



**MOTIVATION STATEMENT BY DR.
ALBERT KAWANA, MP ON THE
OCCASION OF THE TABLING OF THE
WHISTLEBLOWER PROTECTION
BILL**

NATIONAL ASSEMBLY

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WINDHOEK

Honourable Speaker, I have the honour and privilege to rise and motivate the Whistleblower Protection Bill.

You will recall, Honourable Members, that during the State of the Nation Address last year, His Excellency Dr. Hage Geingob, President of the Republic of Namibia directed that the Whistleblower legislation should be finalized and enacted into law as a matter of urgency. This is part of our President's vision to make Namibia the most transparent country in Africa. The President's vision is contained in the Harambee Prosperity Plan. Allow me therefore, Honourable Speaker, to take this opportunity to thank His Excellency the President for this noble vision. I hope that once enacted into law, the whole nation will rally behind our President in ensuring that the law is successfully implemented.

Honourable Speaker, before I discuss pertinent provisions of the Bill, allow me to discuss general Principles. Successful and winning nations of the world have put in place processes that regulate ethical conduct of officials in both public and private sectors. Ethics provides a guide as to what is acceptable and what is not acceptable in the conduct of business.

That what is accepted as unethical has consequences. Each and every patriotic citizen is called upon to report unethical conduct of officials in both public and private sectors. At the same time, such citizen should be assured that he or she will be protected by the State in the event of intimidation, harassment, detrimental action or any form of reprisal being taken against him or her for reporting such unethical conduct.

In addition, it should be understood that unethical conduct does not only refer to corruption or commission of any other criminal offence. It also refers to agreed conduct that does not necessarily constitute a criminal offence but necessary for good governance and prosperity of a nation.

In Namibia, there is a feeling that we have good laws on our statute book, but the only problem is lack of protection for patriotic citizens, law abiding individuals and good citizens who report those who are involved in criminal or unethical activities. Lack of whistleblower protection has been realized by a number of countries and have since come up with legislation to close the gap.

Indeed, even the United Nations has realized the importance of coming up with such legislation and it now encourages Member States to adopt legislative measure aimed at addressing the problem.

Honourable Speaker, it is against this background that the criminal justice system of Namibia should render incentives to whistleblowers to disclose information without fear of reprisals. It is my submission that failure in any criminal justice system to do so could result in reluctance to disclose information and to testify in the ensuing court cases. Indications are that whistleblowers who receive adequate protection will be more inclined to cooperate with the criminal justice system of our Republic.

Due to its political, social and financial implications, a Bill of this nature require extensive consultation and benchmarking exercises. With regard to benchmarking, staff members who were assigned to draft the Bill managed to visit Canada, Ghana, Kenya and South Africa.

These countries have extensive experience in running the Whistleblower Protection Programmes. Therefore, Namibia has adopted what could be considered as good practices from both systems. In addition, we have also used legislation from other countries such as Malaysia and the United Nations Office on Drugs and Crimes Guidelines on Reporting Persons as reference material.

Honourable Speaker, an Inter-Ministerial Committee was also established whose main function was to coordinate with stakeholders. In June last year, the Ministry of Justice held a National Stakeholder Consultative Workshop in Swakopmund. The Workshop was attended by all relevant stakeholders in Namibia as well as experts on Whistleblower Protection from outside Namibia. I must, however, single out experts from Kenya and South Africa. His Excellency Dr. Nickey Iyambo, the Vice-President of the Republic of Namibia, delivered a keynote address at the Workshop.

Allow me, therefore, **Honourable Speaker**, to take this opportunity once again to express my appreciation and gratitude to His Excellency the Vice President for agreeing to deliver a Keynote address. I also thank all the stakeholders who attended the Workshop, especially His Honour the Chief Justice, and my colleagues the Honourable Ministers and Deputy Ministers, for their valuable contribution.

Subsequently, I also extended an invitation to the leaders of opposition political parties represented in Parliament and took them through the provisions of the Bill. I should, therefore, use this opportunity to express my appreciation and gratitude to them for the spirit in which they accepted my invitation. Those who could not attend sent representatives, I am most grateful.

