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ENCOURAGING WHISTLEBLOWERS OF CORRUPTION IN SOUTH AFRICA: A CRITICAL EVALUATION OF MONEY REWARDS

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ABSTRACT

In South Africa, as in many other countries, corruption and related criminal activities are deeply rooted and seem to cripple municipalities and the public sector in general. Studies have shown that whistleblowing is an essential tool that contributes to transparency and thus helps to control corruption. Three methods are available to a government to encourage whistleblowers to come forward: Protecting whistleblowers, creating an ethical government culture, and rewarding whistleblowers. It is therefore not surprising that the Commission of Inquiry into State Capture recommended that the South African government consider introducing money rewards for whistleblowers. This recommendation and the harsh reality that many whistleblowers have lost their lives in South Africa justify a more in-depth investigation into money rewards for whistleblowers.

Research done by Maslen for Transparency International of foreign jurisdictions shows that money rewards (and the resulting increase in reports) can be a cost-effective and time-saving method to bring perpetrators to justice. On the other hand, some scholars such as Aygare and Aidoo-Buameh warn that money rewards could exacerbate existing dysfunctional organisational cultures by fuelling distrust among colleagues in the work environment. Aside from exploring whether money rewards would be beneficial, the current legal position involving whistleblower rewards must also be considered.

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1. INTRODUCTION

Corruption is a reality for many governments globally.¹ Even in South Africa, gross mismanagement and corruption have left municipalities crippled. Recently South African municipalities have been characterised by service delivery failures and gross financial mismanagement.² Although the most recent Auditor General report shows that appropriate action is being taken to address many material irregularities in municipalities, municipalities are still struggling to recuperate.³ The Report further shows that it is possible for municipalities to recover some financial losses because of gross financial misconduct, but doing so takes time and involves spending more money.⁴

Preventing corruption and financial misconduct is therefore preferred over having to recover financial losses suffered. One of the accepted methods to prevent and control corruption and financial misconduct is encouraging whistleblowing.⁵ Studies have shown that whistleblowing is a key tool that provides information about any financial misconduct, corruption, and related activities.⁶ Whistleblowing has also proven to protect government institutions against patrimonial tendencies and institutional apathy.⁷ Three methods are identified that are successful in encouraging whistleblowing namely, providing whistleblower protection, creating an ethical organisational culture, and providing whistleblower incentives such as money rewards.⁸ It is therefore no surprise that the Zondo report recommended that money incentives for whistleblowers be considered to encourage whistleblowing in South Africa.⁹

1 Transparency International "Corruption Perceptions Index", available at <https://www.transparency.org/en/cpi/2020> (visited 21 June 2024).

2 Auditor-General of South Africa *Consolidated General Report on Local Government Audit Outcomes MFMA 2021-22* (2023) 2.

3 Auditor-General of South Africa (2023) at 23.

4 Auditor-General of South Africa (2023) at 23.

5 Teichmann FM & Falker MC (2021) "Whistleblowing Incentives" 28(2) *Journal of Financial Crime* 394 – 405 at 395; Aygare P & Aidoo-Buameh J (2014) "Whistleblower Reward and Systems Implementation Effects on Whistleblowing in Organisations" 2(1) *European Journal of Accounting Auditing and Finance Research* 80 – 90.

6 Teichmann & Falker (2021) at 395; Aygare & Aidoo-Buameh (2014) at 80.

7 Teichmann & Falker (2021) at 395; Aygare & Aidoo-Buameh (2014) at 80.

8 Teichmann & Falker (2021) at 395; Aygare & Aidoo-Buameh (2014) at 80.

9 Davey D (10 March 2022) "Amend South Africa's Legislation to Include Financial Rewards for Whistleblowers" *Mail and Guardian*.

This article explores how legislation creating money incentives for whistleblowers could hypothetically play out in South Africa. This will be done by first looking at the concept monetary incentives and money rewards for whistleblowers. By looking at foreign jurisdictions, the article will show how these are generally structured. The potential benefits and potential dangers of implementing these rewards are then critically discussed within the South African context. The article then investigates the *status quo* of South African legislation and whether it would currently be possible to implement money rewards for whistleblowers, after which it concludes.

2. CONCEPTUALISING MONEY INCENTIVES FOR WHISTLEBLOWERS

Money rewards must be distinguished from financial support or compensation which can also be awarded to a whistleblower.¹⁰ Financial support can be understood as an award made to cover the reasonable costs or expenses incurred by a whistleblower such as seeking legal advice or travel costs.¹¹

Compensation, on the other hand, is money awarded to balance the damages, loss, and harm suffered because of retaliation.¹² Compensation is meant to help whistleblowers recover money that would be sufficient to help them withstand the impact of retaliation such as job loss, tarnished careers, etc.¹³

Money incentives go further than providing financial support or compensating for losses due to retaliation.¹⁴ They motivate whistleblowers through recognition and awards for being a good citizen.¹⁵ Popularly understood as offering a substantial amount of money in return for volunteering information about certain activities, money rewards are in addition to

10 Lubisi S & Bezuidenhout H (2016) "Blowing the Whistle for Personal Gain in the Republic of South Africa: An Option for Consideration in the Fight against Fraud?" 18 *Southern African Journal of Accountability and Auditing Research* 49 – 62 at 52; Vian T, Agnew B & McLennes K (2022) "Whistleblowing as an Anti-Corruption Strategy in Health and Pharmaceutical Organizations In Low- and Middle-Income Countries: A Scoping Review" 15(1) *Global Health Action* 8.

