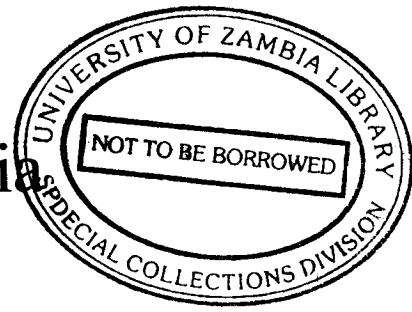


University of Zambia

School of Law



The Legal Protection of Whistleblowers in Zambia

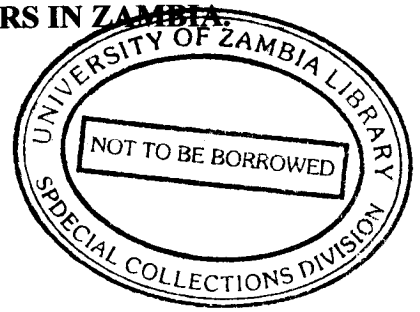
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COURSE: L410 (Directed Research)

SUPERVISOR; Dr. Patrick Matibini

THE LEGAL PROTECTION OF WHISTLEBLOWERS IN ZAMBIA.



BY

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Directed Research submitted to the University of Zambia, Law faculty, in partial fulfilment of the requirements of the Bachelor of Laws degree.

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DECLARATION

I, **DICKSON JERE**, Computer number 22090762, do hereby declare that I am the author of this Directed Research Paper entitled **THE LEGAL PROTECTION OF WHISTLEBLOWERS IN ZAMBIA**, and confirm that it is my original work. I further declare that due acknowledgement has been given where other people's work has been used. I verily believe that this research has not been presented in the Law School or indeed in any other learning Institution for academic purposes.

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THE LEGAL PROTECTION OF WHISTLEBLOWERS IN ZAMBIA

Be accepted for examination. I have checked it carefully and I'm satisfied that it fulfils the requirements relating to format as laid down in the regulations governing Directed Research.

Dr. Patrick Matibini



Date

6th FEBRUARY 2008

ACKNOWLEDGEMENTS

I would like to thank Dr, Patrick Matibini for having accepted to supervise my Directed Research. In particular, I would like to thank him for his invaluable advice and comments during the duration of my research and writing.

I would like to thank Transparent International –Zambia (TIZ) for having allowed me to use their library during my research. Special thanks go to TIZ Executive Director Goodwell Lungu who provided me with several reports, books and internet links for my research. I will remain indebted to him for the assistance.

Last but not the least; I would to thank all my classmates, especially those who were in my Study Group for their advice, academic debates and information sharing. Tenthani Banda, Gabriel Lesa, Evans Sodala, Enos Chibombe, Japhet Chulu, Doreen Machona and Elizabeth Chanda deserve special mention.

And finally, the entire academic staff at the University of Zambia Law School, in particular, lecturers and tutors who mentored me during my study. Among those who deserve special mention are Professor Patrick Mvunga, Professor Carlson Anyangwe, Late Professor Alfred Chanda, Dr. Alfred Ngandu, Dr. Ngosa Simbyakula, Mr. John Sangwa, Mr. Mumba Malila, Judge Philip Musonda, Rtd Judge Kabazo Chanda and Mrs. Lilian Mushota. Thanks to all the support staff at the Law School.

DEDICATION

To my children, Siyabonga and Khuzwayo

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GLOSSARY

1. ACC – Anti Corruption Commission
2. AU – African Union
3. BCCI – Bank of Credit and Commerce International
4. DEC – Drug Enforcement Commission
5. MISA – Media Institute of Southern Africa
6. ODAC – Open Democracy Advice Centre
7. OSC – Office of Special Counsel
8. PCaW – Public Concern at Work
9. PDA – Public Disclosure Act
10. PIDA – Public Interest Disclosure Act
11. SADC – Southern Africa Development Community
12. TIZ – Transparency International – Zambia
13. UK – United Kingdom
14. US – United States of America
15. UN – United Nations
16. WPA – Whistleblower Protection Act
17. ZSIS – Zambia Security and Intelligence Services

ABSTRACT

Zambia has witnessed unprecedented campaign in the fight against corruption since President Levy Mwanawasa ascended to power in 2001. High profile cases involving former senior government officials, including former President Frederick Chiluba, have been prosecuted before the Zambian courts. Most corruption scandals that took place under the government of Chiluba were noticed by public officers, but they were too scared to blow the whistle. This is because there is no law in Zambia that protects employees against retaliation or victimization for exposing wrong doing within their work places. A cross-section of the Zambian community has started demanding for the enactment of specific laws aimed at protecting employees who blow the whistle to expose corruption. The research analyses the current legal position in Zambia concerning the protection of whistleblowers. It also provides a comparative study of selected countries around the world which have well-developed whistleblower protection legislation. And finally, it recommends for Zambia to adopt a two-faceted approach in dealing with whistleblower protection laws by enacting a stand-alone statute, as well as the infusion of specific provisions on whistleblower protection in selected existing statutes such as the Employment Act and the Labour and Industrial Relations Act.

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CHAPTER ONE

INTRODUCTION TO WHISTLEBLOWER LEGISLATION

The fight against corruption in Zambia has gained unprecedented momentum. High profile cases involving former senior government officials, including ex-President Frederick Chiluba, have been prosecuted before the Zambian courts. These cases have been brought to light particularly under the leadership of President Levy Mwanawasa who ascended to power in 2001 and made the fight against corruption as his government's policy. Grand corruption has manifested itself in the public procurement of goods and services, misappropriation of public funds, privatization of state owned enterprises and authorization of development projects, to mention but a few.

However, despite this notable achievement in the fight against corruption, it appears Zambia has not done much in putting in place legal mechanism to protect people who expose wrongdoing in their work places. The lack of protection of people who expose wrongdoing or blow the whistle when they witness malpractices within their institutions has led to calls by many Zambians demanding for the enactment of specific laws that could protect whistleblowers. The research has tried to respond to specific questions, which includes; whether the current legal framework in Zambia is adequate to protect whistleblowers? Whether Zambia needs to enact a stand-alone statute to specifically deal with the protection of whistleblowers? Whether such a statute should apply to both the public and private sectors? And which institutions or information should be exempted from such a law?

This research has endeavored to analyse various statutes, initiatives and attempts that have been made in Zambia aimed at protecting whistleblowers. The research has also shown the best practices around the world on how to protect whistleblowers against retribution. Further, the research has recommended a model which Zambia should adopt in order to address the problem.

The main problem which this research has addressed is the weakness of the law in Zambia in so far as it relate to the protection of whistleblowers. Under the Zambian law, there are no specific legal provisions that deliberately target whistleblowers. Therefore, most Zambian workers hide important information on wrong doing within their work places for fear of victimization. Law enforcement officers also face a lot of hurdles in receiving confidential tips on wrong doing in work places because workers fear to expose corruption because there is no law to protect them when discovered as sources of such information. This has led to a culture of secrecy among Zambian institutions, which consequently provides a fertile ground for corruption to thrive.

The overall objective of this research was to underline the importance of protecting whistleblowers within the context of the fight against corruption. The research has also provided a review of national and international initiatives with a view of identifying the best practices, which could be used in developing whistleblower protection laws in Zambia.

The major significance of this research is to contribute to the ongoing legal and institutional reforms aimed at enhancing the fight against corruption in Zambia.

