THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 1631/23

In the matter between:

WENDY LIHLE NTOMBELA **Applicant**

And

COMMUNITY SCHEME OMBUD SERVICE (CSOS) **First Respondent**

MAATLA HLAPOLOSA *N.O* **Second Respondent**

THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **Third Respondent**

Heard: 28 November 2023

This judgment was handed down electronically by consent of the parties' legal representatives by circulation to them via email. The date for hand-down is deemed 12 March 2024.

JUDGMENT

NGWENYA, AJ

Introduction.

[1] The Applicant, has approached the Court seeking two categories of urgent relief, first to interdict the internal disciplinary action which has been instituted

by the First Respondent and second, to review and set aside a decision by the Second Respondent in his capacity as the disciplinary hearing chairperson.

[2] The application concerns section 188A(11) of the Labour Relations Act, 66 of 1995 (“LRA”) and in particular, the legal consequences of an employee, such as the Applicant, having engaged section 188A(11) of the LRA. Given the narrow legal question, I will deal briefly with the facts giving rise to this application.

[3] But first, there was a challenge to the urgency of this application, however, I am satisfied that the Applicant has made out a case for urgency. Any complaint about the delay in launching these proceedings, does not offset my finding that the Applicant will not obtain substantial redress at a hearing in the ordinary course[1].

The Relevant Facts Giving Rise to this Application

[4] The Applicant is employed by the First Respondent as a Manager: Legal Services. The Applicant’s employment, it is common cause, commenced during or about 2 February 2020.

[5] During or about 22 August 2023, the Applicant emailed the Chairperson of the First Respondent’s Audit and Risk Committee. It is pleaded that in the email, which was transmitted to the Chairperson of the committee and its members, the Applicant disclosed *inter alia* the following:

a. Maladministration and malfeasance on the contract with the panel attorneys by senior management.

b. Preferential treatment by the Chief Ombud of attorneys of the First Respondent’s panel of attorneys.

c. Overcharging and/or overreaching of legal fees by attorneys on the panel attorneys contrary to the agreed tariff.

[1] East Rock Trading 7 (Pty) Ltd & Another v Eagle Valley Granite (Pty) Ltd [2011] ZAGPJHC 196 also [2012]

d. Insistence by the Chief Ombud to approve invoices where panel attorneys have overcharged the First Respondent for services rendered or have not rendered such services.

e. Disregard for the segregation of duties and abuse of power by certain senior officials within the First Respondent, particularly from the Office of the Chief Ombud.

f. Fruitless and wasteful expenditure.

[6] A copy of the email correspondence is attached to the Applicant's founding affidavit.

[7] The following day, on 23 August 2023, the Applicant received a notification of an intention to place her on precautionary suspension. The notification was issued by the Executive Corporate Services, who the Applicant alleges is implicated in the email disclosure. The Applicant was given an opportunity to make written submissions as to why she should not be placed on suspension, and on 24 August 2024 the Applicant was placed on suspension.

[8] On 18 October 2023, the Applicant referred an unfair labour practice dispute relating to her suspension. Among the grounds of unfairness which the Applicant raised is that her suspension entails an occupational detriment in contravention of the Protected Disclosure Act, 26 of 2000 ("PDA").

[9] On 27 October 2023, the Applicant was served with a notice to attend a disciplinary enquiry. On 31 October 2023, the Applicant referred a dispute to the Commission for Conciliation Mediation and Arbitration ("CCMA") in terms of section 188A(11), in which the Applicant requested that the disciplinary enquiry be conducted in terms of section 188A(11). The referral was accepted by the CCMA and the Applicant paid the required fee.

[10] On 1 November 2023, the disciplinary enquiry was scheduled to proceed and was chaired by the Second Respondent, as the internal chairperson. The Applicant moved an application in which she sought the following relief:

"1, the disciplinary proceedings before the appointed presiding officer is terminated.

2, The inquiry into the allegations against the employee is to be conducted by an arbitrator appointed by the CCMA in terms of section 188A(11) of the Labour Relations Act 66 of 1995."

[11] The Applicant and the First Respondent exchanged pleadings concerning the application. On 14 November 2023 the Second Respondent issued a ruling dismissing the Applicant's application and finding that:

50.1 The employee has not satisfied the requirements for the alleged protected disclosure to be worthy of protection in terms of the definition of the Protected Disclosure Act.

50.2 Accordingly, the disciplinary hearing before me is to continue and not be dealt with in accordance with the requirements of s 188A(11) of the Labour Relations Act.

[12] This application was launched by the Applicant against this background.

