GAP GOVERNMENT ACCOUNTABILITY PROJECT

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Protecting Whistleblowers in South Africa: How Well is the Law Working for People?

In 2000, South Africa became the third country in the world to adopt comprehensive legal protections for whistleblowers, following the US and UK. Similar to the UK, South Africa's Public Disclosure Act requires victimized whistleblowers to file lawsuits in order to be reinstated to their jobs and compensated for financial and other losses.

Nearly two decades later, the Government Accountability Project looks at 30 court cases filed by whistleblowers to answer the question: how well – if at all – are employees in South Africa protected and compensated? Has the law achieved what it set out to do?

Do paper rights equal actual rights?

South Africa's Protected Disclosure Act (PDA)[1] provides a broad scope of legal protections to private- and public-sector employees who suffer workplace retaliation after reporting crime, corruption and other misconduct.

To the apparent benefit of whistleblowers, the law covers most employees, allows a wide range of misconduct to be reported, defines retaliation broadly, and allows employees to choose from many disclosure channels. Even though PDA was passed nearly 20 years ago, it contains many provisions considered best practice by today's standards.

As with all whistleblower laws, however, PDA's success in actually protecting people should be evaluated based on its implementation, rather than merely on its language.

To gauge how well PDA has worked in practice, 30 whistleblower cases heard in South African courts between 2003 and 2014 were analyzed. These critical questions were posed:

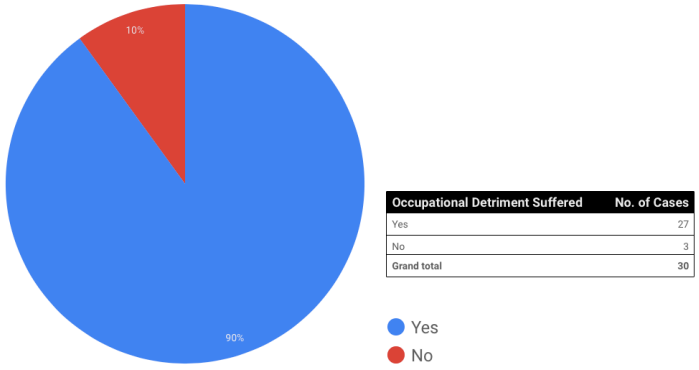
- What types of whistleblower disclosures are being made?
- Who is blowing the whistle?
- What types of relief are whistleblowers seeking?
- Has whistleblowing become more frequent over time?
- To what extent are whistleblowers in South Africa winning their cases?

What types of whistleblower disclosures are being made?

Before assessing the overall effectiveness of PDA, it is important to establish the validity of disclosures made by employees. In other words, analyzing the law's success relies on the assumption that employees' claims of retaliation are *prima facie* valid.

Of the 30 cases, South African courts found 90 percent of the occupational detriment claims were valid (see Table 1). This strongly suggests employees have used PDA as it was intended, and that it is not being abused or misused to file frivolous claims.

[1] http://www.justice.gov.za/legislation/acts/2000-026.pdf

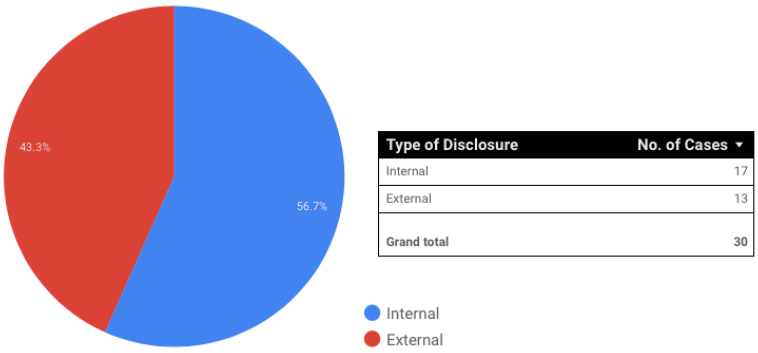


Occupational Detriment Suffered	No. of Cases
Yes	27
No	3
Grand total	30

Table 1

Given that the overwhelming majority of cases are based on substantive, valid claims of workplace retaliation, the next metric worth examining is the nature of the disclosures themselves.

