

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 58/2024

In the matter between:

CEASER MTETWA

Applicant

and

**TRANSNET FREIGHT RAIL, AN OPERATING DIVISION
OF TRANSNET (SOC) LIMITED**

Respondent

Heard: 25 January 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for the hand-down is deemed to be on 29 January 2024.

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] The applicant approached the Court on an urgent basis seeking an interdict to stay the internal disciplinary enquiry pending a determination of an application or a request before the Transnet Bargaining Council (TBC) under section 188A(11) of the Labour Relations Act (LRA)¹. The disciplinary hearing is scheduled to continue on 26, 29 January 2024, and 1 – 2 February 2024.

¹ Act 66 of 1995, as amended:

Section 188A(11) provides;

'Despite subsection (1), if an employee alleges in good faith that the holding of an inquiry contravenes the Protected Disclosure Act, 2000, that employee may require that an inquiry

Background:

[2] The applicant is employed by Transnet as the General Manager for Rail Network and Projects. On 20 November 2023, he was served with a charge sheet notifying him of the scheduled dates of the disciplinary hearing being 4 – 6 and 8 December 2023. No less than 8 broad charges of misconduct were levelled against him, ranging from non-compliance with internal policies related to Lifestyle Audit; declaration of interest and related party disclosures; recruitment, and selection policies. He was further charged with gross dishonesty and misrepresentation.

[3] For the purposes of this application, it would be prudent to summarise the applicant's pertinent averments leading to the charges starting on 31 January 2019 when he was placed on precautionary suspension. That suspension pertained to alleged irregularities in regard to his involvement in a settlement of a contractual dispute between Transnet and an entity known as Polyzomba (The Polyzoma contract). That suspension was uplifted on 4 December 2019.

[4] The applicant was again suspended on 14 November 2022 on the basis of the Polyzoma contract. Whilst still on suspension, he had in September 2023, referred an alleged unfair labour practice to the TBC. Following failed attempts at conciliation on 18 October 2023, the applicant then referred the dispute for arbitration, which is set down for 27 February 2024.

[5] On 1 November 2023, the applicant lodged a grievance against what he contended was harassment related to his precautionary suspension since February 2019, and alleged deviations from policies and unprofessional conduct on the part of Transnet officials. The latter issue related to the applicant having been subjected to a lifestyle audit and having had his personal information circulated throughout Transnet. The grievance came before the Chairperson of the Board and Acting Group CEO. The applicant also had a subsequent meeting with the Chairperson on 15 November 2023.

be conducted in terms of this section into allegations by the employer into the conduct or capacity of the employee.'

[6] As already indicated, the applicant was then on 20 November 2023 served with a charge sheet. As a result of these charges and the impending enquiry, and further what the applicant contends is an anticipated occupational detriment in view of the events leading to the charges, he approached this Court on an extremely urgent basis on 22 January 2024. The papers were served on Transnet at 13h00 affording it until 12h00 on the same day to file a notice of intention to oppose, and to file an answering affidavit by 17h00 on 23 January 2024. The answering affidavit having been filed at midday on 24 January 2024 was followed by the applicant's replying affidavit in the evening before the set-down date.

[7] Transnet in its answering affidavit raised four preliminary points which it contended were dispositive of the matter. These are that urgency in this case is self-created; the non-joinder of the Chairperson of the disciplinary enquiry; the absence of a request by the applicant in terms of section 188A(11) of the LRA; the absence of any evidence of a protected disclosure; and the failure to meet the requirements of interdictory relief.

(i) *Urgency – The legal framework:*

[8] At the onset, it ought to be said that the truncated period with which the applicant served its papers clearly placed considerable pressure on both Transnet and the Court. Inasmuch as the Court appreciates that the applicant as a result of the events in December 2023 and the sitting of the hearing in early January 2024 may structure the rules and truncate the time frames as he deems fit to meet the exigency or urgency of the situation, the question nonetheless is whether the Court is inclined to treat the matter as urgent. This is so in that not every matter brought on an urgent basis is in effect urgent.