Within the context of these reforms, the issue of protecting whistleblowers has attracted a lot of attention among activists, civil society groups and policy makers. Therefore, this research provides a contribution on how best Zambia can implement legal reforms that could enhance the protection of whistleblowers.

The research was conducted mainly through desk study approach that involved literature review of relevant data. However, direct field oral interviews with selected individuals and organisations involved in the fight against corruption in Zambia were conducted to validate some of the data collected. The data was later analysed using simple data analysis techniques especially when analyzing content and gaps in the literature reviewed.

This research is divided into five chapters. The first one provides a justification of the research, including the problem and objectives and the methodology used in the research. Chapter two gives an overview of the theoretical concept of whistleblower protection and legislation connected to it. The third chapter provides a comparative study of selected countries which have whistleblower protection laws. Chapter four provides an analysis of the current legal position in Zambia in relation to whistleblower protection. And finally, chapter five is a presentation of recommendations on how Zambia should tackle legislation for the protection of whistleblowers. Further, it provides conclusions on the subject matter.

CHAPTER TWO

THE CONCEPT OF WHISTLE BLOWING

The concept of whistleblowing is not a new development in the world. It has existed from time in memorial¹. However, the concept has received increased attention in recent years following the global fight against corruption, organized crime and unethical corporate scandals that rocked many big international organizations. In a broad sense, whistleblowing is used to describe any speech that challenges vested interests². But the concept has now being restricted to a narrow definition of employees who expose wrongdoing within their work places. It is not clear as to when this concept first emerged in the world though many writers have attributed the birth of whistleblowing to the United States conference organized by Ralph Nader in the early 1970's where the term first emerged. In a paper released from the conference, whistleblowing was defined as;

An act of a man or woman who, believing that the public interest overrides the interest of the organization he serves, blows the whistle that the organization is involved in corrupt, illegal, fraudulent or harmful activity.³

However, other scholars have argued that the concept of whistleblowing dates back to 1863 when Congress in the United States enacted a False Claims Act in order to curb fraud that existed in companies selling supplies to the Union Army during the civil war⁴.

¹ A. Fundafunda, "Whistle Blowers Baseline Survey" (2006) commissioned by Transparency International Zambia

² Ibid

³ J. Mitchel, paper on "The Past and Future of Whistleblowing", published by <http://www.fasken.com/web>, June 2004, International Law Office Newsletter, p3 (accessed September, 30 2007)

The False Claims Act had provisions that protected whistleblowers. Notwithstanding the debate surrounding the historical background of whistleblowing, the concept has also been understood to mean different things at different times by different people. At times the whistle blowers were “planted” by authorities for political or security reasons, other times these were self-driven individuals doing it for patriotic reasons. Still others were whistle blowers for malicious reasons hoping to harm their opponents at their places of work⁵. That, notwithstanding, experts have also failed to find a common legal definition of the term whistleblowing. It is a term that has attracted a lot of definitions and interpretations among scholars. Whistleblowing is sometimes referred to as public interest disclosure or ethical informing⁶.

The Oxford Dictionary defines a whistleblower as a person who informs people in authority or the public that the company they work for is doing something wrong or illegal.⁷ This definition presupposes that whistleblowing can only take place when an employee exposes wrongdoing to the public or an authority outside the company they work for. However, this is a common misconception about whistleblowing which this definition portrays. It neglects the fact that whistleblowing can also take place internally without public exposure. An employee can expose wrongdoing to his superiors within an organization without the public knowing.

⁴ Ibid

⁵ Ibid

⁶ Ibid

⁷ Edited by S. Wehmeier, Oxford Advanced Learner's Dictionary, Sixth Edition, Oxford University Press (2000)

Such an employee may face consequences or victimization within that organization if there are no rules and regulations governing such disclosures.

Experts have tried to develop several other definitions on the subject.

J.P. Near and M.P. Miceli, defined whistleblowing as:

...the disclosure by organization members of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action.⁸

However, this definition raises a question as to whether a person who discloses wrongdoing to the press would qualify as a whistleblower because the press will merely expose the wrong but cannot take action. Some scholars have argued that the workers who expose wrongdoing in their organizations to the media qualify to be called whistleblowers within the context of acquiring legal protection even though their disclosure is not to an authority.

But Brian Martin defined whistleblowing as:

...the unauthorized disclosure of information that an employee reasonably believes is evidence of the contravening of any law, rule or regulation, code of practice, or professional statement, or that involves mismanagement, corruption and abuse of authority, or a danger to public or worker health safety.⁹

⁸ M. P. Miceli and J. P. Near. 1985. "Characteristics of Organizational Climate and Perceived Wrongdoing Associated with Whistle-blowing Decisions". *Personnel Psychology*, Volume 38 Issue 3

⁹ B. Martin, A Whistleblower's Handbook: How to be an effective Resister, Charlbury UK, Jon Carpenter; Sydney Envirobook 1999, p13

By using the word “unauthorized disclosure”, this definition implies that the whistleblower is equally a guilty person who does an illegal act by breaching the law or regulations in order to expose illegality. This raises the question whether there is justification in breaching company rules and regulations in order to expose a wrong. Most opponents of whistleblowing raise this concern as a main reason why whistleblowers should not be legally protected because their action amounts to committing an illegal act. This position is even more challenged when it comes to employer/employee relationship where there is an agreed contractual term of confidentiality. Should employees be allowed to breach their contractual obligation of confidentiality in the guise of whistleblowing? In the case of *Lion Laboratories Ltd v. Evans*¹⁰, two employees removed confidential memoranda from their employers without authority in order to expose the unreliability of the breathalyzer kits which the company was manufacturing. The confidential information was leaked to the press, which published stories exposing the serious errors in the breathalyzer which could lead to wrongful conviction for drivers arrested driving while drunk. The Court of Appeal, in dismissing the injunction granted to the plaintiff said public interest should supercede confidentiality in such a case.

Stephenson L.J stated;

The courts will refrain breaches of confidence, and breaches of copyright, unless there is just cause or excuse for breaking confidence or infringing copyright. The just cause or excuse with which this case is concerned is the public interest in admittedly confidential information. There is confidential information which the public may have a right to receive and others, in particular the press, now extended to the media, may have a right and a duty to publish, even if the information has been unlawfully obtained in flagrant breaches of confidence irrespective of the motive of the informer.

¹⁰ [1984] 2 All ER 417

Martin in his definition further postulates that the employee should “reasonably” believe that there is an illegal activity within the organization for one to be accorded the status of whistleblower. The inclusion of reasonableness in this definition seems to suggest that malicious or unreasonable disclosure of information cannot fall within the concept of whistle blowing as envisaged in the definition. Therefore, an attempt is being made here to protect innocent individuals or organizations from vexatious allegations by those who may wish to abuse whistleblowing. Consequently, a person who makes unwarranted disclosures knowing very well that they are not true will not qualify as a whistleblower under this definition.

Other experts on Whistleblowing, De Maria and Jan, define a whistleblower as;

... a concerned citizen, totally or predominantly motivated by notions of public interest, who initiates of her or his own free will an open disclosure about significant wrongdoing in a particular organizational role. This disclosure is made to a person or agency capable of investigating the complaint and facilitating the correction of the wrongdoing.¹¹

This definition widens the description of a whistle blower to include non-employees of an organization who have knowledge of wrongdoing and decides to expose it. Further, De Maria and Jan brings out another element in whistle blowing by maintaining that a whistleblower should be motivated by public interest. However, in the absence of well defined legal rules to determine public interest, raises a problem.