PDA is worded in such a way as to favor internal reports to employers rather than external disclosures to public officials, auditors or journalists. Despite this preference for internal reports, 43 percent of the 30 cases stemmed from external disclosures (see Table 2). Though most disclosures in these cases were internal, this majority is narrower than may be expected, given PDA's preference for internal reporting.



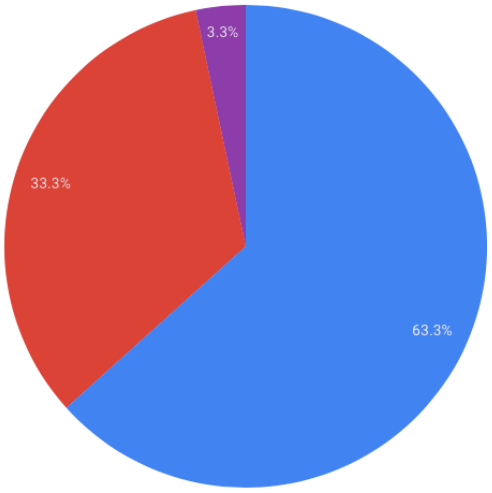
Type of Disclosure	No. of Cases
Internal	17
External	13
Grand total	30

Table 2

This begs the questions: Why do employers' policies and procedures for internal disclosures seem to be less accessible and whistleblower-friendly than PDA assumes? Are the courts taking a more liberal stance on external whistleblower disclosures? Are disclosures of such a serious nature that external disclosures are warranted? These and other potential explanations are worth exploring in further research.

Who is blowing the whistle?

PDA's provisions extend to employees of both private companies and government agencies. The data suggests that employees from both sectors have exercised their legal rights. Out of 29 cases,[2] 19 were filed by private employees and 10 by government workers (see Table 3).



Private or Government	No. of Cases
Private	19
Government	10
Both	1
Grand total	**30**

