INAUGURAL LECTURE OF PROFESSOR REHANA CASSIM

17 AUGUST 2023 AT 17H00

Madam Vice-Chancellor Professor LenkaBula

Acting Executive Dean of the College of Law Professor Kole

Acting Deputy Executive Dean of the College of Law Professor Budeli-Nemakonde

Acting Director of the School of Law, Professor Dube

Director of the School of Criminal Justice, Dr Morodi

Chair of Department of Mercantile Law, Adv Mthembu

The respondent to my lecture, Professor Jonathan Klaaren of the University of the Witwatersrand

Distinguished guests, colleagues, friends and family

I am honoured to be given the opportunity to deliver my inaugural lecture at Unisa today. I am grateful to Unisa and to the College of Law for their support and for recognising my work and my research as deserving of the rank of full Professor, and I am thankful for the opportunity to work in this capacity.

The topic of this inaugural lecture is on whistleblowing, and more specifically:

How should South Africa enhance its whistleblower legislation to safeguard and incentivise whistleblowers while combating corruption?

1 Introduction

The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State, also known as 'the State Capture Commission' or 'the Zondo Commission' after its chair Justice Zondo, was established as part of the remedial action contained in the report of the then Public Protector titled 'State of Capture' released in 2016. The Zondo Commission made numerous recommendations, including recommendations relating to the regulation of whistleblowing in South Africa. In October 2022, the President of South Africa, President Ramaphosa, released his response to the

recommendations of the Zondo Commission Reports outlining his intentions for executing these recommendations. A critical facet of the President's Response concerns better protection for whistleblowers in South Africa.

In response to the whistleblower recommendations of the Zondo Commission Reports and the President's Response thereto, at the end of June this year the Department of Justice and Constitutional Development released for public comment a Discussion Document on Proposed Reforms for the Whistleblower Protection Regime in South Africa.

Transparency International defines whistleblowing as:

> 'the disclosure of information related to corrupt, illegal, fraudulent or hazardous activities being committed in or by public or private sector organisations — which are of concern to or threaten the public interest — to individuals or entities believed to be able to effect action.'[1]

Whistleblowers are vital to exposing corporate crime, corruption, mismanagement and other wrongdoing threatening the rule of law, financial integrity, human rights, the environment and public health and safety. Whistleblowing also encourages transparency and high standards of corporate governance. In *Tshishonga v Minister of Justice and Constitutional Development*,[2] the court said that whistleblowing is an effective and inexpensive measure to curb corruption. Article 4(e) of the Southern African Development Community Protocol against Corruption requires member states, including South Africa, to create, maintain and strengthen "systems for protecting individuals who, in good faith, report acts of corruption".

The President's Response similarly acknowledges whistleblowing as an essential weapon in the fight against corruption.[3] However, although the Zondo Commission emphasised that whistleblowing is one of the most effective tools to combat corruption, the current system in South Africa provides no incentives for whistleblowers to 'break cover'.[4]

This lecture is divided into three main parts. The first part discusses the key reasons why the law on whistleblowing in South Africa must be urgently reformed. The second part provides an overview of the current legislation governing whistleblowing in South Africa and makes

[1] Transparency International 'A Best Practice Guide for Whistleblowing Legislation' 2018 1 at 7, available at https://images.transparencycdn.org/images/2018_GuideForWhistleblowingLegislation_EN.pdf.
[2] 2007 (4) SA 135 (LC) para 166.
[3] The President's Response para 5.7.4.
[4] The Zondo Commission Report Part 1 vol 1 para 555.

recommendations to improve the regulation of whistleblowing. The third part explores the feasibility of providing financial incentives to whistleblowers and makes recommendations on how a whistleblower reward system in South Africa should be structured.

2 The need to urgently reform the law on whistleblowing

In my view, South Africa's corporate whistleblower provisions need to be urgently reformed for three reasons. First, the scale of corruption in South Africa has reached staggering proportions, necessitating a strong legal framework which both encourages whistleblowing and effectively protects whistleblowers.