11 Lubisi & Bezuidenhout (2016) at 52; Vian, Agnew & McLennes (2022) at 8.

12 Lubisi & Bezuidenhout (2016) at 52; Vian, Agnew & McLennes (2022) at 8.

13 Lubisi & Bezuidenhout (2016) at 52.

14 Maslen C (2018) 'Whistleblower Reward Programmes' Transparency International, available at <https://knowledgehub.transparency.org/assets/uploads/helpdesk/Whistleblower-Reward-Programmes-2018.pdf> (visited 30 August 2023).

15 Maslen (2018).

whistleblower protection.¹⁶ In other words, money incentives are awards of money made to persons who gave information which led to successful actions or prosecutions.¹⁷ Money incentives for whistleblowers are also referred to as money rewards or financial bounties.¹⁸

Some definitions of whistleblowers are broad enough to include people such as journalists, auditors, and other officials whose job it is to uncover irregularities.¹⁹ It should be noted that in this instance whistleblowers who have a duty to uncover and report on irregularities might not be entitled to money rewards.²⁰ The rationale is that such whistleblowers should not be rewarded for simply doing their job. However, these whistleblowers should be just as entitled to all protections, support, and compensation as other whistleblowers would – no person should be punished for being a good citizen.

3. MODELS OF WHISTLEBLOWER MONEY REWARD SYSTEMS

Money incentive schemes usually apply to whistleblowers in the public and private sector and their main objective is to improve the detection of certain predetermined illicit or inappropriate behaviour.²¹ The predetermined behaviour could include:

[K]nowledge of any past, present, or likely to occur illegality, economic crime, miscarriage of justice, waste or misappropriation by an organization, degradation of the environment, or the endangerment of health or safety of an individual or community.²²

A reward system therefore targets individual(s) that may have *insider* knowledge of activities such as corruption that authorities would otherwise not be able to obtain. An investigation of 22 foreign jurisdictions²³ shows that whistleblower money reward systems follow different

16 Nyrreröd T & Spagnolo G (2021) "A Fresh Look at Whistleblower Rewards" 10(4) *Journal of Governance and Regulation* 248 – 260 at 249.

17 Andon P et al (2018) "The Impact of Financial Incentives and Perceptions of Seriousness on Whistleblowing Intention" 151(1) *Journal on Business and Ethics* 165 – 178 at 166.

18 Andon et al (2018) at 168; Vian T, Agnew B & Mclennes K (2022) "Whistleblowing as an Anti-Corruption Strategy" 15(1) *Global Health Action* 1 – 14 at 8.

19 OECD (2014) *G20 Anti-corruption Action Plan: Protection of Whistleblowers* at 4.

20 Andon et al (2018) at 168; Vian, Agnew & Mclennes (2022) at 8.

21 Andon et al (2018) at 168; Vian, Agnew & Mclennes (2022) at 8.

22 Andon et al (2018) at 168; Vian, Agnew & Mclennes (2022) at 8.

23 Countries investigated: Australia, Brazil, Canada, Ghana, Hungary, Israel, Kenya, Lithuania, Malaysia, Mexico, Montenegro, Nigeria, Pakistan, Peru, Philippines, Slovakia, South Korea, Taiwan, Ukraine, United Kingdom, United States of America, and Vietnam.

models. Sometimes countries use a combination of these models, depending on the specific goals they want to achieve with these reward systems. These could be divided into four models:²⁴

The first one reflects a simple transaction (also called a cash-for-information scheme) where useful information is *bought* from the whistleblower.²⁵ In a cash-for-information scheme, whistleblowers submit evidence of their information to the authorities.²⁶ Should this evidence prove that misconduct was or is being committed, the authorities can initiate appropriate action. The authority then has the discretion to make an award in return for this information and transfer it to the whistleblower.²⁷

The second model is rewarding a whistleblower if their information leads to a fine, penalty, or recovery of damages and losses.²⁸ Similar to the first model, the whistleblower gives information to the authorities about misconduct.²⁹ When losses, penalties, or fines are recovered from the perpetrator, the whistleblower is awarded a portion of it.³⁰

The third model rewards whistleblowers whose information led to some form of criminal proceedings (criminal indictment, plea agreements, etc).³¹ This model is also like the first one, but here the information must lead to a determined stage in the criminal proceedings. Upon reaching this stage (indictment, conviction, etc), the whistleblower will be entitled to a predetermined reward.

24 Mushwana GF (2023) *Incentivising Whistleblowing to Combat Corruption and Improve Governance: A South African Perspective* unpublished MPhil thesis, Stellenbosch University at 52; Nyneröd & Spagnolo (2021) at 251; Andon et al (2018) at 166; Constantine Cannon “Whistleblower Reward Laws”, available at <https://constantinecannon.com/practice/whistleblower/whistleblower-types/whistleblower-reward-laws/> (visited 30 August 2023); Callahan ES & Dworkin TM (1992) “Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act” 37 *Villanova Law Review* 273 – 336.