¹¹ De Maria, William, & Jan, Cyrelle. (1994) *Wounded Workers*. Queensland Whistleblower Study, Result Release Two. St Lucia, Brisbane: University of Queensland.

It is not clear whether the test to use in determining public interest will be subjective or objective or both. It appears that each particular case will be determined by its own merit depending on the subject matter.

Lastly, Richards Calland and Guy Dehn, defines whistle blowing as an option used by an employee to raise concerns on wrong doing within their work place that threatens others rather than a personal grievance. Thus Whistleblowers are the opposite of the anonymous informer that authoritarian systems nature¹². This seems to be a wide definition that covers a broad spectrum of issues that may fall within whistleblowing.

There are a lot more definitions on this subject but they all seem to underscore the importance of exposing wrong doing in an organization. Since whistle blowing involves the “unauthorized disclosure of information” by an employee, such action usually come with its own consequences. Those who blow the whistle usually face the force of institutional anger and discrediting from their colleagues or superiors. Some of the repercussions which they may face include criticism, poor performance evaluations, punitive transfers, job loss, ostracism, blacklisting and at times stress¹³. Whistleblowers are often seen as trouble makers, busy bodies or disloyal employees who should not be encouraged within organizations.

¹² R Calland and G Dehn, Whistle Blowing Around the World, Law, Culture and Practice, Published by the Open Democracy Advice Centre (ODAC) Public Concerns at Work, London, UK in partnership with the British Council (2004)

¹³ Ibid

Yet others view whistleblowers as “spies” or “informers” who spend much of their time sniffing for wrong doing within their work places. This kind of stigmatization of whistleblowing has created an impression that whistleblowing as an activity should be despised rather than encouraged¹⁴. If understood correctly, whistleblowing is not about informing in a negative, anonymous sense. Rather, it is about "raising a concern about malpractice within an organisation". In this way, it is a key tool in promoting individual responsibility and organisational accountability¹⁵.

The world is discovering the benefits of positive whistle blowing and the need to protect those who expose wrongdoing as opposed to victimizing them. Several international treaties or conventions that deal with corruption and organized crime require state parties to protect whistleblowers. For instance, the United Nations Convention Against Corruption¹⁶, the United Nations Convention Against Transnational Organised Crime¹⁷ and the African Union Convention on Preventing and Combating Corruption¹⁸, have specific provisions that require member states to provide legal mechanisms within their countries to protect whistleblowers. At the regional level, some organizations such as the Southern Africa Development Community (SADC),¹⁹ have passed a protocol that have similar provisions to the ones mentioned earlier on the protection of whistleblowers.

¹⁴ L. Camerer, “Anti-Corruption Strategies”, Institute for Security Studies, Occasional Paper No 47 - 2001

¹⁵ Ibid

¹⁶ Article 32

¹⁷ Article 24 and 25

¹⁸ Article 5 and 6

¹⁹ SADC Protocol against Corruption (2001)

This shows how whistleblowing as a tool of promoting accountability, openness and good corporate governance has become indispensable. Most countries in the world are moving towards enacting laws that protect public interest disclosure by way of protecting people who expose wrong doing. Australia, Britain, Japan and South Africa, are among the countries that have specifically passed stand-alone legislations aimed at protecting whistleblowers. The next chapter will provide a comparative analysis on how these laws were enacted and how they have performed so far in terms of protecting whistleblowers.

CHAPTER THREE

COMPARATIVE STUDY OF WHISTLEBLOWER PROTECTION LAWS

The international community is increasingly recognising the concept of whistleblowing as a powerful tool in the fight against corruption. The legal protection of whistleblowers is receiving attention at the international level with various multinational organizations adopting protocols or conventions that require member states to enact laws that protect whistleblowers. The United Nations, which is the biggest international organization, adopted the United Nations Convention Against Corruption, which has provisions for the protection of whistleblowers. The convention provides *inter alia*;

Each state party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this convention.²⁰

This provision is directly aimed at protecting whistleblowers that expose wrongdoing within their countries. The United Nations has recognized the need of giving protection to such individuals. Further, the convention also urges member states to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established under the convention²¹.

The convention gives a wide guide on what provisions the national whistleblower protection laws should contain.

²⁰ Article 33

²¹ Article 32

For example, it provides that member states should put in place measures that will protect the relatives or other persons close to the whistleblower, including relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning their identity and whereabouts.²² The African Union has also adopted the African Union Convention on Preventing and Combating Corruption, which requires member states to take steps in ensuring that whistleblowers are protected within their domestic jurisdiction. The convention urges member states to adopt legislative and other measures to protect informants and witnesses in corruption and related offences including protection of their identities²³. Further, the convention also requires member states to adopt measures that ensure citizens report instances of corruption without fear of consequent reprisals²⁴. The African Union, while providing a wide range of protection provisions in its convention, also recognizes that innocent people should not be unfairly accused of wrong doing in the guise of whistleblowing by providing false information. To that extent, the convention provides that member states should adopt national legislative measures in order to punish those who make false and malicious reports against innocent persons in corruption and related offences²⁵. At regional level, some multinational organizations have adopted similar conventions urging member states to protect whistleblowers.

²² Article 32 (2) (a)

²³ Article 5 (1)

²⁴ Article 5 (2)

²⁵ Article 5 (3)

For example, the Organisation of American States adopted the Inter-American Convention Against Corruption that provides that member states should consider establishing “systems for protecting public servants and private citizens who, in good faith, report acts of corruption, including protection of their identities, in accordance with their constitutions and the basic principles of their domestic legal systems²⁶.” These initiatives have trickled down to some sub-regional organizations such as the Southern Africa Development Community (SADC), which adopted the SADC protocol Against Corruption (2001), which contain similar provisions. All these initiatives are aimed at encouraging various countries in the world to consider enacting domestic laws that provides protection to whistleblowers.

United States of America

Some members of the international community have recently begun to enact their own laws to protect and encourage whistleblowers. One of the countries with the oldest whistleblowers protection laws is the United States. The statutory protection of whistleblowers in the United States is governed by the Whistleblower Protection Act (WPA) of 1989. The Act was preceded by the Civil Service Reform Act of 1978, which had provisions on the protection of whistleblowers.

²⁶ Section 8

The Act was amended and replaced by the WPA²⁷. The Office of Special Counsel (OSC) is mandated under the United States Act to provide protection of whistleblowers in the federal employment sector. The Special Counsel is appointed by the President and ratified by the US Senate. However, the Special Counsel, who has a fixed five years term, does not serve at the pleasure of the President and can only be removed for misconduct or malfeasance²⁸. This gives the OSC necessary power and impartiality to deal with any case regardless of who is involved. The members of staff of the OSC are career public servants who have civil service protections and are not subject to any political control.

The OSC was established in 1979 and it is mandated to enforce the whistleblower protection provision of WPA²⁹. The OSC was established after the Watergate scandal in which US President Richard Nixon resigned following a corruption scandal. This scandal was followed by well-publicised allegations of retaliation by federal government agencies against employees who had blown the whistle on wasteful spending³⁰. In addition to protecting whistleblowers against retaliation, the OSC operates a secure channel through which federal employees and applicants can make disclosures of official wrong doing, with assurances that their identities will be kept confidential³¹.