Secondly, the reporting rates of wrongdoing in South Africa are low. The main reasons given for not reporting wrongdoing are the fear of being victimised, belief that no action will be taken on the disclosure, belief that the disclosure will not be anonymous and fear of losing one's job. There is also a negative perception of whistleblowers in South Africa, which may stem from South Africa's political history.

Thirdly, in recent years there have been an increasing number of reports of whistleblowers in South Africa who have suffered physical harm or been threatened with physical harm after exposing corruption in the public and private sectors. This is of grave concern.

One extreme example is the assassination of the chief director of financial accounting of the Gauteng Department of Health, Babita Deokoran, who exposed corruption linked to Covid-19 personal protective equipment and was gunned down outside her home, after having faced intimidation and fabricated misconduct charges. In another example, a whistleblower, Atholl Williams, who testified at the Zondo Commission on high-level corruption that implicated the management consultancy firm Bain & Co, in the deliberate destructive reorganisation of the South African Revenue Service, was forced to leave South Africa because he feared for his life.

Former CEO of Eskom, Andre de Ruyter, survived an attempt on his life when his coffee was poisoned with a cocktail of cyanide and sodium arsenite months before he publicly made corruption charges against the ANC in relation to the running of Eskom. Shortly after raising his concerns about corruption in Eskom in a television interview, De Ruyter was abruptly dismissed while he was serving his notice period.

Another whistleblower, Mosilo Mothepu, reported that she suffered panic attacks and was diagnosed with depression, post-traumatic stress disorder, anxiety and insomnia after exposing corruption in state-owned companies.

The repercussions for whistleblowers in South Africa have been severe, as is clear from the reports of whistleblowers who have suffered physical harm, intimidation, loss of jobs and even loss of career prospects.

In light of the recent attacks on whistleblowers in South Africa, as noted in the Zondo Commission Report, it is "of the highest priority that a *bona fide* whistle blower who reports wrongdoing should receive, as a matter of urgency, effective protection from retaliation".[5] The President's Response emphasises too that whistleblowers must be protected from victimisation, prejudice or harm.[6] This recommendation is supported by article 32(2) of the United Nations Convention against Corruption, which South Africa ratified, which requires signatory states to establish procedures for the physical protection of witnesses, experts and victims. It is further supported by articles 5 and 6 of the African Union Convention on Preventing and Combating Corruption, which South Africa also ratified, which require member states to adopt legislative and other measures to protect informants and witnesses in corruption and related offences, including protection of their identities, and to ensure that citizens report instances of corruption without fear of consequent reprisals.

In addition to providing physical protection to whistleblowers, other protective measures that must be introduced in South Africa are relocating whistleblowers and their families where their lives are endangered. South Africa should also enact evidentiary rules to permit whistleblowers to testify in a manner that ensures their safety, for example, allowing testimony to be given using communications technology such as video conference. Furthermore, to enhance the protection of whistleblowers, the victimisation of whistleblowers should be made a criminal offence. It is noteworthy that the Department of Justice and Constitutional Development in its Discussion Paper has proposed that persons who victimise whistleblowers under the auspices of the Protected Disclosures Act 26 of 2000 should be liable on conviction to a fine not exceeding R5 million or to imprisonment for up to five years or to both such fine and imprisonment.

3 The current legislation governing whistleblowing

[5] The Zondo Commission Report, para 557.
[6] The President's Response para 5.7.4.

Turning to the current legislation governing whistleblowing in South Africa, the Protected Disclosures Act 26 of 2000 is the overarching statute regulating whistleblowing by employees. It aims to protect employees in the public and private sectors from being subjected to an occupational detriment because they have made a protected disclosure. An 'occupational detriment' includes a situation where an employee who is a whistleblower is subject to a disciplinary action; dismissed, suspended, demoted, harassed or transferred against his or her will.

