



(1) Reportable Yes  
(2) Of interest to other Judges: Yes  
(3) ~~Revised~~

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Date

**THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

Case no: A2026-037072

In the matter between:

**INDUSTRIAL DEVELOPMENT CORPORATION**

**OF SOUTH AFRICA**

**Appellant**

and

**TEBOGO VINCENT MODIKA**

**First Respondent**

**COMMISSION FOR CONCILIATION MEDIATION**

**AND ARBITRATION (CCMA)**

**Second Respondent**

**ALLAN KAYNE N. O**

**Third Respondent**

**Heard: 11 March 2026**

**Delivered: 17 March 2026**

**Coram: Tokota AJA; Djadje AJA and Moshoana AJA**

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**JUDGMENT**

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**MOSHOANA AJA**

## Introduction

- [1] Before us is an urgent appeal launched in terms of rule 7 of the *Rules Regulating the Conduct of Proceedings of the Labour Appeal Court*<sup>1</sup> (LAC Rules). The appeal reaches this Court with the leave of the Labour Court granted on 5 February 2026. In granting leave to appeal, the Labour Court opined as follows:

‘Further, I believe that the issue of section 188A(11) and its consequences to pending disciplinary proceedings, as well as on what basis should this court [Labour Court] interfere in *medias res* in such instances, is deserving the attention of the Labour Appeal Court. This is especially the case where it comes to what exactly must be considered, and to what extent the Court must be satisfied that a protected disclosure exists. The first respondent has also pointed to conflicting judgments on this issue.’

- [2] The judgment to be appealed against was delivered by the Labour Court on 13 November 2025, the matter having been heard as one of urgency in accordance with rule 38 of the Rules Regulating the Conduct of the Proceedings of the Labour Court<sup>2</sup> (Labour Court Rules). The present urgent appeal is opposed by the first respondent, Mr Tebogo Vincent Modika.

## Postponement application and the conduct of Mr Selala

- [3] At the hearing of the appeal, Mr Modika appeared in person without his attorney of record Mr Selala. He indicated to us that Mr Selala had advised him that in the absence of a ruling that the appeal is urgent, this Court would not entertain the appeal. For that view, no heads of argument were submitted on his behalf. Additionally, he indicated that he is not financially sound to finance the appeal and was unable to cover the fees of Mr Selala or an advocate to be enlisted.
- [4] Having said all that, ultimately, he sought a postponement of the appeal for a period of a month. Mr Manchu, appearing for the appellant forcefully argued

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<sup>1</sup> *Published*: GN 4775, G. 50608 of 3 May 2024 *Commencement*: 17 July 2024 – GN 5038, G. 50929 of 12 July 2024.

<sup>2</sup> *Ibid*

against the postponement and actually submitted to us that the postponement was a stratagem and the professional conduct of Mr Selala is called into question. This, because Mr Selala had some two days ago expressed that heads of argument will not be submitted until a ruling on urgency is made. He actually pointed out to him that such a directive that the appeal shall be heard on the allocated date had been made. He actually fobbed him off instead. After deliberating on the issue, this Court refused to postpone the appeal on the simple basis that it is not properly grounded. A postponement is not there for a mere taking. Absent cogent grounds, a postponement should be refused. This Court was particularly displeased with the conduct of Mr Selala. He remained on record and failed to withdraw from the matter. He sent Mr Modika to Court unrepresented. If he strongly held a view that, absent a ruling on urgency it being a legal argument, the appeal must not proceed, he ought to have appeared before us and advance that argument. If he was not placed in funds as it was intimated, he still had a duty to appear and seek the Court's indulgence to be excused.

- [5] As an officer of the Court, Mr Selala was duty bound to appear before us. His conduct as an attorney of record is not only unprofessional as Mr Manchu points out, but also in fact in contempt of this Court. This Court was minded to direct Mr Selala to deliver an affidavit to this Court to fully explain his conduct, but this Court jettisoned that thinking because Mr Selala is actually not a party to the appeal proceedings. However, should his professional body get wind of these lamentations of this Court, a decision may be taken to deal with the conduct of Mr Selala. In our view, his conduct lacks honesty, candour and competence.

Should the appeal be heard as one of urgency?

- [6] One of the basis upon which the respondent resists the present appeal is that it does not deserve to be heard as one of urgency. It is surprising though that when the respondent approached the Labour Court, he contended that the matter deserved to be heard as one of urgency. The Labour Court agreed with the first respondent and heard the matter as one of urgency. Now that the

first respondent has secured an order on an urgent basis, suddenly, the matter no longer deserves the urgent attention of a higher Court.

