and/or other losses that occurred in the municipality which constitute a criminal offence.

- Regulation 12(e) of the Public Service Regulations requires an employee to report to appropriate authorities any instances of fraud, corruption and other activities that are in contravention of any law of which they become aware of.
- Section 38(1)(g) of the PFMA states that the Accounting Officer is required to report in writing to the Treasury on any, irregular, wasteful and fruitless and unauthorised expenditure relating to the procurement of goods and services.
- Regulations 9.1.2, 12.5.1, 16A8.3(f) and 16A8.5, of the Treasury Regulations issued in terms of the PFMA impose a duty on specific public officials to report unauthorised, irregular or fruitless and wasteful expenditure to the relevant bodies, such as the Accounting Officer and the South African Police Services.
- Section 34 of the Prevention and Combatting of Corrupt Activities Act (12 of 2004), imposes a duty on persons in positions of authority to report instances of fraud, theft, forgery or extortion; or the production of a forged document involving an amount equal or exceeding R100 000 to the South African Police Services.

The objective of whistleblowing is to report fraud with the aim to seek corrective action. Researchers consider whistleblowing as an important tool in fighting fraud. However, given the extent of fraud and the rate of whistleblowing in the Republic of South Africa, one can, however, question whether the aforementioned anti-fraud initiatives are effective. Although a definite answer to this may require further research - one may surely consider other initiatives, such as whistleblower rewards. Though the mere existence of the above legal duties to report fraud does, however, raise other issues such as whether one should in the first place reward public officials who in any event have a legal duty to report fraud.

3 REWARDING WHISTLEBLOWERS

The objective of this section is to discuss the conceptual issues relating to rewarding whistleblowers for disclosed information. The section expounds upon the experiences of the United States of America through the False Claims Act, and also the United Kingdom. Lastly, the position in the Republic of South Africa is considered in order to establish what could potentially motivate South Africans to blow the whistle in the absence of rewards.

3.1 United States of America

Rewarding under the False Claims Act

Incentivising whistleblowers is common practice in the United States of America through the False Claims Act. It started in 1863 in response to contractors defrauding the federal government (Dworkin 2010; Schnell 2013: Online). The False Claims Act was revised in 1986 to

facilitate financially rewarding whistleblowers (relators) in a much simpler and generous fashion – resulting in whistleblowers reaping even more rewards (Dworkin 2010). Prior to its revision, the False Claims Act was amended unfavorably in 1943 by reducing the reward to whistleblowers and with the provision that *qui tam* actions already known by the government could not be filed (Vandekerckhove 2011). A *qui tam* action (whistleblowing under the False Claims Act) is when a private citizen files a false claim (blows the whistle) on behalf of themselves and the government of the United States of America (Devine & Maassarani 2011).

How it works

The False Claims Act is only applicable to cases where the government is a victim (Public Concern at Work 2007:Online). Once a *qui tam* action is filed, it should remain under seal for 60 days for the government (the United States of America's Department of Justice) to consider whether the case is worth pursuing and whether to join prosecution (Pacini, Qui & Sinason 2007:Online; Friedman 1997:Online). In cases where the government joins prosecution, the probability of success is commonly higher; however, government intervention is usually low (Yeoh 2014:Online).

When the *qui tam* action is under seal, the whistleblower cannot disclose having filed a case or reveal any of the evidence (Devine & Maassarani 2011).

Section 3730 "(d)"(2) of the False Claims Act stipulates the minimum and maximum percentages for whistleblower rewards – to be 15% to 30% of recovered monies. Where the Department of Justice does not join prosecution, the whistleblower may receive 25% to 30% of recoveries and 15% to 25% where the Department of Justice does join prosecution (Vandekerckhove 2011; Yeoh 2014:Online). The reward is made to the whistleblower by the court only when the case is successful and prosecuted (Young 2009:Online). Only the information reported is considered and not the motive for blowing the whistle (Masters 2008:Online; Fisher, Harshman, Gillespie, Leland & Yeager 2001:Online).

The False Claims Act is designed to meet the requirements that the reward is: (i) sufficiently "large" and "certain" to justify the whistleblower's effort; and (ii) timely in relation to doing the anticipated activity (Vandekerckhove 2011). Vandekerckhove (2011) further indicates that rewarding the whistleblower is different from purchasing information relating to fraud cases.