A disclosure will be protected under the Protected Disclosures Act if the whistleblower had (i) acted in good faith; (ii) reasonably believed the allegations made and the information disclosed to be substantially true; (iii) not made the disclosure for personal gain, excluding any reward payable in terms of any law; and (iv) it had been reasonable to make the disclosure.[7]

The broad purpose of the Protected Disclosures Act is to encourage whistleblowers to come forward in the interests of accountable, transparent governance in both the public and the private sectors.

Another important statute regulating whistleblowing in South Africa is the Companies Act 71 of 2008. Section 159 of the Companies Act is the heart of whistleblowing legislation for private, public, non-profit, state-owned, and external companies. Since the state holds its shares in state-owned companies in trust for the nation, whistleblowing in state owned entities is important for the country as a whole.

Section 159 of the Companies Act protects shareholders, directors, company secretaries, prescribed officers, employees, registered trade unions and suppliers of goods or services to a company and their employees. It is noteworthy that this group is not limited to 'insiders' in the company: it includes outsiders with a commercial relationship with companies, such as suppliers of goods and services to the company and their employees.

For a disclosure to be protected under the Companies Act, the whistleblower must act in good faith in making the disclosure, and must reasonably believe at the time of making the disclosure that the information showed or tended to show that the company or a director or prescribed officer had committed one of the particular types of wrongdoing listed in s 159 of the Companies Act.

[7] Section 9 of the Protected Disclosures Act.

How do these two statutes interact? Section 159 of the Companies Act applies concurrently with the Protected Disclosures Act. As far as section 159 of the Companies Act creates a right or establishes protection for an employee, this right and protection is in addition to, and does not replace, the right and protection conferred by the Protected Disclosures Act. If section 159 of the Companies Act and the Protected Disclosures Act are inconsistent and conflict with one another both apply concurrently to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the other. Insofar as this is not possible, the Companies Act prevails.

Employees in corporate environments must thus refer to both these statutes when disclosing any wrongdoing — this is a challenging task, given the different requirements for disclosures to qualify for protection.

These two statutes are not the only ones regulating whistleblowing in South Africa. There are at least nine other statutes regulating whistleblowing, some of which protect individuals in the context of whistleblowing, others which encourage whistleblowing, or oblige persons in positions of authority to report wrongdoing. These statutes include the Constitution of the Republic of South Africa, 1996;[8] the Labour Relations Act 66 of 1995;[9] the Prevention and Combating of Corrupt Activities Act 12 of 2004;[10] the Financial Intelligence Centre Act 38 of 2001;[11] the National Environmental Management Act 107 of 1998;[12] the Pension Funds Act 24 of 1956;[13] the Local Government: Municipal Finance Management Act 56 of 2003;[14] and the Public Finance Management Act 29 of 1999.[15] The Competition Commission also encourages whistleblowing on cartels involved in price fixing and collusive tendering.[16]

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[8] See ss 9 (right to equality); 10 (right to human dignity); 11 (right to life); 12 (right to freedom and security of the person); 14 (right to privacy); 16 (right to freedom of expression) and 23 (right to fair labour practices and other rights in labour relations).

[9] See ss 185 (right not to be unfairly dismissed or subject to unfair labour practices); 186(2)*(d)* (occupational detriments under the Protected Disclosures Act); 187(1)*(h)* (automatically unfair dismissals under the Protected Disclosures Act); 188A(11) (inquiries under the Protected Disclosures Act); 191(13) (disputes about occupational detriments under the Protected Disclosures Act) and 194 (limits on compensation).

[10] See ss 18 (offences of unacceptable conduct relating to witnesses) and 34 (duty to report corrupt transactions).

[11] See ss 28 (reporting cash transactions above prescribed limit); 29 (reporting suspicious and unusual transactions); 37 (reporting duty and obligations to provide information not affected by confidentiality rules) and 38 (protection of persons making reports).

[12] See s 31 (access to environmental information and protection of whistleblowers).