²⁷ E. Kaplan, 2001. "The International Emergence of Legal Protections for Whistleblowers", Published by The Journal of Public Inquiry p37

²⁸ Ibid

²⁹ Ibid

³⁰ F. Bruce, "Whistleblower Protection and the Office of Special Counsel; The Development of Reprisal Law in the 1980's", Am U.L (1991)

³¹ Ibid

The Act makes it illegal to take or threaten to take a “personnel action” against a federal employee who has made a protected disclosure³². A protected disclosure is the disclosure of information that an employee reasonably believes evidences a violation of law, rule or regulation, gross waste of funds, gross mismanagement, an abuse of authority, or a significant and specific danger to health or safety³³. Under the United States law, a disclosure need not prove ultimately accurate in order to be protected. It is enough if the person making a disclosure is acting in good faith and with an objectively reasonable belief in its accuracy.

A unique feature of the WPA is that a whistleblower is not required to make his disclosure through any particular channel in order to benefit from the Act’s protection. This enables the employee to get protection from the WPA for any disclosure so long as such information is not otherwise protected against public disclosure by national security laws³⁴. Therefore, employees under the US Act are equally protected for disclosing information or their allegations to the press. Further, the Act permits the disclosure of information which borders on national security provided such information is channeled through the OSC or to an agency’s Office of Inspector General³⁵. This is a very important aspect of the US Act as it allows national security and classified information to be disclosed where corruption or wrong doing is imputed.

³² Ibid

³³ Ibid

³⁴ Ibid

³⁵ Ibid

Therefore, no one can use national security as a shield to commit official corruption or wrong doing as such information is also subject to disclosure albeit through a strict channel.

The OSC has power to determine whether a whistleblower has been victimized or not by the employer. If the employer is found liable the OSC may order such an employer to correct the situation. If the employer fails to comply with the OSC's request for voluntary correction, then the Special Counsel takes the retaliation case for prosecution³⁶. Another important aspect of the US law is that it allows an individual to bring an action against an employer even in cases where the OSC concluded that retaliation did not occur. Further, an individual action can also be instituted if the OSC does not act within 120 days³⁷. And finally, the US Act provides for the right of appeal to an employee who is unsuccessful while generally the employer has no right of appeal³⁸.

United Kingdom (UK)

In the United Kingdom, whistleblower protection is governed by the Public Interest Disclosure Act (PIDA) of 1998. Like in the US, the PIDA was enacted in the wake of well-publicised scandals and disasters that occurred in the early 1990's.

³⁶ Ibid

³⁷ Ibid

³⁸ Ibid

These disasters included the collapse of the Bank of Credit and Commerce International (BCCI), the Clapham Rail crash and the Piper Alpha disaster, which all led to extensive loss of life³⁹. Almost every public inquiry on these disasters found that workers had been aware of the danger, but had either been too scared to sound the alarm or had raised the matter in the wrong way or with the wrong person⁴⁰. The PIDA covers employees from both private and public sector except members of the defence force. In addition to employees, the Act also covers trainees, agency staff, contractors and homeworkers⁴¹. However, the law does not cover self-employed workers, volunteers, intelligence officers or those working in the army.

PIDA covers a broad range of disclosures. However, for the disclosure to have protection, it must be made by an employee who had reasonable belief that a wrong had occurred within his institution. The Public Concern at Work (PCaW), in its Annotated Guide⁴² to the Public Interest Disclosure Act (PIDA, stated that wider disclosures under the PIDA can only be accepted if the whistleblowers meets the following three pre-conditions;

- 1) Reasonably believed he would be victimized if he raised the matter internally or with a prescribed regulator...
- 2) Reasonably believed a cover-up was likely and there was no prescribed regulator...
- 3) Had already raised the matter internally or with a prescribed regulator

³⁹ J. Campbell, "Dare I blow the whistle? Is adequate protection given to SA employees in terms of the Protected Disclosures Act 26 of 2000?" (2004) p44

⁴⁰ Public Concern at Work, <http://www.pcaw.co.uk/legislation.htm>, (accessed September 12, 2007)

⁴¹ Ibid

⁴² Ibid

Under PIDA, whistleblowers must use prescribed channels for making disclosures in order to retain the statutory protection⁴³. The Act's preference is that the disclosure be made to the employer itself or an appropriate public authority⁴⁴. This provision appears to exclude disclosures made to the media. However, the law still permits whistleblowers who are not comfortable raising their concerns internally to take such complaints to a regulator. The UK Act differs from the US one, which does not require employees to use any particular channel when raising a concern. Where the whistleblower is victimized by his employer, he can bring a claim to an employment tribunal for compensation⁴⁵. Awards will be based on the loss suffered and where an employee has been sacked, he may apply for an order to get back his job⁴⁶.

The most important aspect of the UK Act is that it invalidates gagging clauses in employment contracts and severance agreements are also void if they conflict with the PIDA protection. Therefore, confidentiality clauses in employment contracts are void if they purport to prevent an employee from making a protected disclosure. However, one of the key disadvantages of the PIDA is that it does not provide for any independent agency of the State to investigate or prosecute whistleblower complaints like is the case with the US law. An employee must bring his retaliation claim to an employment tribunal, which has power to award compensation⁴⁷.

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ Public Concern at Work, UK Public Interest Disclosure Act

⁴⁶ Ibid

⁴⁷ Ibid

One of the key advantages of the UK PIDA is that it encourages employers to create their own internal procedures of allowing employees blow the whistle within the organization before resorting to other channels⁴⁸. This helps the organizations to control the disclosure of information, which could prove to be very damaging if released to the public.

And finally, the PIDA does not provide protection for public employees who make disclosures in violation of the Official Secrets Act⁴⁹. The law protects information related to security, international relations, defence and criminal investigations and criminalises the unauthorised disclosure of such information⁵⁰. Where the disclosure of the information is found to be in breach of the Official Secrets Act or another secrecy offence, the whistleblower will lose the protection of the PIDA if (a) he has been convicted of the offence or (b) an employment tribunal is satisfied, to a high standard of proof approaching the criminal one, that he committed the offence⁵¹.

South Africa

South Africa is another country with a specific statute that provides for the protection of whistleblowers. The Protected Disclosures Act (PDA) of 2000 was enacted in the post-1994 period after the collapse of the apartheid government.

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Ibid

⁵¹ Ibid

During that period, there were concerns of widespread corruption in government institutions and there was need of enacting a comprehensive law to deal with the culture of secrecy in government⁵². Apart from the PDA, South Africa has other laws that have provisions on the protection of whistleblowers. The Labour Relations Act⁵³ has provisions that outlaw dismissals or unfair labour practices on account of protected disclosures⁵⁴.

The Basic Conditions of Employment Act⁵⁵ has a provision that outlaws discrimination or prejudice related to disclosures⁵⁶ and permits the breach of confidentiality in the employment contract so long as it was done for legitimate and lawful purposes⁵⁷. Other South African statutes that have provisions on whistleblowers, though not specific, are the Employment Equity Act⁵⁸, the Promotion of Equity and Prevention of Unfair Discrimination Act⁵⁹ and the Occupational Health and Safety Act⁶⁰.

