



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: 2025 – 189683

In the matter between:

PUSO FISHER

Applicant

and

AKONA NOBULALI NGCUKA (MATSAU) N.O.

First Respondent

BIDVEST SERVICES (PTY) LTD

Second Respondent

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Third Respondent

Heard: 21 October 2025

Delivered: 28 October 2025

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The time for hand-down is deemed to be 28 October 2025

Summary: Jurisdiction – Labour Court does have jurisdiction to consider an urgent application to interdict disciplinary hearing – applicant must however assert Labour Relations Act (LRA) right – exceptional and compelling reasons

must also be shown – applicant asserting right under LRA and exceptional circumstances shown – Labour Court entitled to intervene

Section 188A(11) of LRA – provisions of section considered – applicant alleging protected disclosure and invoking section – purpose of section is for CCMA to conduct independent disciplinary enquiry which mitigates discipline based on protected disclosure – independent arbitrator determines if misconduct is proven and not whether discipline is for protected disclosure – misconduct is issue best dealt with in evidence – not appropriate for Labour Court to determine issue of protected disclosure at this point

Section 188A(11) of LRA – applicant only required to make out a case that disclosure was made and such disclosure would qualify as protected disclosure under Protected Disclosures Act (PDA) – not required for Court to decide whether applicant would be entitled to protection or whether disclosure bona fide or justified – purpose of s 188A(11) is not that decision be made on a protected disclosure – arbitrator decides whether to accept pre-dismissal arbitration in terms of s 188A(11) – not appropriate for Labour Court to decide such issue

Section 188A(11) – purpose of section to move disciplinary proceedings to CCMA by way of pre-dismissal arbitration under s 188A – impartial arbitration on misconduct charges removes risk of influence in decision of misconduct as a result of protected disclosure – misconduct will thus finally be impartially decided based only on what employer can prove in respect of misconduct – statutory prescribed alternative to internal disciplinary hearing in cases of alleged protected disclosure

Clear right – evidence establishing applicant made protected disclosure – applicant specifically invoking s 188A(11) – internal disciplinary hearing no longer competent / appropriate – misconduct hearing moved to CCMA – clear right shown by applicant – interdicting of internal disciplinary hearing justified.

Prejudice – undue prejudice to applicant to participate in internal disciplinary hearing where risk of protected disclosure may impact decision – in proceedings at CCMA under s 188A(11) commissioner independently

determining allegations of misconduct against applicant – proceeding with internal hearing unduly depriving employee of such protection – little prejudice to employer in such process

Interdict – requirements for interdict satisfied – internal disciplinary hearing interdicted.

JUDGMENT

SNYMAN, AJ

Introduction

[1] The applicant has brought an urgent application to interdict the second respondent (Bidvest Services) from continuing with an internal disciplinary hearing against her, brought on two charges of alleged misconduct. The applicant has alleged that these disciplinary proceedings constitute an occupational detriment against her, based on a protected disclosure she had made. In this context, the applicant has invoked section 188A(11) of the Labour Relations Act (LRA)¹ which reads:

‘Despite subsection (1), if an employee alleges in good faith that the holding of an inquiry contravenes the Protected Disclosures Act, 2000 (Act 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] According to the applicant, the fact that she has referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of section 188A(11), means that the internal disciplinary hearing against her in Bidvest Services, which is set to proceed, should be interdicted. Contrary to the situation often found where employees seek to interdict internal disciplinary proceedings just as some unfounded delaying tactic or undue method to obstruct being disciplined, this is actually a case where the

¹ Act 66 of 1995 (as amended).

applicant has given effect to the general principle that the proper dispute resolution processes as prescribed by the LRA must be followed.² What she is saying is that continuing with the internal disciplinary hearing in circumstances where she invoked such a procedure would be inappropriate, and certainly not competent.

- [3] This application first came before Daniels J on 16 October 2025. On that date, the learned Judge granted an order disposing of the issue of urgency, finding that the matter be decided as one of urgency. An interim interdict was also granted in terms of which Bidvest Services was interdicted from continuing with the internal disciplinary enquiry against the applicant, until this application had been finally decided. And lastly, the learned Judge implemented timelines within which Bidvest Services had to file an answering affidavit and the applicant a replying affidavit, being 17 and 20 October 2025 respectively. The application was postponed by the learned Judge to 21 October 2025 for hearing, which is how it came before me.
- [4] When this matter was argued on 21 October 2025, the applicant complained about not having enough time to say what she wanted in her replying affidavit. I pointed out to her that the deadline was imposed by way of the order of Daniels J, and that I will decide this case only on the basis of what was before me pursuant to that order and the applicant's founding and replying affidavits, and nothing more. Despite the applicant being so informed, she sought to upload a comprehensive further affidavit which she labelled an 'explanatory affidavit' onto CaseLines on 22 October 2025, the day following conclusion of the hearing. There is simply no legal basis for her to submit such an affidavit, and I shall have no consideration or regard to the contents thereof.
- [5] As the applicant is seeking final relief, the applicant must satisfy three essential requirements which must all be shown to exist, being: (a) a clear

² See *Gcaba v Minister for Safety and Security and Others* (2010) 31 ILJ 296 (CC) at paras 59 – 60; *ADT Security (Pty) Ltd v National Security and Unqualified Workers Union and Others* (2015) 36 ILJ 152 (LAC) at paras 30 and 32; *Hendricks v Overstrand Municipality and Another* (2015) 36 ILJ 163 (LAC) at para 27.

right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.³

- [6] In deciding a matter such as this, two questions must be answered at the outset. First, does this Court have the jurisdiction to intervene at this point and grant the applicant the relief she seeks. And second, has the applicant made out a proper case of compellingly extraordinary circumstances to justify intervention at this stage. Fortunately, Daniels J has already disposed of the issue of urgency by way of the order of 16 October 2025, so I need not decide this. I will therefore only deal with the issue of jurisdiction, before turning to deciding the merits of the applicant's application.

