

(3 April 2024 - to date)

[This is the current version and applies as from **3 April 2024**, i.e. the date of commencement of the Judicial Matters Amendment Act 15 of 2023 – to date]

PROTECTED DISCLOSURES ACT 26 OF 2000

(Also known as “The Whistleblower Act”)

(Government Notice 785 in Government Gazette 21453 dated 7 August 2000. Commencement date: 16 February 2001. [Proc. No. R17, Gazette No. 22067 dated 16 February 2001])

As amended by:

Protected Disclosures Amendment Act 5 of 2017 - Government Notice 768 in Government Gazette 41016 dated 2 August 2017. Commencement date: 2 August 2017.

Judicial Matters Amendment Act 15 of 2023 - Government Notice 4597 in Government Gazette 50430 dated 3 April 2024. Commencement date: 3 April 2024.

(English text signed by the President.)

(Assented to 1 August 2000.)

ACT

To make provision for procedures in terms of which employees and workers in both the private and the public sector may disclose information regarding unlawful or irregular conduct by their employers or other employees or workers in the employ of their employers; to provide for the protection of employees or workers who make a disclosure which is protected in terms of this Act; and to provide for matters connected therewith.

(Long title substituted by section 12 of Act 5 of 2017)

PREAMBLE

Recognising that -

- the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom;
- section 8 of the Bill of Rights provides for the horizontal application of the rights in the Bill of Rights, taking into account the nature of the right and the nature of any duty imposed by the right;

Prepared by:

- criminal and other irregular conduct in organs of state and private bodies are detrimental to good, effective, accountable and transparent governance in organs of state and open and good corporate governance in private bodies and can endanger the economic stability of the Republic and have the potential to cause social damage;

And bearing in mind that -

- neither the South African common law nor statutory law makes provision for mechanisms or procedures in terms of which employees or workers may, without fear of reprisals, disclose information relating to suspected or alleged criminal or other irregular conduct by their employers, whether in the private or the public sector;
- every employer, employee and worker has a responsibility to disclose criminal and any other irregular conduct in the workplace;
- every employer has a responsibility to take all necessary steps to ensure that employees and workers who disclose such information are protected from any reprisals as a result of such disclosure;

And in order to -

- create a culture which will facilitate the disclosure of information by employees and workers relating to criminal and other irregular conduct in the workplace in a responsible manner by providing comprehensive statutory guidelines for the disclosure of such information and protection against any reprisals as a result of such disclosures;
- promote the eradication of criminal and other irregular conduct in organs of state and private bodies,

(Preamble amended by the substitution of the 4th, 5th, 6th and 7th paragraphs by section 13 of Act 5 of 2017)

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows: -

TABLE OF CONTENTS

1. Definitions
2. Objects and application of Act
3. Employee or worker making protected disclosure not to be subjected to occupational detriment
- 3A. Joint liability
- 3B. Duty to inform employee or worker
4. Remedies
5. Protected disclosure to legal adviser
6. Protected disclosure to employer

Prepared by:

7. Protected disclosure to member of Cabinet or Executive Council
8. Protected disclosure to certain persons or bodies
9. General protected disclosure
- 9A. Exclusion of civil and criminal liability
- 9B. Disclosure of false information
10. Regulations
11. Short title and commencement

1. Definitions

In this Act, unless the context otherwise indicates -

“business” includes the whole or part of any business, trade, undertaking or service;

(Definition of “business” inserted by section 1(a) of Act 5 of 2017)

“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:

- (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 Chapter II of the Employment Equity Act, 1998 (Act No. 55 of 1998), or the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000); or
- (g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed;

(Definition of “disclosure” substituted by section 1(b) of Act 5 of 2017)

“employee” means -

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

- (b) any other person who in any manner assists or assisted in carrying on or conducting or conducted the business of an employer;

(Definition of “employee” substituted by section 1(c) of Act 5 of 2017)

“employer” means any 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;

“impropriety” means 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 or occurred in the Republic of South Africa or elsewhere; or
- (b) the law applying to the impropriety is that of the Republic of South Africa or of another country;

“Minister” means the Cabinet member responsible for the administration of Justice;