Honourable Speaker, I now turn to the specific provisions of the Bill. The Bill before you, Honourable Members, consists of 11 parts and eighty (80) sections. In the interest of time and given the fact that most of the provisions of the Bill are standard, I will only discuss parts and provisions which I feel need further explanation in my motivation.

Part one of the Bill mainly deals with Preliminary issues such as definitions. What constitutes improper conduct is covered under Clause 2, authorized persons under Clause 3, investigation agencies under Clause 4 and detrimental action under Clause 5. Under this part, no person is allowed to disclose any information which is reported by a whistleblower to relevant authorities. This is intended to protect the identity of a whistleblower and the person who is being accused.

Such information is regarded as confidential information and it is protected by law. It includes information about the identity, occupation, residential address, work address or the whereabouts of a whistleblower or a person related to or associated with a whistleblower, a person against whom a whistleblower has made a disclosure of improper conduct. Confidential information also includes information that is disclosed by a whistleblower and information that, if disclosed to an unauthorized person may cause detriment to any person.

Honourable Speaker, this point is very important and it needs further elaboration. It is very important to protect information made by a whistleblower against any person because if such information is disclosed before the matter is disposed off according to legal procedure, the integrity of such person may suffer irreparable damage even if he or she is eventually cleared of the allegation at the end of the legal proceedings.

Indeed, it is likely that innocent politicians, business people and other public figures may be falsely targeted by their rivals through the use of whistleblowers. We do not want to experience such a situation in our Republic. Against this background, additional safeguards have been provided in the Bill and will be discussed later in other parts of the Bill.

It is common cause that in most cases, improper conduct takes place in big institutions. It is for this reason that Clause 26 of the Bill requires certain categories of employers to be designated so that they become subject to the provisions of this legislation.

Once they are designated, such employers will be required, in terms of Clause 28(2) of the Bill, to appoint ethics and integrity officers to which a whistleblower can report improper conduct of any person within such an organisation.

Honourable Speaker, the meaning of improper conduct is extensively covered under Clause 2 of the bill. Improper conduct is conduct which shows, *inter alia*, that a criminal offence has been committed; a person has not complied with a law which imposes an obligation on that person; a miscarriage of justice has occurred; a disciplinary offence (which is an omission constituting a breach of discipline in a public or private body provided for by law, code of conduct or ethics of an employment contract) has been committed; in any institution there has been waste, misappropriation or mismanagement of resources in such a manner that the public interest has been affected; the environment has been degraded; and the health or safety of an individual or a community is endangered. All these elements constitute improper conduct.

It is clear from the forgoing that improper conduct is a cross cutting issue which involves the investigation powers of various entities under a number of laws. Such investigative power may include the Ombudsman, the Anti – corruption Commission, the Namibian Police, the Namibian Central Intelligence Service, the Namibian Correctional Services, the department dealing with immigration, the office of the Commissioner, Labour Commissioner, and any office, ministry, agency, local authority, regional council or any other body set up by any law.

Clause 5 of the Bill prohibits any detrimental action to be taken against a whistleblower for disclosing improper conduct. For the whistleblower who is an employee, this includes being subjected to intimidation, harassment or any action which is likely to cause harm or injury or loss or damage to property or any interference with such employees' lawful employment.

Interference with lawful employment includes dismissal, suspension, redundancy, demotion, refusal of transfer or promotion as a result of the disclosure of improper conduct, transfer against such an employees' will, change of working conditions or taking of disciplinary action against such an employee.

If the whistleblower is not an employee, is it prohibited to subject such person to discrimination, intimidation, harassment or any action causing personal harm or injury or loss or damage to property or any interference with his or her business or livelihood by any person or institution.

Honourable Speaker, I believe that as a start, whistleblower protection measures discussed above are adequate to encourage law abiding citizens to become whistleblowers. Depending on the circumstances of each case, other protection measures include heavy penalties against perpetrators.

Where necessary, whistleblowers may be placed under the witness protection programme which is a Protection legislation which will be tabled together with this Bill. It is also possible, under extreme circumstances, to pay ex-gratia payment to a whistleblower.