Jurisdiction

- [7] The Court in *Gcaba v Minister for Safety and Security and Others*⁴ said that jurisdiction means: '*... the power or competence of a court to hear and determine an issue between parties ...*'. In the case of applications such as the current application, in which urgent intervention in internal disciplinary proceedings against an employee is sought, the Labour Court must have the jurisdiction in terms of section 157⁵, and the competence and power in terms of Section 158,⁶ in order to do this, as will be elaborated on below.
- [8] The Labour Court will only entertain any application brought directly to the Court to interdict incomplete disciplinary proceedings in truly exceptional circumstances, where material irremediable prejudice or injustice is shown to exist. In *Booyesen v Minister of Safety and Security and Others*⁷, it was held as follows:

³ *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd* 2017 (1) SA 613 (CC) at para 8; *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter and Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) at para 20; *Mere v Tswaing Local Municipality and Another* (2015) 36 ILJ 3094 (LC) at para 4.

⁴ (2010) 31 ILJ 296 (CC) at para 74.

⁵ Section 157(1) reads: '*Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.*'

⁶ Section 158(1) reads: '*(1) The Labour Court may (a) make any appropriate order, including (i) the grant of urgent interim relief (ii) an interdict; (iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act; (iv) a declaratory order*'

⁷ (2011) 32 ILJ 112 (LAC) at para 54.

‘... 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.’

- [9] Similarly in *Member of the Executive Council for Education, Northwest Provincial Government v Gradwell*⁸ the Court confirmed that these kinds of applications should only be entertained ‘... in extraordinary or compellingly urgent circumstances ...’. And in *Jiba v Minister: Department of Justice and Constitutional Development and Others*⁹ the Court held:

‘Although the court has jurisdiction to entertain an application to intervene in uncompleted disciplinary proceedings, it ought not to do so unless the circumstances are truly exceptional. Urgent applications to review and set aside preliminary rulings made during the course of a disciplinary enquiry or to challenge the validity of the institution of the proceedings ought to be discouraged. These are matters best dealt with in arbitration proceedings consequent on any allegation of unfair dismissal, and if necessary, by this court in review proceedings ...’

- [10] The requirements, for the want of a better description, for urgent intervention in incomplete disciplinary proceedings in an employer has in my view been further tightened by the recent judgment of the Labour Appeal Court (LAC) in *Cibane and Another v Premier of Province of Kwazulu-Natal*¹⁰. Relying on how the Constitutional Court dealt with the notion of the Labour Court’s jurisdiction to adjudicate and decide unlawful dismissals in *Steenkamp and Others v Edcon Ltd (National Union of Metalworkers of SA intervening)*¹¹,

⁸ (2012) 33 ILJ 2033 (LAC) at para 46. See also *Uthukela District Municipality (supra)* at para 38; *Ngobeni v Passenger Rail Agency of SA Corporate Real Estate Solutions and Others* (2016) 37 ILJ 1704 (LC) at para 12; *Food and Allied Workers Union and Others v Premier Foods Ltd t/a Blue Ribbon Salt River* (2013) 34 ILJ 1171 (LC) at para 15.

⁹ (2010) 31 ILJ 112 (LC) at para 17

¹⁰ [2025] 10 BLLR 1004 (LAC).

¹¹ (2016) 37 ILJ 564 (CC) at para 106.

being a finding that the Labour Court in fact had no jurisdiction to determine the lawfulness of a dismissal, the Court in *Cibane* decided:¹²

‘It is clear from this passage that outside of the scope of any statutory provision that specifically confers jurisdiction on the Court, the Labour Court has no jurisdiction, in any general sense, to make any determination of the unlawfulness of employer conduct.’

The Court in *Cibane* then specifically came to the following two important conclusions:¹³

‘In the absence of any statutory provision conferring jurisdiction on the Labour Court both in respect of employer conduct alleged to be unlawful and in employment-related matters generally, there can thus be no general rule, as the judgment in *Booyesen* might be construed, to the effect that the Labour Court has jurisdiction to intervene *in medias res* to restrain any alleged illegalities, irregularities or unfairness in incomplete disciplinary proceedings.’

And:¹⁴

‘In summary: to the extent that *Booyesen* has been interpreted to establish a general rule, qualified only by exceptionality, that the Labour Court has jurisdiction to intervene in uncompleted disciplinary proceedings, this is not an interpretation that can be sustained by section 157(1) of the LRA.’

- [11] What the above means, in my view, is that an applicant cannot simply rely on a general jurisdiction of this Court to intervene, qualified only by exceptionality. The applicant must show that the right to intervene arises from a right bestowed on the applicant by the LRA, which is enforceable under the LRA. If that is so, then the Court would have jurisdiction to intervene, on for example an interim basis, pending the enforcement of such right in the normal course. *In casu*, the applicant has a right, under section 188A(11) of the LRA, to refer a dispute to the CCMA for determination because she has alleged her being disciplined constitutes an occupational detriment as a result of a protected disclosure she has made. But does this mean that this process

¹² Id at para 24.

¹³ Id at para 27.

¹⁴ Id at para 32.

should stand in the way of Bidvest Services nonetheless being entitled to continue with the internal disciplinary proceedings, whilst the process invoked by the applicant runs its ordinary course to fruition in the CCMA. This is where the requirement of exceptionality comes into its own. Therefore, I am satisfied that in this case, the applicant seeks to assert a right under the LRA, and this Court therefore has jurisdiction to afford the applicant interdictory relief she seeks, provided she satisfies the essential requirement of truly exceptional circumstances.

- [12] In my view, not to consider the application could cause a grave injustice. I believe it would be patently unfair to expect the applicant to participate in what would clearly be a comprehensive disciplinary hearing, in circumstances where the applicant has alleged an occupational detriment as a result of having made a protected disclosure, which according to her strikes at the very heart of the disciplinary proceedings against her. The issue of the possible occupational detriment following a protected disclosure is in itself an issue that carries with it an inherent quality of urgent intervention, especially where an alternative process to deal with it is available and has been invoked, but despite this, Bidvest Services is pressing on with internal discipline.¹⁵ As held in *Matlala v Foskor Proprietary Limited and Others*¹⁶:

‘Further, there is no equivalent ‘alternative’ to invoking s 188A(11), which Matlala has a right to exercise. While there is a possibility of the provision being abused to delay or avoid an internal hearing, it must be remembered that procedure initiated by the employer does not disappear if an employee successfully invokes the provision. It simply relocates the subject matter of the internal enquiry to arbitral proceedings ...’