<u>Analysis</u>

[13] This Court, in **Jacobs and Others v National Commissioner of South African Police Service and Another**[2]**,** set out the principles which are applicable to the interpretation of section 188A(11) as follows:

"[20] To understand the extent of application of subsection (11) of section 188A, subsection (12) thereof is instructive. It is convenient to set out both subsection (11) and (12) of section 188A:

(11) Despite subsection (1), if an employee <u>alleges in good faith</u> that the holding of an inquiry contravenes the Protected Disclosures Act, 2000 (Act No. 26 of 2000), that employee or the employer may require that an inquiry be conducted in terms of this section into allegations by the employer into the conduct or capacity of the employee.

[2] Unreported Judgment, Labour Court Johannesburg, Case number J 1942/21, 12 March 2021

(12) The holding of an inquiry by an arbitrator in terms of this section and the suspension of an employee on full pay pending the outcome of such an inquiry do not constitute an occupational detriment as contemplated in the Protected Disclosures Act, 2000 (Act No. 26 of 2000).

[21] Obviously, section 188A(11) is not necessarily a scheme to challenge the alleged occupational detriment in terms of the PDA, per se. However, it is a mechanism aimed at avoiding collateral litigation where an employee claims that, the holding of a disciplinary enquiry into allegations of misconduct or suspension pending such an enquiry, offends the provisions of the PDA. Whilst the PDA protects employees who make a protected disclosure, "section 188A(11) aims to strike a balance between taking no action because the person allegedly guilty of misconduct is a whistle-blower in terms of PDA or allowing a disciplinary process, with the safeguard being that the disciplinary process has to be done in a manner that is entirely independent of the employer. In Nxele, this Court pertinently held that:

> "[31] In my view, the only proper construction to be accorded to section 188A(11) is that, ***where an employee or employer requires a pre-dismissal arbitration in terms of section 188A, that request it is imperious. This construction gives effect to the purpose of the legislature which is to provide a degree of protection to employees who make protected disclosures and to avoid parallel litigation, typified in the present case.***
>
> ***[32] Basically, following a section 188A(11) request by the employee, the employer is enjoined to institute a pre-dismissal arbitration in terms section 188A. The internal disciplinary enquiry that would have commenced and is pending must terminate…"'***

(own emphasis and footnotes omitted)

[14] In **Tsibani v Estate Agency Affairs Board and Others**[3] the Court explained the effect of section 188A(11) referral in the following terms:

[3] Unreported J642/2021 [2012] ZALCJHB 150 (24 June 2021)

‘[63] Section 188A(11) is to be understood in the specific context within which it was enacted and is to be applied. Section 188A provides for the appointment of an arbitrator to conduct an inquiry into allegations about the conduct or capacity of an employee. Such a process is on request by an employer, with the consent of the employee, or in accordance with a collective agreement and is to be made in the prescribed form and a prescribed fee is payable. Section 188A(11) provides that if an employee alleges in good faith that the holding of an inquiry contravenes the PDA, that employee or the employer, may require that an inquiry be conducted in terms of section 188A, into the allegations by the employer into the conduct or capacity of the employee. The holding of such an inquiry does not constitute an occupational detriment, as contemplated in the PDA.

[64] <u>Section 188A(11) entitles an employee, who is about to be subjected to an internal disciplinary process and who alleges in good faith that the intended disciplinary hearing contravenes the PDA, to instead request an inquiry be conducted in terms of section 188A. I see no reason why, if an employer , under circumstances where the employee complies with the requirements of section 188A(11), refuses to have the inquiry into the conduct or capacity of the employee conducted in terms of section 188A, the employee would not be entitled to approach this Court for an order interdicting the impending internal disciplinary hearing and an order directing that the inquiry pertaining to the employee’s conduct or capacity be conducted in terms of section 188A of the LRA.’</u> (Emphasis added)

[15] There is no dispute between the parties concerning the interpretation of section 188A(11), the main area of dispute between the parties is whether the Applicant has made a disclosure in good faith. This, the First Respondent contends is a requirement given that section 188A(11) refers to an employee who “<u>alleges in good faith</u>” that the holding of an inquiry contravenes the PDA.

[16] I am in agreement with the Applicant’s argument that this Court has consistently interpreted section 188A(11) to be that, once an employee invokes section 188A(11), the employer is enjoined to institute a pre-dismissal

arbitration in terms of section 188A. The internal disciplinary enquiry that would have commenced and is pending must terminate.

[17] However, the internal inquiry cannot simply terminate if an employee has not met the jurisdictional requirements. The jurisdictional requirements were set out by the Court to in **Mamodupi v Property Practitioners Regulatory Authority**[4] as:

a. That the employee has made a protected disclosure.

b. That employer has subjected the employee, who already made a protected disclosure to an occupational detriment.

c. Once so subjected, an employee must allege honestly and sincerely, that a causal connection exists between his or her protected disclosure and the occupational detriment.

[18] In my view, the Applicant has clearly met the jurisdictional requirements provided for in *Mamodupi*.