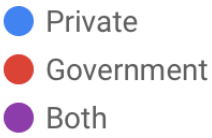


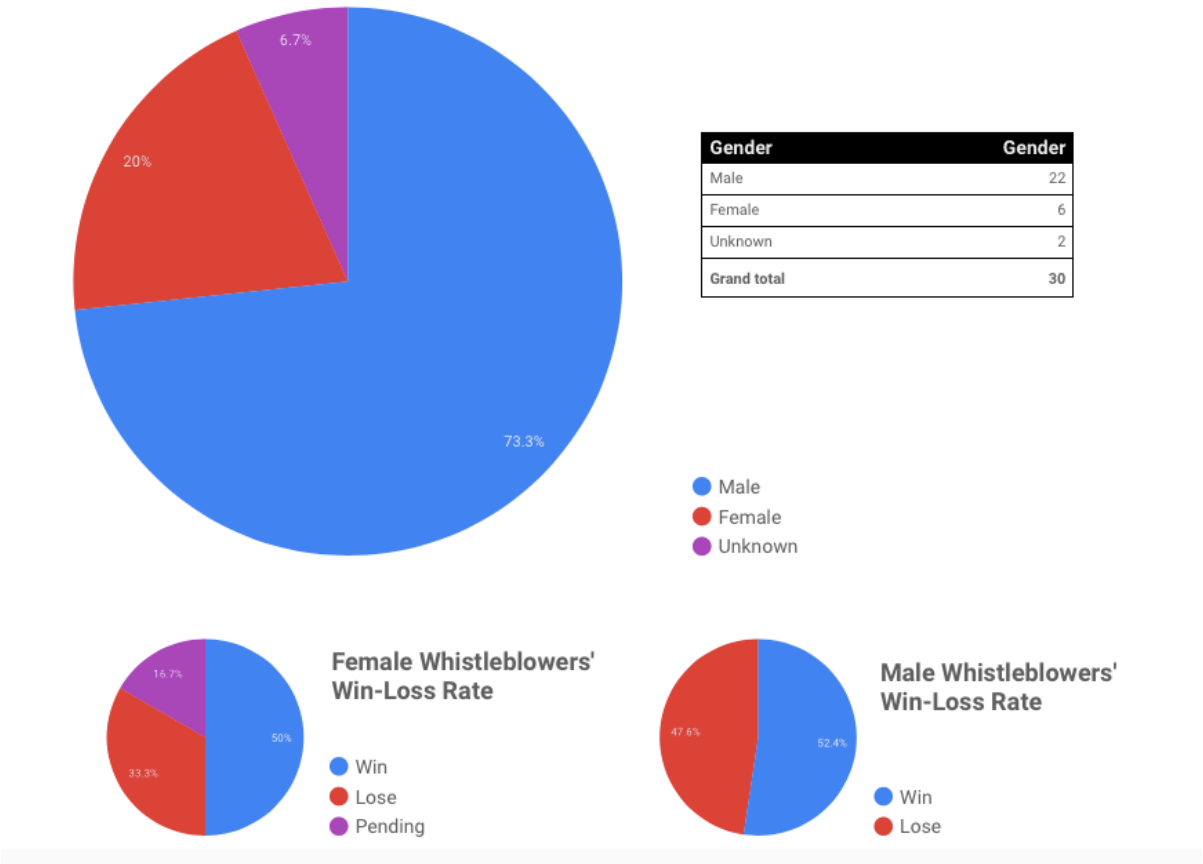
Table 3

Perhaps just as important is the diversity of concerns that South Africans have raised in the public interest. These include people who exposed:

- substandard sanitation conditions at a hospital,[3]
- the "Travelgate" affair, in which dozens of Parliament Members spent public funds on personal luxury vacations,[4] and
- nepotism and financial mismanagement at a private company whose sole shareholder was the government.[5]

Another metric for measuring the diversity of whistleblower cases is gender. In the 30 cases, 22 whistleblowers were men and six were women; two cases are unclear (see Table 4). Given the limited data available, it is difficult to draw conclusions regarding the role of gender, if any.

[2] The 30th case is omitted as the disclosure was made by a private environmental watchdog group against the government, and therefore does not fall within either of the two categories.
[3] Beaurain v Martin N. O. and Others (C16/2012) [2014] ZALCCT 23 (27 May 2014).
[4] Charlton v Parliament of the Republic of SA 2007 (28) ILJ 2263 (LC).
[5] Grieve v Denel (Pty) Ltd 2003 (24) ILJ 551 (LC).



Gender	Gender
Male	22
Female	6
Unknown	2
Grand total	**30**

Table 4

The fact that only 20 percent of cases were brought by women raises more questions than answers. There is value in examining this number relative to the overall percentage of South Africa's workforce that women occupy, how it compares to the visibility of female whistleblowers in other countries in Africa and around the world, and whether female whistleblowers become more common as PDA becomes more entrenched in South African law.

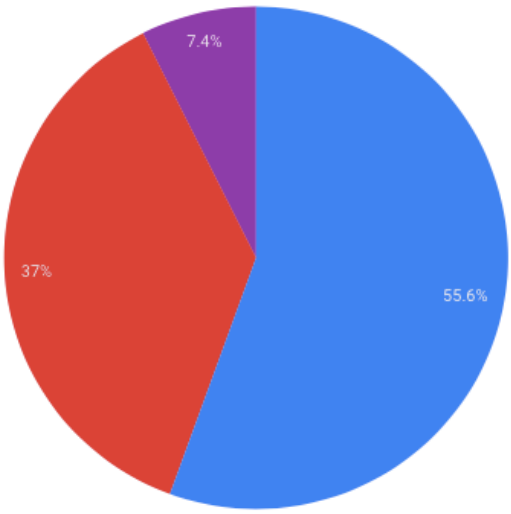
What types of relief are whistleblowers seeking?

In examining the strength of PDA, another key question is whether it helps employees obtain different types of relief. This is especially important given that one of PDA's stated objectives is to provide for certain remedies in connection with any occupational detriment suffered after making a protected disclosure.