[9] The Court may at its discretion under Rule 8 of the Rules of this Court, relax or shorten the strict formal rules relating to time for service, and treat an application as urgent. In such applications, the applicant is required to first, set forth explicitly in the founding papers, the circumstances which he avers, renders the matter urgent and second, to explicitly advance the reasons why he claims that he cannot be afforded substantial redress in due course if he had brought the matter to Court by way of an ordinary non-urgent procedure, instead of this extraordinary urgent procedure.

[10] Whether the applicant will be able to obtain substantial redress in due course is dependent on the facts and particular circumstances of each case². Of equal importance is that urgent relief may be refused in circumstances where the matter has become urgent owing to dilatoriness on the part of the applicant (i.e., the so-called self-created urgency). This is because the primary objective of approaching a Court on an urgent basis, is to prevent harm or prejudice from occurring³. Effectively, an applicant cannot undo the harm complained of, by simply seeking urgent relief. It further needs to be stressed that in the end, Courts enjoys a discretion in the overall determination of whether a matter should be accorded urgency or not, with due consideration of the facts of each specific case.

[11] In contending that the matter is urgent, the applicant averred that;

11.1 He had instructed the late Mr Hope Chaane (Chaane) on 1 December 2023 to assist him in the light of the disciplinary hearing scheduled for 4 December 2023, and had requested documents from Transnet. Having attended the hearing, it was for the first time that Chaane received Transnet's bundle of documents, and he had also requested access to his work laptop and Transnet's network in order to obtain certain documents.

² See *East Rock Trading 7 (Pty) Limited and another v Eagle Valley Granite (Pty) Limited and others* (2012) JOL 28244 (GSJ) at para 6 and 7; See also *Export Development Canada and Another v Westdawn Investments Proprietary and Others* (6151/2018) [2018] ZAGPJHC 60; [2018] 2 All SA 783 (GJ) at para 11; and *Mogalakwena Local Municipality v The Provincial Executive Council, Limpopo and others* (2014) JOL 32103 (GP) at para 63 – 64, where it was held;

"It seems to me that when urgency is an issue the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent.

Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to): Whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the respondent's and the administration of justice, the strength of the case made by the applicant and any delay by the applicant in asserting its rights. This last factor is often called, usually by counsel acting for respondents, self-created urgency."

³ See *Golding v HCI Managerial Services (Pty) Ltd and others* [2015] 1 BLLR 91 (LC) at para 24; *Ntozini and Others v African National Congress and Others* (18798/2018) [2018] ZAGPJHC 415 (25 June 2018) at para 11. See also Erasmus in *Superior Court Practice* at D6 – 23, where it is stated that:

"An interlocutory interdict may be refused if the applicant has delayed long before applying. An application for an interdict *pendente lite* from its very nature requires the maximum expedition from an applicant, who may forfeit his right to temporary relief if he delays unduly in bringing the interim proceedings to finality."

11.2 Mr Chaane had at those proceedings sought a postponement in view of the fact that he only received instructions on 1 December 2023, and further since he was not available to proceed with the matter since he had accepted an acting appointment in this Court during that week. The Chairperson (Adv Nazeer Cassim SC) had granted the postponement, and the parties had agreed that the matter would proceed on 18, 26 and 29 January 2-24.

11.3 On 5 December 2023, the applicant consulted with Chaane and expressed his discomfort with the manner with which the charges against him were formulated, particularly based on the grievance he had lodged on 1 November 2023. The applicant's contention was that he had approached the Acting Group CEO (Phillips) and Chairperson of the Board (Sanqu) and complained about unlawful conduct of certain officials, and also the fact that he had been on suspension for about 20 months at the time. Chaane suggested to him that he would request that the impending hearing be rather heard under section 188A (1) of the LRA⁴, and correspondence was then sent to Transnet in that regard on the same date. Transnet in its response on 19 December 2023, refused to accede to that request.