25 Kenya, Lithuania, Malaysia, Pakistan, Peru, and Taiwan. Maslen (2018) .

26 Maslen (2018).

27 Maslen (2018).

28 Canada, Ghana, Hungary, Republic of Korea, Montenegro, Nigeria, Slovakia, United Kingdom, and United States of America. Secs 23 and 24 of the *Whistleblower Act* 720 of 2006 (Ghana); Mushwana (2023) at 52.

29 Maslen (2018).

30 Maslen (2018).

31 Ghana, Slovakia, and Ukraine. National Whistleblower Centre “Whistleblower Laws around the World”, available at <https://www.whistleblowers.org/whistleblower-laws-around-the-world/> (visited 3 November 2023); secs 23 and 24 of the *Whistleblower Act* 720 of 2006 (Ghana); Mushwana (2023) at 52.

The fourth model (also referred to as *qui tam* laws) creates a parallel system whereby an individual (whistleblower) institutes action on behalf of the state against the perpetrator to recover assets or funds.³² In a *qui tam* model, the whistleblower hires an attorney after they gather evidence and initiate action against the perpetrator on behalf of the state.³³ At this point, the action is placed under seal.³⁴ Once under seal, the state may assess the whistleblower's action and choose to intervene and join the court proceedings. Should the state not join these proceedings, the whistleblower must see it through on his own.³⁵ After the conclusion of the court proceedings, the whistleblower is then awarded a portion of the funds recovered or fined, in addition to reimbursement for legal fees and other expenses.³⁶ This reward model can thus be seen as a form of remuneration for the whistleblowers, aimed at compensating them for their time and efforts to successfully prosecute the perpetrator on behalf of the state.³⁷

4. POTENTIAL BENEFITS

The development and enactment of whistleblower reward systems are justified by the many benefits they provide.³⁸ The starkest benefit is that it encourages whistleblowing which means that the authorities receive more reports.³⁹ It is believed that the anticipated personal costs associated with whistleblowing are balanced by providing a reward and therefore more people will be willing to blow the whistle.⁴⁰ Studies have shown that the whistleblower reward system (*qui tam* model) in the United States of America led to a substantial increase in the

32 United States of America. National Whistleblower Centre (above).

33 Fleischer H & Schmolke KU (2021) "Financial Incentives for Whistleblowers in European Capital Markets Law? Legal Policy Considerations on the Reform of the Market Abuse Regime" *ECGI Law Working Paper* No 189/2012 at 3; Maslen (2018); Thusing G & Forst G (eds) (2016) *Whistleblowing: A Comparative Study* Springer, New York at 287; Bron I (2022) *Square peg in round hole?* unpublished PhD thesis, Carleton University at 48; Givati Y "A Theory of Whistleblower Rewards" (2016) 45 *The Journal of Legal Studies* 43 – 72 at 49.

34 Fleischer & Schmolke (2021) at 3; Thusing & Forst (2016) at 287; Givati (2016) at 49; Bron (2022) at 48.

35 Fleischer & Schmolke (2021) at 3; Thusing & Forst (2016) at 287; Givati (2016) at 49; Bron (2022) at 48.

36 Fleischer & Schmolke (2021) at 3; Thusing & Forst (2016) at 287; Givati (2016) at 49; Bron (2022) at 48.

37 Fleischer & Schmolke (2021) at 3; Thusing & Forst (2016) at 287; Givati (2016) at 49; Bron (2022) at 48.

38 Butler JV, Serra D & Spagnolo G (2020) "Motivating Whistleblowers" 66(2)*Management Science* 605 – 621 at 618.

39 Maslen (2018).

40 Maslen (2018).

number of investigations and more instances where funds were recovered.⁴¹ This suggests that reward systems could not only increase the number of reports, but an actual increase in information that relates to irregularities. This can assist investigations, prosecutions, and recovery of losses. More reports could also lead to a higher crime *clean-up* rate.⁴² Prosecutions or *clean-up* rates are often considered when countries are ranked or monitored, and the resulting indices or registers may have an impact on investments and the economy in general of a country. For example, South Africa's prosecution rate for financial-related crimes was too low which led to South Africa's grey listing by the Financial Action Task Force.⁴³ This in turn discouraged foreign investments and caused the South African Rand to weaken significantly against foreign currencies.

An increase in credible information saves valuable state resources that would otherwise have had to be spent on investigations to uncover it.⁴⁴ One can thus say that whistleblower reward systems can lower public spending because rewarding a whistleblower might cost less than a traditional investigation.⁴⁵ Traditional investigations consume real state resources (human, time, money, and infrastructure resources) whereas whistleblower rewards are "simple wealth transfers".⁴⁶ Investigations can be fast-tracked and time is saved because whistleblowers often come forward with some evidence of their allegations.⁴⁷ Moreover, a *qui tam* model may function similarly to a parallel prosecution system. This means that the state does not have to initiate and oversee all the court proceedings because whistleblowers can do this on behalf of the state. Rewards can therefore lighten the caseload of state prosecutors as well.

41 Maslen (2018).

42 Fleischer & Schmolke (2021) at 7.

43 Investec "South Africa Greylisted: What Does it Mean for You?", available at https://www.investec.com/en_za/focus/economy/its-official-south-africa-greylisted-html#:~:text=SA%20Greylisted%3A%20What%20does%20it,terrorist%20financing%20and%20proliferation%20financing (visited 30 August 2023).

