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GOVERNMENT GAZETTE

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THE PRESIDENCY

No. *785.* 7 August 2000

It is hereby notified that the President has assented to the following Act which is hereby published for general information:—

No, 26 of 2000: Protected Disclosures Act, 2000.

DIE PRESIDENSIE

No. 785. 7 Augustus 2000

Hierby word bekend gemaak dat die President sy goedkeuring geheg het aan die onderstaande Wet wat hierby ter algemene inligting gepubliseer word:—

No. 26 van 2000: Wet op Beskermde Bekendmakings, 2000.

(English text signed by the president.)
(Assented to 1 August 2000.)

ACT

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

PREAMBLE

Recognising that—

- the-Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom;
- section 8 of the Bill of Rights provides for the horizontal application of the rights in the Bill of Rights, taking into account the nature of the right and the nature of any duty imposed by the right;
- criminal and other irregular conduct in organs of state and private bodies are detrimental to good, effective, accountable and transparent governance in organs of state and open and good corporate governance in private bodies and can endanger the economic stability of the Republic and have the potential to cause social damage;

And bearing in mind that—

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

And in order to—

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

BE IT THEREFORE EN-ACTED by the Parliament of the Republic of South Africa, as follows:—

Definitions

1. In *this Act,* unless the context otherwise indicates—

(i) *"disclosure"* means any disclosure of info, mation regarding any conduct of an *employer,* or an *employee* of that *employer,* made by any *employee* who has reason to believe that the information concerned shows or tends to show one or more of the following:

(a) That a criminal offence has been committed, is being committed or is likely to be committed;

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;

(d) that the health or safety of an individual has been, is being or is likely to be endangered;

(e) that the environment has been, is being or is likely to be damaged;

(f) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No, 4 of 2000); or

(g) that any matter referred to in paragraphs *(a)* to *(f)* has been, is being or is likely to be deliberately concealed; (i)

(ii) *"employee"* means—

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

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

(iii) *"employer"* means any person—

(a) who employs or provides work for any other person and who remunerates or expressly or tacitly undertakes to remunerate that other person; or

(b) who permits any other person in any manner to assist in the carrying on or conducting of his, her or its business,

including any person acting on behalf of or on the authority of such employer; (ix)

(iv), *"impropriety"* means any conduct which falls within any of the categories referred to in paragraphs *(a)* to (g) of the definition of *"disclosure",* irrespective of whether or not—

(a) the impropriety occurs or occurred in the Republic of South Africa or elsewhere; or

(b) the law applying to the impropriety is that of the Republic of South Africa or of another country; (vi)

(v) *"Minister"* means the Cabinet member responsible for the administration of Justice; (v)

(vi) *"occupational detriment",* in relation to the working environment of an *employee,* means—

(a) being subjected to any disciplinary action;

(b) being dismissed, suspended, demoted, harassed or intimidated;

(c) being transferred against his or her will;

(d) being refused transfer or promotion;

(e) being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;

(f) being refused a reference. or being provided with an adverse reference, from his or her *employer;*

(g) being denied appointment to any employment, profession or office;

(h) being threatened with any of the actions referred to paragraphs *(a)* to *(g)* above; or

(i) being otherwise adversely affected in respect of his or her employment, profession or office, **including** employment opportunities and work security; (ii)

(vii) *"organ of state"* means—

(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or

(b) any other functionary or institution when—

(i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; *or*

(ii) exercising a public power or performing a public function in terms of any legislation; (vii)

(viii) *"prescribed"* means prescribed by regulation in terms of section 10; (viii)

(ix) *"protected disclosure"* means a *disclosure* made to—

(a) a legal adviser in accordance with section 5;

(b) an *employer* in accordance with section 6;

(c) a member of Cabinet or of the Executive Council of a province in accordance with section 7;

(d) a person or body in accordance with section 8; or

(e) any other person or body in accordance with section 9,

but does not include a *disclosure*—

(i) in respect of which the *employee* concerned commits an offence by making that *disclosure;* or

(ii) made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5; (iii)

(x) *"this Act"* includes any regulation made in terms of section 10. (iv)

Objects and application of Act

2. (1) The objects of this *Act* are—

(a) to protect an *employee,* whether in the private or the public sector, from being subjected to an *occupational detriment* on account of having made a *protected disclosure;*

(b) to provide for certain remedies in connection with any *occupational detriment* suffered on account of having made a *protected disclosure;* and

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

(2) This Act applies to any *protected disclosure* made after the date on which this section comes into operation, irrespective of whether or not the *impropriety* concerned has occurred before or after the said date.

(3) Any provision in a contract of employment or other agreement between an *employer* and an *employee* is void in so far as it—

(a) purports to exclude any provision of *this Act,* including an agreement to refrain from instituting or continuing any proceedings under *this Act* or any proceedings for breach of contract; or

(b) (i) purports to preclude the *employee;* or

(ii) has the effect of discouraging the *employee,*

from making a *protected disclosure.*

Employee making protected disclosure not to be subjected to occupational detriment

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

Remedies

4. (1) Any *employee* who has been subjected, is subject or may be subjected, to an *occupational detriment* in breach of section 3, may—

(a) approach any court having jurisdiction, including the Labour Court established by section 15 l of the Labour Relations Act, 1995 (Act No. 66 of 1995), for appropriate relief; or

(b) pursue any other process allowed or prescribed by any law.