[19] Firstly, there can be no doubt that the email transmitted by the Applicant to the First Respondent's Audit and Risk Committee is a disclosure. It meets the definition of a disclosure in the PDA which is:

"disclosure" means 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;

[4] [2023] ZALCJHB 19 (13 February 2023)

(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 No. 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;

[20] The question of good faith still remains, and the Court in **Radebe & Another v Premier, Free State Province and others**[5] explained how good faith may be inferred, as follows:

'[35]… <u>Whilst good faith and honesty may conceivably amount to the same thing, I am of the view that a case by case approach is the proper one for a court considering these issues. Factors such as reckless abandon, malice or the presence of an ulterior motive aimed at self-advancement or revenge, for instance, would lead to a conclusion of lack of good faith. A clear indicator of lack of good faith is also where disingenuity is demonstrated by reliance on fabricated information or information known by the employee to be false.</u> The absence of these elements on the other hand is a strong indicator that the employee honestly made the disclosure wishing for action to be taken to investigate it.'

'[36] Simply stated if an employee discloses information in good faith and reasonably believes that the information disclosed shows or tends to show that improprieties were committed or continue to be committed then the disclosure is one that is protected. The requirement of 'reason to believe' cannot be equated to personal knowledge of the information disclosed. That would set so high a standard as to frustrate the operation of the PDA. …'

[21] There is no evidence before this Court which indicates that the Applicant made the disclosure with *"reckless abandon, malice or the presence of an*

[5] (2012) 33 ILJ 2353 (LAC)

ulterior motive aimed at self-advancement or revenge". Rather it appears to me that the disclosure was indeed made in good faith. The Applicant explains in the email correspondence that the issues were previously raised with senior management; the Applicant discloses what she believes to be acts of maladministration and malfeasance and undertakes to provide evidence of engagements on the issues upon further request.

[22] It is important to appreciate that it is not necessary for the purposes of establishing good faith that it be proven that information disclosed was correct or true. By definition, and in making the disclosure, the employee must only have 'reason to believe', not that the information is actually true, but that the information 'shows' or 'tends to show' that the impropriety 'has been' or 'is being' or 'may be' committed in the future.

[23] In applying these concepts, the Court **in Baxter v Minister of Justice and Correctional Services and Others**[6] held:

'… it is important to note that the PDA does not require that the disclosures made are factually correct. The phrase 'tends to show' in s 1 of the PDA intends that it is sufficient if the information in the disclosure is indicative of an impropriety. Likewise, the requirement that the employee merely have a reason to believe that the information points to an irregularity does not require personal knowledge of the information disclosed. That would set too high a standard frustrating the operation of the PDA. Hearsay information, depending on its nature and cogency, may provide a basis for a reasonable belief of possible irregularity.'

[24] Based on the above I am satisfied that the Applicant made a protected disclosure.

[25] The second and third jurisdictional enquiry can briefly be considered together. A day after the Applicant made the protected disclosure, she was informed of an intention to place her on suspension. The Applicant, as a consequence, has met the requirements of the second and third jurisdictional requirement.

[6] (2020) 41 ILJ 2553 (LAC)

My view is additionally fortified by the nature of the allegations of misconduct which relate to matters which took place as far back as 2020 and it does not appear to me that these are matters that required the employer to wait three years to bring allegations of misconduct.

[26] I am satisfied that the Applicant has made out a case for the relief sought.

[27] The Applicant has additionally launched a review of the Second Respondent's ruling contending that the internal disciplinary inquiry will proceed. The review application is pleaded in terms of section 158(1)(h) of the LRA and appears to be pleaded on contingent terms. Given the decision I have arrived at above, it is not necessary to deal with the review application. However, for the sake of completeness, I am not satisfied that in this case, the Applicant has made out a case to engage the Court's power to review and set aside a ruling of an chairperson of an internal hearing.[7]

<u>Costs</u>

[28] Guided by section 162 of the LRA, a costs order is not warranted in these proceedings.

[29] In the premise I make the following order:

<u>Order:</u>

[30] The application is dealt with as an urgent application in terms of Rule 8.

[31] The disciplinary proceedings against the Applicant are to be conducted by way of an inquiry by an arbitrator in terms of section 188A of the Labour Relations Act, 66 of 1995.

[32] The internal disciplinary proceedings against the Applicant are interdicted.

[33] No order as to costs.

[7] South African Broadcasting Corporation v Keevy & Others [2020] 6 BLLR 607 (LC); Gcaba v Minister of Safety and Security [2009] 12 BLLR 1145 (CC)

Z NGWENYA

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Advocate R Itzkin (with him Advocate M Moolla)

Instructed by: Zaheera Bobat Attorneys

For the Respondent: Advocate R Masipa

Instructed by: Marivate Inc