Additional reward

Section 3730 "(d)"(2) of the False Claims Act states that in addition to the reward, the whistleblower "shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs".

Statistics of the False Claims Act

The recent largest healthcare fraud uncovered by the Department of Justice through the False Claims Act involved over 243 defendants in 17 federal districts – for false billings amounting to approximately USD\$712 million (Department of Justice 2015: Online).

This follows the False Claims Act recoveries of USD\$5.69 billion in the 2014 fiscal year (Department of Justice 2014:Online). To further demonstrate its successes, there are the following False Claims Act statistics: approximately 647 *qui tam* actions were filed in 2012 compared to 35 filed in 1987 (Department of Justice 2012:Online); up to 4200 *qui tam* actions were pursued between 1987 and 2003, with up to USD\$7.8 billion in recoveries (Pacini *et al* 2007:Online); between 2006 and 2007 over USD\$1.45 billion was recovered by the USA Government in False Claims Act settlement judgments (Young 2009:Online); and in 2012, approximately USD\$16 trillion in False Claims Act settlement judgments had been recovered. Approximately 16% was paid to whistleblowers (Rapp 2012:Online).

To help determine whether the False Claims Act route is worth considering in the Republic of South Africa, certain advantages and disadvantages of the False Claims Act experienced in the United States of America are now considered:

Benefits of the False Claims Act

Requires information from original source

- Section 3730(4A) of the False Claims Act states that the case must be filed by a person with an *original source* of information. Section 3730(4B) of the False Claims Act defines an *original source* as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the government before filing an False Claims Act action under this section which is based on the information".
- The whistleblower needs to provide specific information such as what, why, and how, and therefore fabricating information may not be easy, thereby potentially limiting false allegations (Carson *et al* 2008).

Compensated for suffering

- Whistleblowers recover sufficient monies to withstand suffering from possible job loss, tarnished careers and retaliation (Dworkin 2010). In addition to protection afforded, monies paid to the whistleblower offset costs incurred (Carson *et al* 2008).

No success, no reward

- There is generally no reward for failed cases (Dworkin 1997:Online). For successful cases, the government will recover monies and tax payers will benefit (Carson *et al* 2008).

Supports informers and supplements with required resources

- Most complex cases are difficult to detect without inside information which can be successfully provided by inside informers (Bucy 2003:Online). The law facilitates the obtaining of information from informers in order to successfully prosecute cases (Pacini *et al* 2007:Online).

- The two successful features of *qui tam* as a tool of good external corporate governance and regulatory are: (i) the dissemination of information is facilitated by the law; and (ii) the law supplements limited resources of government attorneys and investigators (Pacini *et al* 2007: Online; Fisher *et al* 2007: Online). With its large recoveries, attorneys are prepared to undertake such cases (Dworkin 2010).

Statistics indicate the benefits outweigh the costs

- From 1997 to 2001 the costs for *qui tam* actions were USD\$1.88 billion, whereas the benefits were USD\$26.8 billion to USD\$97.7 billion (Carson *et al* 2008).
- In its 2014 fiscal year, the United States of America recovered \$5.69 billion through False Claims Act (Department of Justice 2014: Online).

Supports external reporting

- In cases where internal reporting options have been exhausted, external reporting is enabled, assisting whistleblowers to change things internally (Kesselheim 2010: Online).
- Moreover, Zhang, Chiu, and Wei (2009: Online) argued that where evidence is strong and an incentive is available, external reporting intentions are the strongest, however, such intentions decreased where evidence is weak.

Drawbacks of the False Claims Act

Time lag

- Although the general rule is 60 days for the government to consider whether to pursue a case (under seal), it is not uncommon that the government could take one to two years before deciding (Dworkin 2010). In worse cases, it may exceed five years (Devine & Maassarani 2011).
- The prosecution process under the False Claims Act may take long – ranging from two to five or more years (Devine & Maassarani 2011). Meanwhile, the burden of prosecution costs may be difficult for the whistleblower (Carson *et al* 2008). While waiting, the whistleblower may suffer from retaliation and alternative employment becomes difficult.