⁵² Ibid, Campbell, p15

⁵³ Number 66 of 1995

⁵⁴ Section 186(2) d

⁵⁵ Number 75 of 1997

⁵⁶ Section 79(2)(c) (ii)

⁵⁷ Section 90(1) and (2)

⁵⁸ Number 55 of 1998

⁵⁹ Number 4 of 2000

⁶⁰ Number 85 of 1993

The PDA came into effect on 16 February 2001 and it appears to be modeled on the UK's PIDA⁶¹. The purpose of the Act is to protect an employee from being subjected to an occupational detriment on account of having made a protected disclosure, to provide for procedures for disclosures of wrongful workplace conduct, to provide for protection of those employees who make such disclosures and provide remedies⁶². The Act covers both private and public employees unlike the US law, which only covers those working in the public sector. The Act provides wide protection to employees who suffer 'occupational detriment' as a result of making a protected disclosure. Occupational detriment under the South Africa Act has a broad meaning, which includes any dismissal, suspension, demotion, involuntary transfer, failure to promote or disadvantageous alteration in a condition of employment⁶³. Further, the Act provides explicitly that harassment, intimidation and a refusal to provide an employment reference or a provision of adverse reference will constitute occupational detriments⁶⁴.

The South Africa PDA protects almost the same broad range of disclosures like those provided by the UK's PIDA. The disclosures should be made in 'good faith'. The PDA provides for a preferred channel of blowing the whistle which is that the disclosure should be made to the employer or an appropriate public authority⁶⁵.

⁶¹ Ibid

⁶² PDA purpose

⁶³ Ibid

⁶⁴ Section 186

⁶⁵ Ibid

This requirement for a preferred channel of communications implicitly removes protection on disclosures made to the media. This is one of the disadvantages of the South African Act. Further, the PDA does not provide for an independent agency of the state to investigate whistleblower complaints like in the case with the US Act. This leaves the whistleblower with an option of bringing a personal action before a court or tribunal which has competent jurisdiction in order to protect himself against retaliation⁶⁶. Further, the PDA provides an employee who believes that he is going to be subject of an occupational detriment to request for a transfer from the employer to different position⁶⁷.

New Zealand

New Zealand is another country that has a stand-alone statute on the protection of whistleblowers. The Protected Disclosures Act⁶⁸ became law in January 2001 and like the South African Act, it covers both the private and public sectors. The law protects employees who make protected disclosures in 'good faith' and on the basis of reasonable belief that the information disclosed constituted serious wrong doing⁶⁹. One of the most important aspects of the New Zealand Act is that it requires an employee to blow the whistle on wrong doing only when he is motivated by the desire to see the issue raised to be investigated⁷⁰.

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Act of 2000

⁶⁹ Ibid

⁷⁰ Ibid

This novel requirement is meant to discourage employees from blowing the whistle because they are motivated by the desire to either embarrass their superiors or indeed their employers. The New Zealand law also provides a preferred channel of disclosing information similar to the provisions of South Africa and UK. The employee should first make a protected disclosure through an internal channel through the head or deputy head of the organization⁷¹. However, where he believes that the head or deputy head of the organization is involved in the wrong doing or if 20 days has passed without the head taking any action, an employee can then disclosure such information to a minister or the Ombudsman⁷². The Ombudsman is also charged with the responsibility of advising employees about their rights and the channels available to them in order to make protected disclosure⁷³. However, unlike the South Africa and UK Acts, the New Zealand Act provides no protection for disclosures made outside the prescribed channel of communication⁷⁴. Therefore, disclosures made to the media under whatever circumstances are not subject of protection under the Act. This creates a major difficult for employees who would like to give the information to the media so that it can be given publicity and attracts public outcry for investigations. The New Zealand law, unlike the South African and UK Acts, also provides a requirement for employers to establish internal channels and procedures of receiving whistleblower disclosures⁷⁵.

⁷¹ Ibid

⁷² Ibid

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ Ibid

From the foregoing comparative analysis of the different whistleblower protection laws, it is clear that each country adopts the approaches that suits the local set ups.

However, despite the many differences in these statutes, it is clear that they all tend to protect genuine employees who make disclosures in good faith.

The next chapter will present the research findings and gaps in the *Zambian* legal system concerning the legal protection of whistleblowers. This will include a legal audit on the existing laws that have a bearing on the protection of whistleblowers in *Zambia*.

CHAPTER FOUR

WHISTLEBLOWER PROTECTION IN ZAMBIA

The concept of whistleblowing appears to be a novel idea in Zambia which has come in light of the unprecedented fight against corruption in recent years. The prosecution of high level cases involving former senior government officials, including ex-president Frederick Chiluba, has heightened the calls for the protection of whistleblowers.

However, despite the assumption that the term “whistleblowing” is a new phenomena in Zambia, the majority of Zambians have fairly a good understanding of the concept⁷⁶. In fact the actual practice of exposing wrongdoing has existed for many years in Zambia⁷⁷.

However, Zambia has no laws for the protection of whistleblowers. This has led to a situation where people who are aware of wrong doing fear to expose such vices because there are no laws to protect them against retaliation once discovered by the culprits. In fact, some of the high profile official corruption, abuse of office and theft of public funds that took place under the government of Chiluba⁷⁸ could have been avoided if the country had whistle blower protection laws. Most civil servants knew about the corruption but they were too scared to blow the whistle for fear of victimisation⁷⁹. Whistleblower protection laws provide incentives for workers to expose wrong doing knowing well that they will be protected by the law if victimized.

⁷⁶ Ibid, p4

⁷⁷ Ibid

⁷⁸ Between 1991 to 2001

⁷⁹ Interview with Transparency International Zambia Executive Director Goodwell Lungu (August 13, 2007)

Whistleblower laws prevent the person making public interest disclosure from being victimized, dismissed or treated unfairly for having released the information⁸⁰. One of the best ways to protect whistleblowers is to keep their identities and the content of their disclosure confidential⁸¹. Cases abound in Zambia where employees who blew the whistle on wrong doing within their institutions were either dismissed or victimized by their superiors. One of the most publicized cases in Zambia involves the harassment of whistleblowers at the Drug Enforcement Commission (DEC). In this case, the Commissioner of DEC Ryan Chitoba⁸², forcibly transferred a number of his employees to remote areas and demoted others for allegedly informing the media on his perceived corrupt practices⁸³. The affected workers had no recourse to the law and some of them reported the matter to Transparency International Zambia in the hope that they will be helped by the civil society⁸⁴. A number of similar cases have taken place unreported in various institutions. Such cases have contributed to the increasing demand for Zambia to have specific legislation targeted at the protection of whistleblowers.

Zambia does not have any specific law on whistleblowing. However, there are laws that have provisions that could be interpreted as whistleblower protection provisions.

⁸⁰ An Anti Corruption Legal Assessment Study Report (2004) commissioned by USAID and conducted by PATMAT Legal Practitioners.

⁸¹ Ibid

⁸² Chitoba was suspended from his position by President Levy Mwanawasa to facilitate for investigations into the same corrupt practices. He was later arrested on charged for theft of public funds.

⁸³ Post Newspaper July 27, 2007

⁸⁴ Information provided by TI Zambia Secretariat (2007)

The Constitution of Zambia is a supreme law of the Republic, and it does provide in the Bill of Rights the protection of freedom of expression⁸⁵, which allows, among other issues, freedom to communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons⁸⁶. Even though this provision does not explicitly refer to the protection of public interest disclosures, broadly taken, it does underpin the importance of communication. Public interest disclosure is about communication and the freedom of the whistleblower to express his concern about wrong doing in an organization without interference.