11.4 Mr Chaane tragically passed away on 10 December 2023, and his office had closed down for the festive season. The offices opened on 8 January 2024. The only qualified attorney to deal with the matter was the sole Director of the firm, Ms Seepane, who on the same date sent correspondence to Transnet's attorneys of record requesting a postponement of the disciplinary hearing scheduled to commence from 18 January to 2 February 2024. Transnet in its response on 10 January 2024 refused the request.

11.5 Seepane then briefed Counsel on 12 January 2024. Following consultations on 15 and 16 January 2024 and after additional documents were obtained, Counsel advised that the applicant should pursue a process under section 188A(11) of the LRA, but that he had to satisfy the jurisdictional requirements, being that he had made a protected disclosure, was subjected to an occupational detriment as a result of the disclosure, and demonstrate that there was a causal connection between the

⁴Which provides;

'An employer may, with the consent of the employee or in accordance with a collective agreement, request a council, an accredited agency or the Commission to appoint an arbitrator to conduct an inquiry into allegations about the conduct or capacity of that employee.'

disclosure and the occupational detriment. A referral in this regard to the TBC was then lodged on 17 January 2024.

11.6 On 18 January 2024, the disciplinary hearing convened, and the Chairperson was informed of the referral to the TBC in terms of section 188A(11). The Chairperson then postponed the proceedings in order for the applicant to approach the Court with this application.

[12] Transnet contends that the urgency claimed by the applicant is self-created. This was on the basis that central to the applicant's application are the impending charges at the disciplinary enquiry, which forms the very basis for enrolling the matter on extremely urgent basis in the light of his section 188A(11) referral. It was submitted that the urgency was self-created in the light of the timeline since the applicant was served with the charge sheet on 20 November 2023.

[13] As a starting point, the Court appreciates and sympathises with the applicant's dilemma as a result of the tragic and untimely passing of Mr Chaane. The issue nonetheless bar this tragedy, is whether from the overall facts and circumstances of this case given the basis upon which urgency is sought, the Court can in the exercise of its discretion find that the matter indeed deserves its urgent attention.

[14] To the extent that Transnet's contentions were that the urgency claimed is self-created in view of the timeline set out above since the charges were served on the applicant, the first observation is that on the applicant's own version, he had as far back as 1 November 2023 through his grievance and subsequent meetings with Phillips and Sanqu, formed an opinion that he had been subjected to harassment and unlawfulness through his prolonged suspension. This conduct also arose as far back as October 2023, when he discovered that his personal information that he had provided as part of a Lifestyle audit process had been circulated within Transnet.

[15] When he was served with the charges on 20 November 2023, he had viewed these as part of the process of harassing him even further, particularly since he was of the view that the charges were in retaliation after he had lodged a grievance. To this end, clearly when the charges were served, this would have been the first opportunity

as correctly stated by Transnet, for the applicant to have approached the TBC with a section 188A(11) of the LRA request and also this Court for urgent relief.

[16] A further opportunity for the applicant to approach the Court on an urgent basis presented itself on 5 December 2023 after the first sitting of the enquiry was postponed. The applicant had consulted with Chaane, who had advised that he should pursue the section 188A(1) of the LRA route. Transnet had rejected the proposal, and at that time, it was never the applicant's intention to pursue a section 188A(11) of the LRA route. In fact, it is not even evident from the papers that the applicant could have told Chaane that he had made a protected disclosure hence the charges. On his version, in his consultations with Chaane, he had merely expressed his discomfort with the manner with which the charges against him were formulated, particularly based on the grievance he had lodged on 1 November 2023. He had also raised with Chaane, his concerns and what he perceived to be unlawful conduct of certain officials and the fact that he had been on suspension for about 20 months at the time. Thus to the extent that even upon legal advice or approach in regards to section 188A(1) was incorrect, any delays in that regard cannot be placed on Transnet for the purposes of explaining that delay.