Morally/ethically questionable

- Certain questions raised about rewarding whistleblowers, include: (i) is rewarding the best way to curb fraud; and (ii) are “snitchers” desirable in the workplace? (Dworkin 1997: Online). Whistleblower rewards may possibly raise concerns on whether a moral atmosphere is desired within an organisation. Rossouw (2004) considers that adding an ethical dimension in the fight against fraud in an organisation can undermine the motivation and rationalization to commit fraud.

Potential conflict between the whistleblower and employer

- The False Claims Act requires external reporting – which is likely to raise conflict between the whistleblower and employer (Dworkin 1997: Online). Traditionally, whistleblowers are encouraged to firstly blow the whistle internally and only report externally when all internal systems are exhausted (Holtzhausen 2009: Online). Miceli, Near & Dworkin (2009: Online) assert that certain managers may be anxious with external reporting – because it may be viewed as being disloyal and undermining management authority.

No money recovered, no reward

- Fraud losses also include non-financial losses. With the False Claims Act, non-financial fraud losses equal no reward (Dworkin 1997: Online). It may, therefore, be argued that the reporting of matters which do not result in an identifiable financial loss is not as encouraged.

Pending cases and publicly known information

- Where a civil case is already pending and the government is party to the case, and the information disclosed is publicly available, the whistleblower may not file a *qui tam* action (Friedman 1997: Online). This is a pitfall where the plaintiff is willing to testify and has valuable information that may complete the case.

Delayed reporting

- It is argued that whistleblowers tend to delay reporting to allow the fraud to accrue more value to support higher rewards (Carson *et al* 2008). Unfortunately, the cost of silence on fraud is devastatingly high on human lives, employment, and lifelong savings (Auriacombe 2004: Online); and the longer the fraud goes undetected, the more financial damage is caused (Association of Certified Fraud Examiners 2014: Online).

Conclusion

The False Claims Act facilitates for financial rewards to whistleblowers who reported information on fraud perpetrated against the government of the United States of America. The False Claims Act was amended in 1986 to reward whistleblowers more generously. Since its amendment, the False Claims Act seems to be successful, with the government recovering lost monies and whistleblowers receiving lucrative rewards. Moreover, the government subsidies for the required resources and support informers, and attorneys are willing to take on *qui tam* actions.

Unarguably, the False Claims Act process may possibly be long, delayed, create conflict between employer and employee, result in no financial reward, expensive and morally questionable - which may add a great level of stress to the whistleblower. However, apart from its shortcomings which may have repercussions - the benefits of the False Claims Act appear to outweigh the costs associated with filing a *qui tam* action and yield great benefits for the United States of America.

3.2 United Kingdom

The United Kingdom's Public Interest Disclosures Act (Act of 2013) seeks to provide employees with protection against retaliation in the workplace as indicated in section 2 of the Public Interest Disclosures Act. It explicitly denies protection when whistleblowers do so for personal gain (Miceli *et al* 2009:Online) – unless otherwise provided under a statute including compensation for losses suffered (Public Concern At Work 2007:Online). The reason for not rewarding whistleblowers may derive from the belief that they should not be compensated (Bowden 2013:Online).

Rewarding whistleblowers

The concept of rewarding whistleblowers is not new in the United Kingdom. It began in the 13th Century under a statutory scheme – until 1952 (Public Concern At Work 2007:Online). Young (2009:Online) posits that the introduction of *qui tam* actions was raised in the United Kingdom in 2007, but not pursued. Furthermore, in an attempt to discover how the United Kingdom Home Office would recover £250 million a year by 2010, the United Kingdom extensively debated rewarding whistleblowers with a percentage of the damages paid by the wrongdoer (Vandekerckhove 2011; Young 2009:Online). However, this initiative was not approved. Below, are some of the reasons for the rejection:

The United Kingdom's critics of the False Claims Act and rewarding of whistleblowers

Recently, the United Kingdom Financial Conduct Authority and Bank of England Prudential Regulation Authority rejected rewarding whistleblowers: and (i) argued that incentives in the United States of America do nothing for most whistleblowers, but only benefit a small number where reporting led to successful penalties imposed; (ii) maintained there is no empirical research indicating that incentivising whistleblowers would increase the rate of reporting or the quality thereof; and (iii) stressed they should rather encourage strengthening the current whistleblowing procedures and focus on its transparency (DiMauro 2014:Online).