- [13] I am therefore convinced that the necessary exceptional circumstances exist to justify the intervention of this Court at this juncture. I am therefore willing to entertain the merits of the applicant’s application, starting with an exposition of the relevant background facts.

¹⁵ See *Gallocher v Social Housing Regulatory Authority and Another* (2019) 40 ILJ 2732 (LC) at para 17.

¹⁶ (2025/169524) [2025] ZALCJHB 478 (22 October 2025) at para 31.

The background facts

[14] When this matter was argued before me, I indicated to both parties, at the outset, that I believed this matter could be disposed of and relief be afforded to the applicant on the basis of the existence of the referral made to the CCMA under section 188A(11), considered with the common cause fact that the applicant had indeed made a protected disclosure. However, Bidvest Services was adamant that I needed to inquire into the applicant's *bona fides*, or differently put, whether there was any nexus between the applicant's protected disclosure and the disciplinary action taken against her. As a result, this matter was extensively argued by both parties on the basis of this nexus existing or not. However, and for the reasons dealt with later in this judgment, I do not believe any of this is relevant. I say this at this point, because I simply do not intend to set out all of the facts advanced by the parties relating to this issue. I will only set out the facts that I believe is pertinent in deciding whether the applicant is entitled to the relief she seeks.

[15] The applicant is employed by Bidvest Services as a business development executive, commencing employment on 1 April 2024. The applicant reports directly to the first respondent as the chief executive officer (CEO) of Bidvest Services. Prior to first respondent's appointment to her current role as CEO of Bidvest Services, she was the Chief Operating Officer: Customised Solutions at Bidvest Facilities Management (TFMC).

[16] On 10 June 2025, the applicant made a disclosure to the Bidvest Group Executive Director regarding what she perceived to be a procurement irregularity involving the first respondent. According to the applicant, the first respondent was involved in securing an employment opportunity for the son of the procurement manager at Famous Brands in exchange for Bidvest becoming a preferred service provider of Famous Brands. The disclosure was received by the Group Executive Director, who on 26 June 2025 asked the applicant to make a written statement that would be sent to the Group Head of Internal Audit. On 30 June 2025, the applicant did submit the written statement regarding the disclosure she had made and was invited to attend a

meeting with the Group Head of Internal Audit about this, which took place on 8 July 2025. After consideration of the disclosure, the applicant was ultimately informed on 29 September 2025, that the disclosure had been found to lack substance and had no merit, and thus the issue had been concluded.

- [17] It may just be said at this point that the first respondent herself, as the applicant's superior, was not in any manner involved in the receipt, processing of or dealing with this disclosure. According to the first respondent, she was not aware of it at all. The applicant had a different view, indicating that in a conversation on 27 June 2025 with the first respondent, she was informed of it. Bidvest Services has a different take on this conversation, indicating that in it, nothing was said about the protected disclosure, and the conversation solely dealt with the grievance and the relationship of trust between the applicant and first respondent. I do not believe it is necessary, at this point, to decide which version is true. This would be an issue to be decided on another day in proceedings to come. The only important undeniable fact is that the applicant did make a disclosure at Group level, which was received and dealt with as such.
- [18] According to the applicant, the occupational detriment towards her because of the aforesaid disclosure she had made started around 28 July 2025, when she had to attend a mediation session with the first respondent and an external mediator, as a result of a grievance instituted by the applicant against the first respondent in May 2025. In this mediation, and according to the applicant, the first respondent told the applicant she could not be trusted because of the grievance she had lodged, and the first respondent now accused the applicant of being insubordinate. Up to this point, the applicant had a clean employment record and had been awarded long-term share incentives in March 2025 because of her performance and positive contribution to Bidvest.
- [19] According to Bidvest Services, this mediation came about because of a strained relationship between the applicant and the first respondent as her direct superior. As touched on above, the applicant had in fact initiated a grievance against the first respondent, which grievance had nothing to do with

any issue of having made a protected disclosure for which she was being subjected to an occupational detriment. In the mediation, efforts were made to properly engage with the applicant to resolve the issues, but to no avail. Despite all attempts to resolve this grievance by independent mediation, the applicant was not satisfied with proposed mediation outcome, rejected it, and then simply withdrew from the entire grievance process, bringing it to an end.

[20] I must confess that a complete conspectus of the affidavits in this matter make it apparent to me that the relationship between the applicant and the first respondent as her superior was strained, to say the least. It is not necessary, in these proceedings, to delve into why this was the case. On the common cause facts, and towards the end of August 2025, Bidvest Services sought to discuss the possibility of a mutual separation agreement with the applicant. A meeting was convened for this purpose, but the applicant did not attend the meeting. As a result, the applicant was placed on special leave on 10 September 2025 to enable her to obtain proper advice and then give proper attention to the issue of the proposed mutual separation. This mutual separation exploration would be attended to by someone else on behalf of Bidvest Services, namely Aninka Wessels (Wessels). The applicant however refused to accept this special leave and failed to engage on the issue of possible mutual separation.

[21] The first respondent then placed the applicant on suspension on 12 September 2025. The suspension notice reflects that this was being done in anticipation of a disciplinary hearing to follow. It was broadly stated in the suspension notice that the allegations against the applicant concerned her allegedly having attempted to mislead Bidvest and displaying a general lack of attention to her duties. It was also indicated that a notice to attend a disciplinary hearing would follow shortly.

[22] On 19 September 2025, the applicant was given notice to attend a disciplinary hearing scheduled for 1 October 2025. Two charges were proffered against her. The first was gross dishonesty in respect of inviting a person to the Bidvest golf day in 2023, under false pretences. The second charge was

disregarding an instruction which related to her refusal to adhere to the instruction placing her on special leave.