- [7] In terms of section 166(4) of the Labour Relations Act<sup>3</sup>, an appeal against any final judgment or final order of the Labour Court in any matter in respect of which the Labour Court has exclusive jurisdiction may be brought only to the Labour Appeal Court. Such an appeal is to be brought with the leave of the Labour Court as contemplated in section 166(1) of the LRA. Urgency in the Labour Court is governed by Rule 38 of its own rules, whilst urgent appeals are governed by Rule 7 of the Rules of the Labour Appeal Court. Rule 7 provides as follows:

‘7. Urgent appeal

- (1) A party may on notice to all other parties apply to the Judge President for *an appeal to be heard urgently*. The application must be supported by an affidavit setting out reasons for urgency.
- (2) The respondent may file an answering affidavit within 10 days of receipt of the application set out in subrule (1).
- (3) No reply from the applicant will be permitted. The Judge President, or any other appeal judge designated for the process of deciding the application for an urgent appeal will decide the *application in chambers*.
- (4) If the *application is successful*, the Judge President must give directions as to the future conduct of the appeal.

- [8] Regard being had to the text of the above rule, the application for an appeal to be heard urgently is to be lodged with the Judge President and not the Court of appeal as constituted by the Judge President. Now that the Judge President has directed that the appeal should be heard urgently, the appellant became successful, as such the issue has become *res judicata* (decided issue). It is not an issue to be decided by the appeal Court. This Court has

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<sup>3</sup> Act 66 of 1995, as amended.

been constituted by the Judge President as a Court of appeal within the contemplation of section 168(2) of the LRA.

- [9] In its practice note filed in accordance with Rule 12 of the LAC Rules, the appellant recorded that one of the primary issues to be argued is whether this is an instance that warrants the hearing of the appellant's appeal on an urgent basis. Further, it was recorded that the respondent's principal contention is that the matter does not warrant adjudication on an urgent basis. As demonstrated above, this Court of appeal does not have powers to determine the issue of urgent hearing. The issue has already been determined by the Judge President. Section 174(b) of the LRA, accords the Labour Appeal Court, as constituted by the Judge President, powers to (a) confirm; (b) amend; or (c) set aside the judgment or order that is the subject of the appeal and to give judgment or make any order that the circumstances may require. The judgment or order that is the subject of the appeal is the one made by the Labour Court on 13 November 2025. Accordingly, this Court is devoid of any powers to decide the application that fell in the hands of the Judge President.
- [10] Notably, the first order made by the Labour Court on 13 November 2025, was one hearing the application as one of urgency in terms of Rule 38 of the Labour Court Rules. That order is not being impugned by the appellant in the present appeal serving before us. Therefore, the issue of urgency does not feature before this Court. For all the above reasons, this Court shall not entertain any issue related to urgency.

#### Background facts pertinent to this appeal

- [11] For the purpose of readability, this Court shall briefly set out the pertinent facts of the present appeal. Otherwise, for the full rendition of the facts, this Court shall graciously defer to the detailed judgment of the Labour Court<sup>4</sup>.
- [12] Mr Tebogo Vincent Modika is employed by the appellant, Industrial Development Corporation of South Africa (IDC) as a Senior Specialist: Employee Relations and Transformation. Around July 2025, issues relating to

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<sup>4</sup> *Modika v Industrial Development of South Africa and Another* [2026] 2 BLLR 172 (LC).

the conduct of Mr Modika arose. Those related to the alleged malicious and slanderous remarks made by Mr Modika to his colleagues. The appellant was of the view that such conduct warranted disciplinary action in terms of the policies applicable to the employees of the appellant. Following that, the appellant engaged the services of Werksmans to advise it on the discipline of Mr Modika.

- [13] Consequently, on or about 5 August 2025, Mr Modika was placed on a precautionary suspension. On 20 August 2025, Mr Modika launched a complaint with the office of the Public Protector of South Africa. Additionally on 25 August 2025, Mr Modika referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and alleged an unfair labour practice regarding his suspension from duty. On 8 September 2025, misconduct charges were proffered against Mr Modika. On 16 September 2025, the disciplinary hearing commenced before Mr Lavery Modise as a chairperson. Mr Modika called ill on that day and the hearing was postponed due to his indisposition. In the meanwhile, Mr Modika launched a complaint with the Legal Practice Council (LPC) against attorney Sono. Whilst the disciplinary hearing was adjourned, additional misconduct charges were proffered against Mr Modika.
- [14] On 1 October 2025, the disciplinary hearing was to continue when Mr Modika revealed that he had blown a whistle and the issues pertinent to his whistle blowing were being investigated. Resultantly, he sought a further adjournment of the disciplinary hearing. Such an indulgence was granted. On 22 October 2025, Mr Modika requested the CCMA to attempt resolution of the unfair labour practice dispute through arbitration since conciliation failed to resolve the dispute. On 23 October 2025, Mr Modika requested the appellant to suspend the continuation of the disciplinary hearing pending the conclusion of the Public Protector and the LPC processes. Alternatively, he requested that the hearing be conducted in terms of the provisions of section 188A of the LRA.
- [15] All these requests were rejected by the appellant on 27 October 2025. On the same day, Mr Modika filed a referral to the CCMA requesting a section 188A

inquiry by an arbitrator. Simultaneously, Mr Modika also requested a further adjournment of the disciplinary hearing on the grounds of ill-health. In the meanwhile, the appellant objected to the section 188A request and made that objection known to the CCMA. Ultimately, the disciplinary hearing was postponed to the date of 11 and 12 November 2025.