44 Maslen (2018); Mushwana (2023) at 38; Fleischer & Schmolke (2021) at 7; Givati (2016) at 44.

45 Mushwana (2023) at 38; Fleischer & Schmolke (2021) at 7; Givati (2016) at 44.

46 Givati (2016); Mushwana (2023) at 38.

47 Mushwana (2023) at 38.

Whistleblower rewards can also raise public awareness of whistleblowing in general.⁴⁸ When these rewards are accompanied by extensive media coverage, it could improve the public perception of whistleblowing.⁴⁹ Media coverage of whistleblower rewards can also raise public awareness of the importance of reporting irregularities, which in turn encourages more people to blow the whistle.⁵⁰

Empirical evidence suggests that money rewards can motivate a *new* kind of whistleblower.⁵¹ Socio-psychological studies indicate that many whistleblowers are motivated by their moral values.⁵² However, an extrinsic reward such as a substantial amount of money has proved to be a compelling motivational tool for whistleblowing.⁵³ One could thus argue that by offering a money reward, even those not compelled by moral values would be encouraged to blow the whistle.

Money rewards can also promote the dysfunctionality of organised crime networks. A state could offer a reward for the first self-reporting offender in an organised crime network or cartel.⁵⁴ Rewards spark distrust among accomplices and extort the participant's fear of getting caught. The result is that offenders are less willing to participate in such networks, thus deterring organised crime, cartel formation, and corruption.⁵⁵ Cartels' expenses increase because now they have to pay higher bribes (or make bigger threats) than the rewards offered, to prevent reporting.⁵⁶ The rewards thus increase distrust among cartel members and reduce their overall effectiveness.⁵⁷ However, this benefit only occurs if provision is made for

48 Maslen (2018).

49 Maslen (2018).

50 Maslen (2018).

51 Callahan & Dworkin (1992) at 273; Andon et al (2018) at 168.

52 Callahan & Dworkin (1992) at 273; Andon et al (2018) at 168.

53 Callahan & Dworkin (1992) at 273; Andon et al (2018) at 168.

54 Nyrreröd & Spagnolo (2021) at 250; Fleischer & Schmolke (2021) at 5; Spratling GR (2001) "Detection and Deterrence: Rewarding Informants for Reporting Violations" 69 (5/6) *George Washington Law Review* 798 – 823 at 799, 805.

55 Nyrreröd & Spagnolo (2021) at 250; Fleischer & Schmolke (2021) at 5; Spratling (2001) at 799, 805.

56 Nyrreröd & Spagnolo (2021) at 250; Fleischer & Schmolke (2021) at 5; Spratling (2001) at 799, 805.

57 Maslen (2018).

whistleblower awards may be given to co-conspirators.⁵⁸ Studies in South Korea provided evidence that such a reward system weakened the local sugar cartels.⁵⁹

5. POTENTIAL DANGERS

Despite the consensus that money rewards for whistleblowing have many benefits, there are some potential dangers that one must be aware of. One of the biggest concerns amongst scholars appears to be that money rewards will increase the number of reports, but that it will not necessarily increase the number of credible reports, because of opportunism.⁶⁰ Informants may adopt a *lottery* mentality and make all sorts of reports (including frivolous and malicious ones) in the hopes of receiving a large money reward.⁶¹ Williams⁶² warns that in the United States of America specifically, whistleblower rewards are becoming a lottery for a few to get rich from making disclosures.

An increase in unreliable reports means an increase in workload and resource use.⁶³ An added level of administration becomes necessary to screen and separate the reports so further investigations are only conducted on reliable reports.⁶⁴ In some instances, the sheer number of reports “has imposed a heavy and expensive administrative load on reporting agencies”.⁶⁵ However, scholars have shown that such effects can be mitigated by introducing

58 Maslen (2018).

59 Maslen (2018).

60 Aygare & Aidoo-Buameh (2014) at 87; Nyrreröd & Spagnolo (2021) 251; Fleischer & Schmolke (2021) at 9; Bron IG (2022) *Square peg in round hole? Three Case Studies into Institutional Factors Affecting Public Service Whistleblowing Regimes in the United Kingdom, Canada, and Australia* PhD thesis, Carleton University at 49; Franke B, Moser H & Simons D (2020) “A Carrot Without a Stick – The Effect of Monetary Rewards on Corporate Whistleblowing” *Social Science Research Network* at 18; Adesiyan A, Wright N & Everitt K “UK: FCA and PRA Publish Conclusions on the Impact of Financial Incentives for Whistleblowers”, available at <https://www.lexology.com/library/detail.aspx?g=3890b38a-4faa-494b-8743-7a92a632c8fe> (visited 30 August 2023).

61 Fleischer & Schmolke (2021) at 9; Williams S (2013) “Whistleblowers and Extortion”, available at <https://austriancenter.com/whistleblowers-and-extortion/> (visited 30 August 2023); Adesiyan, Wright & Everitt.