- [23] In response to being charged, the applicant on 25 September 2025, raised a written complaint to the Bidvest Group CEO, Mpumi Madisa (Madisa), that she was being subjected to unfair labour practices as a result of the grievance she lodged against the first respondent in May 2025 and the protected disclosure she had made in June 2025. The complaint set out in some detail all the events that transpired, according to the applicant, since initiating the above processes and until she was suspended in September 2025. For the purposes of deciding this matter, it is not necessary to delve into all these events. Suffice it say, the applicant requested intervention from Madisa in respect of what the applicant described as constructive dismissal and victimization for whistle blowing and for lodging a grievance.
- [24] In a response on 29 September 2025, the applicant was informed by Gillian McMahon (McMahon), the Group Executive Director, that, *inter alia*, the Group does not get involved in these kind of issues at Group level, and these issues must be dealt with at Divisional level (thus in Bidvest Services itself). The applicant was encouraged to raise her concerns with the Divisional HR Executive or with Wessels, who had been tasked by the Division to deal with the matter.
- [25] On 1 October 2025, the Disciplinary Enquiry first sat and was postponed to 16 October 2025, for reasons that need not concern this judgment. On 14 October 2025, the Applicant referred a request for the appointment of a CCMA Commissioner in terms of Section 188A(11) to the CCMA. The applicant then sent an e-mail to the initiator of the disciplinary hearing on 15 October 2025, requesting that the disciplinary hearing scheduled for 16 October 2025 be terminated as a result of the referral in terms of section 188A(11) she had made to the CCMA on 14 October 2025. The applicant was informed that it was up to the disciplinary hearing chairperson to decide this issue, and she needed to raise her request with the chairperson. That meant the disciplinary hearing was proceeding, nonetheless.

- [26] The current application then followed, leading to the order by Daniels J on 16 October 2025, and the proceedings now before me.

Analysis

- [27] As touched on above, the applicant has said that she has been visited with an occupational detriment, in that her being charged and disciplined was motivated by her protected disclosure in June 2025 concerning the Famous Brands incident. This is thus a case founded on the Protected Disclosures Act (PDA)¹⁷, which provides that '*No employee may be subjected to any occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure*'.¹⁸ An occupational detriment includes, by definition in the PDA, the taking of disciplinary action.
- [28] As a point of departure, several incontrovertible pertinent facts must be set out. The first such fact is that it was common cause that the applicant had made a protected disclosure in June 2025 concerning an alleged procurement irregularity involving the first respondent and relating to Famous Brands, to the head office of Bidvest Group. This disclosure was accepted, processed, and dealt with as a protected disclosure by Bidvest Group. Secondly, this protected disclosure, and the receipt thereof by Bidvest Group, pre-dated the institution of the disciplinary proceedings against the applicant. Third, and upon the applicant being charged, and before the disciplinary hearing was convened for the purpose of commencing with the actual hearing, the applicant referred a dispute as contemplated by section 188A(11) to the CCMA. So where does this leave the internal disciplinary hearing in Bidvest Services? To answer this question, the purpose of section 188A(11), and how it must be applied, falls to be decided.
- [29] From the outset, it must always be remembered that Section 188A(11) is part and parcel of Section 188A, which envisages pre-dismissal arbitration by the

¹⁷ Act 26 of 2000.

¹⁸ See section 3 of the PDA.

CCMA in the stead of and in place of internal disciplinary hearings in the employer itself. Or in other words, it is a complete substitute for an internal disciplinary hearing.¹⁹ In ordinary circumstances, this process can only be followed by agreement between the employer and the employee.²⁰ However, section 188A(11) specifically envisages that section 188A pre-dismissal proceedings may be unilaterally invoked by either employer or employee if that section is found to apply. Or differently said, the employee may elect to invoke it without needed the consent / agreement of the employer, by way of a mere referral to the CCMA.²¹

[30] There is an important reason why this option of unilateral invoking of section 188A was afforded to the parties in the case of an alleged occupational detriment as a result of a protected disclosure. This was succinctly described in *Nxele v National Commissioner: Department of Correctional Services and Others*²² as such:

‘Section 188A(11) was introduced into the LRA consequent to the amendments to the LRA that came into effect in 2015. The object of this provision is to avoid disputes where an employee claims that the holding of an enquiry into allegations of misconduct, and suspension pending such an enquiry, breach the provisions of the PDA. The section accordingly permits either party to insist on an enquiry under s 188A with a view to reduce the risk of collateral litigation, including High Court litigation, which had been common in these circumstances.’

¹⁹ In *SA Transport and Allied Workers Union and Others v MSC Depots (Pty) Ltd and Others* (2013) 34 ILJ 706 (LC) at para 19, the Court said: ‘... Section 188A holds the promise of the expeditious resolution of disputes about employee conduct and the swift imposition of a fair sanction for any proven misconduct ...’.

²⁰ Section 188A(1) refers to consent being given by the employee of such a process, or a collective agreement providing for the same.

²¹ In *Nxele v National Commissioner: Department of Correctional Services and Others* (2018) 39 ILJ 1799 (LC) at para 30, the Court held: ‘The use of the words ‘despite subsection (1)’ in s 188A(11) clearly shows that the legislature deliberately stripped the employer of its discretion to unilaterally trigger a s 188A hearing, subject to the employee’s consent. At the advent of s 188A(11), employees may ‘require’ or ‘insist’ that the disciplinary enquiry be conducted in accordance with s 188A, termed ‘pre-dismissal arbitration’. The word ‘require’ in s 188A(11), given its ordinary meaning, means to enjoin, oblige, constrain, command, decree, demand, dictate, direct, etc ...’.

²² (2018) 39 ILJ 1799 (LC) at para 26. This judgment was upheld by the LAC in *National Commissioner: Department of Correctional Services v Nxele and Another* [2025] 5 BLLR 472 (LAC). See also *Letsoalo and Others v Minister of Police and Others* (2016) 37 ILJ 1916 (LC) at para 26.

And in *Ntombela v Community Scheme Ombud Service (CSOS) and Others*²³ the Court referred with approval to the following *dictum* from an unreported judgment in *Jacobs and Others v National Commissioner of South African Police Service and Another*.²⁴

‘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.’

[31] In order for the CCMA to have jurisdiction to entertain a dispute under section 188A in the ordinary course under section 188A(1), it needs to be proven that the parties agreed (consented) to it. But as discussed earlier, this is not the case where section 188A(11) applies. In the case of section 188A(11), what must be established by the applicant for pre-dismissal arbitration to be accepted is the following, as appositely set out in *Mamodupi v Property Practitioners Regulatory Authority and Another*.²⁵

‘... The occupational detriment must be retaliatory in form and be connected to the making of the protected disclosure. Accordingly, in my view the provisions of the subsection are evocable if the following jurisdictional facts are present in the order set out below:

45.1 The employee must make a protected disclosure;

45.2 Thereafter, the employer must subject the employee who already made a protected disclosure to an occupational detriment;

²³ [2024] JOL 63608 (LC) at para 13.

