(1) Reportable: Yes/No
(2) Of interest to other Judges: Yes/No
(3) Revised

Signature Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: 2026-049347

In the matter between:

MNIKELWA NXELE **Applicant**

and

THE CHAIRPERSON OF THE DISCIPLINARY HEARING: CHRIS MUDAU *N.O.* **First Respondent**

NATIONAL COMMISSIONER: DEPARTMENT OF CORRECTIONAL SERVICES **Second Respondent**

THE INITIATOR: PUKE MASERUMULE N.O. **Third Respondent**

Heard: **13 March 2026**

Delivered: **24 March 2026**

Labour Law - Precautionary Suspension - Authority of chairperson – declaratory relief – Cout lacks general jurisdiction – Application dismissed.

Protected Disclosures - Section 188A(11) of LRA – Employee's request for s 188A(11) process - Effect on internal disciplinary hearing – pending decision by administrative body, internal hearing halted - Interdict - Disciplinary hearing halted by a s 188A(11) pending administrative body's decision – Application dismissed.

JUDGMENT

MAKHURA, J

Introduction

[1] What began as a seemingly routine internal employment dispute between the Department of Correctional Services (DCS), represented by the second respondent, and the applicant back in 2016 has evolved into something more enduring, probably far more than either party could have anticipated. A decade later, the parties remain entangled in what has become an unfortunate and troubling pattern marked by repeated precautionary suspensions, multiple referrals to the bargaining council and several urgent applications brought before this Court.

[2] In this latest segment of the parties' legal entanglement, the applicant seeks an order as follows:

> '2. Declaring that the First Respondent does not possess the requite (sic) legal authority in terms of the SMS Handbook clause 2.7.2 (c) to suspend and/or cause to be suspended the Applicant;
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> 3. Declaring that the First Respondent does not possess the requite (sic) legal authority in terms of the PUBLIC SERVICE PRECAUTIONARY SUSPENSIONS GUIDE (DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION) dated 04/12/2015 clauses 3 (bullets 2, 7 and 9), 4 (bullet) 5; 7; 8; 9; 10 and 11; to extend and/or cause to be extended, any suspension of the Applicant on behalf of the Second Respondent;
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> 4. Directing the Second Respondent to allow and/or cause to be allowed, the conversion of any further disciplinary hearing in terms of Section 188A(11) of the Labour Relations Act 66 of 1995 (as amended);
>
> 5. That the Second Respondent be compelled to convene and/or cause to be convened, a properly constituted disciplinary hearing under Section

188A(11) to allow the Applicant to fully and meaningfully participate therein.

6. That the Second Respondent is ordered to allow and facilitate the participation of the Applicant, without any hindrance to the said Section 188A(11);

7. That the First and Third Respondents be interdicted from proceeding with the disciplinary hearing against the Applicant, scheduled for the 26 March 2026 and/or any other date there-after.'

Material facts

[3] The litigation history of the matter is well documented in various judgments of this Court and the Labour Appeal Court (LAC) judgment issued on 17 April 2025. This historical background, drawn from these judgments, is also addressed as part of the facts leading to this current application.

[4] On 18 December 2017, this Court, in proceedings between the parties brought under section 158(1)(h) of the Labour Relations Act[1] (LRA) to review the chairperson's finding of guilt and refusal to convert the disciplinary process into an inquiry in terms of section 188A(11), delivered judgment in *Nxele v National Commissioner: Department of Correctional Services & others*[2] *(Nxele I)*. In that decision, the Court held that where an employee invokes section 188A(11), the request for a pre-dismissal arbitration is peremptory, requiring the employer to terminate the internal disciplinary hearing and refer the matter to the relevant dispute-resolution body for inquiry by an arbitrator.

[5] Consequently, the Court reviewed and set aside both the chairperson's ruling and the internal disciplinary hearing that had culminated in the finding of guilt. The DCS was directed that, should it wish to persist with the misconduct allegations against the applicant, it must do so through a section 188A process. The Court had at that

[1] Act 66 of 1995, as amended.
[2] [2019] JOL 43840 (LC); (2018) 39 ILJ 1799 (LC).

time observed that the matter had *“long and protracted history”*, dating back to May 2016.

