

WHISTLEBLOWING IN AFRICA

A CROSS-JURISDICTIONAL GUIDE



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The Webber Wentzel Dispute Resolution Team is proud to present this whistleblowing cross-jurisdictional guide. It focuses on 9 key questions across 8 African jurisdictions, namely: Botswana; Ethiopia; Ghana; Kenya; Mauritius; Mozambique; Nigeria and South Africa.

The Judicial Commission of Inquiry into Allegations of State Capture, which was established to “investigate allegations of state capture, corruption, fraud and other allegations in the public sector including organs of state” in South Africa has concluded its work. South Africa’s Chief Justice, Raymond Zondo, delivered the sixth and final part of the multi-volume State Capture Report at the Union Building on 22 June 2022 in Pretoria, marking almost four years since the commission began.

The commission began its work in August 2017 and was initially given six months to produce its report. Due to the magnitude of the tasks, including issuing 3 171 summonses, using 8 655 530 pages of documents and calling over 300 witnesses, the commission was granted eight extensions by the courts.

The hearings were broadcast and streamed live. The documents referred to in the hearings and the transcript of the hearings were made available to the public on a daily basis. The scale of the corruption was exposed to the world.

It is clear to South Africans, the continent and the world at large that the consequences of state capture, corruption and fraud are deeply significant. They have presented barriers to equitable and sustainable development, resulting in inequity, exclusion and inequality. Whistleblowers assist in shedding light on state capture, corruption and fraud that would otherwise go unnoticed. By reporting it, they not only stand up for themselves but also perform a public service for the majority of their fellow-citizens, because we all pay a price for state capture, corruption and fraud.

During the commission, Zondo commented that “although well-intended”, the current South African legislation that applies to whistleblowers and their protection is “deficient” in a number of areas.

It is clear that whistleblowers help to tackle corruption and need to be protected. **This analysis of the continent’s position and treatment of whistleblowers demonstrates how far we have come and how far we still need to go.**









We want to thank our alliance and relationship firms for teaming up with us, as well as our internal project team, our business development team, and all partners and associates at Webber Wentzel who have had a hand in compiling this publication.

8 COUNTRIES
9 QUESTIONS
Whistleblowers -
Legislative & Policy
Frameworks Africa



Nick Alp
PARTNER
Johannesburg
+27115305339
nick.alp@webberwentzel.com

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BOTSWANA



ABOUT DLG

Desai Law Group (DLG) is Chambers ranked, International Financial Law Review 1000 (IFLR) accredited law firm based in Gaborone, founded in 2016. The goal of DLG is to be among the best legal service providers in Botswana with a commitment to international standards. DLG is a group of talented individuals who have formed a unique, dedicated law firm with one of Botswana's leading corporate lawyers at the helm, Founding and Managing Partner, Rizwan Desai. Additional cutting edge, modern and client-oriented partners include, Eleng Mugabe and Walter Mushi (Partners). The Partners all have extensive experience in the various departments in which they are housed. They have all made a mark in the legal industry as reputable attorneys and experts in their fields.

Contributors: Desai Law Group – Webber Wentzel relationship firm



BOTSWANA

QUESTION	ANSWER
<p>1</p> <p>What is the definition of a whistleblower in your jurisdiction?</p>	<p>According to section 2 of the Whistleblowing Act No. 9 of 2016 (the Whistleblowing Act), a whistleblower means a person who makes a disclosure of impropriety that is protected in terms of the Act. A disclosure of impropriety is protected if: it is made in good faith; the whistleblower reasonably believes that the disclosure and an allegation contained in the disclosure is substantially true; and the disclosure is made to an authorised person. An authorised person is defined under section 2 as a person authorised to receive a disclosure of impropriety. In Botswana, institutions which authorise certain persons to receive a disclosure of impropriety are:</p> <ul style="list-style-type: none"> • The Directorate on Corruption and Economic Crime; • The Auditor-General; • The Directorate of Intelligence and Security; • The Botswana Police Service; • The Ombudsman; • The Botswana Unified Revenue Service; • The Financial Intelligence Agency; • The Competition Authority; • The Botswana Defence Force; and • The Botswana Prisons Services.
<p>2</p> <p>What are the pieces of legislation which govern the protection of whistleblowers in your jurisdiction?</p>	<p>Whistleblowers are protected in terms of various legislation, including: the Constitution of the Republic of Botswana [Cap 00:01], Whistleblowing Act and the Corruption and Economic Crime Act, 1994 (CECA), the Employment Act [Cap 47:01], and the Financial Intelligence Act, No 2 of 2022 (FIA).</p>



QUESTION	ANSWER
<p>3</p> <p>Briefly explain the protective measures in place for whistleblowers (i.e., how is a whistleblower protected in terms of the legislation in place in your jurisdiction).</p>	<p>The Constitution: Section 12(1) of the Constitution of Botswana protects the fundamental right to freedom of expression. This is subsequently limited by s12(2)(b), which states no other law shall be deemed to be inconsistent with the protection of this right if that law provides for, inter alia, the protection of reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, or to prevent the disclosure of information received in confidence.</p> <p>Whistleblowing Act: Section 14 of the Whistleblowing Act protects the whistleblower for the disclosure of impropriety. Section 14(1) states that a whistleblower shall not be subjected to victimisation by their employer, a fellow employee or another person for making a disclosure. Section 14(2)(a) describes the victimisation of an employee as: (i) dismissal or suspension from work; (ii) their post being declared redundant; (iii) being denied promotion; (iv) being transferred by the employer; (v) harassed or intimidated by the employer or fellow employees; (vi) threatened by the employer with any of the above; and (vii) subjected to a discriminatory or other adverse measure by the employer or a fellow employee.</p> <p>Section 15 of the Whistleblowing Act protects the whistleblower against civil and criminal action: a whistleblower shall not be liable to civil or criminal proceedings in respect of a disclosure of impropriety.</p> <p>In addition, section 16 provides protective measures to whistleblowers by ensuring that a provision in a contract of employment between an employer and an employee is void if it prevents an employee from making a disclosure of impropriety; precludes an employee from making a complaint about victimisation; and prevents an employee from bringing an action in court or before an institution to claim relief or remedy in respect of victimisation.</p> <p>CECA: Section 45 offers protection to whistleblowers. Section 45, “Protection of informers”, confers anonymity on whistleblowers, with s45(1) prohibiting the obligation of a witness in a trial in respect of an offence under CECA to disclose the name or address of any informer or state any matter which might lead to their discovery.</p> <p>Section 45(2) allows the court to conceal or obliterate any passages and mentions in any documentary evidence in proceedings under CECA in which an informer is named or described or which might lead to their discovery.</p> <p>Employment Act: Section 13(a) of the Employment Act similarly offers protection to whistleblowers. It provides that neither the Commissioner nor any labour officer shall, in pursuance of the Employment Act, reveal the source of any complaint about a defect or a breach of the law, or give any intimation to an employer that a visit or inspection was made in consequence of such a complaint.</p> <p>Section 23(c) of the Employment Act provides that, in spite of anything in a contract of employment, an employer shall not terminate the contract on the grounds that the employee made, in good faith, a complaint or participated in proceedings against the employer involving the alleged violation of any law.</p> <p>FIA: A person who reports a suspicious transaction under FIA is also indemnified from civil or criminal liability under section 47(1) of the Act, if the report was made in good faith, whether or not an investigation finds the suspicion well-founded. Section 47(2) provides that no evidence about the identity of the person who has made, initiated, or contributed to a report of a suspicious transaction or who has furnished additional information concerning the report is admissible as evidence in court proceedings, unless the person testifies as part of the proceedings.</p>



QUESTION	ANSWER
<p>4</p> <p>What is the procedure prescribed by legislation for an employee to make a protected disclosure?</p>	<p>Whistleblowing Act: Section 9 of the Whistleblowing Act prescribes the procedure for making a disclosure. Section 9(1) provides that a disclosure for impropriety may be made orally or in writing, despite subsection (1). Section 9(2) is progressive, as it allows digital communication. All forms of information communication technology may be used to convey a disclosure of impropriety.</p> <p>Section 9(3) specifies that a disclosure of impropriety shall contain, as far as practicable: (a) the full name, address and occupation of the whistleblower; (b) the nature of the impropriety; (c) the name and particulars of the person the allegations are levelled against; (d) the time and place of the alleged impropriety; (e) the full name, address and description of any witnesses to the impropriety; (f) whether the whistleblower has previously made a disclosure of the same impropriety on a previous occasion and, if so, about whom and to whom the disclosure was made; (g) if the whistleblower is making an employment-related disclosure and if the whistleblower remains in the same employment; and (h) any other information that the Minister may prescribe.</p> <p>FIA: Section 43 of FIA requires a suspicious transaction report made by a specified party under FIA to include: (a) the identification of the customer and the other party to the transaction; (b) the nature of the transaction; (c) the amount of the transaction; (d) the circumstances giving rise to the suspicion; (e) the business relationship of the customer to the person making the report; (f) if the customer is an insider, whether they are still affiliated with the specified party; (g) any voluntary statement made about the origin, source or destination of the proceeds; (h) the impact of the suspicious transaction on the financial soundness of the specified party; and (i) the names of all officers, employees or agents dealing with the suspicious transaction.</p>
<p>5</p> <p>Does the legislation place any reporting obligations on certain employees to report any form of irregular conduct in the workplace? If so, what are the consequences (if any) of a failure to do so?</p>	<p>Employment Act: Section 11(8) of the Employment Act provides that it is the duty of every labour officer to bring to the notice of the Commissioner of Labour any abuses not specifically covered under the Employment Act and any other defects or omissions. The sanction for failure to act in line with this obligation is provided for under section 151(c), which prescribes a fine not exceeding BWP 1 500 or imprisonment for a term not exceeding twelve months, or both.</p> <p>FIA: Section 38 of FIA places an obligation on certain professionals and their institutions to report to the Financial Intelligence Agency suspicious financial transactions they observe in the execution of their professional duties. The various professionals in this section, referred to as specified parties, are listed in Schedule 1 of the FIA. The list includes various professional trades that are critical to or have oversight in commercial and financial transactions. Section 38(3) specifically provides for attorneys, conveyancers, notary publics and accountants to report suspicious transactions in the execution of their duties on behalf of a client, with section 38(4) specifying that this disclosure can be made in privileged circumstances if the transaction is communicated to the attorney to advance a criminal or fraudulent purpose.</p> <p>FIA defines a suspicious transaction as one that is: (a) inconsistent with a customer's known legitimate business, personal activities or normal business for the type of account the customer holds; (b) gives rise to a reasonable suspicion that it may involve the commission of a financial offence; (c) gives rise to a reasonable suspicion that it may involve property connected to the commission of a financial offence or involves property used to commit the financial offence, whether or not the property represents the proceeds of an offence; (d) is made in circumstances of unusual or unjustified complexity; (e) appears to have no economic justification or lawful objective; (f) is made by or on behalf of a person whose identity has not been established to the satisfaction of the person with whom the transaction is made; or (g) raises suspicion for any other reason.</p> <p>Under Section 46(1), a specified party or institution that fails to report a suspicious transaction is liable to an administrative fine not exceeding BWP 5 000 000, or a suspension or revocation of their licence or registration, or both penalties. A member of senior management of a specified party or accountable institution who fails to comply with the anti-money laundering and counter-financing of terrorism measures commits an offence under section 48 of FIA and is liable to a fine not exceeding BWP 250 000, or imprisonment for a term not exceeding five years, or both.</p>