²⁴ At para 21 of such judgment.

²⁵ (J68/23) [2023] ZALCJHB 19 (13 February 2023) at para 45.

45.3 Once so subjected, an employee must allege honestly and sincerely so that a causal connection does exist between his or her protected disclosure and the occupational detriment. Differently put, it is because of having made a protected disclosure that an employer chose to respond by an occupational detriment.'

The Court in *Mamodupi supra* concluded:²⁶

'In my view if any of the above stated jurisdictional facts is absent, subsection 188A (11) cannot be invoked. Therefore, to my mind, the council; accredited agency and the commission must refuse to entertain the request that an inquiry be conducted in terms of this subsection if any of the jurisdictional facts are absent....'

[32] In *Foskor supra*, even though the Court agreed in general with the jurisdictional requirements as set out in *Mamodupi*, the Court warned that one should be careful not to set the bar too high where it comes to the requirement of establishing a nexus between the protected disclosure and the conducting of the discipline, where it comes to deciding whether to accept pre-dismissal arbitration under section 188A(11). In other words, The Court in *Foskor* believed these requirements cannot be said to mean that the applicant party must actually prove that an occupational detriment based on a protected disclosure at least *prima facie* exists. The Court in *Foskor* appositely held in this respect:²⁷

'In *Mamodupi* the court articulated the test for proceeding with the enquiry as being whether the employee has established the *prima facie factual* existence of a contravention. I agree in general with this formulation, but not if it is interpreted to mean that every element required to establish an unfair labour practice relating to an occupational detriment must be established on a *prima facie basis* to pass the threshold of s 188A(11). That dispute falls outside the remit of an arbitrator deciding whether to hear the disciplinary or incapacity case. The assessment of the employee's *bona fide* belief as a precursor to the statutory enquiry also does not require that level of scrutiny, because the

²⁶ Id at para 47.

²⁷ Id at para 49.

issue the arbitrator will decide is not the merits of their occupational detriment claim, but the merits of the employer's case of misconduct or incapacity ...'

- [33] Therefore, it is not necessary for the employee, in this context, to also establish that the disciplinary proceedings against him or her constitutes a contravention of the PDA and that the employee therefore qualifies for protection as a result.²⁸ As held in *National Commissioner: Department of Correctional Services v Nxele and Another*²⁹:

'There is no dispute that Mr Nxele made a protected disclosure in 2018. The issue on appeal is whether the Labour Court was correct in finding that he had alleged in good faith that the holding of a disciplinary enquiry on the 2022 charges amounted to a contravention of the PDA and whether he was therefore entitled to have the disciplinary proceedings converted into an inquiry by arbitrator under section 188A(11) of the LRA.

There is no obligation on an employee who seeks to rely on section 188A(11) to prove that the holding of the disciplinary hearing constitutes a contravention of the PDA. Rather, what is required is that the employee alleges in good faith that the holding of an inquiry does so.'

- [34] The aforesaid means, in my view, that it all practicably unfolds as follows, in the case of this avenue being pursued by the employee. The employee refers a dispute to the CCMA under section 188A(11), alleging that the current disciplinary proceedings, which have not yet commenced but is immanent, constitutes an occupational detriment as a result of a protected disclosure.³⁰ In making this referral, the employee must at the very least seek to establish that the disclosure that has been made to his or her employer, and would

²⁸ This would entail, as set out in *TSB Sugar RSA Ltd (now RCL Food Sugar Ltd) v Dorey* (2019) 40 ILJ 1224 (LAC) at para 56: '... first to determine whether the various disclosures of information constitute disclosures as defined in s 1 of the PDA; secondly, to decide if the disclosures are protected disclosures, as contemplated in s 1, read with s 6 of the PDA; and thirdly, whether Dorey was subjected to an occupational detriment (discipline and dismissal) by RCL on account, or partly on account, of having made a protected disclosure ...'.

²⁹ [2025] 5 BLLR 472 (LAC) at paras 13 – 14.

³⁰ In *Mamodupi* (*supra*) at para 51, the Court said: 'In practical terms, any request in terms of subsection 188A (11) must be accompanied by the proof of the protected disclosure made, which must predate the charge sheet – commencement of a disciplinary action ...'.

qualify as a protected disclosure under section 1 of the PDA³¹. The employee must also establish that the employer received such disclosure or was aware of it. And finally, the employee must establish that he or she has a genuine (*bona fide*), honest and sincere belief that a causal connection (nexus) exists between his or her protected disclosure and the occupational detriment. The Court in *Independent Municipal and Allied Trade Union and Another v City of Matlosana Local Municipality and Another*³² had the following to say where it comes to establishing such a nexus:

‘... Thus, what I am required to establish is the ‘proximate cause’ of the disciplinary enquiry. It is clear that a disciplinary enquiry against an employee need not necessarily be the direct result of a disclosure. I propose that a useful and practical approach is to consider factors such as (i) the timing of the disciplinary enquiry; (ii) the reasons given by the employer for taking the disciplinary steps; (iii) the nature of the disclosure; (iv) and the persons responsible within the employer for taking the decisions to institute charges. ...’

[35] But importantly, it is up to the appointed arbitrator at the CCMA to first decide whether or not the employee has established these jurisdictional pre-requisites, to engage the jurisdiction of the CCMA under section 188A(11), after considering evidence in this regard presented by the parties. In other words, the mere referral of the section 188A(11) dispute to the CCMA does not mean that it automatically substitutes the internal disciplinary proceedings with pre-dismissal arbitration proceedings at the CCMA. It must be up to the arbitrator to decide whether to permit that the proceedings under section 188A be conducted. The important point is that this decision is left up to the arbitrator. It should not be required of the Labour Court to decide this

³¹ Section 1(1)(i) of the PDA defines the term ‘disclosure’ as being 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: (1) That a criminal offence has been committed, is being committed or is likely to be committed; (2) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject; (3) that a miscarriage of justice has occurred, is occurring or is likely to occur; (4) that the health or safety of an individual has been, is being or is likely to be endangered; (5) that the environment has been, is being or is likely to be damaged; and (6) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000).