Additional reasons for not adopting the reward principles include massive legal costs associated with the process; and complex and costly systems (Mont 2014:Online). This is further supported by research conducted by PricewaterhouseCoopers (2013:Online) in the United Kingdom. The research revealed that 52% of the organisations felt strongly that incentivising whistleblowers will not encourage an open culture of reporting (PricewaterhouseCoopers 2013:Online). The report further indicated that incentives require reporting to external regulators while on its own can lead to roguish acts, and the whistleblowers could potentially be the perpetrators (PricewaterhouseCoopers 2013:Online).

In the past, findings by the Public Concern At Work (2007:Online) on its quest to consider the False Claims Act provisions revealed that: (i) the successes of the False Claims Act in recovering defrauded government funds are acknowledged; (ii) the reward system offered in the United Kingdom from the 13th

Century until 1951 was prone to abuse (e.g. wrongdoers defrauded the system in order to uncover minimal fraud); (iii) relying on the reward route has its difficulties as it is only after the fact, where the Public Interest Disclosures Act aims at preventing known fraud and fraud that is likely to happen; (iv) with the False Claims Act, expression of deterrence is outweighed by greed, where greed is used to suppress greed – which is regarded as dangerous, counter-productive and introducing more risks; (v) the United Kingdom encourages the reporting of fraud internally and acknowledge it to external regulators, although it is not the only way; and (vi) rewards undermine supportive cultural values.

For the above reasons the principles of the False Claims Act were not recommended in the United Kingdom. It was believed that measures such as the Public Interest Disclosures Act and adequate government contracts can serve the same purpose and also encourage reporting. The Public Concern At Work (2007:Online) concluded that False Claims Act recoveries seem to increase each year, implying that deterrence is outweighed by greed and such a provision is not recommended in the United Kingdom.

Response to critics

In response to some of the False Claims Act critics, Schnell (2013:Online) argues that: (i) the False Claims Act have been the linchpin to the United States of America's success in combating fraud against the government; (ii) it offers just and necessary incentives for the hardship experienced by whistleblowers in terms of physical, emotional and financial strain; (iii) there is no evidence that the False Claims Act has led to frivolous filing and waste of government resources; (iv) no evidence indicates that the False Claims Act encouraged external reporting compromising company internal reporting processes; and (v) reporting is not solely encouraged by financial reward, but also by citizens wanting to protect the public from harm – and therefore greed and self-centered individuals are not part of the equation.

Schnell (2013:Online) considers that the United Kingdom should look at adopting the False Claims Act in its attempt to enhance whistleblowing. However, this seems to have been dismissed by the United Kingdom given recent developments (DiMauro 2014:Online; Schnell 2014:Online). Schnell (2014:Online) further refers to the decision not to adopt whistleblower rewards by the United Kingdom as being a bad idea – especially in terms of overlooking the False Claims Act successes. The United Kingdom is still not convinced that this would work for them; however, the idea is not entirely dismissed (Schnell 2014:Online).

On the other hand, Bucy (2003:Online) considered that for an effective regulatory system, regulators should be willing to offer whistleblowers significant rewards for valuable information. In support, Dworkin (1997:Online) and Schnell (2013:Online) assert that a shift from the motivation of the whistleblower to the value of the information reported should be considered in the United Kingdom, in order to effectively encourage whistleblowing.

Conclusion

Whistleblower rewards are criticised in the United Kingdom. The Public Interest Disclosures Act focuses on whistleblower protection rather than whistleblower rewards. However, much as whistleblower rewards are criticised, the idea is not entirely rejected. The primary reasons for rejecting whistleblower rewards seem to be that focus should be on enhancing existing whistleblowing measures and that would serve the same purpose in encouraging whistleblowing. The Public Interest Disclosures Act and existing government contracts are considered to be effective as whistleblowing tools. However, researchers are still encouraging the United Kingdom to consider whistleblower rewards looking into the successes and benefits of the False Claims Act.