62 Williams (2013) .

63 Nyrreröd & Spagnolo (2021) at 251; Franke, Moser & Simons (2020) at 18.

64 Fleischer & Schmolke (2021) at 9.

65 Andon et al (2018) at P 176.

stiff penalties for frivolous and malicious reports, especially for repeat offenders.⁶⁶ The penalties may be fines and should be accompanied by publicity orders.⁶⁷

Money rewards may undermine internal reporting structures.⁶⁸ Fleischer and Schmolke⁶⁹ are of the opinion that financial incentives do not really encourage more whistleblowers, it only leads them to prefer external reporting channels. Rewards could encourage reporters to hold off reporting certain activities until they become serious enough to justify direct reporting to external channels so they can access these money rewards.⁷⁰ In this way, money rewards could potentially be counterproductive for early detection of irregularities, because whistleblowers would no longer prefer to raise reports internally first.⁷¹ This means that rewards could weaken the effectiveness of internal reporting channels.⁷²

Many reward models do not preserve the anonymity of reporters.⁷³ For example, the Ghana Whistleblower Act 720 of 2006 determines that whistleblowers may only be eligible for rewards if they made the report to a chief or elder and to a range of government offices and institutions, personally.⁷⁴ The identity of the whistleblower is therefore revealed to multiple persons. However, many systems combine rewards with enhanced protections against retaliation.⁷⁵

Whistleblowing is commonly motivated by acting in the public interest. However, through money rewards, reporting is commoditised.⁷⁶ Whistleblowers receiving these rewards may now be seen as *gold-diggers* or people selling out their comrades, instead of

66 Andon et al (2018) at 176; Fleischer & Schmolke (2021) at .

67 Andon P et al (2018) at 176.

68 Nyrreröd & Spagnolo (2021) at 251; Fleischer & Schmolke (2021) at 8; Aygare & Aidoo-Buameh (2014) at 83.

69 Fleischer & Schmolke (2021) at 8.

70 Fleischer & Schmolke (2021) at 8.

71 Fleischer & Schmolke (2021) at 8.

72 Fleischer & Schmolke (2021) at 8; Aygare & Aidoo-Buameh (2014) at 83.

73 Maslen (2018).

74 Maslen (2018).

75 Maslen (2018).

76 Just Share (2022) *Whistleblower Protection in South Africa: Where to From Here?* at 15; Guthrie CP & Taylor EZ (2017) "Whistleblowing on Fraud for Pay: Can I Trust You?" 2(1) *Journal of Forensic Accounting Research A!* – A19 at A3.

people who made reports in service of public interest.⁷⁷ This means that such rewards could potentially exacerbate negative cultural connotations to whistleblowers.⁷⁸ For example, during the Nazi regime community members reported on each other to obtain favour from the then government. As a result, whistleblowers and whistleblowing are still met with some hostility in Germany today. By offering money rewards, these perceptions can be exacerbated.⁷⁹ Money rewards may also present a moral hazard to those who would otherwise have made a report in the absence of such a reward.⁸⁰

Just as money rewards may cause distrust among members of an organised crime network, so can it create distrust among colleagues in the work environment.⁸¹ Rewards may encourage a work environment characterised by mistrust, surveillance, and trying to find each other out.⁸² When added to the motivation to bypass internal reporting structures, poor internal communication will take place. Consequently, the team spirit will suffer, interpersonal relationships will break down, and organisational productivity will decrease.⁸³ This danger may be of specific consequence in South Africa, where local government is already considered dysfunctional and lacks organisational cohesion.

Lastly, money rewards may encourage certain criminal activities (such as hacking and breaches of privacy) to gain access to information that can be traded for these rewards. Potential reporters could engage in extortion and demand payment from the perpetrator for not making reports.⁸⁴ Rewards are thus seen as an opportunity to either gain money or fame.⁸⁵ For example, Eric Murdock (the Director of Basketball Player Development at Rutgers University) had tapes that showed coach Mike Rive was intimidating players. Instead of making

77 Just Share (2022) at 15; Guthrie & Taylor (2017) at A3.

78 Fleischer & Schmolke (2021) at 10.

79 Fleischer & Schmolke (2021) at 10.

80 Just Share (2022) at 15; Guthrie & Taylor (2017) at A3.

81 Teichmann & Falker (2021) at 402; Aygare & Aidoo-Buameh (2014) at 83; Thusing G & Forst G (eds) (2016) *Whistleblowing: A Comparative Study* New York: Springer at 27; Callahan & Dworkin (1992) at 273; Bron (2022) at 49.

82 Teichmann & Falker (2021) at 402; Aygare & Aidoo-Buameh (2014) at 83; Thusing & Forst (2016) at 27; Callahan & Dworkin (1992) at 273; Bron (2022) at 49.

83 Teichmann & Falker (2021) at 402; Aygare & Aidoo-Buameh (2014) at 83; Thusing & Forst (2016) at 27; Callahan & Dworkin (1992) at 273; Bron (2022) at 49.

84 Aygare & Aidoo-Buameh (2014) at 83.

85 Aygare & Aidoo-Buameh (2014) at 83; Williams (2013) .

a report, Murdock demanded payment from the University, more than the offered reward, and in return, he would promise not to make the tapes public. The University refused to make this payment and staying true to his threat, Murdock made the tapes public. Therefore, in first demanding payment from the University Murdock stepped over the line of doing a good deed and became an extortionist.⁸⁶ Money rewards may motivate a *new kind* of whistleblower, but that also means that such whistleblowers may not ascribe to the moral values of others that motivate them to act in the public interest. There are thus no moral limitations that would prevent these whistleblowers from engaging in criminal activities to help them access whistleblower rewards.