³² (2014) 35 ILJ 2459 (LC) at para 77.

question. That is why, in my view, it is not appropriate for Bidvest Services to say that the Labour Court should enquire into the nexus between the protected disclosure and the disciplinary proceedings against the applicant. This Court cannot be the gatekeeper for access to the CCMA under section 188A(11) and effectively decide this issue for it. The Court in *Mamodupi supra* held as follows:³³

‘I agree that the effect of requiring that an inquiry be conducted in terms of the subsection is that the commenced internal disciplinary hearing terminates. But the termination does not happen automatically after the request. It happens once the administrative bodies has acceded to the request. Such that if the jurisdictional requirements are not met, the commenced internal disciplinary hearing does not lawfully terminate.’

[36] If the arbitrator, once he or she has considered whether the above jurisdictional requirements have been met, decides that there does not exist a qualifying protected disclosure linked to an occupational detriment, then the arbitrator will decline to convene pre-dismissal arbitration proceedings under section 188A, and the matter will simply revert back to the employer for a continuation of the internal disciplinary hearing.³⁴ However, and if the referral is accepted by the arbitrator, it means that section 188A pre-dismissal arbitration proceedings at the CCMA under section 188A(11) must happen, and this would be conducted under the normal procedure applicable to all disputes dealt with by the CCMA under section 188A. Therefore, in the case of an alleged misconduct dispute, the appointed arbitrator must decide, on a balance of probabilities, whether the employee committed the misconduct with which or she has been charged.³⁵ The employer would obviously have to prove its case in this regard, and present proper evidence to substantiate

³³ *Id* at para 48.

³⁴ See *Mudau v Metal and Engineering Industries Bargaining Council and Others* (2013) 34 ILJ 663 (LC) at paras 16 – 17.

³⁵ In *Mudau (supra)* at para 19, the Court held: ‘... The task of arbitrators in terms of s 188A is slightly different in that in that regard the task is to determine on a balance of probabilities whether an employee has committed an offence for which he or she has been charged and, if so, whether there is a basis in fairness to terminate the employment relationship between the parties. In other words, the terms of reference for the arbitrator in terms of s 188A are, unless indicated otherwise, limited to determining whether an employee has committed an offence and, if so, whether there exists a basis in fairness to terminate the employment relationship ...’.

such a conclusion by the arbitrator. If the arbitrator decides the misconduct is not proven, then that is the end of the matter, the employee is effectively finally acquitted, and no further proceedings follow relating to these misconduct allegations, subject of course to the employer's right of review under section 145(1) of the LRA, as a determination by an arbitrator under section 188A is dealt with in the same manner as an arbitration award by a CCMA arbitrator in any dispute under the LRA.³⁶ If the arbitrator accepts misconduct has been committed, then the arbitrator must decide on an appropriate penalty (sanction) based on the particular facts and considerations of fairness. The arbitrator may impose the sanction of dismissal. Where the arbitrator finds that the employee be dismissed, that is equally the end of the matter and the employee's employment is terminated, with no further challenges being permissible, subject also only to the right of the employee to review the determination by way of application to the Labour Court. In *Kubheka v Member of the Executive Council: Human Settlements (Gauteng Provincial Government) and Another*,³⁷ the Court held as follows:

'The s 188A of the LRA scheme catapults the disciplinary process to statutory arbitration at the instance of the employee's consent to forgo the right to the security and comfort of both processes. Equally, the employer relinquishes its prerogative to enforce the disciplinary measures to the arbitrator. The yield to both parties is the impartial adjudicator, costs saving and expeditious outcome.'³⁸

[37] What is important to bear in mind is that the arbitrator, when conducting the proceedings under section 188A(11), does not decide whether the disciplinary proceedings against the employee is irregular or unlawful or somehow compromised because of the protected disclose, or whether the employees

³⁶ In *Solidarity on Behalf of Kruger v Transnet SOC Ltd t/a Transnet National Ports Authority and Others* (2021) 42 ILJ 852 (LAC) at para 18, it was held: 'Arbitration awards issued by an arbitrator in terms of s 188A are final and binding. Such awards may be reviewed by the Labour Court in terms of s 145(1) when issued by an arbitrator acting under the auspices of the CCMA or a bargaining council ...'. Similarly, in *Mudau (supra)* at para 20, it was said: 'An arbitration award made in terms of s 188A is reviewable in terms of s 145 of the LRA ...'. See also *Maeta v Bidvest Services (Pty) Ltd and Others* (2024) 45 ILJ 2587 (LC) at para 35.

³⁷ (2021) 42 ILJ 1497 (LC) at para 26.

³⁸ Of course, and in the case of section 188A(11), no consent is required.

qualifies for protection under the PDA.³⁹ Simply put, the arbitrator does not decide a protected disclosure case. The arbitrator cannot, for example, issue a ruling or determination that any discipline against the employee be terminated because of the protected disclosure, as the arbitrator has no jurisdiction to do so.⁴⁰ All the arbitrator can do is to conduct what is in essence an independent disciplinary hearing in respect of the misconduct charges against the employee, and decide whether these charges have substance and what penalty should be imposed on the employee if the misconduct was found to have been committed. This was made clear in *Foskor supra* as follows:⁴¹

‘... the enquiry conducted by the arbitrator will be concerned only with whether the employer proves the allegations of incapacity or misconduct and any consequences which might flow from that. In the absence of such an arrangement, the arbitrator conducting the misconduct or incapacity inquiry has no authority to determine if the employee has suffered an occupational detriment because they made a protected disclosure. Therefore, the employee cannot use the procedure to vindicate their claim that the disciplinary action of the employer amounts to an occupational detriment under the PDA.’

- [38] An employee believing that he or she is being subjected to an occupational detriment as a result of making a protected disclosure, in the form of being disciplined, should very carefully consider whether they wish to invoke section 188A(11). This is because of section 188A(12), which reads: ‘*The holding of an inquiry by a arbitrator in terms of this section and the suspension of an employee on full pay pending the outcome of such an inquiry do not*

³⁹ An employee would so qualify on the basis as described in *Palace Group Investments (Pty) Ltd and Another v Mackie* (2014) 35 ILJ 973 (LAC) at para 15, as follows: ‘... not all disclosures are protected in the sense of protecting the employee making the disclosure from being subjected to an occupational detriment by the employer implicated in the disclosure. A protected disclosure is defined as a disclosure made to the persons/bodies mentioned in ss 5, 6, 7, 8 and 9 and made in accordance with the provisions of each of such sections. In terms of s 6, for a disclosure to fall within the ambit of a protected disclosure it must have been made in good faith. It is clear that before other provisions of the PDA can come into play, the disclosure allegedly made must answer to the definition of that term as set out in the definitions section ...’.