In the past, attempts have been made to put in place legal mechanism aimed at protecting informers against retaliation, which included concealing their identity. The first attempt was the inclusion of provisions in the repealed Corrupt Practices Act⁸⁷, which were meant to protect informers who blew the whistle on corrupt practices from being exposed to the public during court proceedings.

The Act provided *inter alia*, that:

In any trial in respect of an offence... a witness shall not be obliged to disclose the name or address of any informer, or state any matter which might lead to his discovery⁸⁸.

⁸⁵ Article 20 (1)

⁸⁶ Ibid

⁸⁷ (1980). The Act was repealed and replaced in 1996 by the Anti Corruption Commission Act.

⁸⁸ Section 52 (1)

Further, the same Act provided that where any book, documents or paper presented in evidence in court in any civil or criminal proceedings, which contains an entry or passage in which an informer is named or described or might lead to his discovery should be concealed from view by the court in order not to disclose the informer⁸⁹. These provisions clearly were meant to protect those who expose corruption from being victimized by the culprits who may want to revenge. The Corrupt Practices Act was repealed in 1996 and replaced by the Anti Corruption Commission (ACC) Act⁹⁰. The new Act completely left out these provisions. The author was unable to find any clear explanation as to the reason for removing such provisions in the ACC Act.

Another statute in Zambia which contains a provision that could be interpreted as a whistleblower protection law is the Prohibition and Prevention of Money Laundering Act⁹¹. The Act provides that “it shall not be unlawful for any person to make any disclosure in compliance with this Act”⁹². This clearly provides a wide protection for informers who expose money laundering activities to the authorities. However, this provision appears to have been included in the Act as an afterthought because it has no any other provisions or sub-sections to explain how these disclosures will be made and the rights and obligations of the person making a disclosure. That notwithstanding, such a provision, even though not specific on whistleblowers, could be placed in the broader category of public interest disclosure, which is protected by law.

⁸⁹ Section 54 (2)

⁹⁰ Chapter 91 of the Laws of Zambia

⁹¹ Number 14 of 2001

⁹² Section 4

The Anti Corruption Commission Act is the main law in Zambia that deals with corrupt practices, abuse of office and other related official wrong doing that borders on corruption. One of its major weaknesses is that the Act does not have any specific provisions aimed at the protection of whistleblowers. This, notwithstanding, the Commission tries through its administrative measures to protect its informers as much as possible despite the lack of any legal support⁹³. However, the Act has some progressive provisions which have a bearing on the protection of informers. One such provision in the Tender of Pardon, which provides;

The Director of Public Prosecutions may, at any time, with a view to obtaining at a trial the evidence of any person directly or indirectly concerned with or privy to an offence....tender, or by writing under his hand, authorize any court named by him to tender, a pardon to such person on condition that he makes a full and true disclosure of all facts or circumstances within his knowledge relating to the offence and to every other person involved in the commission thereof, whether as a principal or in any other capacity, together with the delivery up of any document or thing constituting evidence or corroboration of the commission of the offence by the person to be charged or the accused person, as the case may be...⁹⁴

However, where a person has accepted to tender of pardon but has either by willfully concealing anything material, or by giving false evidence, not complied with the conditions on which the tender of pardon was made, that person may be prosecuted. This is one of the provisions in the Zambian laws, which is nearest to the whistleblower protection⁹⁵. There are other provisions that relate to whistleblowing.

⁹³ Interview with Timothy Moono, Public Relations Manager, Anti Corruption Commission (September 15, 2007)

⁹⁴ Section 54(1)

⁹⁵ Ibid

These include the Certificate of Indemnity, the Prohibition of Deception by Witness and the Interference with Witnesses. However, the inadequacy of these laws lie in the fact that at some point the whistleblowers identity will either surface due to subpoena or deductions by the suspect from the evidence adduced in court⁹⁶.

The Parliamentary and Ministerial Code of Conduct Act⁹⁷ is another statute in Zambia that has provisions similar to those on public interest disclosures. The Act provides for any person to report allegations of wrong doing against Minister, Deputy Minister or Member of Parliament in breach the said Act to the Chief Justice in writing⁹⁸. This law primarily promotes transparency among leaders because it requires them to disclose their assets annually for public scrutiny at the Chief Justice's Chambers. However, the Act does not provide for any protection for persons who blow the whistle on an erring leader covered under the Act. In fact, the Act provides, as a mandatory requirement, that any person reporting on wrong doing involving the leaders covered under the Act must do so by way of disclosing their name, address and in addition, sign the disclosure. This is very retrogressive because most people would not want their names to be identified in public. In addition, the Act provides for punitive sanctions for a person who makes a false allegation against any leader covered in the Act⁹⁹.

⁹⁶ Ibid

⁹⁷ Chapter 16 of the Laws of Zambia

⁹⁸ Section 13

⁹⁹ Section 17

The Penal Code Act¹⁰⁰, has provisions that are aimed at protecting witnesses, including servants who testify against their masters from been dismissed from their employment¹⁰¹. The Act also contains several provisions which are mainly aimed at the protection of witnesses generally, which may also include whistleblowers or informers who may become witnesses in Court. The Act criminalizes the interference with witnesses¹⁰² and provides for an offence of contempt of court arising from the proceedings¹⁰⁴. However, the Act provides a wide range of criminal penalties against witnesses such as perjury, refractory witnesses, giving false information, giving contradictory testimony on oath, destroying evidence or giving false information to a Public Officer¹⁰⁵. These provisions, even though they provide some protection for witnesses, they at the same time tend to penalize witnesses. Such wide range of penalties against witnesses may not be appropriate in cases involving corruption and wrong doing.

The first direct attempt in Zambia to have a law that specifically targeted the protection of whistleblowers was the Freedom of Information Bill¹⁰⁶, which was tabled in the National Assembly for enactment in 2002.

¹⁰⁰ Chapter 87 of the Laws of Zambia

¹⁰¹ Section 116 (1) (g)

¹⁰² Section 112

¹⁰⁴ Section 116 (1)

¹⁰⁵ Section 104A, 108, 109, 111 and 116

¹⁰⁶ N.A.B Number 22 of 2002

However, the Bill was withdrawn from the House in order to facilitate for consultations following security concerns raised in the aftermath of the September 11 terrorists' attacks in the United States¹⁰⁷. The Bill provided *inter alia*;

Notwithstanding the provisions of this Act or of any other written law, an employee of a public authority may disclose to the Commission or any other authority which has power to act upon the information disclosed, or any other authorized person the contents of a document, communication or information which exposes the wrongdoing of another employee or officer of the public authority, whether or not that employee came across the information in the course of the employee's duties¹⁰⁸.

Further, the Bill provided for the protection of employees who expose fraudulent, dishonest or criminal conduct or maladministration within their workplaces. The Bill further stated;

No action, disciplinary or otherwise, shall lie and no proceedings may be brought against any employee who discloses information.... for damages arising from-

- (a) the disclosure in good faith of all or part of a record or
- (b) Consequences arising from such disclosure¹⁰⁹.

This Bill was the first landmark opportunity for Zambia to legislate on the protection of whistleblowers. If the Bill is reintroduced in parliament and passed in its current form, it will be a major step towards the legal protection of whistleblowers in Zambia.

Another attempt to provide for specific provisions aimed at protecting whistleblowers has been made in the proposed Anti Corruption Commission Bill¹¹⁰.