3.3 South Africa

Section 9(1)(b) of the Protected Disclosures Act and its application

Like most legislation, the Protected Disclosures Act is not free from criticism. This includes, amongst other things: (i) the limited definition of employee (Bosch & Le Roux 2011:Online); and (ii) not placing a legal duty on the employer to investigate and prosecute based on disclosed information (Diale & Holtzhausen 2005: Online). These and other concerns have been addressed in the Draft Protected Disclosures Bill, referred to *infra*.

However, the crux of this article is that section 9(1)(b) of the Protected Disclosures Act does not offer protection to employees who blow the whistle for personal gain, unless it is payable in terms of the law. Section 9 of the Protected Disclosures Act deals with the protection of whistleblowers who disclosed their concerns to persons or entities mentioned in section 8. If the information is disclosed in terms of this general disclosure for personal gain or to parties other than those mentioned in section 8 of the Protected Disclosures Act, the whistleblower will not be protected and his or her dismissal or occupational detriment will be lawful. The term "personal gain" is not defined in the Protected Disclosures Act and the question arises of what is the exact meaning of this term. In the *Tshishonga v Minister of Justice* matter it was held that incidental gains will not exclude protection.

From the aforesaid it is clear that an employer in the private sector may for instance internally reward its whistle-blowers and such a whistleblower will not forfeit protection solely because of that. This research, however, poses the question whether these types of initiatives should be applied in the Republic of South Africa and as such be regulated by legislation, such as the False Claims Act. If such legislation is passed, section 9 of the Protected Disclosures Act should, therefore, be reconsidered.

With the Protected Disclosures Act, whistleblower experience has been unpleasant in the Republic of South Africa. Numerous examples of this abound in popular media - but the matter of *Tshishonga v Minister of Justice*, is a striking example. In *Tshishonga's* matter the whistleblower was humiliated and suffered occupational detriment for reporting to

the media; and was later dismissed (Le Roux 2010: Online). The court ruled that the disclosure was protected in terms of the Protected Disclosures Act but the whistleblower was only compensated with 12 month's remuneration for unfair dismissal (*Tshishonga v Minister of Justice* 2006:Online).

Another whistleblower was dismissed for reporting and was later compensated with six month's remuneration for unfair dismissal (*Magagane v MTN Group Management Services (Pty) Ltd* 2013:Online).

Both whistleblowers suffered occupational detriment for reporting. The form of compensation offered in these cases was for unfair dismissal suffered and not for reporting fraud. The compensation criteria for unfair dismissal are stipulated in sections 194(1) & 194(4) of the Labour Relations Act (12 of 2002), as amended, which is a separate issue from the rewards discussed in this article.

The challenge with the Protected Disclosures Act is that whistleblowers are only compensated for loss of salary or occupational detriments suffered as a result of reporting fraud and ultimately lose their jobs (Earle & Madek 2007:Online). Moreover, in their pursuit to fight fraud, their careers are tarnished and lives disturbed (Diale 2005:Online). Whistleblowing carries with it excessive emotional and psychological despair, and in the extreme, even the death of whistleblowers (Devine & Maassarani 2011; Tavakolian 1993: Online). The Protected Disclosures Bill partially addresses some of these issues as highlighted below. However, the primary focus of this article is to provide additional motivation to blow the whistle through financial rewards/incentives.

The Protected Disclosures Bill

To address its critics, the Protected Disclosures Act was amended in terms of section 7(1) of the South African Law Reform Commission Act (19 of 1973), as amended. Amendments included:

- Insertion of section 3A and 3B to address joint liability and duty to investigate. Section 3A places liability on the employer and other third parties subjecting an employee/worker to occupational detriment as a result of blowing the whistle. Section 3B further added an obligation for the employer to investigate and prosecute following a disclosure.
- Section 4 was amended with the insertion of section 1B indicating that where the court is satisfied that an employee/worker has suffered occupational detriment, the employer should make a payment to the employee/worker for any damages suffered by the employee/worker.
- Amendment to section 6 includes the employer's duty to have appropriate internal procedures for receiving and dealing with disclosed information, and informing every employee/worker about reporting procedures.

No amendments were included in the Bill with regard to section 9(1)(b) of the Protected Disclosures Act. In section 1B of the Protected Disclosures Bill, the employee/worker has to suffer some form of

occupational detriment and/or damages to qualify for any form of compensation. This article considers whistleblower reward regardless of occupational detriment or damages suffered.