6. STATUS QUO OF SOUTH AFRICAN LAW

Even though the Commission of Inquiry into State Capture has recommended that the legislature provide for whistleblower rewards, South African law already contains some components that mimic whistleblower rewards.

6.1 Compensation

South African law makes little provision for earmarked remedies to whistleblowers who suffered retaliation. Nonetheless, whistleblowers are entitled to claim compensation based on delictual or labour law remedies depending on the retaliation suffered. Most instances where compensation was awarded by South African courts are based on unfair labour practices as described in the Labour Relations Act 66 of 1995.⁸⁷ Many of these cases dragged on for several years and one whistleblower had to wait seven years for their case to be concluded. The amounts of compensation ordered are also relatively small, considering the extent of the reprisals suffered. On average, about one to two years' salary was awarded (where the litigation dragged on for four years).⁸⁸ In addition, a study done by the

86 Williams (2013).

87 *Smyth v Anglorand Securities Ltd* [2022] ZALCJHB 72 (28 March 2022) para 144; *Tshishonga v Minister of Justice and Constitutional Development and Another* 2007 (4) SA 135 (LC) para 309; *Radebe and Another v Premier, Free State and Others* 2012 (5) SA 100 (LAC) para 42; *Potgieter v Tubatse Ferrochrome and Others* [2014] ZALAC 114 (12 June 2014) para 42.

88 *Smyth v Anglorand Securities Ltd* [2022] ZALCJHB 72 (28 March 2022) para 144; *Tshishonga v Minister*

International Bar Association showed that only 25 per cent of all compensation claims brought by whistleblowers for retaliation suffered are successful.⁸⁹ In some instances, whistleblowers were even ordered to pay the opposing party's legal costs.⁹⁰

Specific whistleblowers can claim compensation under the Companies Act 71 of 2008. The Act creates a special statutory remedy for whistleblowers who make reports that involve irregularities under this Act.⁹¹ Compensation may be claimed from another person who retaliated against the whistleblower because they made a report.⁹² The Act does not provide any specifics on how the compensation may be calculated other than "compensation ... for any damages suffered".⁹³

A legal framework is in place for whistleblowers to access compensation based on general remedies such as unfair labour practices, delicts, economic loss, defamation, etc. However, access to such compensation should be improved. Aside from the usual difficulties associated with litigation, one cannot expect whistleblowers to wait an average of four years before getting the order for compensation (then this order must still be carried out by the sheriff or another designated official).

6.2 Support

Little to no specific legal provision is made to support whistleblowers financially or otherwise. Whistleblowers may require support to cover travel expenses, legal assistance, or other social expenses. The only provision is made in section 191 of the Criminal Procedure Act 51 of 1977. People who attend criminal proceedings as witnesses are entitled to a prescribed allowance determined by the Minister.⁹⁴ This allowance is intended to cover a witness' travel and

of Justice and Constitutional Development and Another 2007 (4) SA 135 (LC) para 309; *Radebe and Another v Premier, Free State and Others* 2012 (5) SA 100 (LAC) para 42; *Potgieter v Tubatse Ferrochrome and Others* [2014] ZALAC 114 (12 June 2014) para 42.

89 Feinstein S et al (2021) *Are Whistleblowing Laws Working? A Global Study of Whistleblower Protection Litigation* International Bar Association, London at 62. This report was compiled by a team of researchers. A total of 33 whistleblower cases were examined for the South African section of the report.

90 Feinstein et al (2021) at 62.

91 Sec 159(5) of Act 71 of 2008.

92 Sec 159(5) of Act 71 of 2008.

93 Sec 159(5) of Act 71 of 2008.

94 Sec 191 of Act 51 of 1977.

accommodation expenses which they incur to attend the court proceedings.⁹⁵ In addition, the Minister may determine that certain services be made available to witnesses such as counselling.⁹⁶ The scope of these services is open to the discretion of the Minister.⁹⁷

Despite the lack of specific legal measures, whistleblowers may access support through the usual social support channels. These may include basic access to healthcare, social assistance, and legal aid. South Africa also boasts a comprehensive social assistance system. The Social Assistance Amendment Act 6 of 2008 is the primary piece of legislation in this regard. Social assistance is provided by means of a monthly stipend, referred to as grants. Depending on a person's circumstances grants are offered to people with disabilities, retirees, primary caregivers of children, or those who are in social distress.⁹⁸ Monthly food parcels are also provided for up to three months. Social assistance can be accessed by individuals who follow a relatively simple application process. It is possible that specific whistleblowers could access some of these grants, but in so doing they disclose their identities, their addresses, and other personal information that may endanger them.

Additionally, people who are unable to find employment may access relief through the Unemployment Insurance Fund (UIF) which can pay up to 58 per cent of their usual daily remuneration for up to 238 days.⁹⁹ These benefits are available to persons who have contributed to this fund while they were employed and have been dismissed by their employer, or where the Commission for Conciliation, Mediation and Arbitration deemed a resignation as a constructive dismissal.¹⁰⁰ A whistleblower may also claim UIF benefits where they must work reduced time and as a result, receive less income.¹⁰¹ If a whistleblower should be unable to work for medical reasons and receive less than their normal remuneration, the whistleblower would also be eligible to receive UIF benefits.¹⁰² Similar to accessing social

95 Sec 191 of Act 51 of 1977.

96 Sec 191A of Act 51 of 1977.

97 Sec 191 of Act 51 of 1977.

98 These grants are not substantial. As on 21 September 2023, these grants vary between R 350 and R 2100. South African Government "Social Benefits", available at <https://www.gov.za/services/services-residents/social-benefits> (visited 30 August 2023).