BOTSWANA

QUESTION	ANSWER
<p>6</p> <p>Does the legislation place any reporting obligations on individuals to report any form of conduct which would fall within the relevant definition of corrupt behaviour?</p>	<p>Yes. Section 40(1) of FIA covers general reporting. It states that a person who carries on, is in charge of, manages, or is employed by, a business shall report to the Agency any transaction which they have reason to believe may be suspicious.</p> <p>Section 40(2) also provides that a person who accepts any payment in cash exceeding the amount prescribed or the equivalent in foreign currency shall report it to the FIA. Section 20 of the Financial Intelligence Regulations, 2022 (the FIA Regulations) sets this threshold at BWP 10 000.</p> <p>Under section 46(2), a person who fails to report under this section commits an offence and is liable to a fine not exceeding BWP 3 000 000 or imprisonment for a term not exceeding twenty years, or both.</p>
<p>7</p> <p>Are there specific obligations provided to directors to report any form of conduct which would fall within the relevant definition of corrupt behaviour?</p>	<p>No. There is nothing specific to directors of a company.</p>
<p>8</p> <p>Are there any consequences for an individual who intentionally discloses false information disguised as information relating to a protected disclosure or allegations regarding corrupt behaviour?</p>	<p>Yes. Section 17 of the Whistleblowing Act states that a person who knowingly makes a disclosure alleging impropriety, knowing the information to be false, commits an offence and is liable to a fine not exceeding BWP 10 000 or a term of imprisonment not exceeding five years, or both.</p>
<p>9</p> <p>Please give a short summary of a key decision by your court or regulator where the provisions of legislation applicable to whistleblowers (whether employees or otherwise) have been applied in practice.</p>	<p>To date, Botswana has not recorded any decisions by a court from any of the legislation applicable to whistleblowers.</p>

ETHIOPIA



ABOUT TKLO

Tadesse Kiros Law Office (TKLO) was founded in 1996 by Tadesse Kiros, former Deputy Chief Justice of Ethiopia. TKLO is a leading legal service provider covering several areas of practice, including mergers and acquisitions, energy and mining, projects and infrastructure, tax, banking and finance, insurance, employment, construction, procurement, telecommunication, competition, arbitration and intellectual property. Continuously top-ranked by Chambers and Partners, TKLO serves a number of high-profile investors and is a partnership firm in Ethiopia for top global law firms. This relationship has given TKLO the opportunity to share expertise and resources as well as networks. Its membership of prominent international lawyers' networks, coupled with its relationships with prominent global and regional law firms, positions TKLO uniquely as a local service provider capable of deploying its African and global connections to best serve its clients.

Contributors: Tadesse Kiros & Associates - Webber Wentzel bilateral firm





ETHIOPIA

QUESTION	ANSWER
<p>1</p> <p>What is the definition of a whistleblower in your jurisdiction?</p>	<p>The term “whistleblower” is defined differently in different laws.</p> <p>The Revised Federal Ethics and Anti-Corruption Commission Proclamation No. 1236/2021 defines a whistleblower as “any person who reports to the Commission or ethics liaison units a corruption offence intended to be committed or inaccurate asset registration” (Art 2 (16)).</p> <p>The Protection of Witnesses and Whistleblowers of Criminal Offences (PWWCO) Proclamation No. 699/2010 does not contain a standalone definition for whistleblowers. There is a single definition for both witnesses and whistleblowers. A “whistleblower or witness” is defined as “a person who has given or agrees to give information or has acted or agrees to act as a witness in the investigation or trial of an offence.” (Art. 2 (1)).</p> <p>The Revised Anti-Corruption Special Procedure and Rules of Evidence (Amendment) Proclamation No. 882/2015 also provides a definition for “informant” which is akin to whistleblower. The Amharic equivalent for “informant” in this proclamation is identical to the Amharic equivalent ascribed to “whistleblower” in the preceding Proclamation and under PWWCO Proclamation.</p> <p>The term informant is defined under Revised Anti-Corruption Proclamation No. 882/2015 as: “any person who provides information, when he believes that corruption offences are committed, to appropriate organ or other justice organs, to the heads of public office, public enterprise or public organization or to anyone who has the duty to investigate crimes of corruption based on laws or directives and includes an auditor who audits matters relating to offences of corruption or an auditor who detects the commission of the offence of corruption in connection with the course of his auditing duties, and anyone who inspects or investigates such offences.” (Art. 2 (7))</p>
<p>2</p> <p>What are the pieces of legislation which govern the protection of whistleblowers in your jurisdiction?</p>	<p>The following are the primary legislations governing the protection of whistleblowers in Ethiopia:</p> <ul style="list-style-type: none"> • The Revised Federal Ethics and Anti-Corruption Commission Proclamation No. 1236/2021 (REACC Proclamation) • The Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation No. 699/2010 (PWWCO Proclamation) • Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005 • Revised Anti-Corruption Special Procedure and Rules of Evidence (Amendment) Proclamation No. 882/2015]



ETHIOPIA

QUESTION	ANSWER
<p>3</p> <p>Briefly explain the protective measures in place for whistleblowers (i.e. how is a whistleblower protected in terms of the legislation in place in your jurisdiction).</p>	<p>The following protections are available for a whistleblower and his/her family members (Article 4 of PWWCO Proclamation):</p> <ul style="list-style-type: none"> • physical protection of person and property; • providing a secure residence, including relocation; • concealing identity and ownership; • change of identity; • provision of a self-defence weapon; • immunity from prosecution for an offence for which they render information; • prohibiting an accused person from reaching their residence, workplace or school before or after a final judgment is delivered on the crime for which information is given; • not to disclose the identity of a witness until the trial process begins and the witness testifies; • hearing testimony in camera; • hearing testimony behind a screen or by disguising identity; • producing evidence by electronic devices or any other method; • unless it is deemed confidential, providing information about the progress of the investigation into what has been revealed and advice to a whistleblower; • covering relocation costs, if protection measures entail relocation; • suspension or revocation of retaliatory administrative measures or taking any other compensatory measure; • provision of medical treatment free of charge at government hospitals in case of injury sustained as a result of retaliatory measures; • covering costs of basic needs in case of incapacity to work as a result of retaliatory measures; • in case of death as a result of retaliatory measures, covering funeral expenses and providing a financial subsidy to the family; and • providing or obtaining a counselling service. <p>A separate protective measure or a combination of protective measures may be extended to the whistleblower, as necessary. There are also protections for a whistleblower of corruption crimes under the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005. Protection is afforded to whistleblowers to encourage the disclosure of corruption offences and appropriate consideration is given to the rights and interests of the whistleblower. Disclosure of information by a whistleblower regarding corruption crimes can be made with or without disclosing his/her identity (Articles 48 & 49). Even though the whistleblower has the duty to maintain confidentiality about the subject matter covered under his/her disclosure, the disclosure shall not be considered as a violation of law, oath, or agreement as long as the disclosure is made to the organ empowered to investigate and/or prosecute corruption offences. (Art. 50). In addition, the Proclamation makes a reprisal against a whistleblower illegal and provides that the whistleblower can seek redress from a court to suspend a reprisal measure. (Article 53).</p>



ETHIOPIA

QUESTION	ANSWER
<p>4</p> <p>What is the procedure prescribed by legislation for an employee to make a protected disclosure?</p>	<p>For the whistleblower to qualify for protection, the information shall relate to an offence which is punishable with ten years or more of rigorous imprisonment or the death penalty. In addition, the whistleblower will be eligible if the offence could not have been revealed or established by any other means than whistleblowing AND it is believed that a threat of serious danger exists to the life, physical security, freedom or property of the whistleblower or their family members (Art. 3 of PWWCO Proclamation).</p> <p>The whistleblower, an investigator or a public prosecutor needs to apply for protection, and only after the application is accepted, and a protection agreement is entered into between the whistleblower and the Ministry of Justice, will protection be provided to the whistleblower (Art. 6 (1) and (Art. 8 (1) of the PWWCO Proclamation). The application for protection should include information on the identity and address of the applicant; the offence related to the whistleblowing; the danger to which the applicant is exposed; and any prior civil or criminal case brought against the applicant, debt owed by, or a court decision depriving the applicant of their rights (Article 6 (2). The Ministry of Justice is required to decide on the application for protection within thirty days. Protection may be given in exceptional circumstances pending the decision, if the Ministry believes there is grave danger to the life, physical security, or property of the applicant (Article 7 (2) & (3) of the PWWCO Proclamation).</p>
<p>5</p> <p>Does the legislation place any reporting obligations on certain employees to report any form of irregular conduct in the workplace? If so, what are the consequences (if any) of a failure to do so?</p>	<p>The PWWCO Proclamation does not contain provisions requiring employees to report. However, there are subsidiary legislations requiring employees to report unethical or corrupt behaviour. That reporting will qualify for protection under the PWWC Proclamation. The employees of the Higher Education Relevance and Quality Agency (recently restructured as Education and Training Authority (ETA)) have the duty to report improper conduct at the workplace to the head of the department, ethics office or the Ethics and Anti-Corruption Commission. Failure to report, or reporting contrary to good faith, is considered to be a grave disciplinary violation and will be subject to disciplinary measures, ranging from a fine of three months' salary to dismissal. (Articles 2 (14), 20 (1), 21, 7 (1) of the Employees of Higher Education Relevance and Quality Agency Discipline Directive No. 578/2013.)</p> <p>Employees and Heads of the Ethiopian Railway Corporation (Disciplinary Directive No. 654/2013) are also required to report disciplinary infractions, maladministration, or corrupt behaviour at the Corporation. Failure to do so or reporting contrary to good faith is a grave disciplinary violation and subject to measures ranging from payment of three months' salary as fines to dismissal (Articles 2 (17), 8 (2) & (7), 20 & 21)).</p> <p>According to Food and Medicine Administration Proclamation No. 1112/2019, a person participating in the manufacturing of food who know, or has reason to believe, that a significant risk to the public's health exists, has the duty to promptly inform the relevant federal or regional organ (Article 8 (2)). The same law obliges health professionals working for a medicine or medical device institution to report risks of public health significance related to the quality, safety and efficacy of medicine or quality, safety, and effectiveness of a medical device (Art. 24 (2)). Failure to report may be punished with simple imprisonment of not more than three months and a fine of ETB 10 000 to 50 000 (Article 67 (17)).</p> <p>On customs-related offences, there is also a general duty on any person who has information about untaxed or less taxed goods, in contravention of customs law, or about prohibited, restricted or contraband goods, to immediately inform the nearest branch of the Ministry of Revenues or law enforcement body. The Ministry is obliged to keep the information and the identity of the informant confidential. (Article 133 of Customs Proclamation No. 859/2014 as amended by Proclamation No. 1160/2019).</p>