[6] In 2018, the applicant made a disclosure to the Public Service Commission (PSC). On 10 October 2019, the PSC found that the applicant’s disclosure constituted a protected disclosure in terms of the Protected Disclosures Act[3] (PDA) and that the applicant had been subjected to an occupational detriment in terms of the PDA. It is common cause that the applicant was subsequently subjected to an inquiry by an arbitrator in terms of section 188A(11) of the LRA. Following this inquiry, the applicant was issued a written warning for the misconduct committed, his suspension was uplifted and he was ordered to report for duty on 14 February 2022.

[7] The DCS, dissatisfied with the outcome of the inquiry, sought to challenge it on review. It informed the applicant not to report for duty pending the review application and instructed the applicant not to report for duty pending the outcome of that application. The applicant took the view that he was legally entitled to return to work, which prompted the DCS to launch urgent proceedings to interdict his return. That application was dismissed with costs on 23 February 2022[4], paving the way for the applicant’s return to work.

[8] Notwithstanding this Court’s confirmation that the applicant was lawfully entitled to resume duty, he was, merely three working days later on 28 February 2022, again placed on precautionary suspension pending an investigation into allegations of misconduct. The alleged misconduct concerned the very same attempt to return to work in compliance with the outcome of the section 188A inquiry, which the Court had confirmed on 23 February 2022 that he was entitled to resume his duties. The applicant challenged the suspension before the General Public Service Sectoral Bargaining Council (GPSSBC).

[3] Act 26 of 2000, as amended.
[4] *Department of Correctional Services v Nxele & others* [2022] ZALCJHB 37; (2022) 43 ILJ 1668 (LC) *(Nxele II)*.

[9] In May 2022, the applicant was charged with misconduct arising from his return to work on 14 February 2022. In response, he approached this Court on 17 May 2022 seeking, firstly, an order converting the disciplinary hearing into a section 188A(11) inquiry, secondly, a declaration that his suspension had lapsed by virtue of having exceeded the prescribed 60-day period. A rule *nisi* was issued on 23 May 2022, granting the relief sought, with a return date set for 22 July 2022.

[10] When the matter returned to Court on 22 July 2022, it was argued before Allen-Yaman AJ (as she then was). Judgment was subsequently delivered on 2 August 2022 in *Nxele v National Commissioner: Department of Correctional Services and Another*[5] *(Nxele III)*, in which the Court confirmed the rule *nisi*. The effect of this order was that, should the DCS wish to pursue the charges against the applicant, it was obliged to do so through an inquiry conducted in terms of section 188A of the LRA.

[11] The DCS thereafter appealed the judgment to the LAC. On 17 April 2025, the LAC handed down judgment in *National Commissioner Department of Correctional Services v Nxele and Another*[6] *(Nxele IV)*. In summarising this Court's decision of 2 August 2022, the LAC noted that the charges brought in 2022 were directly connected to the earlier misconduct allegations, and that the applicant's perception of ongoing victimisation could not be regarded as objectively unreasonable.[7]

[12] On appeal, the DCS contended that the Labour Court erred in its approach, arguing that a more stringent and direct nexus was required between the protected disclosure made in 2018 and the charges brought in 2022. According to the DCS, the events of 14 February 2022 bore no relation to the earlier disclosure and therefore could not amount to an occupational detriment under the PDA.[8]

[13] The issue before the LAC was whether the Labour Court erred in finding that the applicant had, in good faith, alleged that proceeding with the internal disciplinary

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[5] [2022] ZALCD 32.
[6] [2025] ZALAC 9; [2015] 5 BLLR 472 (LAC).
[7] Ibid at para 9.
[8] Ibid at para 10.

hearing amounted to a contravention of the PDA entitling him to invoke the protections of section 188A(11). In dismissing the appeal and upholding the decision of this Court, the LAC emphasised that section 188A(11) does not require an employee to prove the contravention, but merely to allege in good faith that the internal process infringes the protections afforded under section 188A(11). The LAC held that:

> 'The concept of good faith is sensitive to context. The undisputed facts before the Labour Court were that the appellant refused to accept the outcome of the section 188A(11) inquiry. This response caused the appellant on Sunday 13 February 2022 to serve on Mr Nxele an application to review the outcome of the inquiry and an application to interdict his return to work. When Mr Nxele sought to return to work on 14 February 2022, there was no lawful impediment on him from doing so, yet, the appellant nevertheless had deployed members of the National Emergency Response Team to bar Mr Nxele from entering the DCS premises and resuming his duties. Mr Nxele was then suspended from duty and at the ensuing arbitration hearing in May 2022 considering the fairness of his suspension, he was served proposed disciplinary charges, related in the main to his failed attempt to return to work on 14 February 2022. In addition, Mr Nxele was notified that the disciplinary hearing which would consider such charges would be held in Pretoria and not in Pietermaritzburg where he worked.
>
> The appellant was aware the first disciplinary hearing instituted against Mr Nxele had been converted into a section 188A(11) inquiry which found that he had raised the allegation in good faith and that the holding of such disciplinary hearing contravened the PDA. Yet, in spite of this, the appellant's response to the outcome of that inquiry was not only calculated but also unusual in a number of respects. The appellant immediately sought to bar Mr Nxele's return to work, going as far as to serve review papers and an interdict application on him on a Sunday. Furthermore, he caused members of the National Emergency Response Team to be deployed to bar Mr Nxele from physically entering the DCS premises and resuming his duties. This was not an ordinary response to the outcome of an inquiry with which an employer took issue. It was a heavy-handed and directed response which reflected a particular and unusual degree of antipathy to the

> outcome of the inquiry and the return of a senior employee to work. There was no indication why such a response was required and no reason advanced why Mr Nxele's return to work would pose any particular threat or danger given his position in the DCS if this was not related to the protected disclosure he had previously made.
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> The appellant's decision thereafter to institute disciplinary proceedings against Mr Nxele related to his attempt to return to work was a similarly unusual and heavy-handed response to the events which had transpired in circumstances in which Mr Nxele was legally entitled to return to work given the outcome of the inquiry, and his attempt to contact politicians responsible for correctional service could not reasonably justify him being physically barred from reporting for duty in the matter that occurred. His suspension from duty and the decision to serve proposed disciplinary charges on Mr Nxele at the arbitration hearing convened to consider the fairness of his suspension reflected a clear intent on the part of the appellant to take whatever steps necessary to prevent Mr Nxele's return, with the decision to hold the hearing to consider such charges in Pretoria and not in Pietermaritzburg where he worked being similarly calculated.'[9]

[14] In summary, the LAC observed an unusual and disproportionate pattern of conduct by the second respondent, an unexplained and heightened hostility toward the applicant, its heavy-handed conduct when the applicant sought to report for duty and its resistance to the section 188A(11) inquiry outcome and found that the above factors support the applicant's good faith belief that the disciplinary process against him was linked to his earlier protected disclosure and that he met the threshold of alleging in good faith that the disciplinary process contravened the PDA.

[15] The LAC's judgment meant that the DCS must continue with the disciplinary process in terms of section 188A(11). The DCS, after its failed appeal, elected not to pursue the charges against the applicant. It abandoned the charges and disciplinary hearing.

[9] Ibid at para 20 – 22.

[16] Approximately three weeks after the LAC delivered its judgment, the applicant was summoned to a meeting with the second respondent on 9 May 2025, during which he was served with a letter of suspension premised, inter *alia*, on allegations of procurement irregularities. Although the applicant was invited to submit representations, the suspension had in effect already been imposed. In his representations, the applicant raised several concerns relating to allegations of irregularities in the DCS's procurement processes, which led to a suspension of at least two officials under his authority and a recommendation for the second respondent to suspend one of the officials. The applicant also raised concerns relating to the second respondent's failure to act on his recommendation to suspend the official. He further noted that he had reported these matters to the Public Protector and the Chairperson of the relevant Portfolio Committee in April and May 2025. The applicant regarded the suspension as retaliatory and linked to these disclosures.