Recent developments

Recently (Deputy Public Protector (PP) 2015), Advocate Malunga highlighted the need to incentivise whistleblowers in the Republic of South Africa. In his initiative, reference was made to the unpleasant incidences suffered by South African whistleblowers versus the successes of the False Claims Act (Nicolson 2015:Online). The view of incentivising whistleblowers is shared by Razzano (2014:Online) – who holds that the principles of the False Claims Act would assist in addressing the challenges of the Protected Disclosures Act regarding the lack of compensation. As Sehgal (2014) states, whistleblowers should not be treated like traitors, but celebrated and rewarded like heroes for doing the right thing.

Conclusion

In the Republic of South Africa, whistleblowers are only compensated for occupational detriment suffered and not for blowing the whistle as per the Protected Disclosures Act. The Protected Disclosures Bill only considers whistleblower compensation when the latter has suffered occupational detriment for reporting fraud. Protection is not afforded in cases where whistleblowers received a reward for reporting fraud unless it is payable in terms of the law.

However, despite the Protected Disclosures Act provisions, whistleblowers still suffer retaliation for blowing the whistle. The article considers that the Republic of South Africa should consider rewarding whistleblowers for reporting valuable information that led to prosecutions or the successful detection of fraud. Such compensation should be to compensate whistleblower travails.

4 DECISION TO BLOW THE WHISTLE

4.1 What motivates South Africans to blow the whistle?

In order to implement correct measures to encourage whistleblowing, it is crucial to understand the motivational factors which influence the decision to report fraud. According to studies in the Republic of South Africa, emphasis was placed on issues of integrity, trust in organisations, and good whistleblowing systems as motivational factors to whistleblowing.

In a study of organisations employing more than 50 employees in the Nelson Mandela Metropole, Perks and Smith (2008:Online) observed that whistleblowing can be improved by focusing on ethical issues and integrity in the workplace. Important issues for consideration included ethics' audits, clear whistleblowing policies, establishment of ethics committees, and ethics training (Perks & Smith 2008: Online). Acquaaah-Gasie (2001:Online) states that employees are more likely to report fraud if they understand that by contributing to workplace integrity, they advance their wellbeing and that of their communities.

To encourage whistleblowing, Diale (2010:Online) suggests a whistleblower framework as advocacy for organisational integrity. This implies that whistleblowing should be properly and positively defined, interpreted, well-positioned, and considered a value add rather than a once-off activity (Diale 2010:Online). Auriacombe (2004:Online) stresses that it is key to design policies and procedures which positively encourage whistleblowing internally, by providing clear guidance on procedures to be followed by whistleblowers and managers in addressing reported matters. The emphasis is to ensure a culture of integrity – and then whistleblowing would follow. However, Holtzhausen (2007:Online) holds that one of the concerns of the Republic of South Africa is integrity in government and the implementation of measures that promote ethical reporting.

A study by Binikos (2008:Online) on a company operating in the Information and Communication Technology sector focused on the relationship between trust in the organisation and internal whistleblowing. It indicated that in an organisation where the level of trust is low, chances of internal whistleblowing would be low – and *vice-versa* (Binikos 2008:Online). Minnaar (2011:Online) also suggests that in transparent systems where trust exists within communities, citizens would feel free to report to authorities and would also be willing to provide more information without fear. It could be inferred that a high level of trust may result in a conflict of loyalties and in turn discourage any form of whistleblowing. Therefore, the relationship between organisational trust and whistleblowing can occasionally be contradictory.

4.2 Factors that could influence the decision to blow the whistle

It is important to look at factors that may potentially influence the decision to blow the whistle on fraud – which may include the following:

- South Africans come from an environment where whistleblowing is viewed in the same light as “informing”. Informers and their activities were resented in communities (Minnaar 2011:Online). Moreover, informers are often classified as selfish, snitchers and those who “split” on their friends (Minnaar 2011:Online). One could ask whether historical associations prohibit whistleblowing in the Republic of South Africa or if it is lack of incentives.
- Negative experiences by whistleblowers with the whistleblower legislation may contribute negatively to whistleblowing. This includes the stressful experience faced by whistleblowers relating to the lack of professional counseling that may possibly be required by them (Tavakolian 1993:Online).
- Regardless of their great contributions, whistleblowers are still perceived as being disloyal (Hoffman & McNulty 2011).