ETHIOPIA

QUESTION	ANSWER
<p>6</p> <p>Does the legislation place any reporting obligations on individuals to report any form of conduct which would fall within the relevant definition of corrupt behaviour?</p>	<p>As indicated above, the Directive regulating the disciplinary behaviour of employees of the Ethiopian Railway Corporation explicitly requires employees and heads of workstreams/ directors to report corrupt behaviour in workplaces.</p>
<p>7</p> <p>Are there specific obligations provided to directors to report any form of conduct which would fall within the relevant definition of corrupt behaviour?</p>	<p>The Directive regulating the disciplinary behaviour of employees of the Ethiopian Railway Corporation applies to directors/heads as well. Therefore, they are required to report corrupt behaviour in the workplace.</p>
<p>8</p> <p>Are there any consequences for an individual who intentionally discloses false information disguised as information relating to a protected disclosure or allegations regarding corrupt behaviour?</p>	<p>The PWWC Proclamation states that giving false information is one of the grounds for the termination of the Protection Agreement (article 12 (1) (h)). In addition, failure to give true information/evidence is punishable with imprisonment not exceeding ten years (Art. 29 (1) (a)).</p>
<p>9</p> <p>Please give a short summary of a key decision by your court or regulator where the provisions of legislation applicable to whistleblowers (whether employees or otherwise) have been applied in practice.</p>	<p>Court decisions are not digitally available in Ethiopia. Selected decisions of the Cassation Division of the Federal Supreme Court are published online and in print. However, there are no decisions related to whistleblowers' protection in these publications.</p>

GHANA



ABOUT BELA

Bentsi-Enchill Letsa & Ankamah ('BELA') is ranked as the leading law firm in Ghana, providing first rate legal services for international and local clients. As a full-service law firm, BELA is structured into specialised departments namely Disputes Department, Financial Institutions & Capital Markets, Corporate & Commercial, and Energy & Infrastructure. The Disputes Department has expertise in Commercial and Corporate Litigation, Alternative Dispute Resolution and Regulatory Investigation & White-Collar Crime. The team's practical knowledge of clients' business problems puts it in the unique position to advise on preventive measures to avoid litigation.

Contributors: Bentsi-Enchill Letsa & Ankamah ('BELA') – Webber Wentzel relationship firm





GHANA

QUESTION	ANSWER
<p>1</p> <p>What is the definition of a whistleblower in your jurisdiction?</p>	<p>A whistleblower is a person who discloses information with reasonable cause to believe that it exposes:</p> <ul style="list-style-type: none"> • economic crime; • a miscarriage of justice; • misappropriation of public resources; • environmental degradation; • danger to health/safety; or • defiance of the law.
<p>2</p> <p>What are the pieces of legislation which govern the protection of whistleblowers in your jurisdiction?</p>	<p>Whistleblower Act, 2006 (Act 720)</p>
<p>3</p> <p>Briefly explain the protective measures in place for whistleblowers (i.e. how is a whistleblower protected in terms of the legislation in place in your jurisdiction).</p>	<p>The Act protects whistleblowers from victimisation in the following manner:</p> <ul style="list-style-type: none"> • CHRAJ Complaint: whistleblowers who believes they have been or are likely to be victimised may file a complaint with the Commission of Human Rights and Administrative Justice (CHRAJ). The CHRAJ will investigate and can order, inter alia, reinstatement, reversal of a transfer, or a transfer of the whistleblower to another establishment. The ruling has the same weight as a judgment or order of the High Court. • Legal Assistance: If the whistleblower requires legal assistance during the inquiry process, the CHRAJ will provide it through the Legal Aid Board or another institution. • Court Action: Whistleblowers may sue in the High Court for damages for breach of contract, or any other relevant relief or remedy. • Police Protection: Whistleblowers may request and be assigned adequate police protection if they have a reasonable belief that their family's life or property is endangered or likely to be endangered as a result of the disclosure. • Immunity: Whistleblowers are protected from civil and or criminal proceedings or liability arising from the disclosure, unless it is proved they knew the information was false and made the disclosure with malicious intent. • Void Contractual Provisions: Any contractual provision in an employment or other agreement that: <ul style="list-style-type: none"> - seeks to prevent or discourage an employee from making a disclosure; - precludes an employee from making a complaint of victimisation; or - prevents an employee from bringing an action in court or before any other institution to claim a relief or remedy in respect of victimisation is void and unenforceable.



GHANA

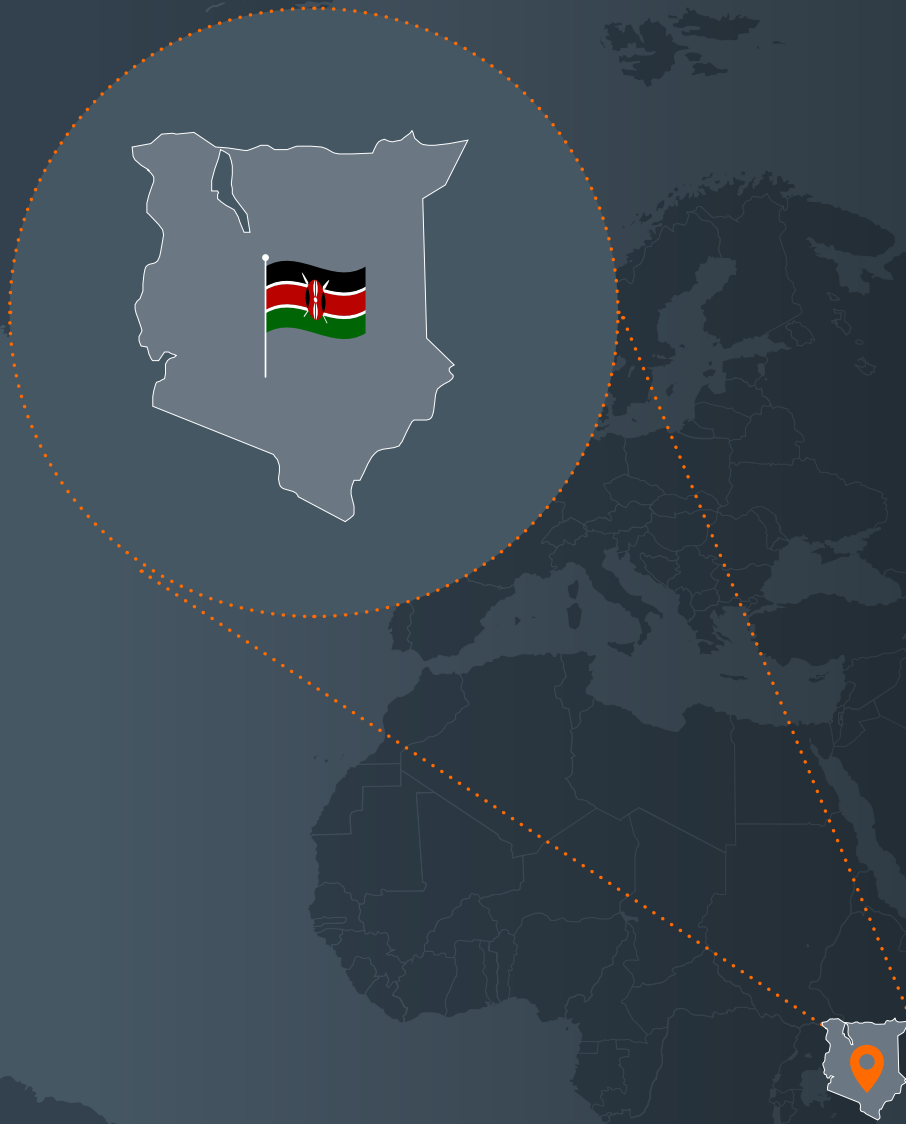
QUESTION	ANSWER
<p>4</p> <p>What is the procedure prescribed by legislation for an employee to make a protected disclosure?</p>	<p>The Act does not provide a special procedure for a protected disclosure by an employee. It provides generally that a disclosure may be made either orally or in writing and must contain:</p> <ul style="list-style-type: none"> • the full name, address, and occupation of the whistleblower; • the nature of the impropriety; • the alleged offender; • a time and place of occurrence; • the full name, address and description of another person who witnessed the commission of the crime (if applicable); and • relevant information about any previous disclosures made. <p>If the disclosure is made orally, the person to whom the disclosure is made shall reduce it into writing with the same particulars.</p>
<p>5</p> <p>Does the legislation place any reporting obligations on certain employees to report any form of irregular conduct in the workplace? If so, what are the consequences (if any) of a failure to do so?</p>	<p>No. The general circumstances for whistleblowing, stated above, apply to all persons.</p>
<p>6</p> <p>Does the legislation place any reporting obligations on individuals to report any form of conduct which would fall within the relevant definition of corrupt behaviour?</p>	<p>No.</p>
<p>7</p> <p>Are there specific obligations provided to directors to report any form of conduct which would fall within the relevant definition of corrupt behaviour?</p>	<p>No.</p>



GHANA

QUESTION	ANSWER
<p>8</p> <p>Are there any consequences for an individual who intentionally discloses false information disguised as information relating to a protected disclosure or allegations regarding corrupt behaviour?</p>	<p>The Act does not protect a whistleblower who knowingly and maliciously discloses false information. That person may be liable to civil or criminal proceedings brought in respect of the false information.</p>
<p>9</p> <p>Please give a short summary of a key decision by your court or regulator where the provisions of legislation applicable to whistleblowers (whether employees or otherwise) have been applied in practice.</p>	<p><i>In the Republic v Fast Track High Court, Accra Ex-Parte Commission on Human Rights And Administrative Justice</i> [Unreported; Civil Motion No J5/10/2007; 21 December 2007] the Supreme Court had to determine whether a formal complaint (within the meaning of article 218 (a) of the 1992 Constitution) by an identifiable complainant was a condition precedent to CHRAJ commencing investigations. It expressed the view that the Act requires a disclosure of impropriety to be made formally to named individuals and institutions and it does not provide for anonymous or other allegations made in the media etc.</p>

KENYA



ABOUT A&K

A&K is the largest full-service corporate law firm in East Africa, with over 100 lawyers. It has developed specialist expertise in several practice areas, including corporate and commercial law, mergers and acquisitions, private equity, energy, infrastructure, project finance, real estate, competition, capital markets, banking and finance, intellectual property, tax, employment, dispute resolution and forensics, investigations and compliance. A&K operates Africa-wide, both in its own capacity and in collaboration with ALN firms across the continent. It has offices in Nairobi, Mombasa and affiliate offices in Dubai (ALN UAE|Anjarwalla Collins & Haidermota (AC&H)) and Tanzania (ALN Tanzania|A&K Tanzania) which provide corporate and commercial legal services. A&K has won various awards, including the 'African Law Firm of the Year – Large Practice' award at the African Legal Awards five times since the launch of the award in 2013.