[17] In the end, and in the light of the delays between 20 November 2023 when the charges were issued and on 22 January 2024 when this application was launched, and further in view of the manner with which the section 188A(11) was pursued, it is concluded that on the whole, the applicant has not satisfied the requirements set out in Rule 8 of the Rules of this Court in claiming extreme urgency. On the contrary, the urgency claimed is self-created, as the matter had become urgent only on account of the applicant's dilatoriness and belated referral of his section 188A(11) request to the TBC. As correctly pointed out on behalf of Transnet, had the applicant in good faith truly believed that the charges and the hearing constituted an occupational detriment within the meaning of the PDA, nothing prevented him from immediately referring a dispute to the TBC at any time prior to 17 January 2024, particularly as of 1 November 2023, when he had lodged his grievance. This was even moreso since on his own version, there was already another dispute of an alleged unfair labour practice pending before the TBC.

[18] Counsel for the applicant had referred to *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and others*⁵ for the proposition that a delay in instituting proceedings was not on its own a ground for refusing to grant urgency and that the court was obliged to consider the circumstances of the case and the explanation given. This was on the basis that the question remained whether despite the delay, the applicant can or cannot be afforded substantial redress at the hearing in due course.

[19] It however needs to be pointed out that as to whether an applicant cannot obtain substantial redress in due course is dependent on the nature of the primary relief sought and what is pleaded in the papers. It is against this qualification that it is my view that even if given the timelines and the explanation for the delays proffered may have any substance, the applicant nonetheless faces a further hurdle to the extent that he had based his claim of urgency on his referral in terms of section 188A(11) of the LRA. In effect, a reading of the founding affidavit suggests that the basis upon which the applicant had approached the Court on an urgent basis was the fact that he had only in the afternoon of 17 January 2024 approached the TBC with a section 188A(11) of the LRA referral, as he deemed the disciplinary hearing to be an occupational detriment in view of an alleged protected disclosure he had made. The referral was lodged a day prior to the disciplinary enquiry commencing. It was further submitted on his behalf that in view of the circumstances leading to the charges, he fears that the occupational detriment would result in his dismissal. Transnet views such conduct on the part of the applicant as a mere legal stratagem meant to stall the disciplinary proceedings.

[20] The question as to the import of the provisions of section 188A(11) of the LRA within the context of an impending disciplinary enquiry has been before this Court on an urgent basis on numerous occasions. The issue is whether a mere allegation that a protected disclosure has been made in the course of a disciplinary enquiry was sufficient on its own to put a halt to those proceedings.

⁵ At paras 6 – 8.

[21] This brings into question what the role and powers of a chairperson should be when such an issue is raised midstream the disciplinary enquiry. Similarly, and to the extent that an interdict is sought before the Court, the question is what it is that the Court ought to consider in determining that indeed there is cause for the matter to be pursued before the bargaining council or CCMA under section 188A(11) of the LRA, and thus grant the interdict.

[22] These questions arise in view of the fact that there is no doubt that the provisions of section 188A(11) of the LRA may be open to abuse by employees who merely invoke them with the purpose of seeking to either avoid or prolong the internal disciplinary proceedings. In answering these questions, this Court in *Nxele v National Commissioner: Department of Correctional Services & Others*⁶ after considering the provisions and the purpose of the Protected Disclosure Act, held that the only proper construction to be accorded to section 188A(11) was that where an employee or employer requires a pre-dismissal arbitration in terms of section 188A, that request it is imperious. It was held that this construction gave effect to the purpose of the legislature which was to provide a degree of protection to employees who make protected disclosures, and to avoid parallel litigation. Thus, it was posited that once a section 188A(11) request was made, the employer was enjoined to institute a pre-dismissal in terms of 188A, and that the ongoing internal disciplinary enquiry must be halted⁷.