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

(a) any dismissal in breach of section 3 is deemed [o be an automatically unfair dismissal as contemplated in section 187 of that Act, and the dispute about such a dismissal must follow the procedure set out in Chapter VIII of that Act; and

(b) any other *occupational detriment* in breach of section 3 is deemed to be an unfair labour practice as contemplated in Part B of Schedule 7 to that Act, and the dispute about such an unfair labour practice must follow the procedure set out in that Part: Provided that if the matter fails to be resolved through conciliation, it may be referred to the Labour Court for adjudication.

(3) Any *employee* who has made a *protected disclosure* and who reasonably believes that he or she may be adversely affected on account of having made that *disclosure*, **must, at** his or her request and if reasonably possible or practicable, be transferred from the post or position occupied by him or her at the time of the *disclosure* to another post or position in the same division or another division of his or her *employer* or, where the person making the *disclosure* is employed by an *organ of state*, to another *organ of state*.

(4) The terms and conditions of employment of a person transferred in terms of subsection (2) may not, without his or her written consent, be less favorable than the terms and conditions applicable to him or her immediately before his or her transfer.

Protected disclosure to legal adviser

5. Any *disclosure* made—

(a) to a legal practitioner or to a person whose occupation involves the giving of legal advice; and

(b) with the object of and in the course of obtaining legal advice,

is a *protected disclosure*.

Protected disclosure to employer

6. (1) Any *disclosure* made in good faith—

(a) and substantially in accordance with any procedure *prescribed*, or authorised by the *employee's employer* for reporting or otherwise remedying the *impropriety* concerned; or

(b) to the *employer* of the *employee*, where there is no procedure as contemplated in paragraph (a),

is a *protected disclosure*.

(2) Any *employee* who, in accordance with a procedure authorised by his or her *employer*, makes a *disclosure* to a person other than his or her *employer*, is deemed, for the purposes of *this Act*, to be making the *disclosure* to his or her *employer*.

Protected disclosure to member of Cabinet or Executive Council

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

(a) an individual appointed in terms of legislation by a member of Cabinet or of the Executive Council of a province;

(b) a body, the members of which are appointed in terms of legislation by a member of Cabinet or of the Executive Council of a province; or

(c) an *organ of state* falling within the area of responsibility of the member concerned.

Protected disclosure to certain persons or bodies

8. (1) Any *disclosure* made in good faith to—

(a) the Public Protector;

(b) the Auditor-General; or

(c) a person or body *prescribed* for purposes of this section; and

in respect of which the *employee* concerned reasonably believes that—

(i) the relevant *impropriety* falls within any description of matters which, in the ordinary course are dealt with by the person or body concerned: and

(ii) the information disclosed, and any allegation contained in it, are substantially tree,

is a *protected disclosure.*

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

General protected disclosure

9. (1) Any *disclosure* made in good faith by an *employee*—

(a) who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and

(b) who does not make the *disclosure* for purposes of personal gain, excluding any reward payable in terms of any law;

is a *protected disclosure* if—

(i) one or more of the conditions referred to in subsection (2) apply; and

(ii) in all the circumstances of the case, it is reasonable to make the *disclosure.*

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

(a) that at the time the *employee* who makes the *disclosure* has reason to believe that he or she will be subjected to an *occupational detriment* if he or she makes a *disclosure* to his or her *employer* in accordance with section 6;

(b) that, in a case where no person or body is *prescribed* for the purposes of section 8 in relation to the relevant *impropriety*, the *employee* making the *disclosure* has reason to believe that it is likely that evidence relating to the *impropriety will* be concealed or destroyed if he or she makes the *disclosure* to his or her *employer*;

(c) that the *employee* making the *disclosure* has previously made a *disclosure* of substantially the same information to—

(i) his or her *employer*; or

(ii) a person or body referred to in section 8,

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

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

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

(a) the identity of the person to whom the *disclosure is* made;

(b) the seriousness of the *impropriety;*

(c) whether the *impropriety is* continuing or is likely to occur in the future;

(d) whether the *disclosure* is made in breach of a duty of confidentiality of the *employer* towards any other person;

(e) in a case falling within subsection (2)(c), any action which the *employer* or the person or body to whom the *disclosure* was made, has taken, or might reasonably be expected to have taken, as a result of the previous *disclosure;*

(f) in a case falling within subsection (2)(c)(i), whether in making the *disclosure* to the *employer* the *employee* complied with any procedure which was authorised by the *employer*; and

(g) the public interest.

(4) For the purposes of this section a subsequent *disclosure* may be regarded as a *disclosure* of substantially the same information referred to in subsection (2)*(c)* where such subsequent *disclosure* extends to information concerning an action taken or not taken by any person as a result of the previous *disclosure.*

Regulations

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

(a) for the purposes of section 8(1), matters which, in addition to the legislative provisions pertaining to such functionaries, may in the ordinary course be referred to the Public Protector or the Auditor-General, as the case may be;

(b) any administrative or procedural matter necessary to give effect to the provisions of *this Act;* and

(c) any other matter which is required or permitted by *this Act* to **be** prescribed.

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

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

(4) *(a)* The *Minister* must, after consultation with the Minister for the Public Service and Administration, issue practical guidelines which explain the provisions of *this Act* and all procedures which are available in terms of any law to *employees* who wish to report or otherwise remedy an *impropriety.*

(b) The guidelines referred to in paragraph *(a)* must be approved by Parliament before publication in the *Gazette.*

(c) All organs of state must give to every *employee* a copy of the guidelines referred to in paragraph *(a)* or must take reasonable steps to bring the relevant notice to the attention of every *employee.*

Short title and commencement

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