Contributors: Anjarwalla & Khanna LLP – Webber Wentzel relationship firm



KENYA

QUESTION	ANSWER
<p>1</p> <p>What is the definition of a whistleblower in your jurisdiction?</p>	<p>Kenya does not currently have a Whistleblower Protection Act, but a comprehensive Whistleblower Protection Bill, 2021 (the Whistleblower Bill) is currently before the National Assembly awaiting first reading. At the time of writing, the Kenyan National Assembly has been prorogued ahead of the General Elections scheduled to be held on 9 August 2022. Therefore, there is no certainty around the promulgation of the Bill.</p> <p>The Bill as currently drafted defines a ‘whistleblower’ as any person who has personal knowledge of or access to any data, information, fact, or event constituting improper conduct and who discloses that information.</p> <p>The term also appears in the Bribery Act, (No. 47 of 2016) (the Bribery Act), which defines a ‘whistleblower’ as ‘a person who makes a report to the Ethics and Anti-Corruption Commission (the Ethics Commission) or the law enforcement agencies on acts of bribery or other forms of bribery’.</p>
<p>2</p> <p>What are the pieces of legislation which govern the protection of whistleblowers in your jurisdiction?</p>	<p>The primary legislation governing the protection of whistleblowers are the Bribery Act and the Bribery Regulations, 2021.</p> <p>Furthermore, as provided above, it is important to consider the Whistleblower Bill, as it sets out procedures for disclosing information on improper conduct within the public and private sectors and provides an overarching legal and institutional framework for the protection of whistleblowers.</p> <p>Although other existing laws do not expressly contain provisions relating to whistleblowing, they do address in a general principles-based way the role that whistleblowers, informers and witnesses play in exposing improper conduct.</p> <p>For instance, the Ethics and Anti-Corruption Commission Act (No. 22 of 2011) requires the Ethics Commission to develop and promote standards and best practices in integrity and anti-corruption and empowers it to receive complaints on the breach of the code of ethics by public officers. The Leadership and Integrity Act (No. 9 of 2012) provides for a ‘general leadership and integrity code’ for State Officers, which includes fostering public trust, avoiding conflicts of interest, and promoting integrity. It provides that any person may lodge a complaint alleging breach of the code.</p> <p>The Anti-Corruption and Economic Crimes Act (No. 3 of 2003) contains provisions protecting from any reprisal informers who may assist or disclose information to the Ethics Commission or any investigator relating to an allegation that economic crime(s) were committed.</p>



KENYA

QUESTION	ANSWER
<p>3</p> <p>Briefly explain the protective measures in place for whistleblowers (i.e., how is a whistleblower protected in terms of the legislation in place in your jurisdiction).</p>	<p>The Bribery Act protects a whistleblower when a complaint or a case of bribery is involved. Under the Bribery Act, any person who demotes, admonishes, dismisses from employment, transfers to unfavourable working areas, or otherwise harasses and intimidates a whistleblower is guilty of an offence and shall be liable upon conviction to a fine not exceeding KES 1 000 000 or to imprisonment for a term not exceeding one year, or both.</p> <p>The Bribery Act also provides protection for a whistleblower by the Witness Protection Agency. The Witness Protection Agency is established under the Witness Protection Act (No. 16. of 2006) and its objective is to provide protection to witnesses who are required to give evidence in any criminal proceedings.</p> <p>The Bribery Regulations provide that both public and private entities shall establish appropriate measures to protect from retaliation, reprisal, or victimisation any person who reports, in good faith, any knowledge or suspicion of an act of bribery or corruption.</p> <p>As required under the Bribery Act, the Attorney-General also issued Guidelines to assist public and private entities to prepare procedures to prevent bribery and corruption. The Guidelines set out various guiding principles, including on the protection of whistleblowers.</p> <p>More specifically, the procedures should provide effective protective measures for whistleblowers, informants, and witnesses. This includes maintaining the confidentiality of the identity of whistleblowers, informants, and witnesses; the details of the bribery or corruption report; and the sources of information relating to the bribery or corruption report. These measures should include establishing reporting channels for whistleblowers; taking appropriate action on reports of retribution, victimisation or intimidation of informants, witnesses, and whistleblowers; and instituting protection measures for whistleblowers, informants, and witnesses within the entity.</p>



KENYA

QUESTION	ANSWER
<p>4</p> <p>What is the procedure prescribed by legislation for an employee to make a protected disclosure?</p>	<p>The Bribery Act is silent on the procedure for an employee to make a protected disclosure. However, the Guidelines provide for several measures that an organisation should put in place to enable the reporting, recording, processing, and dissemination of whistleblower reports for action and feedback. The Guidelines require the reporting mechanisms to facilitate timely reporting; access to reporting channels; confidentiality; prompt action; protection of whistleblowers; and feedback.</p> <p>The Whistleblower Bill, as currently drafted, sets out how to make a disclosure. Firstly, every private and public body must establish and maintain written procedures, including time periods for managing and investigating disclosures by employees. The procedures should at least include the following:</p> <ul style="list-style-type: none"> • Receiving and reviewing disclosures. • Referring a disclosure to an appropriate public body or the Commission on Administrative Justice. • Reviewing and investigating disclosures in accordance with the principles of fairness and natural justice. • Respecting the confidentiality of information collected in relation to disclosures and investigations; and • Protecting the identity of individuals involved in the disclosure process. <p>The Bill provides that a public or private body may appoint a senior official to be the designated officer for the purposes of managing and investigating disclosures.</p> <p>A disclosure ought to be made if an employee has information that they reasonably believe is evidence of improper conduct that has or may have occurred. However, a disclosure does not qualify for protection if the person making it commits an offence by making it. The Bill provides various entities to which a protected disclosure may be made, including the Commission on Administrative Justice, the Presidency, the Ethics Commission, an employer of a whistleblower, and a registered newspaper or media house.</p> <p>In determining the appropriate person or body to whom a protected disclosure may be made, the Bill states that a whistleblower shall take into account whether there is a reasonable fear that they may be subject to dismissal, suspension, harassment or intimidation at their place of employment; whether there is reasonable belief that evidence may be concealed or destroyed; and whether the person to whom the disclosure is made is likely to frustrate the objective, among others.</p> <p>An employee may make a disclosure directly to the Commission on Administrative Justice in the following instances:</p> <ul style="list-style-type: none"> • No procedures have been established by the public or private body or the Commission on Administrative Justice; • The person has made a disclosure and an investigation was not completed in accordance with the procedures; • The person is dissatisfied with the final decision of a disclosure investigation; • The subject-matter of the disclosure involves the supervisor, chief executive, or head of the public or private entity where the employee works; and • A disclosure is made and a reprisal is taken or directed against the person. <p>The Bill requires all disclosures to be in writing. A disclosure must contain, as far as practicable, the following:</p> <ul style="list-style-type: none"> • The full name and contact information of the whistleblower, unless the disclosure is made anonymously; • The nature of the improper conduct; • The details of the person alleged to have engaged in improper conduct; • The time and location where the alleged improper conduct took place; and • If the disclosure is related to the whistleblower's employment, whether the whistleblower remains in the same employment. <p>If a disclosure is made anonymously, the Bill provides that it must be made in writing and contain a mark affirming the person's honest belief in the truth of the information disclosed.</p>



KENYA

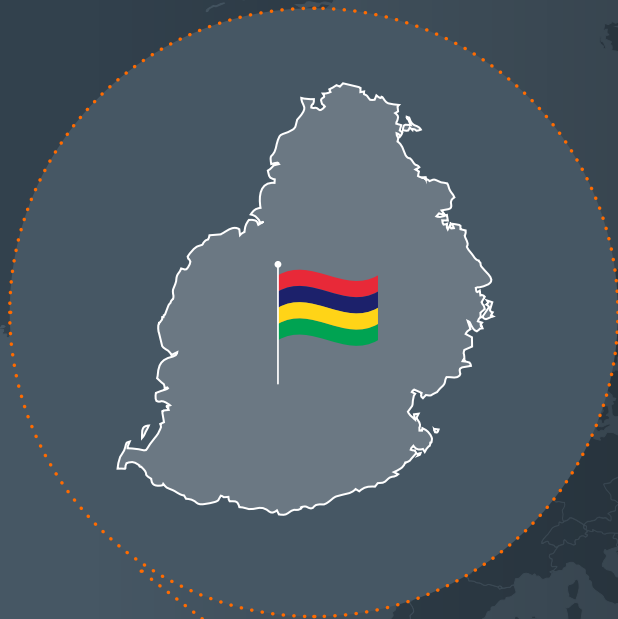
QUESTION	ANSWER
<p>5</p> <p>Does the legislation place any reporting obligations on certain employees to report any form of irregular conduct in the workplace? If so, what are the consequences (if any) of a failure to do so?</p>	<p>The Bribery Act places a responsibility on state officers, public officers, or any person holding a position of authority to report to the Ethics Commission.</p> <p>The Bill provides that any person who has knowledge that improper conduct has occurred or is likely to occur and does not make a disclosure within two days commits an offence.</p>
<p>6</p> <p>Does the legislation place any reporting obligations on individuals to report any form of conduct which would fall within the relevant definition of corrupt behaviour?</p>	<p>The Bribery Act requires every state officer, public officer, or any other person holding a position of authority in a public or private entity to report to the Ethics Commission within twenty-four hours of acquiring any knowledge or suspicion of instance of bribery.</p> <p>Failure to abide by the duty to report within the specified timelines is an offence. Please note that, although the above provision appears to be limited to any person 'holding a position of authority', the provision in the Bribery Act which criminalises the failure to report appears to extend the duty to report to 'any other person who, despite being aware of or suspicious of the commission of an offence under the Act, fails to report the act to the Commission within the specified period.....'</p>
<p>7</p> <p>Are there specific obligations provided to directors to report any form of conduct which would fall within the relevant definition of corrupt behaviour?</p>	<p>The duty to report as set out above applies to all persons holding a position of authority, whether in a private or public entity. The Bribery Act or the Bribery Regulations do not place any specific obligations on directors to report over and above the general duty to report.</p> <p>The Whistleblower Bill also imposes an obligation to make a disclosure. Any person who has knowledge that improper conduct has occurred or is likely to occur and does not make a disclosure within two days commits an offence.</p>