[17] The applicant further stated that the second respondent:

> 'is prepared to bend the rules and modus operandi to suspend me with haste and remove me from the system in order to silence me on the perishable and non-perishable contract and to protect the Durban SCM officials. I mention bending the rules and modus operandi because the previous process to suspend an employee, drawing from the recent December 2024 experience, is to afford me an opportunity to make representations before suspending me. This time, the National Commissioner opted to take away that opportunity and went for a straight suspension. One wonders why?
>
> <u>It is difficult to resist a conclusion that the National Commissioner is subjecting me to occupational detriment because of the protected disclosure I made</u> to the National Commissioner himself, Minister, Public Protector and Portfolio Committee Chairperson. This is impermissible and I will stop at nothing to vindicate my rights against an apparently unlawful conduct.' (Emphasis added)

[18] On 30 June 2025, the applicant referred two disputes, contained in a single referral form. The first concerned an alleged unfair labour practice dispute relating to his

suspension; the second alleged that he had been subjected to an occupational determinant in contravention of the PDA. The applicant contended that the suspension had been imposed unilaterally and in retaliation for disclosures he had made regarding procurement irregularities in the award of food contracts, irregularities in the 2025 learnership recruitment process, and the second respondent's failure to act against what he described as *"corrupt officials"* within the Durban Supply Chain Management Unit. He further submitted that these disputes must be viewed against the backdrop of the parties' extensive litigation history. The applicant sought a declaration that the suspension was unfair and constituted a breach of the PDA and sought compensation of 12 and 24 months' remuneration, respectively.

[19] Following his suspension, the applicant was charged and called to attend a disciplinary hearing on 8 July 2025, chaired by the first respondent. At the commencement of the disciplinary hearing, the applicant raised several preliminary points, including that he had made a protected disclosure under the PDA, that the disciplinary proceedings constituted an occupational detriment and that he had referred an unfair suspension dispute to the GPSSBC. The disciplinary hearing was postponed *sine die*. Later that day, the second respondent addressed a letter to the applicant informing him that his suspension had not lapsed and that he was still not permitted to report for duty. The applicant was warned that any attempt to return to work would constitute contravention of his suspension conditions.

[20] On 9 July 2025, the DCS's attorneys of record, Puke Maserumule Attorneys, addressed correspondence to the applicant instructing him not to report for duty on the basis that he remained on suspension. Several days later, on 15 July 2025, the applicant launched an urgent application in this Court seeking a declaratory order that his suspension of 9 May 2025 had lapsed in terms of clause 2.7.2(c) of the SMS Handbook. That application was ultimately unsuccessful.[10]

[10] *Nxele v National Commissioner: Department of Correctional Services* [2025] ZALCJHB 571; [2026] 3 BLLR 262 (LC) *(Nxele V)*.

[21] On 14 August 2025, the second respondent addressed a letter to the applicant recording that his suspension had lapsed on 4 August 2025 and that he was required to report for duty on 5 August 2025. The applicant was instructed to report for duty on Friday, 15 August 2025, which he duly did. On his second working day back at work on Monday, 18 August 2025, the second respondent issued a notice to the applicant in the following terms:

> 'This Office received a letter dated 9 July 2025 from Puke Maserumule Attorneys Inc., which represents the Department in the disciplinary proceedings initiated against you, which are currently pending.
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> The letter contains serious allegations of possible gross misconduct against you, and this Office has been requested to investigate them. For ease of reference, a copy of the letter is attached.
>
> In light of the nature and seriousness of the allegations, the Department is contemplating your suspension from duty, pending the outcome thereof. You are accordingly invited to make written representations why you should not be suspended whilst the investigation is conducted…'

[22] The allegations referred to in the notice related to a claim by Puke Maserumule Attorneys that, in response to their correspondence of 9 July 2025 advising him not to report for duty, the applicant had telephoned a member of the firm and had allegedly made threats directed at her and the firm. The applicant, however, disputed this characterisation and said that he stated that he did not take instructions from the attorney concerned.

[23] On 27 August 2025, the applicant was again placed on suspension. He remained on suspension until 26 October 2025, upon which he reported for duty the following day, 27 October 2025, and notified the second respondent in writing that his suspension had since lapsed and that he was back at work.

[24] However, the applicant would be suspended again on 26 November 2025. This time, he was suspended on allegations of maladministration for inter *alia* issuing

an instruction to his subordinate *"to perform his private duties using the human and physical resource of the Department whilst you were on precautionary suspension"*. The conduct in question was alleged to have occurred between 1 July and 7 November 2025.