[23] On the face of it, this approach accords with the purposes of the PDA, which is to afford an employee a remedy in terms of section 4(1)(a) - (b) of the PDA⁸, to

⁶ (2018) 39 ILJ 1799 (LC).

⁷ At para 31 – 32; See also *Jacobs and Others v National Commissioner of South African Police Service and Another* [2021] ZALCJHB 263 (17 March 2021).

⁸ 4 Remedies

- (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 151 of the Labour Relations Act, 1995 (Act 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 to 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

approach any court, including this Court, to institute any other prescribed process including before the CCMA in order to protect his/her rights.

[24] It is however my view that the position in *Nxele* was properly qualified in *Mamodupi v Property Practitioners Regulatory Authority and Another*⁹. The Court as in *Nxele*, correctly identified the purpose of section 188A(11) as being a buffer to a continuation of an occupational detriment equivalent to an interdict necessitating a halt of the internal proceedings¹⁰. The Court's proposition however was that from a reading of section 188A(11), a mere allegation that a protected disclosure was made was not on its own sufficient. I agree with this proposition that a contravention must not only be alleged, but that it must *prima facie* factually exist¹¹. Furthermore, I agree that an employee relying on section 188A(11), must have demonstrated that the contravention occurred, that a protected disclosure as defined in the PDA was made, and further demonstrate as to when, where, and to whom the disclosure was made. Equally so, and as submitted on behalf of Transnet, a causal link between the occupational detriment and the disclosure must have been established.

[25] A further question however that arises is whether it is for the Chairperson at the enquiry to make a finding that there is a *prima facie* case of a protected disclosure, or whether that determination must be made by the CCMA or the Bargaining Council when the matter is referred. In other words, the question is whether the Chairperson can simply halt the proceedings upon the allegation being made without more.

[26] The answer is to be found in section 4(1)(a) of the PDA as already pointed out elsewhere in this judgment. This therefore implies that a chairperson of a disciplinary enquiry, is not required to enquire into the merits of the alleged protected disclosure, or whether the employee is subjected to an occupational detriment. The Chairperson is indeed obliged to halt the proceedings, but on condition that the employee has made

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- (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."

⁹ [2023] ZALCJHB 19 (13 February 2023).

¹⁰ At para 47.

¹¹ At para 44.

the allegation before the CCMA or Bargaining Council or has already approached the Court for relief as contemplated in section 4(1)(a) or section 4(2)(b) of the PDA.

[27] In the absence of these steps having been taken by an employee, it is my view that the Chairperson is not obliged to halt the proceedings purely based solely on a mere allegation by an employee. Further to the extent that the allegations (i.e., a section 188A(11) referral) have not been placed before a forum and are suddenly raised at the enquiry coupled with an intention to approach a relevant forum, it is my view that this is a matter best left for the Chairperson to deal with within his or her discretion, bearing in mind the rights of an employee under section 4 of the PDA.

[28] In instances where an employee has approached this Court for interdictory relief on account of a section 188A(11) referral as in this case, the starting point is that it is trite that an applicant seeking to interdict a disciplinary hearing is required to demonstrate exceptional circumstances before the Court can intervene¹². For the purposes of urgency, it was further said in *Jiba*¹³ that although this Court had jurisdiction to entertain an application to intervene in incomplete disciplinary proceedings, it ought not to do so unless the circumstances were truly exceptional.

[29] The issue of exceptionality is raised within the context of the 'jurisdictional' factors as referred to in *Mamodupi*¹⁴, which factors in my view are those that ought to be pleaded before this Court where urgency is claimed on *inter alia*, account of the section 188A(11) referral. It is in this regard that I reiterate support for the proposition that it is not sufficient for an employee to simply without more, allege that a protected disclosure was made for the Court to grant relief, let alone on an urgent basis. In essence therefore, there is a requirement to plead the very basis and nature of the

¹² See *Booyesen v Minister of Safety and Security and others* [2011] 1 BLLR 83 (LAC); (2011) 32 ILJ 112 (LAC) at para 54, where it was held;

"To answer the question that was before the court a quo, the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However, such an intervention should be exercised in exceptional cases. It is not appropriate to set out the test. It should be left to the discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would in my view be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means. The list is not exhaustive."

