

Companies Act, 71 of 2008

Protection for whistle-blowers

It is not often that an employee reports misconduct in the workplace to his employer. This is mainly because the employee is unsure whether to report the matter or not and often for fear of reprisal by his employer. In order to address this problem and to ensure that the employee is protected from any detriment, parliament enacted the Protected Disclosures Act, 26 of 2000 (the "Protected Disclosures Act"). The Protected Disclosures Act provides amongst its objects, the protection of an employee, whether in the private or public sector, from being subjected to what is called an "occupational detriment". The Protected Disclosures Act defines an occupational detriment as being subjected to disciplinary action, being dismissed, suspended, demoted, harassed or intimidated or being transferred against your will because of the disclosure.

In addition to the above, the Companies Act of 2008 (the "Act") now also contains provisions in respect of the protection of whistle-blowers in section 159.

To the extent that section 159 of the Act creates any right of, or establishes any protection for an employee, as defined in the Protected Disclosures Act:

- that right or protection is in addition to, and not in substitution for, any right or protection established by that Act;
- and that Act applies to a disclosure contemplated in this section by an employee, as defined in that Act, irrespective of whether that Act would otherwise apply to that disclosure.

What you should know:

Any provision of a company's Memorandum of Incorporation or rules, or an agreement, is void to the extent that it is inconsistent with, or purports to limit, set aside or negate the effect of section 159.

Section 159 (3) of the Act applies to any disclosure of information by a person contemplated in section 159(4) (listed below) if:

- it is made in good faith to the Commission, the Companies Tribunal, the Panel, a regulatory authority, an exchange, a legal adviser, a director, prescribed officer, company secretary,

auditor, a person performing the function of internal audit, board or committee of the company concerned;

- and the person making the disclosure reasonably believed at the time of the disclosure that the information showed or tended to show that a company or external company, or a director or prescribed officer of a company acting in that capacity, had:
 - contravened this Act, or a law mentioned in Schedule 4 (Schedule 4 identifies legislation that should be enforced by the Commission and includes legislation such as the Close Corporations Act, Share Blocks Control Act, Co-operatives Act, etc.);
 - failed or was failing to comply with any statutory obligation to which the company was subject;
 - engaged in conduct that had endangered, or was likely to endanger, the health or safety of any individual, or had harmed or was likely to harm the environment;
 - unfairly discriminated, or condoned unfair discrimination, against any person, as contemplated in section 9 of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000; or
 - contravened any other legislation in a manner that could expose the
 - company to an actual or contingent risk of liability, or is inherently prejudicial to the interests of the company.

What you should know:

A shareholder, director, company secretary, prescribed officer or employee of a company, a registered trade union that represents employees of the company or another representative of the employees of that company, a supplier of goods or services to a company, or an employee of such a supplier, who makes a disclosure contemplated in section 159(4):

- *has qualified privilege in respect of the disclosure;*
- *and is immune from any civil, criminal or administrative liability for that disclosure.*

A person contemplated in the abovementioned paragraph is entitled to compensation from another person for any damages suffered if the first person is entitled to make, or has made, a disclosure contemplated in this section and, because of that possible or actual disclosure, the second person:

- engages in conduct with the intent to cause detriment to the first person, and the conduct causes such detriment; or
- directly or indirectly makes an express or implied threat, whether conditional or unconditional, to cause any detriment to the first person or to another person, and:
 - intends the first person to fear that the threat will be carried out; or
 - is reckless as to causing the first person to fear that the threat will be carried out, irrespective of whether the first person actually fears or feared that the threat will or would be carried out.

Any conduct or threat contemplated above is presumed to have occurred as a result of a possible or actual disclosure that a person is entitled to make, or has made, unless the person who engaged in the conduct or made the threat can show satisfactory evidence in support of another reason for engaging in the conduct or making the threat.

A public company or a state-owned company must directly or indirectly:

- establish and maintain a system to receive disclosures contemplated in this section confidentially, and act on them; and
- routinely publicise the availability of that system to the categories of persons contemplated in section 159(4), as mentioned above.

Based on the above summary of the pertinent provisions of the Act, it is evident that companies have to ensure proper execution of their responsibilities while complying to the law at all times.

NEED ASSISTANCE WITH THE IMPLICATIONS OF THIS ACT?

CONTACT:

Monument Office Park, Block 5, Suite 102,
79 Steenbok Avenue, Monument Park
Tel: 086 111 10 10
Fax: 086 604 1315
e-mail: hello@fluidrockgovernance.com
website: www.fluidrock.com

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