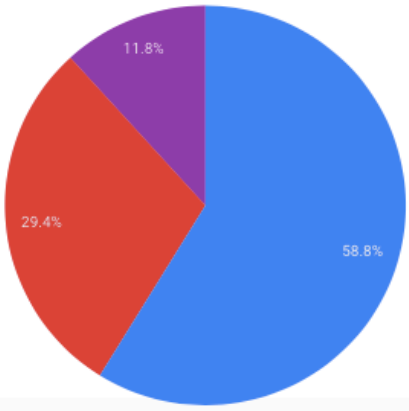
In the 30 cases, whistleblowers sought two types of compensation: interim relief and financial relief. Interim relief includes court orders that bar an employer from firing or suspending an employee prior to a final ruling. Financial relief includes lost wages and other compensatory damages ordered in a final ruling.

The data suggests most South African whistleblowers seek interim rather than financial relief by more than a 2-to-1 margin.[6]

Of 27 cases in which occupational detriment was suffered, 19 included requests for interim relief such as court orders to stop employers from conducting disciplinary hearings, suspensions and dismissals (see Table 5). Six cases involved requests for financial relief including award of lost wages, payment of legal fees, and compensatory sums of money (see Table 6). The remaining cases are unclear or pending.



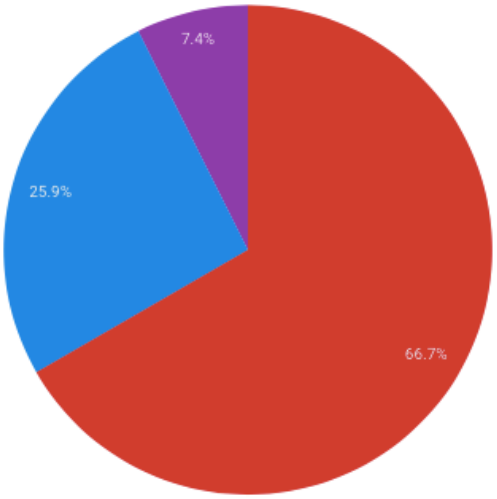
Interim Relief Sought	No. of Cases
Yes	15
No	10
Unknown	2
Grand total	**27**



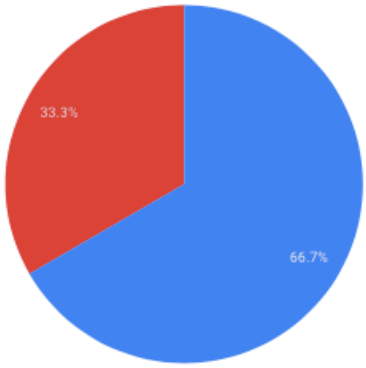
Interim Relief Provided	No. of Cases
Yes	10
No	5
Unknown	2
Grand total	**17**

Table 5

[6] Only the final relief sought is counted, so no cases are double-counted. If a whistleblower sought both interim and financial relief, only the financial relief was tallied as it was the final relief sought in court.



Financial Relief Sought	No. of Cases
Yes	7
No	18
Unknown	2
Grand total	**27**



Financial Relief Provided	No. of Cases
Yes	6
No	3
Grand total	**9**

Table 6

There a number of potential explanations for this discrepancy. For example, given the power dynamics between many whistleblowers and the large corporations and state institutions they face, it is reasonable to expect many to bypass seeking financial relief because of fear of additional retaliation, the burdens of long-term litigation and the accompanying legal costs, and the more immediate need to avoid short-term retaliation.

Has whistleblowing become more frequent over time?

A key marker of a successful whistleblower law is its ability to encourage whistleblowers not only to come forward, but to seek legal redress for retaliation suffered. An effective law therefore should encourage greater whistleblower interaction with the legal system over time, as the law becomes more entrenched and precedent develops.

Within the confines of this 30-case analysis spanning 12 years, PDA appears to have presided over a general increase in whistleblower-related court cases over time (see Table 7). The decrease after 2014 is related to the difficulty in finding case data after 2014.