KENYA

QUESTION	ANSWER
<p>8</p> <p>Are there any consequences for an individual who intentionally discloses false information disguised as information relating to a protected disclosure or allegations regarding corrupt behaviour?</p>	<p>The Bribery Act is silent on the intentional disclosure of false information disguised as information relating to a protected disclosure or allegations regarding corrupt behaviour. However, it is important to note that the Bill provides that any person who deliberately and voluntarily gives false or misleading information in connection with a disclosure of improper conduct commits an offence and is liable on conviction to imprisonment for up to fourteen years or a fine of up to KES 10 000 000, or both.</p> <p>The Commission on Administrative Justice under the Whistleblower Bill also has the power to revoke the protection given to a whistleblower if it is determined that, in disclosing improper conduct, the whistleblower made a material statement which he or she knew or believed to be false.</p> <p>Section 65 of the Anti-Corruption and Economic Crimes Act provides protection for informants from any action or proceeding but does not extend this protection to someone who, when making the disclosure, did not believe it to be true.</p>
<p>9</p> <p>Please give a short summary of a key decision by your court or regulator where the provisions of legislation applicable to whistleblowers (whether employees or otherwise) have been applied in practice.</p>	<p>Several Kenyan decisions have dealt with reprisals on whistleblowers in the context of employment. In a recent case, for example, an accountant employed at Maasai Mara University, a public university in Kenya, exposed gross mismanagement and theft of public funds at the University and was subsequently dismissed from employment when the disclosure gained public notoriety after a documentary aired on national television. The accountant avers that his former employer acted unlawfully in dismissing him from employment, and that the dismissal was retaliation for having blown the whistle. At the time of writing, the dispute is before the Employment and Labour Relations Court and is yet to be determined.</p> <p>In another instance, the Employment and Labour Relations Court found in favour of an employee working at the Customs Department of the Kenya Revenue Authority whose employment was unlawfully and unfairly terminated on account of whistleblowing and reporting a fraudulent release of containers at the port.</p> <p>It is important to note that the Report of the Taskforce on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya, 2015 identified that a key obstacle to effectively fighting and combating corruption was a weak legal regime of witness and whistleblower protection. The Taskforce recommended that the Government fast track the enactment and implementation of a Whistleblower Protection Act to provide a comprehensive mechanism for protecting whistleblowers and informants.</p> <p>In this regard, it is anticipated that, once the Bill is in force, whistleblowers will receive substantial protection under the law. This should incentivise those who may otherwise fail to disclose improper conduct owing to a fear of reprisals.</p>

MAURITUS



ABOUT BLC ROBERT & ASSOCIATES

BLC Robert & Associates Ltd is the leading independent business law firm in Mauritius. It serves a spectrum of corporate and institutional clients, multinational companies, financial institutions, funds and public sector bodies. With deep expertise, a client-centric approach and service excellence, it helps clients investing or doing business in Africa and Asia via the Mauritius IFC to achieve their objectives, close deals, protect and preserve their business interests. The firm's lawyers are multi-specialists, with in-depth expertise in diverse sectors, and they have strong capabilities to provide clients with tailored commercial, pragmatic solutions to complex legal matters. BLC Robert & Associates, which has been named as 'Law Firm of the Year in Mauritius' by both Chambers Global and IFLR, is a member of Africa Legal Network (ALN), an alliance of independent, highly-ranked firms in 13 countries.

Contributors: BLC – Webber Wentzel relationship firm



MAURITIUS

QUESTION	ANSWER
<p>1</p> <p>What is the definition of a whistleblower in your jurisdiction?</p>	<p>There is no specific definition of a whistleblower in Mauritius in any legislation to date. A commonly-used interpretation is that it refers to the exposure, by an employee or any other person, of corruption, fraud, other wrongdoings, and dishonest/illegal activity in an organisation which could harm public interest.</p>
<p>2</p> <p>What are the pieces of legislation which govern the protection of whistleblowers in your jurisdiction?</p>	<p>Mauritius has no specific whistleblowing legislation. The applicable pieces of legislations are as follows:</p> <ul style="list-style-type: none"> • Prevention of Corruption Act of 1 April 2002 (POCA) • Financial Intelligence and Anti-Money Laundering Act of 10 June 2002 (FIAMLA) • Good Governance and Integrity Reporting Act of 9 December 2015 (GGIR) • Workers' Rights Act of 23 August 2019 (WRA)



MAURITIUS

QUESTION	ANSWER
<p>3 Briefly explain the protective measures in place for whistleblowers (i.e., how is a whistleblower protected in terms of the legislation in place in your jurisdiction).</p>	<p>Corruption Prevention: The POCA provides that any person may, orally or in writing, without disclosing their identity, notify the Independent Commission Against Corruption (ICAC) of the existence or possible existence of corruption. For that purpose, the POCA urges the ICAC to take all necessary steps to facilitate the notification of the possible existence of an act of corruption.</p> <p>Employment (Employer – Employee): The WRA affords a worker protection against termination of their work agreement if they file a complaint in good faith or participate in proceedings against an employer involving an alleged breach of any employment terms and conditions.</p> <p>Good governance and integrity reporting: The GGIR states that a person will not incur any civil or criminal liability as a result of a disclosure or a report to the Integrity Reporting Services Agency (IRSA) that is shown to be genuine, or at the time they make that disclosure or report, have reasonable grounds to believe that the information they disclose is true and warrants an enquiry.</p>
<p>4 What is the procedure prescribed by legislation for an employee to make a protected disclosure?</p>	<p>There are no specific procedures in local legislation for protected disclosure by an employee. Under the Code of Corporate Governance for Mauritius (the National Code), launched by the National Committee on Corporate Governance in 2017, all organisations, including public entities, are encouraged to put in place whistleblowing rules and procedures, which should be disclosed in their annual reports.</p> <p>Following the National Code, an audit committee on compliance, whistleblowing, and fraud (the Committee) should be set up to review:</p> <ul style="list-style-type: none"> • the adequacy and security of the organisation’s arrangements for its employees and contractors to raise concerns, in confidence, about possible wrongdoing in financial reporting or other matters. (The Committee shall ensure that these arrangements allow a proportionate and independent investigation of such matters and appropriate follow-up action); • the company’s procedures for detecting fraud; • the company’s systems and controls to prevent bribery and receive reports on non-compliance; • regular reports from the compliance officer and the adequacy and effectiveness of the company’s compliance function; • significant transactions not directly related to the organisation’s normal business, as the committee might deem appropriate; and • significant cases of employee conflicts of interest, misconduct or fraud, or any other unethical activity by employees or the organisation. <p>Every organisation is strongly encouraged to document a whistleblowing policy and communicate it internally. The policy should make it safe and acceptable for employees/third parties to raise concerns about possible improprieties in matters of financial reporting and other malpractices at the earliest opportunity.</p>



MAURITIUS

QUESTION	ANSWER
<p>5</p> <p>Does the legislation place any reporting obligations on certain employees to report any form of irregular conduct in the workplace? If so, what are the consequences (if any) of a failure to do so?</p>	<p>Corruption Prevention: The POCA obliges an officer of a public body (Ministry or Government department, a Commission set up under the Constitution or under the authority of any other law, a local authority, a statutory corporation, or a Government company) to make a written report to the ICAC when they suspect that an act of corruption was committed within or in relation to that public body.</p> <p>The POCA also imposes a legal obligation on the following persons to refer to the ICAC for investigation where, in the exercise of their functions, they believe that an act of corruption or a money laundering offence may have occurred:</p> <ul style="list-style-type: none"> • a Judge or Magistrate; • the Ombudsman (The Ombudsman is a constitutional post; a public office appointed by the President, acting after consultation with the Prime Minister, the Leader of the Opposition, and other leaders of parties in the National Assembly, in terms of section 96 of the Constitution of Mauritius (the Constitution). The main powers of the Ombudsman are to investigate any action by any officer/authority in which a member of the public (resident in Mauritius or where the action was taken when he/she was present in Mauritius) claims to have sustained injustice as a consequence of maladministration in connection with the action taken, as per section 97 of the Constitution. There are exceptions to the Ombudsman's powers and, to summarise, these include being unable to investigate the judiciary or actions taken by the Director of Public Prosecutions. Moreover, section 99 of the Constitution grants the Ombudsman powers to require the production of information/documents for any investigation, except for cabinet documents); • the Director of Public Prosecutions; • the Director of Audit; or • the chief executive of a public body. <p>To fight against money laundering: The FIAMLA imposes reporting obligations on banks, financial institutions, cash dealers, and members of relevant professions or occupations when they have reasons to believe that a transaction is suspicious.</p> <p>Regulation 26 of the Financial Intelligence Anti-Money Laundering Regulations 2018 (the FIAML 2018) spells out that a reporting person (banks, financial institutions, cash dealers, and members of relevant professions or occupations) must appoint a Money Laundering Reporting Officer (MLRO)/or a Deputy Money Laundering Reporting Officer to perform the duties of the MLRO in his absence. Under regulation 22 FIAML 2018 it is also necessary to appoint a Compliance Officer (CO).</p> <p>Good governance and integrity reporting: The GGIR imposes a legal obligation on the following persons to make a written report to IRSA where, in the exercise of their functions, they have reasonable grounds to suspect that a person has acquired unexplained wealth:</p> <ul style="list-style-type: none"> • a judicial officer (a person appointed to exercise exclusively judicial functions); • the Ombudsman; • the Director of Audit of the National Audit Office; • the Director of the Financial Intelligence Unit; • the Director-General of the ICAC; • the Director-General of the Mauritius Revenue Authority; • the Governor of the Bank of Mauritius; • an integrity reporting officer nominated by a public interest entity; or • an officer of a statutory corporation, or body corporate. <p>The FIAMLA provides that a whistleblower (banks, financial institutions, cash dealers, and members of relevant professions or occupations) who, knowingly or without reasonable excuse, fails to inform the Financial Intelligence Unit of a suspicious transaction, commits an offence and shall, on conviction, be liable to a fine of up to MUR 1 000 000 and to imprisonment for up to five years.</p>



MAURITIUS

QUESTION	ANSWER
<p>6</p> <p>Does the legislation place any reporting obligations on individuals to report any form of conduct which would fall within the relevant definition of corrupt behaviour?</p>	<p>Corruption Prevention: The POCA requires an officer of a public body to make a written report to the ICAC if he/she suspects that an act of corruption has been committed within or in relation to that public body.</p> <p>The POCA also imposes a legal obligation on the following persons to refer to the ICAC for investigation where, in the exercise of their functions, they believe that an act of corruption or a money laundering offence may have occurred:</p> <ul style="list-style-type: none"> • a Judge or Magistrate; • the Ombudsman; • the Director of Public Prosecutions; • the Director of Audit; or • the chief executive of a public body.
<p>7</p> <p>Are there specific obligations provided to directors to report any form of conduct which would fall within the relevant definition of corrupt behaviour?</p>	<p>There is no specific legal obligation. The National Code recommends that boards of directors describe their whistleblowing procedures in their code of ethics and include in their annual report the following:</p> <ul style="list-style-type: none"> • a report on whistleblowing rules and procedures; • possible protections, e.g. confidential hotlines; • access to a confidential and independent person or office; • safe harbours and rewards; or • immunity for whistleblowers.
<p>8</p> <p>Are there any consequences for an individual who intentionally discloses false information disguised as information relating to a protected disclosure or allegations regarding corrupt behaviour?</p>	<p>Corruption Prevention: The POCA provides that a person who makes a false disclosure, knowing it to be false, commits an offence and shall, on conviction, be liable to pay a fine of up to MUR 50 000 and to imprisonment for up to one year.</p> <p>Good governance and integrity reporting: The GGIR provides that any person who knowingly makes a false, malicious, or vexatious disclosure to the IRSA commits an offence and shall, on conviction, be liable to a fine of up to MUR 50 000 and to imprisonment up to one year.</p>
<p>9</p> <p>Please give a short summary of a key decision by your court or regulator where the provisions of legislation applicable to whistleblowers (whether employees or otherwise) have been applied in practice.</p>	<p>Independent Commission Against Corruption v District Ltd 2019 SCJ 250, from the Supreme Court of Mauritius, clarified the interpretation of section 16(2)(a) of FIAMLA, which provides a guarantee of immunity for those who report suspicious transactions and encourages the reporting of suspicious transactions. The Court held that this provision merely provides that a person should not be victimised for having reported a suspicion in good faith under FIAMLA, whether or not the suspicion was well-founded, nor can they be sued for defamation in relation to the report they have made.</p>

MOZAMBIQUE



ABOUT ABCC

Avillez, Bacar, Duarte & Centeio- Sociedade de Advogados, Lda. (ABCC) (formerly SCAN) is a first-tier law firm in Mozambique, which was established in 2009 by combining a team of lawyers with around 25 years of experience. The firm has represented government institutions and public companies, as well as private entities, including major engineering companies and foreign organizations, in matters related to natural resources (water, waste, energy, construction and civil engineering, and logistics sectors). It has also advised on many of the largest and most important transactions in Mozambique in the areas of commercial law, mergers and acquisitions, privatizations, banking, financial, tax and customs, and acted on numerous lawsuits, including recovery claims and arbitration. ABCC has been recognised in the main legal directories such as Chambers Global, IFRL1000 and Legal 500.