⁴⁰ See *Feni v Pan SA Language Board* (2011) 32 ILJ 2136 (LC) at paras 19 – 20; *NEHAWU v Office of the Premier: Limpopo Provincial Government* 2022 JDR 1969 (LC) at paras 9 – 10.

⁴¹ Id at para 45. See also *Tsibani v Estate Agency Affairs Board and Others* [2021] JOL 51625 (LC) at para 72.

constitute an occupational detriment as contemplated in the Protected Disclosures Act What this means is that an employee, who may be found by an arbitrator to have committed the misconduct with which he or she has been charged, and then dismissed as a result, cannot pursue the occupational detriment issue any further, as for example an automatic unfair dismissal under section 187(1)(h) of the LRA. Where completely independent and impartial arbitration, conducted by a body specifically designated for such pursue by way of the LRA, determines that an employee be dismissed for proven misconduct, that must finally dispose of any notion that the dismissal is motivated by the employee making a protected disclosure.⁴² Colloquially speaking, an independent CCMA arbitrator would have no skin in that game.

- [39] Therefore, pre-dismissal arbitration under section 188A(11) is a process that completely substitutes the internal disciplinary hearing in all respects. The two processes cannot exist side by side. Once the pre-dismissal arbitration proceedings are convened, then internal disciplinary proceedings must terminate. This was made pertinently clear in a number of judgments. First, in *Foskor supra* it was held:⁴³ ‘... If the request for a statutory hearing is successful, it merely means that the internal incapacity or misconduct inquiry is substituted with an arbitration presided over by a completely independent chairperson ...’. Next, and in the Labour Court judgment in *Nxele supra*, it was stated:⁴⁴ ‘... The internal disciplinary enquiry that would have commenced and is pending must terminate ...’. The same sentiment was expressed in *SA Broadcasting Corporation SOC Ltd v Phasha*⁴⁵ as follows: ‘... The essence of s 188A is to provide for a pre-dismissal arbitration which substitutes arbitration before an independent arbitrator for a disciplinary enquiry ...’. As lastly, as succinctly said in *Tsibani v Estate Agency Affairs Board and Others*:⁴⁶

‘Section 188A(11) does not envisage the holding of two parallel hearings. Section 188A provides for an inquiry into allegations relating to an employee's

⁴² *Tsibani (supra)* at para 63.

⁴³ *Id* at para 44.

⁴⁴ *Id* at para 32. In *Mudau (supra)* at para 16, the exact same thing was said.

⁴⁵ (2021) 42 ILJ 816 (LC) at para 24.

⁴⁶ [2021] JOL 51625 (LC) at para 67.

conduct or capacity and for such an inquiry to be conducted by an arbitrator, in accordance with the provisions of the said section. If the inquiry relates to allegations relating to an employee's conduct, the section 188A inquiry will happen instead of an internal disciplinary hearing.'

[40] This brings me neatly back to the case *in casu*. All that this Court is now required to decide is firstly whether there is a protected disclosure made by the applicant which Bidvest Services is aware of. The answer is yes. Secondly, this Court must decide if this protected disclosure pre-dated the institution of the disciplinary proceedings, and once again, the answer is in the affirmative. And lastly, is there a referral by the applicant of a dispute as contemplated by section 188A(11) to the CCMA, which is obviously the case, because this is why we are here.

[41] Once the aforesaid is true, the CCMA arbitrator must now be given the opportunity to do his or her job to decide if the referral qualifies for acceptance as being a *bona fide* allegation of a protected disclosure as contemplated by section 188A(11), for the purposes of deciding whether or not to convene pre-dismissal arbitration proceeding sunder section 188A. It is in this context that the CCMA arbitrator is the one that must decide if the nexus between the disciplinary proceedings and the protected disclosure, which was the subject matter of so much debate between the parties before me, exists. This Court should decline to usurp these functions specifically bestowed on the arbitrator, by becoming involved in this determination. As decided in *Foskor supra*:⁴⁷

'The next issue is whether it is appropriate for the Labour Court to determine whether or not the statutory enquiry can proceed? The request is made to the CCMA or relevant bargaining council. It is the commissioner or panellist who is called upon to preside in the enquiry and therefore is first seized with the question whether the request has been properly made. As far as possible, this court should not be usurping that primary role by determining the jurisdictional question in the form of issuing a declarator before the request has even been considered by the arbitral forum. This is exactly what this court would be

⁴⁷ Id at para 50.

doing if it considered whether Matlala is entitled to the primary relief he seeks ...'

- [42] Therefore, and as matters stand, the applicant has properly initiated a process under the LRA which, if accepted by the CCMA, would serve to supplant the internal disciplinary hearing conducted by Bidvest Services with pre-dismissal arbitration under the auspices of the CCMA, and thus terminate any disciplinary proceedings against the applicant in Bidvest Services itself. But it is also true that the decision in this regard has not yet been made by an allocated CCMA arbitrator. That being the case, it would be entirely inappropriate and in my view in fact irregular to allow Bidvest Services to proceed with the internal disciplinary hearing, and as such, it must be interdicted. The applicant has thus shown a clear right in this respect. As succinctly stated in *Tsibani supra*:⁴⁸

'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.'

- [43] If the internal disciplinary proceedings against the applicant in Bidvest Services are not interdicted, and allowed to continue, the applicant would face the dubious prospect of having to participate in an internal disciplinary hearing which could have no lawful consequence and could rightly be considered to be terminated. Secondly, this situation may then require and / or lead to all kinds of collateral challenges and litigation to address the issue going forward, which is the very thing that section 188A(11) seeks to avoid. And finally, it

⁴⁸ Id at para 64.

would also deprive the applicant of the opportunity to avail herself of the protection of an independent determination of the misconduct charges against her, where internal disciplinary proceedings may be compromised as a result of the protected disclosure she has made.⁴⁹.