¹⁰⁷ Zambia Alert Update, December 20, 2002 by the Media Institute of Southern Africa (MISA)

¹⁰⁸ Section 17 (1)

¹⁰⁹ Section 17 (2)

¹¹⁰ Draft Bill of 2005

The proposed Bill has progressive provisions for the protection of witnesses and whistleblowers and has also maintained the current provisions on Tender of Pardon. The proposed Bill clearly states that it is intended to protect whistleblowers against retaliation by their employees. It states;

Any employer shall not threaten or take action in respect of an employee who discloses information to the Commission or any other law enforcement agency where the employee reasonably believes to have evidence of-

- (a) a violation or contravention of any law; and
- (b) gross mismanagement of funds and abuse of authority...¹¹¹

This is a very wide provision which has been extended to cover all law enforcement agencies such as Zambia Police, Drug Enforcement Commission and the ACC itself. Further, the Bill proposes to criminalize any employer who threatens or takes action against an employee who blew the whistle in line with the law. If found guilty of retaliation against a whistleblower, the employer will be liable for a term of imprisonment of one year without an option for a fine¹¹². However, like many other whistleblowers protection laws around the world, making of false, frivolous or groundless complaints or allegations will constitute an offence¹¹³ punishable upon conviction, to a fine or to imprisonment for the term of not less than two years, or both¹¹⁴.

¹¹¹ Section 74 (1)

¹¹² Section 74(2)

¹¹³ Section 77(1)

¹¹⁴ Section 77(2)

The ACC Bill has provided for another separate provision specifically dealing with the protection of informers and information¹¹⁵. The provision provides that no action or proceedings, including disciplinary action, may be instituted or maintained against a person in respect of assistance given by the person to the Commission¹¹⁶ or a disclosure of information made by the person to the Commission¹¹⁷. This provision is important in protecting informers or whistleblowers against retaliation by their employers. In addition, the Bill provides that in any trial for an offence committed under the proposed ACC Act, a witness is not obliged to disclose the identity or address of any informer or person who assisted the Commission in an investigation into an alleged or suspected offence¹¹⁸. Further, a witness is also not obliged to state any matter which may disclose the identity or address of such an informer or person¹¹⁹. Any breach of these provisions will attract either a fine or a term of imprisonment of not less than one year¹²⁰. Where any document which is in evidence or liable to inspection in any civil or criminal proceeding contains any entry or passage in which any informer is named or described or which might lead to the persons discovery, the Court before which the proceedings is held shall cause any such entry or passage to be concealed from view or to be obliterated in a manner that may not disclose the identity of the informer¹²¹.

¹¹⁵ Section 73(1)

¹¹⁶ Ibid (a)

¹¹⁷ Ibid (b)

¹¹⁸ Section 73(2) (a)

¹¹⁹ Ibid (b)

¹²⁰ Ibid (3)

¹²¹ Ibid (4)

It is clear from the foregoing that the environment is opportune for Zambia to enact comprehensive whistleblower protection laws. The attempts that have been made in the past are a clear testimony that the country is now coming to grips with the need for the protection of informers or whistleblowers who provide critical information on wrong doing.

The next Chapter will provide recommendations on how Zambia could deal with the issue of the protection of whistleblowers in a more comprehensive manner.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

Historically, whistleblower protection laws in various jurisdictions were enacted following a spate of scandals, corruption and/or retaliation on people who blew the whistle. In the US, for example, whistleblower protection laws were passed in the wake of increasing mistrust of the federal government after the Watergate scandal and the well-publicised allegations of retaliation by government agencies against employees who had blown the whistle on wasteful defence funding¹²². Similarly, in the United Kingdom, the whistleblower protection legislation was enacted in the aftermath of well-publicised scandals and disasters that occurred in 1980s and early 1990s, involving the collapse of a commercial bank, the drowning of four children at Lyme Bay and the Clapham Rail clash¹²³. Inquiries into these incidents revealed that people within the organizations knew of the potential dangers or corrupt practices but were unwilling to come forward in fear of reprisals¹²⁵.

Zambia has been rocked with major scandals involving abuse of authority, theft of public funds and corruption by public officers. Official corruption permeated all government organs and huge sums of public funds have been lost in dubious transactions.

¹²² Ibid

¹²³ Ibid

¹²⁵ Ibid

For example, the Zambian government lost about US\$ 25 million in a botched military supply deal involving then President Frederick Chiluba and a Congolese businessman Katebe Katoto¹²⁶. A lot more corrupt scandals and theft of public funds by Zambian top government officials were exposed in the case of *Attorney General of Zambia v Meer Care and Desai and Others*¹²⁷, in which Judge Peter Smith ordered the former president Chiluba and his co-defendants to pay back stolen funds amounting to over US\$ 50 million dollars to the Zambian government. It is clear that most public workers knew of these corrupt practices, but for a variety of reasons, were not willing to come forward and blow the whistle in fear of retaliation. For example, former secretary to the treasury Mr. James Mtonga confessed that he facilitated the payments of US\$ 25 million in the botched military deal because he was scared of losing his job if he had refused to process the payments¹²⁸. These incidents, among others, clearly suggest that Zambia needs to address the issue of protecting whistleblowers if corruption is to be curbed. It is universally proven that anti-corruption efforts are hampered when employees are reluctant to expose wrong doing for fear of retaliation. Therefore, whistleblower protection laws become a necessity if a culture of secrecy among employees is to be curtailed and promote an environment where corruption and wrong doing can be exposed without hindrance or fear of reprisals. The environment in Zambia is clearly opportune for the enactment of the whistleblower protection law.

¹²⁶ President Levy Mwanawasa's Special Address to the National Assembly of Zambia (July 11, 2002)

¹²⁷ [2007] EWHC 952 Ch

¹²⁸ Witness statement tendered in the London High Court in the case of *Attorney-General of Zambia v Meer Care and Desai v Others*

Zambia is a member of several international bodies that have passed treaties, protocols and conventions on the need of enacting legislation to protect whistleblowers. Zambia, as a member of the United Nations (UN), has ratified the UN Convention against Corruption¹²⁹, which require member states to pass domestic laws on the protection of whistleblowers, among other provisions. Similarly, at a continental level, Zambia is a member of the African Union, which adopted a Convention the prevention of corruption. Zambia has ratified the African Union Convention on Preventing and Combating Corruption¹³⁰, which also has provisions that require member states to provide, within their domestic jurisdiction, laws on the protection of whistleblowers. And at a regional level, Zambia is a member of the Southern Africa Development Community (SADC), which has passed a SADC Protocol against Corruption¹³¹. Zambia has ratified this Protocol, which also require member states, among others things, to enact laws for the protection of informers or whistleblowers who expose corruption. Therefore, at the international level, Zambia has committed herself to enacting comprehensive laws aimed at curbing corruption and organized crime. This calls for comprehensive laws, which will also protect the people who blow the whistle on wrong doing. Therefore, there is a strong legal basis for Zambia to pass legislation aimed at protecting whistleblowers. There is no standard legal model for the protection of whistleblowers in the world. Various jurisdictions provide different methods of protecting whistleblowers.