Contributors: ABCC- Bilateral firm - Webber Wentzel bilateral firm



MOZAMBIQUE

QUESTION	ANSWER
<p>1 What is the definition of a whistleblower in your jurisdiction?</p>	<p>Mozambican laws do not offer a “legal definition” of a whistleblower. However, from article 287 of the Mozambican Criminal Procedural Code, we understand a whistleblower to be someone who conveys to the relevant entities that a crime has occurred.</p>
<p>2 What are the pieces of legislation which govern the protection of whistleblowers in your jurisdiction?</p>	<p>The protection of whistleblowers is protected by Act No. 15/2012 of 14 August, which established mechanisms to protect the rights and interests of victims, whistleblowers, witnesses, declarants, or experts in Criminal Procedure and created the Central Department of Victims’ Protection.</p>



MOZAMBIQUE

QUESTION	ANSWER
<p>3</p> <p>Briefly explain the protective measures in place for whistleblowers (i.e., how is a whistleblower protected in terms of the legislation in place in your jurisdiction).</p>	<p>The measures in place to protect whistleblowers are divided into three categories: (1) the security special program; (2) procedural measures; and (3) extra-judicial measures.</p> <ol style="list-style-type: none"> 1) Article 17, No. 3 of Act No.15/2012, of 14 August, provides the following administrative measures to protect whistleblowers: <ul style="list-style-type: none"> • A change of identity, where the competent authority (Civil Identification National Department or Migration National Service, as appropriate) may provide different identification data; • A change to the physical appearance of the whistleblower; • Providing new accommodation, locally or abroad, for the whistleblower for a certain time; • Giving the whistleblower a special allowance for their or their families' needs while they are under special protection; • Creating conditions for the whistleblower to raise funds. 2) Under article 13 of Act No.15/2012, of 14 August, the procedural measures are: <ul style="list-style-type: none"> • Anonymity, by using a code to refer to the whistleblower during the process; • Hiding the whistleblower's image, distorting their voice or both, when they are giving evidence in a public hearing; • Using a teleconference to avoid recognition of the whistleblower. 3) Under article 16 of Act No.15/2012, of 14 August, the extrajudicial measures are: <ul style="list-style-type: none"> • Police protection for the whistleblower and their relatives; • Personal security for the whistleblower and their relatives; • Transporting the whistleblower in a government vehicle, which may include a police escort, to enable them to attend the public hearings; • Providing a secure room in the place where the hearings are occurring, to keep the whistleblower separate from other participants in the process; • Moving the whistleblower's home or providing temporary accommodation in another safe place.
<p>4</p> <p>What is the procedure prescribed by legislation for an employee to make a protected disclosure?</p>	<p>Labour legislation does not specifically protect employees in the event of a disclosure. Article 54, No.5, line i) of the Labour Act (No. 23/2007 of 1 August) only states that it is possible to access the Labour Inspectorate or the Institution of Labour Justice. The only provision for an employee's protection in case of a disclosure is in article 15, No.2, line a), <i>in fine</i>, which allows for an anonymous report to be made to the General Labour Inspectorate in the event that an employer violates any duty.</p>
<p>5</p> <p>Does the legislation place any reporting obligations on certain employees to report any form of irregular conduct in the workplace? If so, what are the consequences (if any) of a failure to do so?</p>	<p>In general, the legislation does not place any reporting obligation on certain employees. Reporting is a simple subjective right that the employee may exercise, not an obligation. Given that the main beneficiary of the right is the employee, the law does not lay down any consequences for failing to disclose.</p>



MOZAMBIQUE

QUESTION	ANSWER
<p>6</p> <p>Does the legislation place any reporting obligations on individuals to report any form of conduct which would fall within the relevant definition of corrupt behaviour?</p>	<p>The Mozambican Criminal Procedural Code (article 285) – the generally applicable law in criminal procedures – makes it obligatory to report crimes in specific situations, such as:</p> <ul style="list-style-type: none"> • For police agents, when they become aware of any type of crime; • For public employees, if they become aware of crimes in the context of their public services. <p>We therefore assume that if crimes are related to corruption, reporting is obligatory for police and public employees.</p>
<p>7</p> <p>Are there specific obligations provided to directors to report any form of conduct which would fall within the relevant definition of corrupt behaviour?</p>	<p>The law – article 285 of the Criminal Procedural Code – does not place a specific obligation on directors to report corrupt behaviour. The obligation to report is generally only required of police agents and public employees, in the contexts mentioned previously.</p>
<p>8</p> <p>Are there any consequences for an individual who intentionally discloses false information disguised as information relating to a protected disclosure or allegations regarding corrupt behaviour?</p>	<p>There are legal consequences for a dishonest report. Article 14 of Act No. 6/2004 states that if a whistleblower knowingly reports false information they will be prosecuted for “dishonest report” (<i>denúncia de má fé</i>). The penalty is imprisonment for up to six months and a fine. According to article 63, no.1, line b), of the Mozambican Penal Code (Act 24/2019 of 24 December) the quantitative of the fine penalty, paid in amount, vary from one hundredth of the minimum salary in force (MZN 4.820,00) to one minimum salary per each day of condemnation. On other hand, the days of the fine vary from 3 days up to 2 years. The criteria to determine the days of the fine penalty depends on the severity of the crime perpetrated and the criteria to determine the amount to be paid per each day of the condemnation depends on the financial ability of the defendant condemned.</p>
<p>9</p> <p>Please give a short summary of a key decision by your court or regulator where the provisions of legislation applicable to whistleblowers (whether employees or otherwise) have been applied in practice.</p>	<p>The majority of court decisions are not recorded (possibly due to a non-jurisprudential system in Mozambique). The verdicts in Mozambique are, basically, founded on laws and not jurisprudence. It was therefore impossible to find a short summary of a key decision by a court or regulator in Mozambique.</p>

NIGERIA



ABOUT ALUKO & OYEBODE

Aluko & Oyeboode is one of the largest integrated law firms in Nigeria, providing a comprehensive range of specialist legal services to top-tier Nigerian, international and multinational clients. It was established in January 1993 and now has 19 Partners and about 85 Managing Associates, Senior Associates and Associates. The firm's areas of specialisation include: Mergers and Acquisitions; Capital Markets; Banking and Corporate Finance; Compliance and Investigation; Corporate and Commercial Practice; Energy and Natural Resources; Intellectual Property; Litigation and Arbitration; Power/Infrastructure Finance; Privatisation; Public Private Partnerships; Real Estate; Taxation; Admiralty and Shipping; Aviation; and Telecommunications, Media and Technology. The head office is in Lagos and there are also offices in Abuja and Port Harcourt. Aluko & Oyeboode consistently achieves a top tier ranking across its various practice groups by IFLR1000, Chambers Global, Legal 500 and has received many other internationally-recognized awards.

Contributors: Aluko & Oyeboode - Webber Wentzel bilateral firm.



NIGERIA

QUESTION	ANSWER
<p>1 What is the definition of a whistleblower in your jurisdiction?</p>	<p>A whistleblower is a person who reports some form of impropriety, misconduct, or crime to the appropriate authority. Some of the whistleblowing guidelines in Nigeria specifically define the term. The Central Bank of Nigeria’s Guidelines for Whistle Blowing in the Nigerian Banking Industry defines a whistleblower as “any person(s) including the employee, management, directors, depositors, service providers, creditors and other stakeholder(s) of an institution who reports any form of unethical behaviour or dishonesty to the appropriate authority.” In the Budget and National Planning Whistleblowing Policy of the Federal Ministry of Finance, a whistleblower is defined as “a person who voluntarily discloses to the Federal Government of Nigeria, through the Federal Ministry of Finance, Budget and National Planning, a possible misconduct or violation that has occurred, is ongoing, or is about to occur with specific concerns which are in the public interest”.</p>
<p>2 What are the pieces of legislation which govern the protection of whistleblowers in your jurisdiction?</p>	<p>Nigeria does not yet have a whistleblowing statute. While there is presently a Whistle Blower Protection Bill, 2019 and a Public Interest Disclosure and Complaints (Enactment) Bill, 2021 before the National Assembly, both bills are yet to be passed into law. However, whistleblowing provisions are contained in some existing statutes, including provisions in the Corrupt Practices and Other Related Offences Act; the Economic and Financial Crimes Commission Act; the Investment and Securities Act; and the Freedom of Information Act.</p> <p>Also, certain government agencies have issued whistleblowing guidelines. These include: the Central Bank of Nigeria’s Guidelines for Whistle Blowing in the Nigerian Banking Industry, 2014; the Budget and National Planning Whistleblowing Policy of the Ministry of Finance; and the Whistle Blowing Guidelines for Pensions, 2008 issued by the Nigerian Pension Commission. There are also whistleblowing provisions contained in: the Central Bank of Nigeria’s Anti-Money Laundering/Combating the Financing of Terrorism (AML/CFT) Policy and Procedure Manual; the Rule Book of the Nigerian Stock Exchange, 2015; and the Code of Corporate Governance for Public Companies, 2011 issued by the Securities and Exchange Commission.</p>