“occupational detriment”, in relation to an employee or a worker, means—

- (a) being subjected to any disciplinary action;
- (b) being dismissed, suspended, demoted, harassed or intimidated;
- (c) being transferred against his or her will;
- (d) being refused transfer or promotion;
- (e) being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;
- (f) being refused a reference, or being provided with an adverse reference, from his or her employer;
- (g) being denied appointment to any employment, profession or office;

- (h) being subjected to any civil claim for the alleged breach of a duty of confidentiality or a confidentiality agreement arising out of the disclosure of—
 - (i) a criminal offence; or
 - (ii) information which shows or tends to show that a substantial contravention of, or failure to comply with the law has occurred, is occurring or is likely to occur;
- (i) being threatened with any of the actions referred to in paragraphs (a) to (h) above; or
- (j) being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities, work security and the retention or acquisition of contracts to perform work or render services;

(Definition of “occupational detriment” substituted by section 1(d) of Act 5 of 2017)

“organ of state” means -

- (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
- (b) any other functionary or institution when -
 - (i) exercising a power or performing a duty 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;

“prescribed” means prescribed by regulation in terms of section 10;

“protected disclosure” means a disclosure made to -

- (a) a legal adviser in accordance with section 5;
- (b) an employer in accordance with section 6;
- (c) a member of Cabinet or of the Executive Council of a province in accordance with section 7;
- (d) a person or body in accordance with section 8; or
- (e) any other person or body in accordance with section 9,

but does not, subject to section 9A, include a disclosure—

- (i) in respect of which the employee or worker concerned commits a criminal offence by making that disclosure; or
- (ii) made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5;

(Words following paragraph (e) of the definition of “protected disclosure” substituted by section 1(e) of Act 5 of 2017)

“temporary employment service” means any person who, for reward, procures for or provides to a client other persons who—

- (a) render services to, or perform work for, the client; and
- (b) are remunerated by the temporary employment service;

(Definition of “temporary employment service” inserted by section 1(f) of Act 5 of 2017)

“this Act” includes any regulation made in terms of section 10;

“worker” means—

- (a) any person who works or worked for another person or for the State; or
- (b) any other person who in any manner assists or assisted in carrying on or conducting or conducted the business of an employer or client,

as an independent contractor, consultant, agent; or

- (c) any person who renders services to a client while being employed by a temporary employment service.

(Definition of “worker” inserted by section 1(g) of Act 5 of 2017)

2. Objects and application of Act

- (1) The objects of this Act are—
 - (a) to protect an employee or worker, whether in the private or the public sector, from being subjected to an occupational detriment on account of having made a protected disclosure;
 - (b) to provide for certain remedies in connection with any occupational detriment suffered on account of having made a protected disclosure; and

- (c) to provide for procedures in terms of which an employee or worker can, in a responsible manner, disclose information regarding improprieties by his or her employer.

(Section 2(1) substituted by section 2(a) of Act 5 of 2017)

- (2) This Act applies to any protected disclosure made after the date on which this section comes into operation, irrespective of whether or not the impropriety concerned has occurred before or after the said date.
- (3) Any provision in a contract of employment or other agreement between an employer and an employee or worker is void in so far as it—
 - (a) purports to exclude any provision of this Act, including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract; or
 - (b)
 - (i) purports to preclude the employee or worker; or
 - (ii) has the effect of discouraging the employee or worker,

from making a protected disclosure.

(Section 2(3) substituted by section 2(b) of Act 5 of 2017)

3. Employee or worker making protected disclosure not to be subjected to occupational detriment

No employee or worker may be subjected to any occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure.

(Section 3 substituted by section 3 of Act 5 of 2017)

3A. Joint liability

Where an employer, under the express or implied authority or with the knowledge of a client, subjects an employee or a worker to an occupational detriment, both the employer and the client are jointly and severally liable.

