Introduction
This article aims to provide a basic understanding of the Protected Disclosures Act 26 of 2000 (hereinafter “the PDA”), having particular reference to the protection afforded by the Labour Relations Act 66 of 1995 (hereinafter “the LRA”) to employees who make a disclosure to their employer.

Background
The preamble of the PDA recognises the presence of criminal and/or other irregular conduct in organs of state and private institutions, which is detrimental to good, effective, accountable and transparent governance in these entities. The effect of such conduct increases the likelihood of social damage, as well as destabilising the economy. In light of this, the PDA provides a platform in which every employee and employer has an obligation to disclose any criminal and/or irregular conduct in the workplace.

In addition to this responsibility to disclose, the PDA also provides that employers have an equal duty to ensure that all necessary steps are taken to protect employees from any detriment, as a result of their disclosure of such information.

The PDA thus aims to facilitate a culture wherein whistleblowing in the workplace is done in a responsible manner, which is regulated by substantial statutory guidelines.

What is a Protected Disclosure?
In order to qualify for protection, a disclosure made by an employee must be one that is regarded as “protected” under the PDA. Section 1 of the PDA defines a disclosure as the disclosure of information by an employee, regarding any conduct of an employer, or an employee of that employer, which shows that:

1. A **criminal offence** has been committed, or is being committed or is likely to be
committed;
2. A person has failed, is failing or is likely to fail to comply with any legal obligation which they have;
3. A miscarriage of justice has occurred, is occurring or is likely to occur;
4. The health or safety of an individual has been or is likely to be endangered;
5. The environment has been, is being or is likely to be damaged;
6. Unfair discrimination is taking place, as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; or
7. Any matter related to the above, has been or is likely to be deliberately concealed.

Furthermore, a “protected disclosure” is not only a disclosure made to an employer but, may include a disclosure made to a legal adviser, Cabinet Member, Public Protector, regulatory body, member of the press, or police official. Section 3 of the PDA states that 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.

An “occupational detriment” includes any disciplinary action, being dismissed, suspended, demoted, harassed or intimidated, being transferred against one’s will, being refused a transfer or promotion, or being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security.

Judicial Decisions & Application of the PDA
It is important to note that a disclosure made in terms of the PDA need not be factually accurate, rather, the disclosure made must be in good faith, and the employee making such disclosure must reasonably believe that the information disclosed is substantially true. Furthermore, the disclosure may not be made by an employee for the purposes of personal gain.

This is evident in the recent case of Chowan v Associated Motor Holdings (Pty) Ltd and Others 2018 (4) SA 145 (GJ) whereby the court held that the claimant’s subjective belief that she was being discriminated against was ‘reasonable’ within the meaning of ‘disclosure’ in terms
of section 1 of the PDA. Since the disclosure was also made in good faith, it was protected.

Furthermore, the Labour Appeal Court in Lou-Anndree John v Afrox Oxygen Limited (JA90/15 [2018] ZALAC re-iterated that an employee need only prove that their belief was reasonable in order for their disclosure to be protected. It was held that a ‘reasonable belief’ does not relate to the reasonableness of the information, but rather the reasonableness of the belief. A belief can still be reasonable, even if the information turns out to be inaccurate. It was held that the onus to prove the accuracy of the information, in order to enjoy protection, would elevate the requirement to a higher standard than that required by the PDA.

As a result, such a requirement would frustrate the functioning of the PDA.

It is clear that the PDA does not require disclosures to be factually correct, in order for an employee to be protected.

**Remedies**

Section 4 of the PDA provides that where an employee has been subjected, is currently subjected, or may be subjected to an occupational detriment, he/she may approach any court with jurisdiction, including the Labour Court, in order to seek the appropriate relief or pursue any other process allowed or prescribed by any law.

Moreover, any dismissal on account, or partly on account, of an employee having made a protected disclosure, is deemed to be an automatically unfair dismissal in terms of the LRA. Any other occupational detriment, which is the result of having made a protected disclosure, is deemed to be an unfair labour practice in terms of the LRA.

**Conclusion**

In conclusion, the provisions of the PDA create an environment where whistleblowing is not only protected, but is encouraged as an additional responsibility of employees and employers. As long as disclosures are made in accordance with the procedures set out in the PDA, they will be protected.
Employers should ensure that PDA policies are put in place, and should train their employees as to the provisions of the PDA, in order to create a working environment where whistle-blowers are encouraged and protected. The Employer will not only be acting in accordance with the LRA and the PDA, they will also be promoting a greater sense of accountability in the workplace.

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