[25] On 9 February 2026, the applicant was served with a notice to attend a disciplinary hearing scheduled for 19 February 2026. The charges preferred against him related to alleged misconduct committed between 1 July and November 2025, during periods when he had been on precautionary suspensions. These included allegations that he had issued unauthorised instructions to a subordinate to perform private tasks for his personal benefit, misused departmental assets and human resources, prejudiced the proper administration and functioning of the DCS, and caused the DCS to incur irregular, wasteful, and fruitless expenditure in contravention of sections 45(b) and (c) of the Public Finance Management Act[11] (PFMA).

[26] On 15 February 2026, the applicant sent a WhatsApp message to the second respondent seeking to invoke section 188A(11) and requesting that the disciplinary hearing be converted into an inquiry by arbitrator. The second respondent replied on 18 February 2026, acknowledging receipt of the request but indicating that any preliminary point, such as section 188A(11), should be raised before the appointed chairperson at the hearing scheduled for 19 February 2026.

[27] On 16 February 2026, the applicant referred a request too the GPSSBC for an inquiry by arbitrator in terms of section 188A(11) of the LRA. On 17 February 2026, the GPSSBC sent a tax invoice to the applicant.

[28] When the disciplinary hearing convened on 19 February 2026, the second respondent indicated an intention to consolidate the charges issued on 9 February 2026 with those arising from the earlier allegations relating, inter *alia*, to procurement irregularities for which the applicant had been called to a disciplinary hearing on 8 July 2025. The second respondent further advised that a new,

[11] Act 1 of 1999.

additional charge sheet would be served on the applicant and that, in conjunction with the consolidation application, a postponement would be sought together with an extension of the applicant's suspension. The applicant objected to the consolidation, contending that the earlier proceedings had been abandoned. His primary objection was however directed at the internal disciplinary hearing in light of his pending section 188A(11) referral, which he submitted required that the internal process be halted until the GPSSBC had pronounced on the matter.

[29] The chairperson, having heard the submissions by both parties, postponed the disciplinary hearing to 26 March 2026 and extended the applicant's suspension to the same date. The applicant objected to the extension, contending that the chairperson lacked the authority to extend his suspension. The chairperson nevertheless maintained his ruling and subsequently issued a written decision on 24 February 2026 confirming both the postponement and the extension of the suspension. It was this ruling that prompted the applicant to launch the present application.

<u>Analysis</u>

The substantive relief

[30] The applicant seeks two primary forms of relief. First, he seeks a declaration that the first respondent lacks legal authority, whether under clause 2.7.2(c) of the SMS Handbook or under the Public Service Precautionary Suspensions Guide issued by the Department of Public Service and Administration, to impose or extend any precautionary suspension against him on behalf of the second respondent.

[31] Second, the applicant seeks mandatory relief directing the second respondent to initiate a process under section 188A(11) of the Labour Relations Act, to convene a properly constituted inquiry in terms of that provision, and to ensure that the applicant is afforded participation in those proceedings. Interwoven with these orders is an order to interdict the disciplinary hearing scheduled for 26 March 2026.

[32] The second respondent raised two preliminary points – urgency and non-joinder of the DCS. Having considered the issues, I was satisfied that the application should be entertained on an urgent basis. The non-joiner is highly technical and unnecessary and falls to be dismissed. The DCS is before Court represented by the second respondent, who is cited in his official capacity. The point was not even pursued during the hearing.

[33] I proceed to consider the merits of the application. In doing so, I address the issues in two discrete parts – first, the issue of suspension; and second, the section 188A(11) process, which deals with the conversion of the disciplinary hearing into a section 188A(11) process and the consequent interdict of the disciplinary hearing scheduled for 26 March 2026.

Suspension

[34] The applicant contends that the application is brought in terms of section 77(3) read with section 77A of the Basic Conditions of Employment Act[12] (BCEA). He characterises his claim as one grounded in *"the rule of law"* and his *"contractual entitlement"* to render his services as the Regional Commissioner. He argues that his claim does not concern the fairness of his suspension. The applicant then submits that this Court has jurisdiction and powers to determine *"a legality review"* in terms of section 157(1) and (2) read with section 158(1)(h) of the LRA. Section 158(1)(h) deals with legality reviews, and there is no review application before this Court.