(Section 3A inserted by section 4 of Act 5 of 2017)

3B. Duty to inform employee or worker

- (1) Any person or body to whom a protected disclosure has been made in terms of section 6, 7 or 8, respectively, must, subject to subsection (3), as soon as reasonably possible, but in any event within 21 days after the protected disclosure has been made—
 - (a) decide whether to—

- (i) investigate the matter or not; or
 - (ii) refer the disclosure to another person or body if that disclosure could be investigated or dealt with more appropriately by that other person or body; and
- (b) in writing acknowledge receipt of the disclosure by informing the employee or worker of the decision—
 - (i) to investigate the matter, and where possible, the time-frame within which the investigation will be completed;
 - (ii) not to investigate the matter and the reasons for such decision; or
 - (iii) to refer the disclosure to another person or body.
- (2) The person or body to whom a disclosure is referred as contemplated in subsection (1)(a)(ii) must, subject to subsection (3), as soon as reasonably possible, but in any event within 21 days after such referral—
 - (a) decide whether to investigate the matter or not; and
 - (b) in writing inform the employee or worker of the decision—
 - (i) to investigate the matter, and where possible, the time-frame within which the investigation will be completed; or
 - (ii) not to investigate the matter and the reasons for such decision.
- (3) The person or body, referred to in subsection (1) or (2), who is unable to decide within 21 days whether a matter should be investigated or not, must—
 - (a) in writing inform the employee or worker—
 - (i) that he, she or it is unable to take the decision within 21 days; and
 - (ii) on a regular basis, at intervals of not more than two months at a time, that the decision is still pending; and
 - (b) as soon as reasonably possible, but in any event within six months after the protected disclosure has been made or after the referral has been made, as the case may be, in writing inform the employee or worker of the decision—

- (i) to investigate the matter, and where possible, the time-frame within which the investigation will be completed; or
 - (ii) not to investigate the matter and the reasons for such decision.
- (4) The person or body, referred to in subsection (1) or (2), must, at the conclusion of an investigation, inform the employee or worker of the outcome thereof.
- (5) The person or body, referred to in subsection (1) or (2), does not have to comply with—
 - (a) subsection (1)(b), (2)(b), (3) or (4) if that person or body does not know the identity and contact details of the employee or worker who has made the disclosure; or
 - (b) subsection (1)(b), (2)(b) or (3) if it is necessary to avoid prejudice to the prevention, detection or investigation of a criminal offence.

(Section 3B inserted by section 4 of Act 5 of 2017)

4. Remedies

- (1) Any employee who has been subjected, is subjected or may be subjected, to an occupational detriment in breach of section 3, or anyone acting on behalf of an employee who is not able to act in his or her own name, may—

(Words preceding section 4(1)(a) substituted by section 5(a) of Act 5 of 2017)

- (a) approach any court having jurisdiction, including the Labour Court established by section 151 of the Labour Relations Act, 1995 (Act No. 66 of 1995), for appropriate relief; or
 - (b) pursue any other process allowed or prescribed by any law.
- (1A) Any worker who has been subjected, is subjected or may be subjected, to an occupational detriment in breach of section 3, or anyone on behalf of a worker who is not able to act in his or her own name, may approach any court having jurisdiction for appropriate relief.

(Section 4(1A) inserted by section 5(b) of Act 5 of 2017)

- (1B) If the court or tribunal, including the Labour Court is satisfied that an employee or worker has been subjected to or will be subjected to an occupational detriment on account of a protected disclosure, it may make an appropriate order that is just and equitable in the circumstances, including—
 - (a) payment of compensation by the employer or client, as the case may be, to that employee or worker;

- (b) payment by the employer or client, as the case may be, of actual damages suffered by the employee or worker; or
- (c) an order directing the employer or client, as the case may be, to take steps to remedy the occupational detriment.

(Section 4(1B) inserted by section 5(b) of Act 5 of 2017)

- (2) For the purposes of the Labour Relations Act, 1995, including the consideration of any matter emanating from this Act by the Labour Court -

- (a) any dismissal in breach of section 3 is deemed to be an automatically unfair dismissal as contemplated in section 187 of that Act, and the dispute about such a dismissal may follow the procedure set out in Chapter VIII of that Act or any other process to recover damages in a competent court; and

(Section 4(2)(a) substituted by section 5(c) of Act 5 of 2017)

- (b) any other occupational detriment in breach of section 3 is deemed to be an unfair labour practice as contemplated in section 186(2) of that Act, and the dispute about such an unfair labour practice must follow the procedure set out in section 191: Provided that if the matter fails to be resolved through conciliation, it may be referred to the Labour Court for adjudication.