¹³ *Jiba v Minister of Justice and Constitutional Development and Others* [2009] ZALC 57; (2010) 31 ILJ 112 (LC) ; [2009] 10 BLLR 989 (LC) at para 17

¹⁴ At paras 46 – 47.

alleged protected disclosure as part of demonstrating exceptional circumstances necessitating urgent intervention by this Court.

[30] As to what is pleaded before the Court for the purposes of obtaining relief when section 188A(11) is invoked is however a completely separate matter to what is placed before the CCMA or Bargaining Council when such referrals are made. These forums within the context of their own rules and processes are however best placed to decide on how they wish to conduct their own proceedings when faced with such requests. This is so in the light of the provisions of section 188A (6), which provides that “Section 138, read with the changes required by the context, applies to any inquiry in terms of this section”.

[31] The next enquiry for the purposes of relief in this case is whether the applicant has pleaded the basis for this Court to form a *prima facie* view that indeed an allegation in good faith was made that the holding of the on-going disciplinary enquiry contravenes the PDA in that it constitutes an occupational detriment. Again, it needs to be stressed that it is not for the Court at this stage to determine definitively whether there is indeed a protected disclosure that was made in good faith. All that the Court needs to do is to determine whether *prima facie*, it is placed in a position to determine for the purpose of interdictory relief, whether the allegation was made.

[32] Transnet is correct in pointing out that from a reading of the founding affidavit, it is difficult to distil what is the protected disclosure that is relied on. Equally so, it is not clear as to when, how and to whom the disclosure was made. The Court equally draws a blank from the section 188A(11) referral to the TBC as attached to the founding affidavit. Significantly, upon the TBC having received the referral, its response on 22 January 2024 and having sought guidance from *Mamodupi*, was that the applicant needed to satisfy the ‘jurisdictional’ requirements through an affidavit or a written statement. This response was before both the answering and replying affidavit in this matter were filed and served. As at the hearing of the matter, the applicant had not filed any such affidavit or statement in support of his referral before the TBC under section 188A(11), despite seeking urgent relief from this Court.

[33] The highwater mark of the applicant's allegations are that his prolonged suspension was 'harassment and unlawful'. He had contended that the protected disclosure is within the context of his grievance which had ended with a meeting with Phillips and Sanqu. That grievance pertained to what he referred to as 'a witch hunt and unfair labour practice', and further related to alleged deviations by the HR Executive from internal policies, and his unprofessional conduct related to the precautionary suspension and the passing of his personal information.

[34] Amidst all these grievances however, nowhere in the founding affidavit is there an indication that the applicant alleged that his suspension or any other conduct on the part of Transnet's employees relates to a protected disclosure or that the suspension or any conduct constituted an occupational detriment. Inasmuch as I agree with the submissions made on behalf of the applicant that it was not a requirement in order to obtain interdictory relief that he should set out the details of his alleged protected disclosure, in the same vein however, if the Court is not placed in a position to form even a *prima facie* view that indeed there is such an allegation, I fail to see how the Court can equally come to his assistance. Furthermore, since the applicant alleged that the basis of his disclosure was the grievance lodged on 1 November 2023, the Court has serious doubts that his 'disclosure' falls anywhere near its definition as contemplated in Section 1(1)(i) of the PDA¹⁵.

[35] In *Tsibani v Estate Agency Affairs Board and Others*¹⁶ this Court in considering the import of the provisions of section 188A(11) of the LRA, correctly in my view, observed that the LRA provided for other remedies, viz, sections 186(2)(d),

¹⁵ Section 1(1)(i) of the Protected Disclosure Act defines 'disclosure' as:

'Any disclosure of information 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 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.'