[35] It is trite that this Court's jurisdiction is specifically circumscribed by the legislation and that it does not enjoy general jurisdiction and general supervisory authority over all employment-related matters.[13] Certain disputes must be referred to the CCMA or relevant bargaining council. Accordingly, the question is whether, on the pleadings, the applicant has established a proper jurisdictional basis for this Court

[12] Act 75 of 1997.
[13] See: *Baloyi v Public Protector & others* [2020] ZACC 27; (2021) 42 *ILJ* 961 (CC); *Passenger Rail Agency of South Africa & others v Ngoye & others* [2024] ZALAC 18; (2024) 45 ILJ 1228 (LAC); *Cibane & another v Premier, Province of KwaZulu-Natal & another* [2025] ZALAC 44; (2025) 46 ILJ 2587 (LAC).

to issue the two declaratory orders – first, that the chairperson has no authority to suspend in terms of clause 2.7.2(c)[14] of the SMS Handbook, and second, that the chairperson has no authority to extend or cause to extend the suspension in terms of the Public Service Precautionary Suspensions Guide (Department of Public Service and Administration) dated 4 December 2025. The Public Service Precautionary Suspension Guide is exactly that, a guideline issued by the Minister. Any claim grounded on this document is certainly not one based on a breach of contract.

[36] The pleadings fail to disclose any statutory or contractual source conferring jurisdiction on this Court to determine these questions or to issue declaratory relief of the kind sought. On this basis alone, the application must fail for want of jurisdiction.

[37] Even assuming, for argument's sake, that this Court were vested with jurisdiction, there is no practical purpose to be served by issuing the declaratory relief sought. The SMS Handbook already regulates the issue of precautionary suspension and expressly provides that, where a suspension exceeds 60 days, it is the chairperson of the disciplinary hearing who must determine whether any further postponement is warranted. The applicant therefore seeks a declaration that merely restates what the regulatory framework already stipulates. During argument, Mr Mataka, on behalf of the applicant, correctly conceded that the second respondent had the authority to impose the suspension and that the chairperson acted within the powers afforded by clause 2.7.2(c) in extending it.

[38] The applicant's complaint does not concern the review of the chairperson's decision – whether it was reasonable, irrational or otherwise irregular. Rather, his challenge is against the very source of the chairperson's authority. Accordingly, the application for declaratory relief in respect of the suspension cannot be sustained and falls to be dismissed.

[14] This clause provides that: *"If a member is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within 60 days. The chair of the hearing must then decide on any further postponement".*

Section 188A(11)

[39] In opposing this relief, the second respondent submits that the orders sought are incompetent and that the applicant has failed to demonstrate that he made a disclosure in good faith, as required under the PDA. It is further contended that the applicant will not suffer any occupational detriment should the internal disciplinary hearing proceed, and that the interdict sought in respect of the hearing scheduled for 26 March 2026 cannot be sustained independently of the section 188A(11) relief.

[40] The record reflects that the applicant was initially suspended in May 2025 on allegations relating to procurement irregularities. It is common cause that he raised concerns regarding these alleged irregularities and that these concerns amounted to a disclosure, even though the disclosure itself is not included in the papers before this Court. Thereafter, he faced two further suspensions arising from a variety of allegations. The conduct leading to the two further suspensions and the charges against the applicant occurred during the time he was on the May 2025 suspension and continued into the time when he was on the 27 August 2025 suspension.

[41] For present purposes, it is not necessary for this Court to consider whether a nexus exists between each set of charges brought against the applicant. Further, it is not for the Court to decide whether the applicant has made a disclosure in good faith and whether the internal disciplinary hearing must be converted to section 188A(11) proceedings. That is an issue for the GPSSBC.

[42] Section 188A(11) provides:

> '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.'