99 Sec 13 of the Unemployment Insurance Act 63 of 2001; GN 98 in GG 29594 of 5 February 2007.

100 Secs 12 and 16 of the Unemployment Insurance Act.

101 Sec 12(1B) of the Unemployment Insurance Act.

102 Sec 20 of the Unemployment Insurance Act.

assistance, a whistleblower must follow an application process whereby extensive personal information is required. Moreover, a service certificate and a UI19 form must be completed by the employer to complete any UIF benefit application.

Whistleblowers can access free legal services, provided by Legal Aid, if they qualify through a means test. This means that their income and assets must be below a determined threshold. As with all other assistance, whistleblowers will be required to provide a significant amount of personal information. These legal services include the provision of legal advice and legal representation in court proceedings.

In the *Discussion Document of the Proposed Reforms for Whistleblower Protection*, (the Discussion Document) some of the recommendations were that a fund be established from which the legal services expenses of whistleblowers can be paid.¹⁰³ It also recommended that a fund (unclear if it would be the same fund) be financed through the recovery of stolen monies to provide incentives or rewards to whistleblowers.¹⁰⁴ The Discussion Document then proposes that legislation be amended to provide for the establishment of such a fund.¹⁰⁵ The overall purpose of this fund should be to assist whistleblowers “who have been dismissed, and who face severe financial hardship in meeting their basic needs and that of their dependents”.¹⁰⁶ This proposition does not provide specifics on how this fund should be financed, although some of the literature relied on proposes an amount to be levied from the salaries of all employees, similar to that of a UIF levy.¹⁰⁷

Even if there are very few support mechanisms specifically for whistleblowers, there are general support mechanisms that they can access. Support mechanisms are scattered across different government institutions and accessing a combination of these mechanisms would require many applications and increase the vulnerability of the whistleblower due to the amount of personal information that would have to be disclosed in each application. Whistleblowers who report on government misconduct may be particularly vulnerable, as this

103 Department of Justice and Constitutional Development (2023) *Discussion Document on Proposed Reforms for the Whistleblower Protection Regime in South Africa* at 36.

104 Department of Justice and Constitutional Development (2023) *Discussion Document on Proposed Reforms for the Whistleblower Protection Regime in South Africa* at 36.

105 Department of Justice and Constitutional Development (2023) at 99.

106 Department of Justice and Constitutional Development (2023) at 100.

107 Lubisi & Bezuidenhout (2016) at 60.

support is provided by the very institution about which the whistleblower has reported. It could be beneficial if a coordinating body, such as an independent whistleblower institution, is tasked with making these applications on behalf of the whistleblower. It could be the one-stop-shop that whistleblowers can turn to access all the support services they need. In addition, applying through an independent institution could provide additional protection of personal data. Following this route would also mean that the establishment of yet another fund would be unnecessary which will help the South African government to support whistleblowers and optimise scarce resources. This path would also mean that the establishment of another fund would be unnecessary, which would help the South African government to support whistleblowers and optimise scarce resources. Moreover, these support mechanisms ought to be reviewed to establish whether their access to whistleblowers can be improved and streamlined.

6.3 Rewards

While there are no legal provisions in South African law specifically titled “whistleblower rewards”, there are a few provisions that could be adapted to fit this purpose. The National Environmental Management Act 107 of 1998 (NEMA) makes provision for private prosecutions of statutory environmental crimes which has many similarities with the USA *qui tam* laws.¹⁰⁸ If such a prosecution is successful, the court may grant the costs and expenses of the prosecution.¹⁰⁹ It would appear then that such an order would cover more than just the usual legal costs that are covered in traditional costs orders.¹¹⁰

Whistleblowers may also institute a private prosecution against crimes other than those in NEMA if they have a substantial and peculiar interest in the case.¹¹¹ At face value, this too seems similar to the USA *qui tam* laws, however, many requirements must be met before such a prosecution may be instituted.¹¹² If successful, the court may order that the State reimburse the private prosecutor for expenses and costs associated with the prosecution.¹¹³

108 Sec 33 of NEMA.

109 Sec 33 of NEMA.

110 Sec 33 of NEMA.

111 Secs 7 and 8 of Act 51 of 1977.

112 Secs 7 and 8 of Act 51 of 1977.

113 Sec 15 of Act 51 of 1977.

A provision that resembles the second reward model can be found in NEMA, where the second reward model is used:¹¹⁴

A court which imposes a fine for an offence in terms of this Act or a specific environmental management Act may order that a sum of not more than one-fourth of the fine be paid to the person whose evidence led to the conviction or who assisted in bringing the offender to justice.