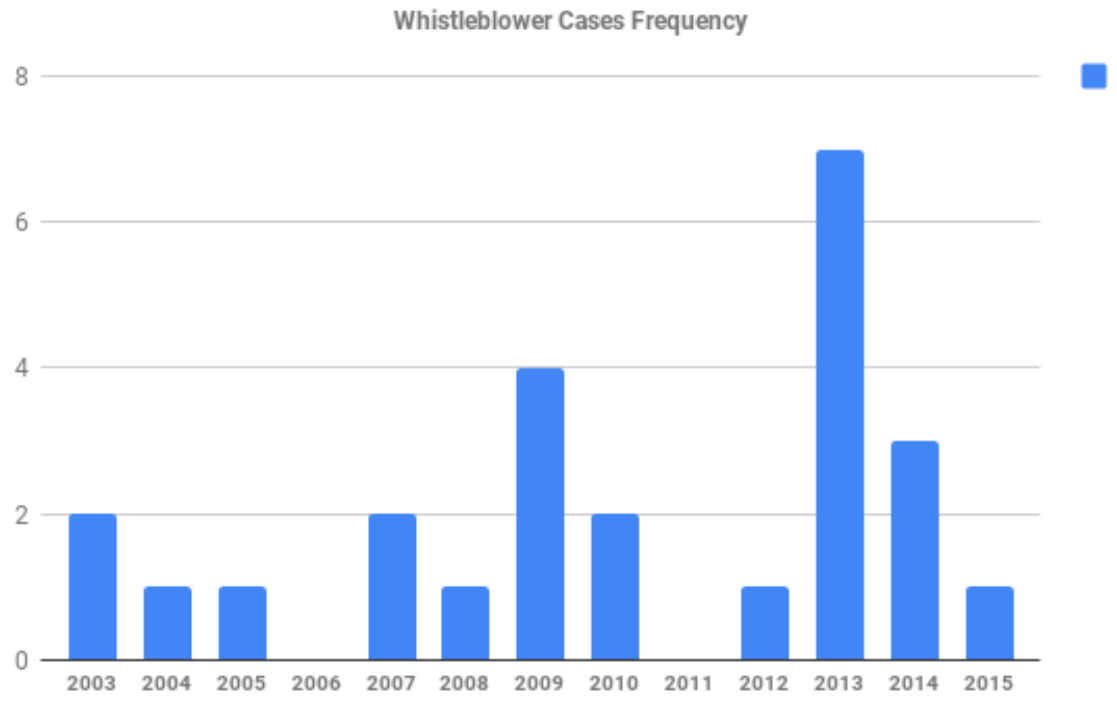


Table 7

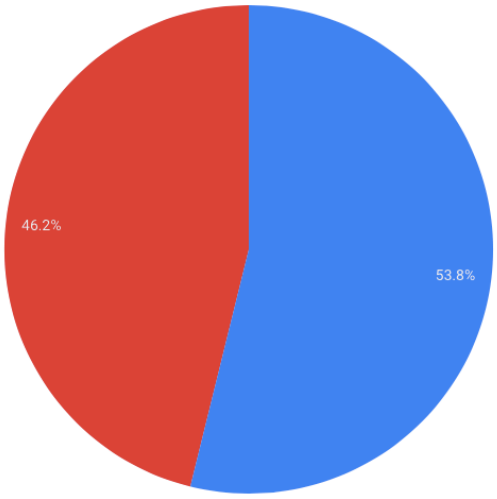
Only eight cases (27 percent) were decided within the first six years, from 2003-08. Comparatively, 21 cases (70 percent) were decided in the subsequent six years, from 2009-2014. Of these, 13 were heard in 2013-14 alone. One case remains pending. This increase suggests a positive correlation between whistleblower court cases and amount of time elapsed since PDA was signed into law.

It is worth noting, however, that other explanations may account for the increase in whistleblower cases. Further research into this topic could explore whether this increase is an isolated South Africa phenomenon or part of a broader global or regional trend; or whether an increase in corruption better explains the rise in whistleblower activity.

To what extent are whistleblowers in South Africa winning their cases?
Perhaps the most important criterion for measuring PDA's effectiveness in practice is whether South African whistleblowers who go to court actually win.