[43] This Court's earlier decision in *Nxele I* clarified the effect of such a request or invocation of section 188A(11). There, Nkutha-Nkontwana J (as she then was), held that:

> 'In my view, the only proper construction to be accorded to s 188A(11) is that, where an employee or employer requires a pre-dismissal arbitration in terms of s 188A, that request 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.
>
> Basically, following a s 188A(11) request by the employee, the employer is enjoined to institute a pre-dismissal arbitration in terms of s 188A. The internal disciplinary enquiry that would have commenced and is pending must terminate. It must be emphasised that, since it is the employer's managerial prerogative to exercise discipline that gets delegated in terms of a s 188A process, the employer remains responsible for referring the request to the relevant dispute-resolution institution and attending to the payment for the services of that institution.'[15]

[44] The issue was again examined by this Court in *Mtweta v Transnet Freight Rail and Operating Division of Transnet (SOC) Limited*[16] *(Mtweta),* where Tlhohlalemaje J, having referred to *Nxele I* above and the judgment of Moshoana J in *Mamodupi v Property Practitioners Regulatory Authority and Another*[17], held that:

> '... 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 halted…
>
> It is however my view that the position in *Nxele* was properly qualified in *Mamodupi v Property Practitioners Regulatory Authority and Another* [2023] ZALCJHB 19 (13 February 2023). <u>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</u>

[15] *Nxele I* at paras 31 – 32.
[16] [2024] ZALCJHB 17.
[17] [2023] ZALCJHB 19.

internal proceedings. 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 exist. 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.

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.

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 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.'[18] (Emphasis added)

[45] On what the employee's duty is in invoking section 188A(11), the LAC has now provided authoritative clarification in *Nxele IV*, confirming that an employee invoking section 188A(11) bears no duty to prove that the internal process contravenes the PDA; it is sufficient that the allegation is made in good faith. The threshold is therefore a lower one than suggested in *Mtweta*. The employee must

[18] *Mtweta* at paras 22 – 26.

demonstrate only that the allegation is *bona fide*, not that the occupational detriment has in fact occurred.

[46] Whether the jurisdictional requirements for a section 188A(11) inquiry have been met is a matter reserved for the CCMA or bargaining council to determine upon receipt of the referral, rather than for the employer or the chairperson of the internal hearing. This principle is now trite.

[47] In *Matlala v Foskor Proprietary Limited and Others*[19] *(Matlala)*, this Court was confronted with an application to interdict the disciplinary hearing and to compel the disciplinary hearing to be converted into an inquiry by an arbitrator under section 188A(11), alternatively to stay the disciplinary proceedings pending the CCMA's decision on the section 188A(11) request. The Court granted the alternative relief, holding that once a section 188A(11) request is placed before the CCMA or a bargaining council, it was for the appointed arbitrator to decide whether the jurisdictional requirements have been satisfied and that the Court should not usurp those powers.[20]

[48] In its more recent decision handed down on 16 March 2026, the LAC in *Industrial Development Corporation of South Africa v Modika*[21] *(Modika)* affirmed the above principle and explained that the administrative act of enrolling a section 188A(11) matter constitutes a jurisdictional finding or decision by that body and that contrary to *Matlala*, it is not the appointed arbitrator who determines whether the jurisdictional requirements for the inquiry have been met.[22] The LAC continued:

> 'An administrative body like the CCMA does not finally determine its jurisdictional powers. It does so for the sake of convenience. Its decision on that is not binding on a Court. This statement of law does not suggest that the administrative body cannot on its own establish whether it possesses jurisdictional powers to act. The foundational principle of administrative law is that administrative bodies created

[19] [2025) ZALCJHB 478.
[20] Ibid at para 50.
[21] Case No. A2026-037072 dated 16 March 2026.
[22] Ibid at para 37.

by statutes should not exceed powers granted to them. Those bodies are entitled to make an initial determination regarding their authority to exercise a statutory power. Always, that initial determination, will be subject to judicial review.

Accordingly, a Court must wait for the administrative body to make the initial determination. If the determination is on the objective facts wrong, a Court of law can always set aside that initial determination on review. Therefore, a Court of law, absent any judicial review, is not empowered to exercise the initial determination on behalf of the administrative body. When the Labour Court concluded that the jurisdictional requirements to accept a section 188A(11) referral existed, it in error usurped the powers of the CCMA. The jurisdictional facts alluded to in *Mamodupi* must be established by the CCMA since it is a body statutorily tasked with the power to accept the referral.'