(Section 4(2)(b) substituted by section 5(c) of Act 5 of 2017)

- (3) Any employee who has made a protected disclosure and who reasonably believes that he or she may be adversely affected on account of having made that disclosure, must, at his or her request and if reasonably possible or practicable, be transferred from the post or position occupied by him or her at the time of the disclosure to another post or position in the same division or another division of his or her employer or, where the person making the disclosure is employed by an organ of state, to another organ of state.
- (4) The terms and conditions of employment of a person transferred in terms of subsection (3) may not, without his or her written consent, be less favourable than the terms and conditions applicable to him or her immediately before his or her transfer.

(Section 4(4) substituted by section 5(d) of Act 5 of 2017)

5. Protected disclosure to legal adviser

Any disclosure made -

- (a) to a legal practitioner or to a person whose occupation involves the giving of legal advice; and
- (b) with the object of and in the course of obtaining legal advice,

is a protected disclosure.

6. Protected disclosure to employer

(1) Any disclosure made in good faith—

- (a) and substantially in accordance with any procedure authorised by the employee's or worker's employer for reporting or otherwise remedying the impropriety concerned and the employee or worker has been made aware of the procedure as required in terms of subsection (2)(a)(ii); or
- (b) to the employer of the employee or worker, where there is no procedure as contemplated in paragraph (a),

is a protected disclosure.

(2)

- (a) Every employer must—
 - (i) authorise appropriate internal procedures for receiving and dealing with information about improprieties; and
 - (ii) take reasonable steps to bring the internal procedures to the attention of every employee and worker.
- (b) Any employee or worker 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 the purposes of this Act, to be making the disclosure to his or her employer.

(Section 6 substituted by section 6 of Act 5 of 2017)

7. Protected disclosure to member of Cabinet or Executive Council

Any disclosure made in good faith to a member of Cabinet or of the Executive Council of a province is a protected disclosure if the employee's or worker's employer is—

(Words preceding section 7 substituted by section 7 of Act 5 of 2017)

- (a) an individual appointed in terms of legislation by a member of Cabinet or of the Executive Council of a province;
- (b) a body, the members of which are appointed in terms of legislation by a member of Cabinet or of the Executive Council of a province; or
- (c) an organ of state falling within the area of responsibility of the member concerned.

8. Protected disclosure to certain persons or bodies

(1) Any disclosure made in good faith to—

- (a) the Public Protector;
- (aA) the South African Human Rights Commission;
- (aB) the Commission for Gender Equality;
- (aC) the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities;
- (aD) the Public Service Commission;
- (b) the Auditor-General; or
- (c) a person or body prescribed for purposes of this section; and

in respect of which the employee or worker concerned reasonably believes that—

(Words preceding section 8(1)(i) substituted by section 8(a) of Act 5 of 2017)

- (i) the relevant impropriety falls within any description of matters which, in the ordinary course are dealt with by the person or body concerned; and
- (ii) the information disclosed, and any allegation contained in it, are substantially true,

is a protected disclosure.

(2) A person or body referred to in, or prescribed in terms of, subsection (1) who is of the opinion that the matter would be more appropriately dealt with by another person or body referred to in, or prescribed in terms of, that subsection, must render such assistance to the employee or worker as is necessary to enable that employee or worker to comply with this section.

(Section 8(2) substituted by section 8(b) of Act 5 of 2017)

9. General protected disclosure

(1) Any disclosure made in good faith by an employee or worker—

(Words preceding section 9(1)(a) substituted by section 9(a) of Act 5 of 2017)

- (a) who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and
- (b) who does not make the disclosure for purposes of personal gain, excluding any reward payable in terms of any law;

is a protected disclosure if -

- (i) one or more of the conditions referred to in subsection (2) apply; and
- (ii) in all the circumstances of the case, it is reasonable to make the disclosure.

(2) The conditions referred to in subsection (1)(i) are—

- (a) that at the time the employee or worker who makes the disclosure has reason to believe that he or she will be subjected to an occupational detriment if he or she makes a disclosure to his or her employer in accordance with section 6;
- (b) that, in a case where no person or body is prescribed for the purposes of section 8 in relation to the relevant impropriety, the employee or worker making the disclosure has reason to believe that it is likely that evidence relating to the impropriety will be concealed or destroyed if he or she makes the disclosure to his or her employer;
- (c) that the employee or worker making the disclosure has previously made a disclosure of substantially the same information to—
 - (i) his or her employer; or
 - (ii) a person or body referred to in section 8,

in respect of which no action was taken within a reasonable period after the disclosure; or

- (d) that the impropriety is of an exceptionally serious nature.