[13] See ss 9B (protection of disclosures) and 13B(10) (restrictions on administration of pension funds).

[14] See ss 32(6) and (7) (reporting by accounting officer of irregular expenditure, theft and fraud) and 102(2) (reporting by the board of irregular expenditure and losses).

[15] See s 38(1)*(g)* (responsibility of accounting officer to report unauthorised, irregular or fruitless and wasteful expenditure).

[16] Corporate Leniency Policy, adopted in 2009 under s 49E of the Competition Act 89 of 1998.

This dispersed whistleblowing regulation presents a confusing web for whistleblowers to navigate, and provides inconsistent protection. The complexity and vagueness may also discourage people from disclosing wrongdoing in their environment.

In my view, the South African legislature must enact a consolidated legislative framework governing whistleblowing in the various sectors to ensure clarity, to provide effective and consistent protection for whistleblowers across multiple sectors, and to make the whistleblowing laws easy to understand and to rely on.

It is noteworthy that the Department of Justice and Constitutional Development in its Discussion Paper has at this stage confined its whistleblower recommendations to enhancing solely the Protected Disclosures Act, and widening the protection in this Act to include persons that are not in an employer and employee relationship. While this recommendation may commendably broaden the scope of the Protected Disclosures Act in my view it does not go far enough. It will not address the problem of whistleblowers having to navigate a confusing web of dispersed legislation, nor the problem of inconsistent protection provided for whistleblowers in the various statutes.

4 Financial incentives

(a) Compensation under the Protected Disclosures Act and the Companies Act

Regarding the feasibility of providing financial incentives to whistleblowers, under the Protected Disclosures Act a whistleblower who discloses any information for personal gain, will not be protected. 'Personal gain' includes any commercial or material benefit or advantage received by or promised to the employee in exchange for the disclosure and any expectation by the employee of a benefit or advantage that is not due in terms of any law. But if the employee benefits incidentally from the disclosure, this will be protected, provided it was not the purpose of the disclosure.

Under section 4(2)(*a*) of the Protected Disclosures Act, if a whistleblower is dismissed for making a protected disclosure, the dismissal is deemed to be an automatically unfair dismissal as contemplated in the Labour Relations Act. Compensation for an automatically unfair dismissal should be just and equitable, but the maximum compensation that may be awarded is the equivalent of 24 months' remuneration.[17] Any other occupational detriment suffered by a whistleblower is deemed under the Protected Disclosures Act to be an unfair labour practice,

[17] Section 194(3) of the LRA.

for which the compensation must again be just and equitable but may not exceed the equivalent of 12 months' remuneration.[18] It is clear that compensation for a whistleblower under the Protected Disclosures Act is restricted merely to loss of income within the framework of the Labour Relations Act.

Section 159 of the Companies Act likewise provides no financial incentives to whistleblowers for making disclosures that lead to successful resolutions of matters. The only compensation that may be awarded to whistleblowers is that they may claim compensation for any damages they may suffer if they are victimised as a result of their disclosure of wrongdoing.[19]

(b) Controversy about rewarding whistleblowers

Since the Protected Disclosures Act and the Companies Act provide limited and restricted financial incentives to whistleblowers for their disclosures, the question must arise whether this is the correct approach and whether whistleblowers ought to be rewarded financially for disclosures that lead to successful resolutions of matters.

The President's Response emphasises that, although a policy of financially rewarding whistleblowers has proved very effective in other jurisdictions facing procurement fraud and corruption, the policy carries the risk that it could impute a motive to the whistleblower, which could prejudice a successful prosecution.[20] It is highly controversial whether whistleblowers should be rewarded financially for their disclosures.

On the one hand, financial awards may encourage whistleblowers to speak up about corruption and disclose high-quality information that would otherwise be difficult to obtain. An award system may motivate companies to improve their internal whistleblowing systems and to deal more proactively with illegal behaviour. These awards may also reduce the financial risks faced by whistleblowers by offsetting costs that they may incur in making the disclosure of wrongdoing and compensating them if they were to lose their jobs.