- [16] On 10 November 2025, Mr Modika launched an urgent application in the Labour Court seeking, amongst other, reliefs of a final nature, an interdict of the continuation of the disciplinary hearing. Mr Modika was successful before the Labour Court, hence the present appeal.

### Judgment of the Labour Court

- [17] The judgment of the Labour Court is lengthy and has dealt with almost all the issues that were debated before it. It is noteworthy that the Labour Court heavily relied on its previous judgment by the same judge in the matter of *Fischer v Ngcuka N.O and others*<sup>5</sup>. It is troubling for this Court to note that in the notice of motion, the relief sought by Mr Modika was that of a final interdict. He sought that:

'2. Interdicting and restraining the first respondent from proceeding with disciplinary hearing against applicant scheduled for 11-12 November 2025.

- [18] More troubling for this Court is the case made by Mr Modika in his founding affidavit. This being the case that the appellant was to meet at the Labour Court. Mr Modika testified as follows:

'47 I submit that as an employee, I have a clear right to fair labour practices and the right not to be unfairly dismissed as provided for in the Constitution and the LRA. Even if I were to participate in the said disciplinary hearing as arranged by the employer in its current format, the injustice that I stand to suffer would not be addressed by any subsequent unfair dismissal remedies provided for in the LRA.'

- [19] Mr Modika was fortunate to walk away with more than what he bargained for. Regarding the interdict, the Labour Court fashioned the following order:

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<sup>5</sup> (2025/189683) [2025] ZALCJHB 514 ((8 October 2025)).

'The internal disciplinary enquiry at the first respondent into the charges of misconduct against the applicant, is interdicted and suspended pending a decision by the arbitrator appointed by the second respondent whether the disciplinary enquiry should be conducted in accordance with section 188A(11) of the Labour Relations Act.'

[20] First and foremost, this order is completely at odds with the notice of motion as well as the case made in the founding affidavit. Mr Modika did not seek an interdict pending a decision of the arbitrator. On the facts of this case, it is apparent that the CCMA had already decided to hold a section 188A(11) enquiry. That much is clear from the fact that an arbitrator was already appointed and the process was already set down for 17 November 2025, with Commissioner Allan Kayne already appointed. The parties had already received a notice of set down on 10 November 2025. Such means that the CCMA had before 10 November 2025 made a decision that the section 188A(11) inquiry shall be convened. It baffles this Court as to why an interdict or suspension of the disciplinary hearing, as fashioned by the Labour Court, had to occur when it was not sought. More recently, the Constitutional Court cautioned against an approach where a Court decides what it was not asked to decide.<sup>6</sup>

[21] In *Director of Hospital Services v Mistry*<sup>7</sup>, the Appellate Division, then, the apex Court, stated the law as follows:

'When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is ... and has been said in many other cases ... an applicant must stand or fall by his petition and the facts alleged therein and that although sometimes it is permissible to supplement allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny.' [Own emphasis]

[22] In *Minister of Safety and Security v Slabbert*<sup>8</sup>, the learned Mhlantla JA, as she then was, aptly stated the following:

<sup>6</sup> See: *Vodacom (Pty) Ltd v Makate and Another* 2025 (6) SA 352 (CC) at para 99.

<sup>7</sup> 1979 (1) SA 626 (A) at 635H-636B.

'The purpose of pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at trial. It is equally not permissible for a trial court to have recourse to issues falling outside the pleadings when deciding the case.' (Own emphasis)

[23] More recently, the Supreme Court of Appeal reverberated similar sentiments in *De Nysschen v Government Employees' Pension Fund and others*<sup>9</sup>. The learned Dambuja JA, writing for the majority, competently stated the law thus:

'[16] ... Once the interdictory relief was granted, that should have been the end of the matter.

'[17] The court erred in granting the further, unsolicited order for payment against the appellant. Apart from the fact that no such order had been sought by the Department, the issue of the (re)payment of the benefit was not necessary for determination of the mandatory interdict. Both this Court and the Constitutional Court have repeatedly expressed the principle that the dispute between parties is defined in the pleadings before court. Courts may, on their own accord raise issues of law that emerge fully from the record where consideration of those issues is necessary for the decision of the case. In this case, the foundation for the relief sought by the appellant was the Department's refusal to submit her exit documents to the GEPPF. The Department's defence was that its refusal to submit the documents were justified given the appellant's obligation to pay to it the pension benefit paid to her. The issue fell to be determined solely on the pleadings and evidence rather than on the interests of justice basis advanced by the high court.

[18] As it was submitted on behalf of the appellant, if the Department intended to claim, in these proceedings, repayment of a debt due to it, it was incumbent upon it to set out a properly pleaded claim, and the relief sought. It failed to do so despite a number of invitations extended to it by the appellant. It merely contended that the appellant

<sup>8</sup> [2010] 2 All SA 474 (SCA) at para 11.