Part 2 of the Bill establishes a Whistleblower Protection Office which may consist of a Commissioner, Deputy Commissioners and other staff members of the Office. The staff of the Office are, *inter alia*, tasked with the investigation of disclosures of improper conduct and the determination of appropriate action to be taken; investigation of complaints of detrimental action and where appropriate reference of complaints to the Tribunal established under this Bill for remedial action; appearing before the Tribunal; initiating and laying criminal charges against any person who has committed a criminal offence under the Act once it is passed into law; issuing temporary prohibition notices and applying for confirmation of such notices before the Tribunal; and establishing programmes to educate the Public.

Clause 8 of the Bill provides for the appointment of a Commissioner and Deputy Commissioners. Honourable Speaker, it is important that senior staff members who are tasked with such important national responsibility must enjoy the confidence of both the Executive and the Legislature. Such staff members must be of the highest integrity and professionalism who are not subject to external influences, some of which might be based on purely personal and political agenda. Against this background, the Commissioner and Deputy Commissioners are appointed by the President with the approval of the National Assembly.

It is further provided under Clause 8 that the Minister responsible for Justice must submit a list of names of persons of good character and of high integrity who possess qualifications and experience as may be prescribed to the National Assembly. The National Assembly will then, through a resolution, approve the names and then the National Assembly through the Speaker will submit the names to the President for appointment.

Honourable Speaker, I submit that this Bill is one of the most important to the Namibian nation once passed into law.

It will go a long way to address the concerns of some of our citizens, especially lack of legislation to protect whistleblowers both in the public and private sectors in our country. Given the potential of unintended consequences that the law may produce, it is necessary to put in place adequate checks and balances. It is for this reason that Part 3 of the Bill establishes the Whistleblower Protection Advisory Committee.

The Committee consists of major stakeholders whose line functions will have a major impact in the administration of this Bill once it is passed into law. In terms of Clause 20, the committee consists of the Permanent Secretary of Justice who is the chairperson; the Permanent Secretary of the Office of the Prime Minister; the Ombudsman; the Director-General of the Anti- Corruption Commission; the Inspector-General of Police; the Director-General of the Namibia Central Intelligence Service; the Environmental commissioner; one person appointed by the Minister from a list of persons nominated by registered employers' organisation; and one person appointed by the Minister from a list of persons nominated by registered trade unions.

In terms of Clause 22, the functions and powers of the Committee include making recommendations to the Minister regarding policy matters, including amendments to the legislation, making of regulations and issuing of guidelines; advise the Minister on the formulation of whistleblower protection policies in accordance with the current law and international best practices; and give advice to the Whistleblower Office on the performance of its functions and exercise of its powers.

Part 4 of the Bill deals with designated employers. **Honourable Speaker**, it is reasonably understood that not every institution including those who employ cattle headers or domestic assistants will be subject to all the provisions of this Bill once it is passed into law. It is for this reason that in terms of Clause 26, the Minister may after consultation with the Committee discussed above by notice in the Gazette designate employers or classes of employers to whom the provisions of the law will apply.

Before the Minister makes a designation under Clause 26 of the Bill, the following factors should be taken into account: the number of employees employed by the employer and the nature of work that the employees perform; the nature of business activity or trade that the employer is engaging in or service that the employer is rendering; the likelihood that acts of improper conduct may or may not occur in the course of or within the employers' business activity or trade; and any other factor that the Minister considers necessary to make a decision.

Once the Minister has designated such employers, chief executive officers of such entities will be required to establish codes of conduct. This is provided for under Clause 27 of the Bill. In addition, Chief executive officers are also required, in terms of Clause 28 of the Bill, to establish internal disclosure procedures and designate senior staff as ethics and integrity officers who will be responsible for receiving and dealing with disclosures of improper conduct made by employees employed by such designated employers. The procedures should be detailed in a code of conduct which such designated employer is required to establish.

Part 5 of the Bill deals with disclosure of improper conduct. Honourable Members, this has already been discussed, therefore, it is not necessary for me to discuss this matter any further serve to highlight that Clause 35 of the Bill addresses the issue of anonymous disclosures. Anonymous disclosures may be necessary in some situations where the whistleblower is not willing to disclose his or her identity for fear of reprisal.