On the other hand, financial awards for whistleblowing raise moral and ethical concerns as well as concerns that whistleblowers would be motivated by gain rather than a desire to help expose wrongdoing. A counter argument is that in an environment where the level of corruption is high, the need to expose corruption should trump concerns about the motives of

[18] Section 194(4) of the LRA.
[19] Section 159(5)(*a*) of the Companies Act.
[20] The President's Response para 5.7.7.

whistleblowers. Because awards to whistleblowers are optional and not forced on them, those with strong moral convictions against being rewarded for disclosing wrongdoing may if they choose simply decide not to take the award.

Another argument against financially rewarding whistleblowers is that the awards may encourage fraudulent and malicious reporting and false allegations. To overcome this concern, the legislative framework could explicitly discourage whistleblowers from such misconduct. In any event, fraudulent reporting is a criminal offence, which exposes a whistleblower to perjury charges.

A further objection to financially rewarding whistleblowers is that doing so undermines companies' internal compliance efforts. External reporting is also seen as the whistleblower being disloyal to the company. But studies show that whistleblowers who report externally had often used the company's internal systems unsuccessfully because the company failed to take any action. In many instances the internal compliance systems of organisations are inadequate or not effective.

The whistleblower award programmes in the United States of America are well-established, and reports show that they have enjoyed much success. They are found under the False Claims Act of 1986[21] and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010[22] which amended the Securities Exchange Act of 1934 (by adopting section 240.21F titled 'Securities Whistleblower Incentives and Protection').

Under the False Claims Act, whistleblowers are given a percentage of the moneys recovered for reporting fraud perpetrated again the US government.[23] The Securities Exchange Act requires the Securities and Exchange Commission (the SEC) to pay awards to whistleblowers who provide it with original information about violations of federal securities laws.

Closer to home, in Namibia, Uganda, Tanzania and Ghana provision is made in the relevant legislation for whistleblowers to be financially rewarded. For example, in Uganda whistleblowers may be rewarded for their disclosures with 5% of the net liquidated sum of money recovered based on that disclosure, which must be paid within six months after the recovery of the money. In Ghana a Whistleblower Reward Fund has been established under

[21] Sections 3279–3733 of the False Claims Act, 31 U.S.C..
[22] Public Law No 111-203, 124 Stat. 1376 (2010). Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act established the Security and Exchange Commission's whistleblower programme and added s 240.21F to the Securities Exchange Act of 1934, which provision came into effect on 12 August 2011.
[23] Sections 3729 and 3730 of the False Claims Act.

which whistleblowers may be rewarded from the Fund with 10% of the amount recovered from their disclosures.

The Department of Justice and Constitutional Development does not recommend that whistleblowers should be rewarded financially for their disclosures under the Protected Disclosures Act. But it recommends that a fund should be created to assist whistleblowers who have been dismissed and who face severe financial hardship in meeting their basic needs. The creation of this fund may not go far enough in incentivising whistleblowers in South Africa to come forward.

In my view the benefits of a whistleblower award system in South Africa outweigh the possible misgivings about it, given the high level of corruption, particularly in state-owned companies. According to Transparency International, although rewards help to restore a whistleblower's situation, their main aim is to incentivise whistleblowers to come forward. As reporting rates of wrongdoing in South Africa are low, whistleblowers urgently need to be encouraged to come forward with high-quality information to curb corruption, state capture, fraud, bribery, tax evasion and money laundering in South Africa, and a whistleblower award system would provide the necessary incentives for them to do so.

(c) Structuring the whistleblower award programme in South Africa

Many factors must be considered when structuring a programme to award whistleblowers. The system must be designed in accordance with best practices for South Africa because if it is poorly designed and implemented, its administrative costs may be excessive and hence unfeasible. It is also essential to ensure that the time between a whistleblower submitting a claim for an award and being paid is not too long, as a long delay may deter whistleblowers from disclosing wrongdoing again.