<sup>9</sup> [2024] 4 BLLR 349 (SCA) at paras 16 to 18.

was indebted to it. It was improper for the high court to grant relief that had not been sought. The appeal must therefore succeed.”<sup>10</sup>

(Own emphasis)

- [24] Accordingly, the Labour Court erred in issuing an order not sought by Mr Modika. Regard being had to the pleaded case of Mr Modika, what he sought to protect was his right to fair labour practice and the right not to be unfairly dismissed as protected by the Constitution of the Republic of South Africa, 1996, (the Constitution) and the LRA. If Mr Modika sought an interim relief pending a decision by the CCMA, his notice of motion should have said so. In any event, such a relief, if sought, would have been oxymoronic because at the time of approaching the Labour Court, the CCMA had already decided. Nevertheless, these rights were never threatened by the appellant in any manner. Applying the subsidiarity principle, Mr Modika could not seek protection directly from the Constitution<sup>11</sup>. Conducting an internal disciplinary hearing *per se* does not threaten the right to be fairly dismissed, on the contrary, it enhances it, as contemplated by section 188(2) of the LRA.
- [25] It is not axiomatic that every disciplinary hearing ends with a dismissal. Looking into the crystal ball or being clairvoyant on such an issue of how the disciplinary hearing terminates is completely unwarranted. Section 188A(11) affords an employee the right to request an inquiry by an arbitrator, provided the jurisdictional requirements to exercise that right is met. This right was never threatened and it was, on the pleaded facts, already successfully exercised by Mr Modika. Properly considered, Mr Modika approached the Labour Court with a declaration of rights frame of mind. The CCMA had already exercised its powers by appointing an arbitrator. The appellant had already objected to the imposed process. Therefore, Mr Modika was somewhat seeking congruency from the Labour Court regarding what he believed to be his rights.

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<sup>10</sup> See also: *Bliss Brands (Pty) Ltd v Advertising Regulatory Board NPC and others* 2023 (10) BCLR 1153 (CC).

<sup>11</sup> *Union for Police and Corrections Organisation v South African Custodial Management (Pty) Ltd and Others* (2022) 43 ILJ 341 (CC).

- [26] The consequences of affording an employee a right in section 188A(11) is that the internal disciplinary hearing morphs into being an occupational detriment. These are dire consequences for any employer, hence the need to exercise the powers in the subsection rationally and without arbitrariness. By a stroke of a pen, an employer may find itself on the wrong side of the law. Section 3 of the Protected Disclosures Act<sup>12</sup> (PDA) prohibits subjecting an employee to occupational detriment on account of having made a protected disclosure. When faced with an application of the nature where the rights in subsection (11) are asserted, the Labour Court must be satisfied on the balance of probabilities that the jurisdictional requirements of invoking the subsection have been met by the time it is approached, given the dire consequences of the invocation of the subsection. The Labour Court is not bound by the initial determination made by the Commission that the jurisdictional requirements were met.
- [27] Such initial determinations are made for convenience. Greater care ought to be exercised by the Labour Court because the subsection does not envisage hearing an employer before the exercise of the statutory power to appoint an arbitrator to conduct an inquiry on behalf of the employer. It cannot be, that an employer's right to fair labour practices, guaranteed in section 23(1) of the Constitution could be limited contrary to section 36 read with section 34 of the Constitution. Once rights in subsection (11) are afforded to an employee, the employer without the application of the law, becomes a felon. Its internal disciplinary proceedings, which may be well-meaning would instantaneously have to terminate because it has since changed character – it is an occupational detriment. This cannot be in keeping with the spirit, purport and objects of the Bill of Rights. Section 39(2) of the Constitution impels every court when interpreting any legislation to do so by promoting the spirit, purport and objects of the Bill of Rights.
- [28] Since the decision of *Setlogelo v Setlogelo*<sup>13</sup>, the discretionary remedy of interdict existed to protect legally enforceable rights that are threatened unlawfully. More recently, the Constitutional Court in *United Democratic*

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<sup>12</sup> Act 26 of 2000.

<sup>13</sup> 1914 AD 221.

*Movement and Another v Lebashe Investment Group (Pty) Ltd and Others*<sup>14</sup>, felicitously stated the law as follows:

[47] An interdict is an order by a court prohibiting or compelling the doing of a particular act for the purposes of protecting legally enforceable right, which is threatened by continuing or anticipated harm...

[48] In granting an interdict, the court must exercise its discretion judicially upon consideration of all the facts and circumstances. An interdict is “not a remedy for the past invasion of rights: it is concerned with the present and the future”. The past invasion should be addressed by an action of damages. An interdict is appropriate only when future injury is feared.’