Yeoh's (2014:Online) empirical study revealed that employees would first weigh the financial and non-financial benefits before they can blow the whistle. Despite legislation to enhance whistleblowing, the decision to blow the whistle on one's boss or

colleague still remains a tough decision and may raise issues of contention, loyalty and morality (Auriacombe 2004:Online; Public Concern At Work, 2007:Online). It poses a great dilemma and is often associated with psychological and financial problems (DLA Piper 2013:Online). Moreover, it can compromise one's career, job and reputation (Lee & Kleiner 2011: Online).

The decision to remain silent may be influenced by several factors. According to Auriacombe (2004: Online), one of the results of a culture of silence is that society values compensation and punishment more than a culture of detection and deterrence of fraud. Thus it can be argued that in an organisational culture where compensation and punitive measures do not exist, the rate of whistleblowing may be very low or non-existent.

As indicated by several researchers above, an ethical organisational culture and integrity in the workplace is desirable to encourage whistleblowing. Employees are likely to behave according to set standards and values as well as disregard their own. Moreover, where employees perceive the level of ethical commitment by the employer to be stronger, the rate of reporting seems to be on the rise.

In the presence of all these measures, whistleblowing is on the decrease in the Republic of South Africa – could it be as a result of fear? Could whistleblower reward serve as a motivational factor for their efforts and bravery? A study to determine whether rewards could positively influence whistleblowing in the Republic of South Africa would be beneficial.

5 LIMITATIONS

An extensive literature review was conducted to address the research objective. The research was not a review of the affectivity of the legislative prescripts discussed or of the level of protection offered to whistleblowers in terms of relevant legislation. The research findings did not provide any assurance that the same False Claims Act benefits and drawbacks, as experienced in the United States of America, would be experienced in the Republic of South Africa – should similar provisions be considered. The research was limited to fraud perpetrated against the government. However, there is no restriction against a private sector entity rewarding persons who had blown the whistle against fraud.

6 OVERALL CONCLUSION

6.1 Recommendations and issues for consideration

The Republic of South Africa is a constitutional democracy and is governed by the rule of law. However, the rise of fraud has the potential to destroy the spirit of the new democracy. Thus there is a great need for courageous individuals to report

fraud. Whistleblowing provides valuable service to organisations and the public. It is the most cost-efficient method to detect and promote good governance.

The United States of America, United Kingdom and the Republic of South Africa have implemented legislation in terms of whistleblowing to enhance good governance in the workplace. The False Claims Act in the United States of America and associated rewards appears to have proven successful withstanding its drawbacks. However, the United Kingdom still criticises whistleblower rewards and places reliance on the Protected Interest Disclosures Act and other government measures.

The Protected Disclosures Act in the Republic of South Africa on the other hand, denies whistleblowing for personal gain unless it is payable in terms of the law. However, the decision to blow the whistle is still a difficult one given the challenges whistleblowers face, specifically in the Republic of South Africa.

The article suggests that compensating whistleblowers in the fight against fraud be considered in the Republic of South Africa - considering the principles of the False Claims Act. Whistleblowers should not only be compensated for loss of pay or occupational detriment suffered, but be treated like the heroes they are and compensated for their efforts.

However, much as the benefits of the False Claims Act are attractive and yield great benefits for the United States of America, an empirical study should be conducted in the Republic of South Africa to determine whether rewarding whistleblowers would yield positive results should it be considered.

Rewarding whistleblowers would require amending section 9(1) (b) of the Protected Disclosures Act or introduction of a new law facilitating whistleblower rewards. When considering whistleblower rewards, the following may be considered:

- The False Claims Act benefits and drawbacks - and the False Claims Act critics in the United Kingdom.
- If personal gain for whistleblowing would benefit the economy of the Republic of South Africa and whether the country would morally justify financial incentives for doing the right thing.
- If rewarding public officials for reporting fraud can be justified since it forms part of their legal duties.
- The provision of temporary financial relief when cases take longer and where the whistleblower has been dismissed or suffering financial harm.
- The need for one dedicated body responsible for dealing with claims – to minimize delays and possible multiple reporting.

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