(i) <u>Empowering private individuals with enforcement action</u>

One vital factor to be considered in developing a whistleblower award programme for South Africa is whether private individuals should be empowered to enforce action on behalf of the State. Such an action is known as a qui tam approach, which is a civil action that complements but does not replace the traditional public enforcement of laws.[24] Private citizens are given the right to enforce their actions independently on behalf of the State, and to approach a court to

[24] R Brunette & J Klaaren 'Reforming the public procurement system in South Africa' (2020) *Position Papers on State Reform* Public Affairs Research Institute 1 at 17.

enforce a public law for the State. Such efforts are encouraged with a financial incentive for successful litigation.

The qui tam approach has been adopted by the False Claims Act and the Securities Exchange Act in the USA. Private persons, known as relators, may file suits for violations of the False Claims Act on behalf of the government.[25] The qui tam complaint is then sealed for 60 days, during which the government must investigate the complaint.[26]

If the government decides to intervene in the action, it becomes primarily responsible for prosecuting it.[27] In this event the whistleblower is entitled to receive between 15 and 25 per cent of the proceeds of the action or settlement of the claim, provided that the whistleblower's original information leads to a successful prosecution.[28] The award depends on how far the whistleblower substantially contributed to the prosecution of the action, and it is paid to the whistleblower only if the case succeeds.[29]

If the government declines to take over the action, the whistleblower may themselves pursue it.[30] Then the whistleblower's share increases to between 25 to 30 per cent of the proceeds of the action or settlement of the claim.[31] Under the Securities Exchange Act, for the voluntary disclosure of original information from a whistleblower that results in the imposition of monetary sanctions of over USD 1 million, the SEC pays the whistleblower an award ranging from 10 to 30 per cent of the amount collected from those sanctions.[32]

The Public Affairs Research Institute proposed the introduction by legislation of qui tam provisions in South Africa. As stated in the Zondo Commission Report, this proposal was motivated by Brunette and Klaaren,[33] who contend that South African public procurement law needs a tougher approach to enforcement, which could be achieved by empowering and incentivising whistleblowers to bring civil claims for the recovery of damages suffered by the State as a result of procurement fraud and corruption.

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[25] Section 3730*(b)*(1) of the False Claims Act.
[26] Section 3720*(b)*(2) of the False Claims Act.
[27] Section 3730*(c)*(1) of the False Claims Act.
[28] Section 3730*(d)*(1) of the False Claims Act.
[29] Ibid.
[30] Section 3730(*c*)(3) of the False Claims Act.
[31] Section 3730(*d*)(2) of the False Claims Act. In some instances, relators are prohibited from filing qui tam actions, such as when they were convicted of criminal conduct arising from their role in the violation of the False Claims Act (s 3730(*d*)(3)) or when the qui tam action is based on information that has already been publicly disclosed (s 3730(*e*)(4)(A)).
[32] Sections 240.21F-3(*a*) and 240.21F5(*b*) of the Securities Exchange Act.
[33] Jonathan Klaaren & Ryan Brunette 'The Public Procurement Bill needs better enforcement: A suggested provision to empower and incentivise whistle-blowers' (2020) 7 *African Public Procurement Law Journal* 16.

The advantages of the qui tam approach are that where information is difficult and costly to access, the qui tam approach draws it out.[34] It also covers for gaps in investigative capacity, while at the same time incentivising whistleblowers to make disclosures.[35]

But the Zondo Commission Report opposes the introduction of qui tam provisions because of potential complications that may arise when private individuals are empowered to litigate for personal financial reward in the State's name.[36] Opponents of the qui tam approach also argue that it encourages unnecessary litigation and there is potential for abuse.