(Own emphasis)

[29] For various other reasons that will follow hereunder, the Labour Court erred when it granted an interdict, more particularly where an irreparable harm was not demonstrated by Mr Modika. The law as codified in *City of Tshwane Metropolitan Municipality v Afriforum and another*<sup>15</sup> was aptly stated in the following terms:

[55] Before an interim interdict may be granted, one of the most crucial requirements to meet is that the applicant must have a reasonable apprehension of irreparable and imminent harm eventuating should the order not be granted...

[56] Within the context of a restraining order, harm connotes a common-sensical, discernible or intelligible disadvantage or peril that is capable of legal protection... And that disadvantage is capable of being objectively and universally appreciated as a loss worthy of some legal protection...’

[30] With considerable respect, in a rather contradictory fashion, the Labour Court first concluded that ‘*I am satisfied that the jurisdictional requirements under section 188A(11) as discussed above have been met*’. In the same breath, the

<sup>14</sup> An unreported judgment (CCT 39/21) [2022] ZACC 34 (22 September 2022).

<sup>15</sup> 2016 (9) BCLR 1133 (CC).

Labour Court concluded that the arbitrator must be given an opportunity to discharge his or her duties to decide whether or not to convene a pre-dismissal arbitration proceeding under section 188A. Further, the Labour Court concluded that '*it is my view that the applicant has properly initiated a process under the LRA which, if accepted by the CCMA would serve to finally terminate the internal proceedings in the IDC*'.

- [31] The Labour Court in *Mamodupi v Property Practitioners Regulatory Authority and Another*<sup>16</sup>, which judgment the Labour Court herein supposedly followed, held that before the jurisdictional requirements are met, the CCMA or bargaining council is not empowered to accept a section 188A(11) referral. It also held that what terminates the internal hearing is the acceptance of the referral after the jurisdictional requirements are met. Differently put, where the jurisdictional requirements are met, the internal enquiry terminates automatically without a need for an interdict.
- [32] Regard being had to the apparent contradictory findings, with considerable regret, the Labour Court did not follow the *Mamodupi* precedent. It must be mentioned that the Constitutional Court has refused direct access application in seeking to overturn that precedent. The Labour Court herein does not find that *Mamodupi* was wrongly decided. Therefore, it remained a binding authority on the Labour Court on application of the *stare decisis* principle.
- [33] I now briefly turn to the grounds putted for by the appellant. Broadly, the grounds may be summarised as follows; (i) usurpation of the CCMA's powers; (ii) misapplication of section 188A(11) of the LRA; and (iii) impermissible intervention in *medias res*.

#### Usurpation of the CCMA's powers.

- [34] An administrative body like the CCMA does not finally determine its jurisdictional powers<sup>17</sup>. 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

<sup>16</sup> (J68/23) [2023] ZALCJHB 19 (13 February 2023)

<sup>17</sup> See: *South African Rugby Players Association (SARPA) and others v SA Rugby (Pty) Ltd and others* [2008] 9 BLLR 845 (LAC) at para 40.

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 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.

[35] 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.

[36] In *Matlala v Foskor Proprietary Limited and others*<sup>18</sup>, the Labour Court concluded thus:

[50] The next issue is whether it is appropriate to determine whether or not the statutory enquiry can proceed? The request is made to the CCMA or the relevant bargaining council. It is the commissioner or panellist who is called upon to preside in the inquiry 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 been considered by the arbitral forum. This is exactly what this court would do if it considered whether Matlala is entitled to the primary relief.

[51] Should the court then grant an 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

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<sup>18</sup> (2025/169524) [2025] ZALCJHB 478 (22 October 2025) at paras 50 and 51.

the 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.'

(Own emphasis)

- [37] The findings by the Labour Court in *Matlala* are not, in my respectful view, entirely correct. It is not the appointed arbitrator who must determine whether the jurisdictional requirements are met or not. It is the Commission, the council or the accredited agency as the administrative bodies that must determine that. That much is clear from the text of subsection (1) read with subsection (11). An arbitrator is appointed once the Commission, council or accredited agency accepts a referral in accordance with section 188A(11). The role of the appointed arbitrator once so appointed is to hear the misconduct or incapacity allegations. The decision to appoint the arbitrator is that of the administrative body and not the arbitrator himself. The jurisdictional requirements alluded to in *Mamodupi* is entirely different to a jurisdictional issue that may arise in a conciliation or arbitration process. An appointed arbitrator becomes *functus officio* on the question whether to accept or reject the referral. However, that inquiry by the arbitrator is a still born until an administrative decision is made to accept the referral to conduct an inquiry by the arbitrator. Different from the present matter, in *Matlala*, the applicant expressly prayed for an interdict pending a ruling by the CCMA. This prayer somewhat justifies the order ultimately made in paragraph 2 of the order in *Matlala*. The primary remedy prayed for by Matlala was a final interdict of the disciplinary hearing, similar to the relief sought by Mr Modika. That primary relief was refused.
- [38] Inasmuch as there was evidence that *de facto* (factually) the CCMA, as of 2 November 2025, had accepted the referral, there was no evidence that the jurisdictional facts were found to be present. In *Mamodupi*, the Labour Court emphatically found that the CCMA must refuse to accept the referral if the jurisdictional requirements did not exist, in which case, the internal disciplinary hearing remains unaffected.