[49] In summary, a request made in terms of section 188A(11) operates to halt or pause any internal disciplinary proceedings, at least temporarily, pending the determination by the CCMA or the relevant bargaining council. Should that body accept and enroll the matter, the internal process falls away and the dispute proceeds as an inquiry by an arbitrator in terms of section 188A(11). The administrative decision by the administrative body (per the binding authority of *Modika* and not the appointed arbitrator as per *Matlala*) to accept (or reject) the referral constitutes a jurisdictional ruling by the CCMA or bargaining council, which may be reviewed on objectively justifiable grounds. For these reasons, this Court should not interfere with or anticipate the administrative body's decision on the employee's request or referral.

[50] Turning to the present matter, the GPSSBC had not yet pronounced on the applicant's section 188A(11) request at the time of the hearing, by either enrolling or rejecting the request. At the time of the hearing, the GPSSBC had only issued an invoice signaling receipt and acknowledgment of the request. Whilst this development suggests that the request is processed, it would be inappropriate for this Court to speculate or to pre-empt the GPSSBC's decision. For the purpose of

the application, the GPSSBC has not made the jurisdictional determination and it should be allowed space to do so.

[51] Against this backdrop, the applicant seeks orders directing the second respondent to convert the disciplinary hearing into section 188A(11) inquiry, compelling him to convene the inquiry and to allow and facilitate the applicant's participation in the inquiry. This relief is misconceived because that is a matter within the competence of the GPSSBC, not this Court. This Court is not empowered to issue this relief.

[52] The applicant further seeks to interdict the disciplinary hearing scheduled for 26 March 2026. In light of the principles outlined above, that relief is unnecessary. As already stated, once a section 188A(11) referral is placed before the CCMA or bargaining council, the internal process is, at minimum, paused pending the CCMA or bargaining council's decision. If the matter is enrolled, the internal process falls away in favour of the inquiry by arbitrator. If it is not enrolled, the applicant would have a choice whether to challenge that decision or to subject himself to what he considers an occupational detriment. The application for a final interdictory relief is therefore premature, unsustainable and falls to be dismissed. There is no application for interim interdictory relief.

<u>Costs</u>

[53] The question of costs falls within the discretion of this Court in terms of section 162 of the LRA. The applicant's ordeal since 2016 cannot be underestimated. In considering an appropriate cost order, the Court is mindful of the protracted history of litigation between the parties and the considerable personal burden this may have placed on the applicant, who has been obliged to finance his litigation from his own resources. By contrast, the second respondent has, over the past year alone, suspended the applicant in May, August and November. This is not and cannot be considered a normal working environment.

[54] The Court cannot ignore or disregard the applicant's evident loss of confidence in the internal disciplinary mechanisms of the DCS, an apprehension not without

foundation given the rapid succession of suspensions imposed between May and November 2025, as well as the fact that none of the disciplinary hearings had taken off. The record further reflects that the applicant had also been suspended in December 2024, resulting in four suspensions within an eleven-month period. The timing of the suspensions, particularly the suspension imposed on 27 August 2025, which followed closely upon the expiry of the previous suspension, and on an allegation the second respondent became aware of as early as 9 July 2025 but waited for the expiry of the May 2025 to lapse before imposing the second, reinforces the applicant's loss of confidence in the internal disciplinary process. Another factor is that the DCS simply abandoned the February 2022 disciplinary charges after its failed appeal bid to resist the hearing being conducted under section 188A(11).

[55] Against this background, although the applicant has not succeeded in the present application, his decision to approach this Court was neither frivolous nor vexatious. On the contrary, the application appears to have been driven by a genuine attempt to protect and vindicate his statutory rights in circumstances where he perceived, not unreasonably in my view, as unfair and an abuse of internal disciplinary mechanisms, particularly given the abnormal frequency of suspensions and the patterns of issuing multiple charge sheets at or closer to each 60-day interval. From the proceedings of 19 February 2026, the applicant was due to be issued a fourth set of charge sheets, in a period between the end of June 2025 and February or March 2026. In exercising my discretion, I therefore do not believe that an order of costs would be warranted.

[56] In the premises, the following order is made:

<u>Order</u>

1. The application is dismissed.

2. There is no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant: Mr R. Mataka

c/o Morathi & Mataka Attorneys

For the 2nd Respondents: Mr P. Maserumule

c/o Puke Maserumule Attorneys Inc.