If a qui tam approach is rejected in South Africa, then the alternative approach is what is called an administrative system or a 'cash for information' approach, in terms of which the relevant agency exercises a discretion to decide whether the claim should be pursued. This seems to be the approach suggested by both the Zondo Commission Report[37] and the President's Response,[38] which recommend that a fixed percentage of the moneys recovered from the disclosure should be awarded to whistleblowers, provided that the information disclosed was material to the obtaining of the award.

Although this approach is simpler than the qui tam approach, its disadvantage is that it is in the discretion of the relevant agency whether to pursue the matter. Should the relevant agency decide not to pursue the matter, the whistleblower would have no option to proceed with an independent enforcement action.

Disappointingly, despite the recommendations of the Zondo Commission and the President to reward whistleblowers a fixed percentage of the moneys recovered from the disclosure, the Department of Justice and Constitutional Development in its Discussion Paper has not adopted this recommendation.

(ii) Rewarding whistleblowers when no money is recovered from the disclosure

[34] Jonathan Klaaren & Ryan Brunette 'The Public Procurement Bill needs better enforcement: A suggested provision to empower and incentivise whistle-blowers' (2020) 7 *African Public Procurement Law Journal* 16 at 19.
[35] Jonathan Klaaren & Ryan Brunette 'The Public Procurement Bill needs better enforcement: A suggested provision to empower and incentivise whistle-blowers' (2020) 7 *African Public Procurement Law Journal* 16 at 19.
[36] The Zondo Commission Report Part 1 vol 1 para 568.
[37] The Zondo Commission Report Part 1 vol 1 para 569.
[38] The President's Response para 5.7.8.

Another factor to be considered when developing South Africa's whistleblower award programme is whether whistleblowers should be rewarded for their disclosures which lead to a successful sanctioning of wrongdoing but do not result in a recovery of money from the wrongdoer, because either the disclosure involves no monetary sanction being imposed on the wrongdoer or a monetary sanction cannot be collected from the wrongdoer. The Zondo Commission Report and the President's Response suggest that whistleblowers should be rewarded only when money is recovered from the disclosure.

In my view, contrary to this approach, amid South Africa's high corruption rate and low reporting rate of wrongdoing, South Africa's whistleblower award programme should provide for whistleblowers to be rewarded for information, even if it leads to no financial recovery from the disclosure but results in at least a successful criminal prosecution or a successful resolution of the matter. Awards should also be given to whistleblowers if the disclosure prevents financial loss to institutions or benefits the public interest. This approach may result in a higher reporting rate of wrongdoing and may stem the rampant corruption in South Africa.

(iii) Size of the award

A further consideration in developing a whistleblower award programme for South Africa is the size of the award to be given to the whistleblower. As mentioned earlier, under the False Claims Act in the USA, whistleblowers receive an award of between 15 to 25 per cent, while under the Securities Exchange Act, the percentage of the whistleblower award ranges from 10 to 30 per cent of the monetary sanctions collected. The SEC may, in its discretion, increase or decrease the award percentage based on an analysis of various factors. In Uganda the percentage of the award is 5% of the net liquidated sum of money recovered from the disclosure, while in Ghana it is 10% of the amount recovered from the disclosures made by the whistleblower.

It is submitted that the percentage of the award to be given to whistleblowers in South Africa should vary based on an analysis of several factors. One relevant factor should be the significance and the quality of the information provided by the whistleblower, as well as its truthfulness, reliability and completeness. The type and severity of the wrongdoing disclosed by the whistleblower must also be considered, and a higher award should be given if the wrongdoing is egregious. Other factors should be the degree of assistance provided by the whistleblower and whether the whistleblower's assistance saved time in investigating the matter. A further factor should be the resources that are conserved as a result of the

whistleblower's assistance. Since the size of the award is intended to serve as a motivating factor for whistleblowers to disclose wrongdoing it should not be too low or trivial.