[39] One of the crucial jurisdictional requirement is that Mr Modika had to establish that he made a protected disclosure. No competent and objective evidence was led by Mr Modika that he made a protected disclosure as defined in the PDA. On the contrary, on his own version, he lodged a grievance against his superior. A grievance against a fellow employee is not a protected disclosure as defined. Mr Modika testified before the Labour Court as follows:

‘22. Meanwhile, on 29 July 2025 already, I lodged a Protected Disclosure *complaint* under the PDA *for harassment, bullying and abuse of power* with Talent Management and Organisation Effectives against the Head Ms Lydia Mdaka. I was clear that the formal complaint is lodged under PDA, I was since provided with a Reference Number thereto.

27. On 08 September 2025 I received an email from the DE: Human Capital to inform me that a law firm, ENS Africa, has been appointed to investigate *my complaint* which I lodged on 29 July 2025.’

[40] This Court is in full agreement with the vista shared by the learned Lekhuleni J in the matter of *Ramela v Saths Cooper (N.O) and two others*<sup>19</sup>, where the learned Justice said:

‘[57] The institution of disciplinary action itself is not an occupational detriment. As foreshadowed above, for the institution of disciplinary action to be an occupational detriment, it must be in response to a protected disclosure’ and a causal connection must exist between the protected disclosure and the disciplinary action...’

[41] The learned Justice in *Ramela*, after being influenced by *Mamodupi*, dismissed an application with costs. Ramela had sought an interim interdict.

[42] Undoubtedly, what Mr Modika did was to lodge a complaint/grievance against Ms Mdaka. As pointed out in *Mamodupi*, a protected disclosure invites a misery and or detriment against an employee who makes it. In this instance, the appellant instead took it upon itself to appoint a law firm to investigate what was clearly a complaint against Ms Mdaka. The fact that Mr Modika chose to label the complaint a protected disclosure does not make it one. It is

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<sup>19</sup> (2025-055130) Western Cape Division, Cape Town (25 April 2025) at para 57.

not a situation of *if it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck*. Section 1 of the PDA defines what a disclosure and a protected disclosure means. The complaint that was investigated did not meet the requirements of section 1.

- [43] Mr Modika is disclosing nothing but that he simply complained about the treatment he allegedly received from Ms Mdaka. Ironically, Mr Modika, in his referral documents to the CCMA, craftily seemed to be connecting the alleged protected disclosure with the suspension that had occurred on 5 August 2025. Impliedly, the occupational detriment would have been the suspension because of its closeness, in terms of date, to his alleged protected disclosure. He made the referral on 27 October 2025. It must have dawned on him that almost three months had passed in between the alleged disclosure and the now assumed occupational detriment, the initiation of the disciplinary inquiry.
- [44] As held in *Mamodupi*, and accorded an imprimatur in *Ramela*, an occupational detriment must be swift in order to causally connect it to the protected disclosure. The question is, why would the appellant wait three months in order to deal with the whistle blower? It is preposterous for an employer to waylay, as it were, a whistle blower. Like a female lion hunter, the employer must pounce on its prey at the earliest available opportunity. Instead Modika received joy because the appellant appointed a law firm to investigate his complaint.
- [45] The Labour Court went a little overboard in its judgment when it characterised the complaint as a failure to comply with the legal obligations on the part of Ms Mdaka, that she compromised the health of individuals and acted discriminately. Nevertheless, it remains the duty of the CCMA to establish whether a *bona fide* disclosure causally linked to the alleged occupational detriment existed before invoking the statutory power in section 188A(11). It is not the duty of the Labour Court to establish the existence of the jurisdictional requirements. The Labour Court is not empowered to exercise any power located in section 188A(11). Accordingly, this Court agrees that the Labour Court usurped the powers of the CCMA.

Misapplication of section 188A(11) of the LRA

- [46] Having found that the Labour Court usurped the powers of the CCMA, it follows axiomatically that the Labour Court misapplied the section. As confirmed in *Mamodupi*, it is the CCMA that must reach a conclusion that it must accept referral and exercise powers located in the subsection. It bears mentioning that subsection (11) references subsection (1), which expressly provides that the request must be directed to a council, an accredited agency or the Commission. Thus, a similar request may be made by an employee to the same bodies. It cannot be a request to the Labour Court. The Labour Court cannot appoint an arbitrator. The request is specific, that is to appoint an arbitrator. Where subsection (11) refers to an inquiry, it is not any other inquiry but one that is conducted by an arbitrator to be appointed by the recognised administrative bodies.
- [47] There can be no doubt that *Mamodupi* was correct when it concluded that in order to invoke the powers in subsection (11), the stated jurisdictional requirements must exist. It was not suggested in *Mamodupi* that it is the duty of an arbitrator during the conducting of the inquiry to determine *bona fide* disclosure and all related factors of a protected disclosure. In conducting the inquiry into allegations of misconduct or incapacity, the already appointed arbitrator will not enquire into whether section 3 of the PDA has been contravened. That remains the powers of a Court as contemplated in section 4(1)(a) of the PDA. Only section 191(13)(a) of the LRA grants the Labour Court powers to determine an unfair labour practice as defined in section 186(2)(d) of the LRA. In passing, I mention that it may be argued that section 4(1)(b) of the PDA affords the CCMA some powers to provide remedies. However, such an issue did not arise before us. The power to appoint an arbitrator does not lie with the arbitrator himself or herself. It lies with the council, accredited agency or Commission as administrative bodies. Before an arbitrator may be appointed – an exercise of statutory or public power, the three mentioned bodies must ensure that they do not act *ultra vires* (outside powers).