Of 26[7] whistleblower cases heard on the merits, whistleblowers had a 54 percent success rate (see Table 8). This is surprisingly high. One initial explanation is that the large numbers of requests for interim relief inflated the success rate.

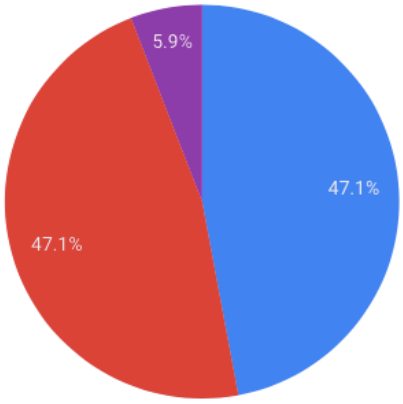
[7] In addition to the three cases omitted because there was no actual occupational detriment suffered, an additional case has been removed here because the decision is pending.



Whistleblower Win-Loss Ratio	No. of Cases
Win	14
Lose	12
Grand total	**26**

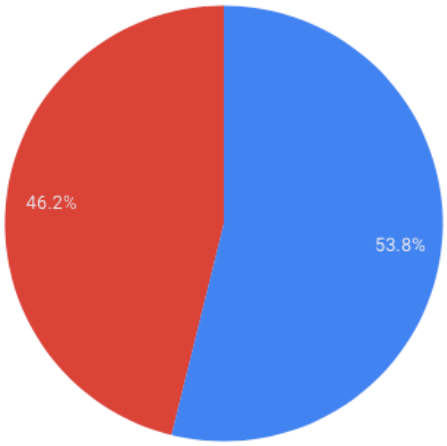
Table 8

Upon further analysis, this appears not to be the case. In fact, of those whistleblowers seeking interim relief, the success rate (58 percent) was actually lower than for those seeking financial relief (67 percent) (see Tables 9 and 10).



Internal Disclosures	No. of Cases
Win	8
Lose	8
Pending	1
Grand total	**17**

Table 9



External Disclosures	No. of Cases
Win	7
Lose	6
Grand total	13

Table 10

Given the data's suggestion that the success rate was not inflated by disproportionate awards of interim relief, there must be an alternative explanation. Here we are forced to confront the reality that the case data, while illuminating, is ultimately incomplete.

It is an unavoidable reality that in South Africa, a significant number of whistleblowers – and would-be whistleblowers – never actually have their day in court. In some cases, the contents of whistleblowers' disclosures make it to court, but their personal interests do not.

Take the case of Jimmy Mohlala, a municipal politician who blew the whistle about a local African National Congress leader's corruption relating to the construction of a stadium for the 2010 FIFA World Cup. After making his disclosure, Mohlala refused to resign his post and the anti-corruption case went to court. Mohlala was gunned down on Jan. 4, 2009 – the day before he was supposed to present evidence in court. To date, the anti-corruption case remains unresolved, and Mohlala's personal grievances were never – and likely never will be – addressed.

Mohlala is not alone. Moses Phakwe and Xola Banisi are among the other South African whistleblowers who were killed before they could seek legal redress. Imraahn Ismael-Mukaddam and Takalani Murathi suffered lesser forms forms of retaliation including intimidation and suspension, but opted not to seek legal redress in court.[8]

Some South African whistleblowers' reluctance and even inability to take their cases to court presents a serious ongoing challenge to observers evaluating PDA's overall effectiveness. While whistleblowers who use PDA may have a high success rate in court, this achievement is greatly diminished by the reality that employees face barriers to entry. The most extreme of which, as exemplified by the Banisi, Mohlala and Phakwe cases, is the very real threat of deadly retaliation.

Without a broad strengthening of legal protections and rule of law, even the best policies and procedures would be insufficient to empower employees and shield them from reprisals.

[8] https://www.opendemocracy.org.za/images/docs/publications/HeroesUnderFire.pdf

This report presents the preliminary results of the Government Accountability Project's country research. It has not been peer reviewed and may be subject to updates before publication next year.