NIGERIA

QUESTION	ANSWER
<p>3</p> <p>Briefly explain the protective measures in place for whistleblowers (i.e., how is a whistleblower protected in terms of the legislation in place in your jurisdiction).</p>	<p>Under the whistleblowing provisions of some statutes and guidelines, protective measures are in place to protect the whistleblower from detrimental action resulting from a disclosure. We discuss some of these below.</p> <p>The Corrupt Practices and Other Related Offences Act (CPRO Act): The CPRO Act established the Independent Corrupt Practices and Other Related Offences Commission (the ICPC). It prohibits and prescribes punishment for corrupt practices and related offences and provides protection for persons who give information to the ICPC about an offence.</p> <p>Where any complaint made by an officer of the ICPC states that the complaint is made in consequence of information received by the officer, the identity of the informant and everything contained in the relayed information may not be disclosed in public, except to a trial judge or a defence lawyer in proceedings before a court or a tribunal. If any document or material given in evidence in proceedings before a court could potentially reveal the identity of the informant, the court should conceal or remove it to protect the identity of the informant.</p> <p>The Economic and Financial Crimes Commission Act (EFCC Act): The EFCC Act, among other things, establishes the Economic and Financial Crimes Commission (EFCC) which is charged with the responsibility of enforcing all economic and financial crime laws. Officers of the EFCC cannot be compelled to disclose the source of their information or the identity of their informants, except by an order of Court.</p> <p>The Investment and Securities Act (ISA): The ISA established the Securities and Exchange Commission (SEC) and a system to regulate investment and securities business in Nigeria. The ISA gives an employee of a capital market operator or a public company the right to disclose any information connected with activities in his workplace which tends to show that a criminal offence has been or is likely to be committed or that a person has failed, is failing or is likely to fail to comply with any legal obligation that he is subject to.</p> <p>The ISA also prescribes that no employer shall subject an employee to any detriment on the grounds that the employee has made a disclosure in accordance with the provisions of the ISA. Where an employee has been subjected to such detriment, he is entitled to present a complaint to the SEC, and the SEC will launch an investigation into the complaint. If, after concluding the investigation, the SEC is satisfied that the employee suffered a detriment as a result of a disclosure, it shall direct the employer to take certain remedial measures, including reinstating the affected employee to his appropriate position or paying compensation to him where his employment had been terminated.</p> <p>The Freedom of Information Act (FOI Act): The FOI Act was enacted to, among other things, make public records and information more freely available, provide for public access to public records and information, and protect serving public officers from the adverse consequences of disclosing certain kinds of official information.</p> <p>The FOI Act gives any person the right to access or to request information which is in the custody or possession of any public official, agency, or institution. Under section 27 of the FOI Act, no civil or criminal action could be taken against an officer of any public institution for disclosures made in good faith pursuant to the Act.</p> <p>The Central Bank of Nigeria’s Guidelines for Whistleblowing for Banks and Other Financial Institutions in Nigeria (the CBN Guidelines): The CBN Guidelines mandate all financial institutions under the supervision of the CBN to put in place a whistleblowing policy and publish it to all employees, management, directors, and other stakeholders. Under the Guidelines, a whistleblower can disclose any information connected with the activities of a financial institution which indicates that an infraction has been committed or that a person has failed to comply with banking laws, internal policies, and procedures, etc. The disclosure is to be made to either the relevant financial institution, the CBN or any other appropriate agency.</p> <p>Financial institutions are required to treat all disclosures in a confidential manner and to keep the identity of the whistleblower confidential. No financial institution shall subject a whistleblower to any detrimental treatment on account of a disclosure. The whistleblower is entitled to report any detrimental treatment to the CBN, and they will be entitled to compensation and/or reinstatement for the detrimental treatment. The infringing financial institution would also be subject to sanctions by the CBN.</p>



NIGERIA

QUESTION	ANSWER
<p>3</p> <p>Briefly explain the protective measures in place for whistleblowers (i.e., how is a whistleblower protected in terms of the legislation in place in your jurisdiction).</p>	<p>The National Pension Commissions Whistle Blowing Guidelines for Pensions (the NPC Guidelines): Under the NPC Guidelines, the directors, management, employees, and any other persons that have dealings with a Pension Fund Administrator (PFA) or Pension Fund Custodian (PFC) have a responsibility to report any breach of the Pension Reform Act, codes, guidelines, rules, and regulations issued by the Nigerian Pension Commission (the NPC). PFAs and PFCs are required to undertake that any employee blowing the whistle on unethical or illegal activities will not be victimised in any way.</p> <p>To protect whistleblowers, the NPC Guidelines provide that a PFA or PFC shall not dismiss, suspend, fire, demote or redeploy a whistleblower without the consent of the NPC. Further, the PFA or PFC shall not deny the whistleblower any of his entitlement. Any salary review that will negatively affect the whistleblower must receive the NPC’s approval. A whistleblower is entitled to complain to the NPC about a detrimental action. The NPC can issue a letter of caution to the PFA or PFC and direct it to retract the action taken.</p> <p>The Central Bank of Nigeria’s Anti-Money Laundering/Combating the Financing of Terrorism (AML/CFT) Policy and Procedure Manual (the AML/CFT Manual): The AML/CFT Manual sets out policies and procedures to ensure that the CBN and its employees conduct business in accordance with the relevant anti-money laundering laws.</p> <p>Reports of violations or suspected violations of the manual shall be kept confidential, and the identity of the whistleblower shall be protected at all times. Whistleblowers shall be protected by the Bank if they are threatened or likely to be exposed to risk as a result of reporting unethical conduct. Employees who threaten whistleblowers are to be disciplined in line with the CBN’s Human Resources Policy and Procedure Manual.</p>
<p>4</p> <p>What is the procedure prescribed by legislation for an employee to make a protected disclosure?</p>	<p>Most of the statutes and guidelines discussed above do not specify a procedure for an employee to make a protected disclosure.</p> <p>The NPC Guidelines require disclosures to be in writing. The whistleblower must set out the background and history of the concern, giving names, dates, and places where possible, and the reason why they are particularly concerned about the situation. If the whistleblower is unable to put their concern in writing, they may contact an appropriate officer of the NPC. The whistleblower is encouraged to put their name to the allegations. The NPC will consider anonymous disclosures at its discretion.</p> <p>The SEC’s Code of Corporate Governance for Public Companies, 2011 stipulates that companies should have a whistleblowing policy, including a dedicated hotline or email system which could be used anonymously to report unethical practices. The Code does not specify any protections for the whistleblowers.</p>
<p>5</p> <p>Does the legislation place any reporting obligations on certain employees to report any form of irregular conduct in the workplace? If so, what are the consequences (if any) of a failure to do so?</p>	<p>Under the NPC Guidelines, the Chief Compliance Officer of a PFA or PFC has a responsibility to report to the NPC any breach of the Pension Reform Act, codes, guidelines, rules, and regulations issued by the NPC, in the course of the company’s business. A similar responsibility is also placed on the directors, management, employees, and any other person(s) that have dealings with the PFA or PFC. The NPC Guidelines do not specify any consequence for failing to make a disclosure.</p>



NIGERIA

QUESTION	ANSWER
<p>6</p> <p>Does the legislation place any reporting obligations on individuals to report any form of conduct which would fall within the relevant definition of corrupt behaviour?</p>	<p>Section 23 of the CPRO Act imposes a duty on a public officer to whom any gratification is given, offered, or promised, in contravention of the Act, to report it, along with the name of the offeror to the nearest officer of the ICPC or a police officer. The same applies to a public officer from whom gratification has been solicited or obtained. The section provides that failure to comply with this provision, without reasonable excuse, is an offence which, upon conviction, attracts a prison sentence, a fine not exceeding NGN 100 000 or a prison term not exceeding two years, or both.</p>
<p>7</p> <p>Are there specific obligations provided to directors to report any form of conduct which would fall within the relevant definition of corrupt behaviour?</p>	<p>The NPC Guidelines require directors to report to the NPC any breach of the Pension Reform Act, codes, guidelines, rules, and regulations issued by the NPC.</p> <p>In the Central Bank of Nigeria's Code of Corporate Governance for Banks and Discount Houses in Nigeria, 2014, financial institutions are encouraged to make certain disclosures in their annual reports. This includes the disclosure of frauds and forgeries and any other matter not specifically mentioned but which could affect the financial condition of the bank significantly.</p>
<p>8</p> <p>Are there any consequences for an individual who intentionally discloses false information disguised as information relating to a protected disclosure or allegations regarding corrupt behaviour?</p>	<p>Yes. The Federal Ministry of Finance's Budget and National Planning Whistleblowing Policy provides that a first level investigation would be conducted into all items of information disclosed under the policy. A false or misleading report would be referred to law enforcement agencies for investigation and possible prosecution.</p> <p>Section 25 of the CPRO Act provides that any person who makes a false or misleading disclosure to a public officer, in the course of the exercise of the officer's duty, shall be guilty of an offence and shall be liable, upon conviction, to a fine not exceeding NGN 100 000 or a prison term not exceeding two years imprisonment, or both. A similar provision is contained in section 39 of the EFCC Act.</p>
<p>9</p> <p>Please give a short summary of a key decision by your court or regulator where the provisions of legislation applicable to whistleblowers (whether employees or otherwise) have been applied in practice.</p>	<p>In Ibirogba v. The Council, Federal Polytechnic Yaba, the Claimant, who was the bursar of the defendant school, had disclosed to third parties information connecting the rector of the school with corrupt practices and the mismanagement of the school's funds. Premised on that disclosure, the third parties lodged a petition with the EFCC. The school subsequently set up a committee to investigate the allegations made to the EFCC. The committee found that the claimant had supplied the information to the third parties which formed the basis of the EFCC petition. He was accused of gross misconduct on the basis that he had, among other things, leaked official documents and brought disrepute to the school. He was suspended for three months and placed on half salary for the duration of the suspension. The suspension was subsequently extended indefinitely.</p> <p>The court found that the claimant's suspension was a reprisal for disclosing the information that led to the EFCC petition and violated the whistleblower protections contained in the EFCC Act and the FOI Act. The court therefore declared the suspension to be unlawful and set it aside.</p>

SOUTH AFRICA



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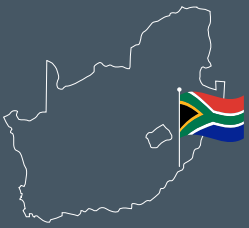
Contributors: Webber Wentzel





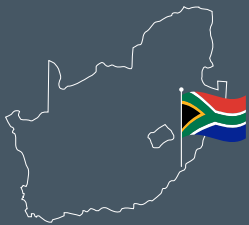
SOUTH AFRICA

QUESTION	ANSWER
<p>1</p> <p>What is the definition of a whistleblower in your jurisdiction?</p>	<p>There is no precise definition of a whistleblower in South Africa, although it can generally be said to be somebody who raises a concern about wrongdoing within an organisation, or through an independent structure associated with the organisation.</p> <p>Although South Africa has no public body dedicated to whistleblowing, there are several organisations, such as the Open Democracy Advice Centre, which can offer helpful advice and guidance to everyone.</p>
<p>2</p> <p>What are the pieces of legislation which govern the protection of whistleblowers in your jurisdiction?</p>	<p>The main laws that pertain to whistleblowers are:</p> <ul style="list-style-type: none"> • the Constitution of the Republic of South Africa; • Protected Disclosures Act of 2000 (PDA); • the Labour Relations Act of 1995; • the Companies Act of 2008; and • the Protection Against Harassment Act of 2011. <p>The primary legislation governing the protection of whistleblowers is the PDA. The PDA is aimed at employees and excludes volunteers and independent contractors. It applies whether or not the information is confidential and extends to malpractice occurring overseas.</p> <p>The PDA draws heavily on the UK's Public Interest Disclosure Act.</p>