- [48] The powers in subsection (1) and (11) are no different to the powers contemplated in, for instance, sections 135(1) or 136(1) of the LRA. As an example, absent a dispute – jurisdictional fact – a power cannot exist to appoint a commissioner. Similarly, absent the jurisdictional facts tabulated in *Mamodupi*, a statutory power to appoint an arbitrator cannot be exercised. The principle of legality, as expressed in a barrage of judgments of the Constitutional Court, simply implies that absent powers, a functionary cannot exercise statutory or public power.<sup>20</sup>
- [49] An additional factor to highlight is that unlike in a subsection (1) situation subsection (11) does not contemplate a consent of the other party (employer). It is clear, as found in *Mamodupi*, that subsection (11) serves as a buffer against an occupational detriment. It actually serves as an interdict on its own once the jurisdictional facts are established. What immediately springs to mind is section 64(4) and (5) of the LRA with regard to the implementation of the unilaterally changed conditions of employment. An employee who is buffered by the exercise of this powerful statutory power is armoured to seek an interdict if an employer seeks to jeopardise the appropriately accorded buffer. Self-help is inimical to a rule of law<sup>21</sup>. Regard being had to the order granted by the Labour Court and its reasoning considered in this judgment, it goes without saying that the Commission when it appointed Commissioner Allan Kayne it had not established that the required jurisdictional facts existed. If the Commission did establish the existence of the jurisdictional requirements, it was a futile exercise for the Labour Court to allow the Commission to later, after the appellant being interdicted, to still accept jurisdiction. Clearly, the purpose of accepting jurisdiction is to ensure that the internal disciplinary hearing is terminated as found in *Mamodupi*.

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<sup>20</sup> *Department of Transport and Others v Tasima (Pty) Limited (CCT5/16)* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) para.81

<sup>21</sup> *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) at para 18.

- [50] As far back as 1986, the then Appellate Division (now Supreme Court of Appeals) in *Duncan v Minister of Law and Order*<sup>22</sup> expressed the law in the following terms:

‘If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, i.e. he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power...’

- [51] The above view was sagaciously expressed by the SCA in *Minister of Safety and Security v Sekhoto and another*<sup>23</sup> in the following terms:

‘Once the jurisdictional facts for an arrest ... in terms of any paragraph of section 40(1) ... are present, a discretion arises. ... In other words, once the required jurisdictional facts are present the discretion whether to arrest or not arises.’

- [52] *Duncan* and *Sekhoto* were cited with approval by the Constitutional Court in the matter of *Raduvha v Minister of Safety and Security and another*<sup>24</sup>. Accordingly, a proper application of subsection (11) requires a consideration of the question whether the functionary (Council, Accredited Agency or Commission) had established that the jurisdictional facts are present before exercising the statutory power to accept jurisdiction and appoint an arbitrator. According to Hoexter the point about jurisdictional facts is that the exercise of power depends on their existence or observance, as the case may be. If the jurisdictional facts are not present or observed then the exercise of power will as a general rule be unlawful<sup>25</sup>.

- [53] By seeking to establish and find the jurisdictional facts on its own, the Labour Court misapplied section 188A (11). A jurisdictional fact is a pre-condition which must exist prior to the exercise of administrative power and not after the exercise of the power. In this matter, it is apparent that the Labour Court condoned the exercise of the power to appoint the arbitrator and still, for

<sup>22</sup> 1986 (2) SA 805 (A) at 818G-H.

<sup>23</sup> 2011 (5) SA 367 (SCA) at para 28.

<sup>24</sup> 2016 (10) BCLR 1326 (CC).

<sup>25</sup> C Hoexter *Administrative Law in South Africa* 2ed (2012) 209.

reasons that are not altogether clear to this Court, proceeded to afford the Commission a reprieve, as it were, to regularise its unlawful conduct whilst at the same time unleashing the discretionary remedy of an interdict in the circumstances where no clear and protectable right was demonstrated. The Labour Court, in my respectful view, had put the cart before the horses. That is nothing but a misapplication of the subsection.