[44] As opposed to the aforesaid prejudice faced by the applicant, Bidvest Services will suffer little harm. If the CCMA arbitrator ultimately decides the referral does not qualify, the *status quo* is automatically restored, and the internal disciplinary proceedings are then simply reinstated / reinstituted. And if the CCMA accepts the referral, Bidvest Services still has the opportunity to prove the misconduct charges against the applicant, and if successful, secure her dismissal. It will also have the added benefit of the nature of the pre-dismissal arbitration proceedings under section 188A, which would finally dispose of the protected disclosure issue as a basis to challenge any dismissal following on such process.

[45] In presenting argument, counsel for Bidvest Services stated that to allow this matter to proceed under section 188A(11) would cause undue delay and additional expense for Bidvest Services. Although this may have a ring of truth, the situation is in my view exaggerated. Yes, pre-dismissal arbitration proceedings would take longer than internal disciplinary hearings, but nonetheless, the CCMA is known for expeditiously dealing with disputes, so the further delay is not excessive. And as far as expense is concerned, this cannot be considered material, and in any event, it fails to account for the upside that there will not be a later unfair dismissal challenge to the CCMA, should the applicant be dismissed, which would have cost Bidvest in any event. Overall, it is my view that these considerations are not material.

[46] I am therefore satisfied that the applicant has made out a proper case of undue prejudice should Bidvest Services proceed with the internal disciplinary

⁴⁹ As said in *Foskor (supra)* at para 51: '*Should the court then grant interim relief by suspending the internal inquiry pending the decision of the CCMA commissioner whether to proceed with the s 188A(11) enquiry? If the court does not stay the internal enquiry, Matlala could be denied the opportunity of exercising his right to request the statutory enquiry because, unless the request for the statutory enquiry is accepted, the employer can proceed with the internal one in the meantime ...*'.

hearing, despite her invoking section 188A(11) of the LRA. Overall, considerations of prejudice favour the applicant.

[47] Lastly, and on the issue of the availability of a suitable alternative remedy, this has to a large extent already been dealt with, above. I am satisfied that no suitable alternative remedy exists, as the process under section 188A(11) can in itself be described as the appropriate alternative remedy available for issues relating to occupational detriments based on protected disclosures.⁵⁰ There is really nothing else the applicant can do to assert her rights in this regard. The only other option would be, should she be dismissed, to pursue an automatic unfair dismissal claim, but this is reactive, and cannot serve to achieve the objectives envisaged by section 188A(11). I again refer to *Foskor supra*, where the following sentiments were expressed:⁵¹

‘... Matlala has acted with speed in bringing this application, the prejudice to the employer of the delay must be balanced against Matlala’s lost opportunity of an inquiry before an arbitrator. Matlala has no other suitable way of effectively preserving his right to have his request considered. Whatever the merits of his request are, that should be determined by the forum considering it and granting interim relief would facilitate that ...’

And in *Gallocher v Social Housing Regulatory Authority and Another*⁵² it was held:

‘Also, the nature of the effect of occupational detriments on employees is an issue that cries out for urgent intervention by this court, especially where an employee has not been dismissed. There is provision in the LRA for an automatic unfair dismissal claim where an employee is dismissed due to an occupational detriment, but this would not apply in this case. There is no other remedy available to stop the detriment short of dismissal being visited upon an employee, other than by way of immediate intervention by this court. Insofar as it can be said that the applicant’s pending unfair labour practice dispute referred to the CCMA is an alternative remedy, it can even be said

⁵⁰ See *Letsoalo (supra)* at para 27.

⁵¹ *Id* at para 52.

⁵² (2019) 40 ILJ 2732 (LC) at para 82.

that approaching this court is not competent without such a referral, making the prior referral necessary for this application.'

Conclusion

[48] In sum, I am satisfied that the applicant has met the requirements necessary in order for her to obtain the relief she seeks. The applicant has a clear right to the relief she seeks, has no alternative remedy available to her, and considerations of prejudice favour her. The applicant's application must thus succeed.

[49] However, it must be reiterated that as yet, the CCMA had not decided whether the applicant's referral under section 188A(11) is to be entertained. Any interdict granted must account for the fact that it must lapse if the CCMA decides not to accept such referral, and this matter then reverts back to an internal disciplinary hearing. The relief afforded must therefore reflect that the internal disciplinary proceedings be interdicted pending the decision of the CCMA. The relief must also cater for the fact that the internal disciplinary proceedings must terminate if the CCMA accepts the referral and convened pre-dismissal arbitration proceedings. The order I grant will reflect this.

Costs

[50] The applicant represented herself. Even though she was successful, the issue of costs thus does not arise. I would in any event not have been inclined to make any costs award against either party, no matter who was successful, considering that the parties have an ongoing relationship with one another. I also consider that further proceedings between them are a certainty, and in such context it would not be appropriate to mulch either one with a costs order at this stage.⁵³ I am also mindful of the *dictum* of the Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*⁵⁴ where it comes to costs awards in employment disputes before this Court, and I do not

⁵³ See *Gallocher (supra)* at para 85.

⁵⁴ (2018) 39 ILJ 523 (CC) at para 25.

consider there to be sufficient reason to depart from this. For all these reasons, I exercise the wide discretion I have under section 162(1) by making no order as to costs.

[51] For all the reasons as set out above, I make the following order:

Order

1. The internal disciplinary enquiry at the second respondent into the charges of misconduct against the applicant, is interdicted and suspended pending a decision by the arbitrator appointed by the third respondent whether the disciplinary enquiry should be conducted in accordance with Section 188A(11) of the Labour Relations Act.
2. In the event that the arbitrator appointed by the third respondent decides that the disciplinary enquiry shall be conducted in accordance with Section 188A(11) of the Labour Relations Act under the auspices of the third respondent, the internal disciplinary enquiry at the second respondent shall be considered and regarded to be finally terminated.
3. In the event that the arbitrator appointed by the third respondent decides that the disciplinary enquiry shall not be conducted in accordance with Section 188A(11) of the Labour Relations Act under the auspices of the third respondent, the internal disciplinary enquiry at the second respondent may recommence forthwith, and the interdict granted in terms of paragraph 1 of this order shall automatically lapse.
4. There is no order as to costs.

S Snyman

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant:

In person

On behalf of the First Respondent:

Mr C Beckenstrater of Moodie & Robertson

Inc Attorneys

LABOUR COURT