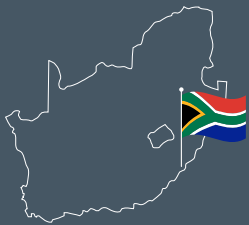
SOUTH AFRICA

QUESTION	ANSWER
<p>3</p> <p>Briefly explain the protective measures in place for whistleblowers (i.e., how is a whistleblower protected in terms of the legislation in place in your jurisdiction).</p>	<p>The Constitution: Section 16(1)(b) of the Constitution provides that everyone has the right to freedom of expression, which includes freedom to receive or impart information or ideas. Section 23(1) states that everyone has the right to fair labour practices.</p> <p>The Labour Relations Act: The Labour Relations Act protects whistleblowers in sections 186(20(d) and 187(1)(h), which refer to unfair labour practice and unfair dismissal. Also, section 191(3) empowers an employee to refer a dispute about an unfair labour practice, if the employee has suffered occupational detriment by an employer that has contravened section 3 of the PDA.</p> <p>The Companies Act: The Companies Act governs whistleblowing within all profit and non-profit companies registered under the Companies Act. Section 159 protects a whistleblower in this context against any civil, criminal, or administrative liability for a disclosure made in terms of the Companies Act.</p> <p>The Protection Against Harassment Act (PAHA): Under section 2 of the PAHA, a citizen can get a protection order against a person harassing them. This is granted by the Magistrate’s Court and prohibits the perpetrator from harassing the victim any further. Any person who is a victim can apply on behalf of another person.</p> <p>The PDA: The PDA sets out procedures which protect from occupational detriment employees in both the public and private sector who disclose information about unlawful or corrupt conduct by their employers or fellow employees.</p> <p>Occupational detriment is widely defined by the PDA. It includes harassment, dismissal, transfer against the will of the employee, non-promotion, a denial of appointment, or being “otherwise adversely affected”.</p> <p>The PDA sets out a clear and simple framework to promote responsible whistleblowing by:</p> <ul style="list-style-type: none"> • Reassuring workers that silence is not the only safe option; • Providing strong protection for workers who raise concerns internally; • Reinforcing and protecting the right to report concerns to public protection agencies such as the Public Protector and Auditor-General; and • Protecting more general disclosures, provided that there is a valid reason for going wider, and that the particular disclosure is a reasonable one. <p>A disclosure is a “protected disclosure” under the Protected Disclosures Act if the disclosure:</p> <ul style="list-style-type: none"> • contains information about “impropriety”; and • was made to the right person, according to the scheme established by the Act. <p>An employee must have reason to believe that information regarding any conduct of an employer, or an employee of that employer, complies with one or more of the following:</p> <ul style="list-style-type: none"> • A criminal offence has been committed; • A person has failed to comply with a legal obligation; • A miscarriage of justice has occurred; • The health or safety of an individual has been endangered; • The environment has been damaged; • There has been unfair discrimination, as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000; or • Any matter referred to above was deliberately concealed. <p>People who are victimised in breach of the PDA, whether they are dismissed or not, can refer a dispute to the Commission for Conciliation, Mediation and Arbitration and thereafter to the Labour Court. People who are dismissed for making a protected disclosure can claim either compensation, up to a maximum amount of two years’ salary, or reinstatement.</p> <p>Confidentiality clauses in workers’ contracts and severance agreements are ineffective insofar as they conflict with the PDA.</p> <p>The PDA was recently amended to include section 9A, which excludes civil and criminal liability for an employee who makes a protected disclosure of information under certain circumstances. This does not extend to circumstances where the employee or worker participated in the disclosed impropriety.</p>



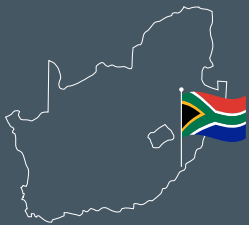
SOUTH AFRICA

QUESTION	ANSWER
<p>4</p> <p>What is the procedure prescribed by legislation for an employee to make a protected disclosure?</p>	<p>There are four ways an employee can disclose which qualify for the protections afforded in the PDA. These are:</p> <ul style="list-style-type: none"> • A disclosure made by a whistleblower to someone to obtain legal advice about the disclosure is a protected disclosure (clause 5 of the PDA); • An internal disclosure. A disclosure to the employer will be protected if the whistleblower acts in good faith, and follows the process set out for such disclosures by the employer (clause 6 of the PDA). The PDA encourages employers to have in place a whistleblower policy; • Regulatory disclosures. The PDA reinforces and strengthens the right to make disclosures to specified regulatory bodies (clause 8). These include the office of the Public Protector, the South African Human Rights Commission, the Commission for Gender Equality, the Public Service Commissioner, and the office of the Auditor-General, among others. Disclosures to these bodies will be protected if the whistleblower makes the disclosure in good faith and the employee reasonably believes the Public Protector or Auditor-General would usually deal with the kind of problem that the whistleblower wants to talk about. There is no requirement that the concern should first have been raised with the employer; • Wider disclosures (for example, to the police, MPs, and even the media). This is known as a general protected disclosure (clause 9 of the PDA). This applies where the whistleblower honestly and reasonably believes that the information and any allegation contained in it are substantially true and that the disclosure is not made for personal gain. Crucially, to be protected there must also be a good cause for making disclosure, and the particular disclosure must be reasonable. <p>In determining whether it is reasonable for an employee or worker to make the disclosure, consideration must be given to:</p> <ul style="list-style-type: none"> • The identity of the person to whom the disclosure is made; • The seriousness of the impropriety; • Whether the impropriety is continuing or is likely to occur in the future; • Whether the disclosure is made in breach of a duty of confidentiality of the employer towards any other person; • Whether the person making the disclosure complied with any procedure authorised by the employer.
<p>5</p> <p>Does the legislation place any reporting obligations on certain employees to report any form of irregular conduct in the workplace? If so, what are the consequences (if any) of a failure to do so?</p>	<p>The PDA imposes an obligation on employers in section 6(2)(a)(i) and (ii) to authorise internal reporting procedures to handle the disclosure of information and make employees aware of the existence of these procedures. The PDA is silent on the consequences of a failure to authorise internal procedures for disclosures.</p>



SOUTH AFRICA

QUESTION	ANSWER
<p>6</p> <p>Does the legislation place any reporting obligations on individuals to report any form of conduct which would fall within the relevant definition of corrupt behaviour?</p>	<p>Numerous laws govern the offences of corruption, bribery and theft.</p> <p>The Prevention and Combating of Corrupt Activities Act of 2004 (PRECCA) is South Africa's primary anti-bribery and anti-corruption legislation. PRECCA criminalises bribery and corruption in both the private and public sectors. PRECCA imposes a duty on a person in a position of authority, and certain institutions, to report knowledge or suspicions of bribery and corruption. The general offence of corruption, as set out in section 3 of PRECCA, is very broadly defined. In essence the elements of corruption in PRECCA can be described as:</p> <ul style="list-style-type: none"> • a person in a position of power, who • offers to give or gives and/or agrees to receive/or is receiving • gratification • to improperly or unduly influence another. <p>PRECCA also creates a duty to report corrupt transactions. Section 34(1)(a) and (b) provides that any person who "holds a position of authority" must report to the police official in the Directorate for Priority Crime Investigation (DPCI) in the following circumstances:</p> <ul style="list-style-type: none"> • --- if the person who holds a position of authority, "knows or ought reasonably to have known or suspected that any other person has committed"; • an offence in respect of (a) corruption misconduct or (b) fraud, theft, extortion, forgery; and • the offence involves an amount of ZAR 100 000 or more. <p>There is also a duty to report suspicious and unusual activities under section 28 and 29 of the Financial Intelligence Centre Act (FICA). Such reporting obligations are triggered when a financial institution or individual either has actual knowledge or reasonably suspects that it has received, is about to receive, or about to facilitate receiving or moving proceeds of unlawful activity. A failure to comply with this reporting duty can lead to a person being imprisoned for a period not exceeding twelve years or a fine of up to ZAR 100 million, as set out in section 68 of FICA.</p> <p>Section 37 of FICA provides that the duties to report are not affected by any confidentiality laws or agreements, and section 38 provides protection for people who report unlawful activity to the Financial Intelligence Centre.</p>
<p>7</p> <p>Are there specific obligations provided to directors to report any form of conduct which would fall within the relevant definition of corrupt behaviour?</p>	<p>See above regarding obligations on individuals to report any form of conduct which would fall within the relevant definition of corrupt behaviour.</p> <p>The Companies Act establishes some proactive measures in an attempt to prevent corruption. Regulation 43 of the Companies Act provides <i>inter alia</i> that any listed public company or any other company that has, in any of two of the previous five years, scored above 500 points in terms of Regulation 26(2), must appoint a social and ethics committee. The social and ethics committee, in terms of Regulation 43(5), must <i>inter alia</i> monitor the company's activities relating to the Organisation for Economic Co-operation and Development (OECD) recommendations regarding corruption and report, through one of its members, to the shareholders at the company's annual general meeting on the matters within its mandate.</p> <p>In terms of Regulation 29 of the Companies Act, a duty is placed upon a registered auditor to report any irregularities evident during an audit to the Companies and Intellectual Property Commission (CIPC), the board of directors of the company involved and/or the professional body to which the auditor belongs, e.g. SAICA. Such an irregularity includes any act or omission committed by any person responsible for the management of the company which has unlawfully caused loss to the company or is fraudulent or amounts to theft.</p>



SOUTH AFRICA

QUESTION	ANSWER
<p>8</p> <p>Are there any consequences for an individual who intentionally discloses false information disguised as information relating to a protected disclosure or allegations regarding corrupt behaviour?</p>	<p>Importantly, the PDA provides protection for disclosures made in good faith. The PDA does not extend to employees who maliciously raise matters they know to be untrue. If the employee is, however, making a disclosure to a legal adviser for purposes of obtaining legal advice, the PDA is silent as to whether this disclosure need be in good faith.</p> <p>Section 9B of the amended PDA provides that an employee or worker who intentionally discloses false information:</p> <ul style="list-style-type: none">• knowing that information to be false or who ought reasonably to have known that the information is false; and• 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 of up to two years, or both.
<p>9</p> <p>Please give a short summary of a key decision by your court or regulator where the provisions of legislation applicable to whistleblowers (whether employees or otherwise) have been applied in practice.</p>	<p>The truthfulness or accuracy of the disclosure is not a requirement for protection. The test is whether the employee reasonably believed that the information disclosed in good faith was true. This was confirmed by the Labour Appeal Court (LAC) in John v Afrox Oxygen Ltd [2018] 5 BLLR 476 (LAC), where it was held that an onus to prove the accuracy of the information disclosed would place a greater burden on the employee than intended by the PDA, which requires merely a reasonable belief, by the employee, that the information is accurate. The same approach was followed in Chowan v Associated Motor Holdings (Pty) Ltd and Others 2018 (4) SA 145 (GJ), where the court held that the employee's reasonable belief that she was being discriminated against, however inaccurate, coupled with the fact that she acted in good faith, was enough to afford her protection.</p>

Cape Town

15th Floor, Convention Tower
Heerengracht, Foreshore,
Cape Town
8001
+27 21 431 7000

Johannesburg

90 Rivonia Road,
Sandton
Johannesburg
2196
+27 11 530 5000

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