Clause 35 requires that in such a situation, the authorized person receiving the information must assess whether the disclosed information is credible. There is a requirement to carry out an investigation in accordance with the procedure provided for under Clauses 37, 38 and 40.

Part 6 of the Bill from Clauses 37 through to 43 provide the procedures how information received from whistleblowers should be handled. Part 7 deals with whistleblowers protection measures. It spells out procedures regarding the protection or circumstances when a whistleblower is not protected. This is covered under Clauses 44 through to 52 of the Bill.

In some cases, it will be necessary for the whistleblower to be granted immunity from civil and criminal proceedings. In addition, it will be necessary to put such a whistleblower under the Witness Protection Act. This is a new law that will have to be passed to protect witnesses. It will replace the current procedure where witnesses are protected under the Criminal Procedure Act of 1977.

Part 8 covers complaints of detrimental action. This is the situation where a whistleblower is intimidated, harassed, threatened, dismissed, harmed or his or her property is deliberately destroyed purely because such a person has turned whistleblower. Clauses 53 through to 56 provide procedures how such situations can be handled and how perpetrators can be brought to book.

Part 9 of the Bill covers the establishment and functions of the Whistleblower Protection Review Tribunal. Given the nature of cases and the importance of disposing such cases in a speedy manner, a review Tribunal is proposed to be established under the Bill.

In order to cut down on the cost, it is proposed that the members of the Tribunal should serve on a part time basis. The Tribunal will be empowered to review the decisions of all those who will be entrusted with the administration of the new legislation. These matter are covered under Clauses 57 through to 64.

Part 10 provides the procedure to be followed by the Tribunal during the proceedings and the power conferred upon the Tribunal to order remedies to aggrieved persons. This is covered under Clauses 65 through to 73. Part 11 covers general issues. Allow me, **Honourable Speaker**, to highlight one important aspect that is covered under Clauses 74 and 75.

Experience elsewhere shows that in some countries, whistleblowing can be demanding to family members, especially in circumstances where the whistleblower is the sole breadwinner. In some cases, a whistleblower faces detrimental action against powerful forces such as employers who might take action against an employee for disclosing information of a criminal nature against the company.

In such a situation, it is only fair and just to appreciate the courage of a law abiding citizen or person. Depending on the circumstances of the case, such a person deserves a reward. This fact is recognized under Clause 74 where the Commissioner may request the Criminal Assets Recovery Committee established under section 77 of the Prevention of Organized Crime Act of 2004 to recommend to Cabinet that a whistleblower who makes a disclosure of improper conduct that leads to the arrest and successful prosecution of an accused person be rewarded with a prescribed amount of money.

In other situation, the Commissioner may also request the Committee referred to above to recommend to Cabinet that a whistleblower whose disclosure results in the recovery of an amount of money or other property be rewarded from the Criminal Assets Recovery Fund established under Section 74 of the Prevention of Organized Crime Act of 2004.

Honourable Speaker, one concern which was highlighted during the consultation process was the possibility of malicious whistleblowing against prominent individuals such as politicians, business personalities, traditional leaders, religious leaders, community leaders, and indeed other innocent citizens. I should point out that the concern has been partly addressed by Clause 30 (5) (a) of the Bill. It is provided that a person who intentionally makes a disclosure knowing or believing that the information contained in the disclosure is false or untrue, commits an offence and is, on conviction, liable to a fine not exceeding N\$100,000 or to imprisonment for a period not exceeding 20 years or to both such fine and imprisonment.

Honourable Speaker, Honourable Members, the ball is now in your court. You can choose to propel Namibia to the top league of countries by making the Land of the Brave the most transparent country on the African Continent in accordance with the wishes of our President by speedily adopting this Bill or to see Namibia sliding into the reverse year of bad governance.

I believe that the speedy passing of this Bill will go a long way towards fighting corruption, poaching, drug trafficking, human trafficking, environmental degradation, money laundering, and fighting crime generally in our country. Let us make Namibia a heaven of peace and stability. Let us ensure that Namibia continues to be among the top league of good governance not only on the African Continent but also the world over.

Against the aforementioned background, I humbly present to you Honourable Members the Whistleblower Protection Bill for your consideration and prompt approval.

I thank you.