Whistleblowers of statutory environmental crimes can access a money reward when their information leads to a successful conviction or fine. Section 34B of NEMA and private prosecution provisions function separately. This means that one does not have to institute a private prosecution to access the section 34B reward – providing information and evidence would suffice. No provision is made for a similar reward for other crimes. In addition, these rewards cannot be accessed by a person in service of the State, or under a legal duty to implement this Act.¹¹⁵

The South African Police Service (SAPS) uses an informant or informer system that operates according to the first reward model, to help fulfil its mandate under the Constitution.¹¹⁶ In this system, money is paid to informers for their information. Informers are usually recruited by investigating officers, who offer a fee in return for information about criminal activities.¹¹⁷ The amount of this fee or reward depends on the circumstances. Some of the factors that are considered include the effort in finding the information, expenses to obtain the information, travel expenses, the level of personal danger, the time it took to collect the information, and whether the information contributed to an arrest or conviction.¹¹⁸ Informants have been invaluable for crime intelligence used to prevent crime, gather evidence, and improve investigations.¹¹⁹ The informer system can be viewed as offering non-substantial rewards to whistleblowers (who essentially are informers).

114 Sec 34B of the NEMA.

115 Sec 34B(2) of the NEMA.

116 Sec 205(3) of the Constitution of the Republic of South Africa, 1996; Secs 1, 2(3), and 6 of the National Strategic Intelligence Act 39 of 1994; Burger J “Worrying Increases in Crimes Relating to Aggravated Robbery in South Africa can be Linked to Failures by the Police Crime Intelligence Division”, available at <https://shorturl.at/ptzA2> (visited 30 August 2023); Minnaar A (2011) “The Use of Informers: An Essential Tool in the Fight against Crime?” 24(3) *Acta Criminologica* 83 – 97 at 85.

117 Minnaar (2011) at 86.

118 Minnaar (2011) at 86.

119 Sec 205(3) of the Constitution of the Republic of South Africa, 1996; secs 1, 2(3), and 6 of the National

Whistleblower rewards have also been implemented on a municipal level in the City of Cape Town since 2013.¹²⁰ The City's reward system is established in their *Informant Reward Policy 2013*. According to the Policy, information that leads to an arrest, recovery of stolen goods, or the successful confiscation of goods is eligible for a reward.¹²¹ These rewards are capped at R 5 000 per report and a person must apply to the City to claim the reward. Between October 2013 and June 2016, the City of Cape Town spent R33 500, which enabled them to make 51 arrests and R5 million worth of recoveries.¹²²

7. CONCLUSION

The article investigated how legislation establishing money rewards for whistleblowers could hypothetically play out in South Africa. It is established that money rewards are awards made in addition to financial support and compensation, for volunteering information about irregularities and misconduct. Drawing from foreign jurisdictions that have implemented such rewards, four different models can be identified by which money rewards are administered. Restricted empirical evidence exists on the implementation effects of whistleblower money rewards limited the analysis. This article investigated the common benefits and dangers associated with these rewards in jurisdictions that have implemented them.

Using money rewards has many benefits for the government: (i) encourages more reports, (ii) saves state resources, (iii) raises public awareness, (iv) motivates whistleblower not persuaded by their intrinsic morality, and (v) promotes dysfunctionality in organised crime networks.

However, money incentives may have some drawbacks: (i) may create a lottery mentality, (ii) unreliable reports will increase workload, (iii) undermine internal reporting and early warning structures, (iv) jeopardise whistleblower's anonymity, (v) may discourage intrinsically motivated whistleblowers through commoditisation, and (vi) promotes

Strategic Intelligence Act 39 of 1994; Burger (undated); Minnaar (2011) at 85.

120 City of Cape Town, Media Office "City's Informant Reward System Pays Off", available at <https://shorturl.at/loCGK> (visited 30 August 2023); Francke RL (15 July 2022) "Here's What You Need to Know about the City of Cape Town's Informant Reward System" *IOL News*.

121 City of Cape Town (2023). Francke (2022).

122 City of Cape Town (2023). Francke (2022).

dysfunctionality in government institutions. Despite these potential dangers and little empirical evidence, many scholars agree that money rewards are a cost-effective, democratic, and decentralised method to combat crime.

These benefits and dangers show that the impact of introducing cash rewards depends on the culture and context in which the reward system is intended to operate. The study of South African legislation shows that some provisions have already been made to allow whistleblowers access to compensation, support and money rewards. Historically, whistleblowers must engage in lengthy and costly litigation to access compensation and the amounts awarded are small in comparison with the retaliation suffered and the litigation and time costs. South Africa also boasts a comprehensive social support programme through various bodies, but the amount of personal information required, and numerous applications may increase whistleblowers' vulnerability to retaliation.

South African law also provides for money rewards, using a combination of the models discussed. The SAPS uses an established informant system that operates according to the first model. In addition, NEMA has created a reward for whistleblowers of statutory environmental crimes or deviations, where money rewards can be paid for information that was material to the imposition of a fine or the recovery of losses. Private prosecution works similarly to the *qui tam* model, but whistleblowers can only be compensated for legal fees and reasonable expenses associated with the prosecution.

An argument may be made for improving the legal construction for whistleblower money rewards, but some issues will need to be thoroughly considered by the Legislature. For example, the inadequate protection of whistleblowers, how will they be able to access rewards if they must flee the country to ensure their safety? Does South Africa have the administrative capacity to effectively implement improved and more elaborate whistleblower rewards?