(Section 9(2) substituted by section 9(b) of Act 5 of 2017)

(3) In determining for the purposes of subsection (1)(ii) whether it is reasonable for the employee or worker to make the disclosure, consideration must be given to—

(Words preceding section 9(3)(a) substituted by section 9(c) of Act 5 of 2017)

- (a) the identity of the person to whom the disclosure is made;
- (b) the seriousness of the impropriety;

- (c) whether the impropriety is continuing or is likely to occur in the future;
 - (d) whether the disclosure is made in breach of a duty of confidentiality of the employer towards any other person;
 - (e) in a case falling within subsection (2)(c), any action which the employer or the person or body to whom the disclosure was made, has taken, or might reasonably be expected to have taken, as a result of the previous disclosure;
 - (f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the employee or worker complied with any procedure which was authorised by the employer; and
(Section 9(3)(f) substituted by section 9(d) of Act 5 of 2017)
 - (g) the public interest.
- (4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information referred to in subsection (2)(c) where such subsequent disclosure extends to information concerning an action taken or not taken by any person as a result of the previous disclosure.

9A. Exclusion of civil and criminal liability

- (1) A court may find that an employee or worker who makes a protected disclosure of information—
- (a) referred to in paragraph (a) of the definition of disclosure; or
 - (b) which shows or tends to show that a substantial contravention of, or failure to comply with the law has occurred, is occurring or is likely to occur,

shall not be liable to any civil, criminal or disciplinary proceedings by reason of having made the disclosure if such disclosure is prohibited by any other law, oath, contract, practice or agreement requiring him or her to maintain confidentiality or otherwise restricting the disclosure of the information with respect to a matter.

- (2) Exclusion of liability as contemplated in subsection (1) does not extend to the civil or criminal liability of the employee or worker for his or her participation in the disclosed impropriety.

(Section 9A inserted by section 10 of Act 5 of 2017)

9B. Disclosure of false information

- (1) An employee or worker who intentionally discloses false information—

- (a) knowing that information to be false or who ought reasonably to have known that the information is false; and
- (b) with the intention to cause harm to the affected party and where the affected party has suffered harm as a result of such disclosure,

is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment.

(2)

- (a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the Director of Public Prosecutions.
- (b) The Director of Public Prosecutions concerned may delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.

(Section 9B inserted by section 10 of Act 5 of 2017)

10. Regulations

- (1) The Minister may, after consultation with the Minister for the Public Service and Administration, by notice in the *Gazette* make regulations regarding -

- (a) for the purposes of section 8(1), matters which, in addition to the legislative provisions pertaining to such functionaries, may in the ordinary course be referred to any of the persons or bodies referred to in section 8(1);

(Section 10(1)(a) substituted by section 21 of Act 15 of 2023)

- (b) any administrative or procedural matter necessary to give effect to the provisions of this Act; and
- (c) any other matter which is required or permitted by this Act to be prescribed.

- (2) Any regulation made for the purposes of section 8(1)(c) must specify persons or bodies and the descriptions of matters in respect of which each person or body is prescribed.

- (3) Any regulation made in terms of this section must be submitted to Parliament before publication thereof in the *Gazette*.

(4)

- (a) The Minister must, after consultation with the Minister for the Public Service and Administration, issue practical guidelines which explain the provisions of this Act and all procedures which are

available in terms of any law to employees or workers who wish to report or otherwise remedy an impropriety.

(Section 10(4)(a) substituted by section 11 of Act 5 of 2017)

- (b) The guidelines referred to in paragraph (a) must be approved by Parliament before publication in the *Gazette*.
- (c) All organs of state must give to every employee or worker a copy of the guidelines referred to in paragraph (a) or must take reasonable steps to bring the relevant notice to the attention of every employee or worker.

(Section 10(4)(c) substituted by section 11 of Act 5 of 2017)

11. Short title and commencement

This Act is called the Protected Disclosures Act, 2000, and commences on a date determined by the President by proclamation in the *Gazette*.