¹⁶ [2021] ZALCJHB 150 (24 June 2021).

191(1)(a) or 191(13) of the LRA, in the event an employee alleges that he or she has made a protected disclosure and is subjected to an occupational detriment as a result thereof. Thus where an employee has not invoked these provisions which are remedies available to her, any determination of the question whether she had made a protected disclosure or not, cannot be answered by way of a section 188A(11) process¹⁷.

[36] Effectively what the above means is that since the provisions of section 186(2)(d) and those of section 191(13) of the LRA are designed to cater for unfair labour practice disputes in instances where the conduct on the part of the employer complained of is alleged to amount to an occupational detriment (as defined in section 1 of the PDA), it is under these provisions at which a determination can be made as to whether a disclosure, if any, deserved protection under the PDA.

[37] The above conclusions are further fortified by the very remedies provided under section 4(1)(a) - (b) of the PDA. In this regard, it was further correctly observed in *NEHAWU obo N Phathela v Office of the Premier: Limpopo Provincial Government and Others*¹⁸ that where an employee alleges that he/she has been subjected to an occupational detriment (in breach of section 3 of the PDA) other than dismissal, such an occupational detriment is deemed to be an *unfair labour practice* as contemplated by the LRA. A dispute about an occupational detriment (short of dismissal) may be referred to this Court *provided* that the matter has been referred to conciliation and the matter remains unresolved, and as prescribed by section 4(2)(b) of the PDA.

[38] Against the above, it is common cause that the applicant's alleged unfair labour practice related to his prolonged suspension is currently before the TBC and is set-down for a hearing on 27 February 2024, where he can clearly obtain substantial redress. His case throughout, inclusive of when he had consultations with the late Mr Chaane on 5 December 2023, has always been about the alleged harassment as a result of the prolonged suspension, and the alleged unlawful conduct on the part of the HR Executive related to his personal information he had disclosed during the

¹⁷ At para 74.

¹⁸ [2022] ZALCJHB 8 (7 February 2022) at para 9.

process of the Lifestyle Audit. The case changed texture and morphed into an alleged protected disclosure on 15/16 January 2024 after consultations with Counsel, some two days before the internal hearing was to proceed. This clearly raises doubts about his *bona fides* when claiming a protected disclosure, especially in circumstances where as already stated, he allegedly made the disclosure to Phillips and Sanqu on 15 November 2023.

[39] In the end however, it ought to be concluded that the applicant has not satisfied the requirements of urgency, and that the urgency claimed is clearly self-created. The applicant has not demonstrated any exceptional circumstances necessitating that the matter be accorded urgency, and furthermore, in the absence of any *prima facie* evidence of any allegation of a protected disclosure, Transnet is correct in its submissions that the underlying *causa* for interdictory relief sought does not exist. On the opposite end, given what the applicant's case has been throughout and what is actually pleaded in this case, there is no doubt that he will be able to obtain substantial redress in due course.

[40] Accordingly, based solely on the conclusions in regards to urgency, it follows that the matter ought to be struck off the roll, without the need for the Court to consider the other preliminary points raised by Transnet, or consider whether the other requirements for interim relief have been satisfied.

[41] The Court has had further regard to the requirements of law and fairness insofar as Transnet sought a costs order. It is however the court's view that the facts and circumstances of this case dictate that each party be burdened with its own costs.

[42] Accordingly, the following order is made;

Order:

1. The applicant's application is struck off the roll on account of lack of urgency.
2. Each party is to pay its own costs.

Edwin Tlhotlhemaje
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: S.B. Nhlapo with T. Malungani, instructed by H.M Chaane
Attorneys

For the Respondent: L. Malan SC instructed by Maserumule Attorneys

LABOUR COURT