A pertinent factor to be considered is the unique hardship experienced by the whistleblower as a result of his or her disclosure. As discussed earlier, whistleblowers have suffered severe repercussions for whistleblowing in South Africa. The whistleblower award must match the financial impact that the disclosure has on the whistleblower. To be fair and just a higher personal cost should result in a higher award. For example, the award should cover any loss that a whistleblower might incur as a result of losing his or her job; costs linked to a change of occupation, such as moving expenses or professional training; and any potential loss of career prospects. The award should also compensate the whistleblower for any social ostracism suffered as a result of the disclosure and for any emotional or psychological distress, anxiety and retaliation encountered by the whistleblower.

(iv) Safeguards against malicious reporting

If whistleblowers in South Africa are to be rewarded financially for their disclosures, there must be effective safeguards to protect against malicious reporting and false allegations.

The Protected Disclosures Act already has some safeguards against malicious reporting. For example, section 9B of the Protected Disclosures Act provides that if an employee intentionally discloses false information knowing the information to be false (or who ought reasonably to have known this) with the intention to harm the affected party and the affected party suffers harm as a result of the disclosure, the employee will be guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding two years, or to both such fine and imprisonment. The safeguards in the Companies Act against malicious reporting require that a disclosure will be protected only if it is made in good faith[39] and if the whistleblower reasonably believed at the time of making the disclosure that the information showed or tended to show that the company or a director or prescribed officer had committed one of the types of wrongdoing listed in section 159.

Under the Securities Exchange Act of the USA, a whistleblower who knowingly and wilfully makes any materially false, fictitious or fraudulent statement is not eligible for an award.[40] The SEC may also impose a permanent bar on a claimant if it finds that the claimant submitted

[39] Section 159(3)(*a*) of the Companies Act.
[40] Section 240.21F-8(c)(7) of the Securities Exchange Act.

materially false, fictitious or fraudulent statements in his or her whistleblower submissions, in which event no further claims will be accepted from that person.[41] Similar provisions should be enacted in South Africa's whistleblower award programme to guard against malicious reporting and false claims.

(v) Enforcing the whistleblower award programme

With regard to enforcing the whistleblower award system, in my view a dedicated body should be authorised to conclude agreements with whistleblowers to reward them for their disclosures. Having an independent body to perform this function and enforce the whistleblower award programme will ensure that the programme is properly and efficiently executed and will minimise delays in finalising claims from whistleblowers.

5 Conclusion

In conclusion, whistleblowers are not traitors but people with courage who choose to take action against abuses they come across, rather than taking the easy route and remaining silent. Whistleblowing is neither self-serving nor socially reprehensible. It involves a substantial risk for whistleblowers, who render a valuable service to society. For this reason whistleblowers must be adequately protected and rewarded.

Some of the other recommendations of the Department of Justice and Constitutional Development to broaden the Protected Disclosures Act include permitting whistleblowers to request state protection if they have reasonable cause to believe that their lives or that of their family are endangered because of the disclosure, imposing criminal offences for a body not acting on a disclosure, and creating a mechanism to provide legal assistance by the Legal Aid Board to whistleblowers at the Minister's discretion. These proposals are still in the early stages and will require further development before being drafted into an Amendment Bill. The Department of Justice and Constitutional Development has indicated that a costing exercise will still be conducted to determine the financial implications of its proposed changes.

It is hoped that the proposed changes, once they are finalised and implemented, will go further in protecting and rewarding whistleblowers, and in assisting to combat and prevent corruption and state capture. It is imperative that we provide greater support and incentives to whistleblowers and promote a culture of accountability and integrity, which is sorely lacking in South Africa.

[41] Section 240.21F8(e) of the Securities Exchange Act.

I would like to take this opportunity to thank you for your time and presence today and for sharing this special occasion with me. I would like to sincerely thank Professor Jonathan Klaaren for agreeing to respond to this lecture. I also wish to thank my parents, Farouk and Rasheeda Cassim, for their endless support and encouragement, for teaching me to believe in myself, and to persevere through the challenges which life sends my way. I am also grateful for the support of my colleagues in the Unisa College of Law.

I thank you.