¹²⁹ Ratified on December 7, 2007, Times of Zambia Report of December 15, 2007

¹³⁰ Ratified on March 30, 2007, African Union Treaty-Status List Per Country Addis Ababa, 2007 p2

¹³¹ Ratified on August 14, 2001, Report on International Conventions and Treaties on Corruption by Ernest Mwenya, Transparent International Zambia (2003)

For example, South Africa has passed comprehensive whistleblower laws with specific provisions infused in different statutes. These statutes include; the Labour Relations Act, the Basic Conditions of Employment Act, the Employment Equity Act and the Promotion of Equality and Prevention of Unfair Discrimination Act and the Occupational Health and Safety Act¹³². These statutes have special provisions that protect employees who blow the whistle to expose wrong doing. However, in addition to these provisions scattered in several statutes, South Africa has a stand alone Public Interest Disclosure Act, which is the overall law that regulates and protects whistleblowers. This paper is inclined to adopt the South African model for Zambia. This model allows for specific provisions in relevant statutes to be infused on the protection of whistleblowers, while at the same time enact an overall statute, which will provide a comprehensive legal framework on the subject.

Recommendations

Double-faceted Approach

As indicated above, Zambia should adopt a double-faceted approach to whistleblower protection. There is need for the country to enact a stand alone statute to provide a comprehensive legal framework dealing with whistleblower protection and matters incidental to it. There is also need for maintaining specific provisions on whistleblower protection in the Freedom of Information law as well as the Anti Corruption Commission law.

¹³² Ibid

These provisions target primarily issues which each specific statute deal with. For example, the proposed ACC law deals mainly with protection of whistleblowers and informers who expose corruption to the Commission. The Commission's mandate is specific on cases it can deal with. Therefore, specific provisions on whistleblower should be maintained. Similarly, the whistleblower protection provisions in the Freedom of Information law would deal with public service employees who may disclose information, without authority, but which exposes wrong doing. This provision should be maintained in the statute notwithstanding that Zambia should enact a stand alone Whistleblower Protection Act. Further, the Employment Act¹³³, the Labour and Industrial Relations Act¹³⁴ and the Penal Code should have specific provisions on whistleblower protection. In particular, Section 108 of the Labour and Industrial Act, which prohibits dismissal from employment based on discrimination, should include whistleblowing as one of the acts constituting discrimination if dismissed for blowing the whistle. In addition, the Employment Act should provide that confidentiality clauses in employment contracts will be void to the extent that they purport to prevent an employee from making a protected disclosure.

Public Interest Disclosure Act

The law, which should provide a comprehensive legal framework for whistleblower protection in Zambia, should be called Public Interest Disclosure Act.

¹³³ Chapter 268 of the Laws of Zambia

¹³⁴ Chapter 269 of the Laws of Zambia

Whistleblower usually connotes a negative term, which is used to describe people who are destructive or indeed informers who work for some secret services such as the intelligence agencies. In Zambia, some people have negative views about whistleblowers. According to Transparency International (Zambia) Baseline Study¹³⁵, the majority of respondents surveyed said whistleblowers are not appreciated in places of work and in society. They said whistleblowers are viewed as traitors, bootlickers, spies, jealous people, malicious, gossips and *kamucheka* (local slang for intelligence officers in Zambia). Therefore, the use of Public Interest Disclosure will help reduce the stigma associated with whistleblowing. Further, the term public interest disclosure provides a broader scope compared to whistleblowing.

Scope of the Act

The Zambian Act, like the US and Britain, should have a wide scope and cover both the public and private sector. The Act should provide protection to all employees including those working in security agencies such as Zambia Police, Zambia National Service, Zambia Army, Zambia Air Force, Zambia Prisons Services and the Zambia Security and Intelligence Services (ZSIS). However, like is the case in most jurisdictions, classified information pertaining to national security should not be covered as part of protected disclosures if made to the public or to any unauthorized person. The Act, like the UK PIDA, should also cover trainees, agency staff, independent contractors, house servants and students on attachment.

¹³⁵ Ibid

Wider Disclosures

The Act should provide for a broad-based channel of disclosing information, which should extend to the media. Employees should be allowed to choose their own suitable channel of disclosures which they feel safe and comfortable to use even in cases where established channels of disclosure have been established. The whistleblower only needs to justify his decision of ignoring the established channel if he reasonably believed that he would be victimized if he raised the matter within the prescribed channel. However, this notwithstanding, employers may devise procedures within their institutions which may involve the requirement for internal disclosures as a first step. But such procedures should not prohibit a genuine whistleblower from ignoring the internal procedures if he feels unsafe to use that prescribed channel.

Classified information, especially from the Defence and Security Services should only be disclosed to the Public Interest Commission (See below). This should be the only exception to the general rule that an employee may choose his own safe channel of disclosure. If classified information is not disclosed through this channel, regardless of the reasons, such a person making a disclosure may not enjoy the protection of the Act. This is aimed at balancing public interest and national security and it will be the duty of the Public Interest Commission to access the disclosed information.

Public Interest Commission

The Zambian Act should provide for the establishment of a Public Interest Commission, modeled on the US Office of Special Counsel.

The members of the Commission should be appointed by the President and ratified by the National Assembly, with security of tenure. The Commission should be the first point of contact for employees facing retaliation or harassment for blowing the whistle. The Commission should have powers to investigate complaints from employees and intervene where it finds a *prima facie* case against the employer. The Commission should also have powers to order reinstatement, damages or reconciliation between the employee and the employer. In the event that the employer refuses to accept the Commission's decision, the Commission should have powers to institute prosecution on behalf of the employee in the High Court. However, the employee who does not want to go through the Commission or who may be dissatisfied with the Commission's decision, he should be allowed to appeal to the High Court. The creation of a Commission of this nature will help reduce a backlog of cases in the High Court and speed up the process of resolving disputes arising from Public Interest Disclosure Act. It will also help poor employees to access the Commission cheaply without going direct to the High Court where they may need to engage the services of a lawyer to prosecute the erring employer, which can be expensive.

False Disclosures

A protected disclosure is the disclosure of any information that an employee reasonably believes evidences a violation of law, rule or regulation, gross waste of funds, gross mismanagement, abuse of authority, or a significant and specific danger to public health or safety¹³⁶. The employee making a disclosure should reasonably believe that such information was true at the time of making a disclosure.

¹³⁶ Ibid

Therefore, a person making a disclosure should not be required to ultimately prove the accuracy of the information for him to get protection under the law. There should be a presumption that a report was made in good faith by the employee. This position is designed to make it easier for whistleblowers to make a case of retaliation or victimization against employers. However, the law should contain minimum measures to restore maligned reputation caused by frivolous, vexatious and malicious disclosures¹³⁷. The law should penalize the deliberate use of fabricated information for malicious reasons.

Conclusion

The international community is increasingly recognizing the role of whistleblowers in the fights against corruption. Employees are an invaluable source of important information regarding wrong doing which usually come through their knowledge by virtue of their positions. Efforts to fight corruption are usually hampered in environments where employees are reluctant to come out in the open for fear of victimization by their employers. Therefore, any credible anti corruption efforts should take on board the enactment of laws that seek to protect employees who blow the whistle on wrong doing. However, statutory protection for whistleblowers is only one aspect of the broader efforts in the fight against corruption. Whistleblower protection laws can only succeed if implemented in corroboration with cultural changes.

¹³⁷ Ibid

Even in countries such as the US, which has had whistleblower protection laws for over 20 years, many members of the federal workforce remain unaware of these protections¹³⁸. Therefore, there is need to accompany whistleblower protection laws with worker's education. In this regard, the trade unions can play a major role in educating their members on the whistleblower protection laws and the many avenues available for them to make their disclosures.

¹³⁸ Ibid

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