#### Impermissible intervention in *Medias res*

- [54] The Labour Court correctly observed that a Court is authorised to intervene in incomplete proceedings only in exceptional circumstances. As to what exceptional circumstances mean, this Court can do no better than what the Constitutional Court stated in the *Law Society of South Africa and others v President of the Republic of South Africa and others*<sup>26</sup>, when it expressed that such circumstances arise where an aggrieved person cannot be afforded substantial relief once a process is completed.
- [55] The Labour Court accepted that Mr Modika has a right in terms of the subsection to refer a dispute to the CCMA. The Court was satisfied that since Mr Modika was asserting a right afforded in the LRA, a grave injustice would occur if the internal disciplinary process is not interfered with. This Court fails to understand this reasoning or the forensic plied by the Labour Court in this regard. For starters, absent jurisdictional requirements the right in the subsection does not avail to Mr Modika. No grave injustice would have occurred, particularly because a substantial redress existed in due course. Assuming for now that the internal disciplinary inquiry was indeed an occupational detriment, if a dismissal ensues after the completion of the disciplinary inquiry, section 187(1)(h) of the LRA considers that dismissal to be automatically unfair. Such is a powerful redress which is available in due course. No grave injustice would occur.
- [56] Such simply implies that there were no exceptional circumstances that forced the Labour Court to have intervened. As the *Law Society* case decreed, the interests of justice also play a role. It is not in the interest of justice for Courts

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<sup>26</sup> 2019 (3) SA 30 (CC).

to interfere in incomplete domestic proceedings. A right located in the subsection may only be asserted and availed to an employee once the jurisdictional requirements are shown to exist. Until then a mere referral to the CCMA is not an assertion of a protectable right. A protectable right would arise once the jurisdictional requirements are met. Courts should truly be slow to interfere in incomplete proceedings. On proper assessment of the facts herein it is more probable than not that Mr Modika simply lodged a grievance, which is not a right in terms of the LRA. In *Mkokeli v Bloemberg LP*<sup>27</sup> after placing reliance on the judgment of this Court in *DBT Technologies (Pty) Ltd v Garnevska*<sup>28</sup>, the Labour Court concluded that lodging of a grievance does not amount to an exercise of a right conferred by the LRA.

- [57] Similarly, in lodging a complaint against Ms Mdaka, Mr Modika was neither exercising a right in terms of the LRA nor did he make a protected disclosure. The fact that he, with respect, labelled it a protected disclosure with a reference number does not make it a protected disclosure, irrespective of what appears to be an alarmist and sensational approach. It was not necessary for him, when lodging a grievance against Ms Mdaka, to still give it a label – Protected Disclosure. Such was a misnomer seeking to hype up sensation and alarming. This Court repeats, just because he gave it that label does not mean it is a protected disclosure. In my view, with due respect, the misnomer was actuated by self-fulfilling prophecy to personally gain some censure being meted out by the appellant against Ms Mdaka.

### Conclusions

- [58] This Court takes a firm view that an interdictory relief as fashioned by the Labour Court was unwarranted. As a matter of fact, Mr Modika failed to establish a clear right which is protectable by way of an interdict. The fact that a decision of the CCMA pends, which in effect it was already taken, *albeit* unlawfully, it would seem, does not entitle Mr Modika to an interdictory relief. The Constitutional Court has long decreed that approaching a Court for review does not give rise to a right protectable by an interdict. The fact that Mr

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<sup>27</sup> (2021) 42 ILJ 1224 (LC).

<sup>28</sup> [2020] 9 BLLR 881 (LAC).

Modika referred a request to the CCMA does not give rise to a protectable right. In *National Treasury and Others v Opposition to Urban Tolling Alliance and Alliance and others (OUTA)*<sup>29</sup>, the learned Moseneke DCJ expressed the following:

[50] Under the *Setlogelo* test, the *prima facie* right a claimant must establish is not merely the right to approach a court in order to review...it is a right to which if not protected by an interdict, irreparable harm will ensue.

[51] ... therefore, the harm that the applicants rely upon will not be caused by the past decisions they impugn in the review. There is a misalignment between the decisions they seek to review and the source of the harm they fear.

(Own emphasis)

[59] This Court is satisfied that Mr Modika will not suffer an irreparable harm if the disciplinary inquiry, chaired by an external legal practitioner were to proceed. As indicated earlier, if the disciplinary inquiry amounts to an occupational detriment, a dismissal that may ensue would be in contravention of the PDA and automatically unfair. In fact, it is the appellant who is risking by proceeding with an occupational detriment regard being had to the provisions of section 187(1)(h) of the LRA.

[60] As indicated in this judgment, the Labour Court erred by usurping the powers of the CCMA, misapplying the subsection and impermissibly interfering in *medias res* absent exceptional circumstances<sup>30</sup>.

[61] Because of all the above reasons, the appeal must succeed.

[62] In the circumstances the following order is made:

### Order

1. The appeal is upheld.

<sup>29</sup> 2012 (6) SA 223 (CC) at paras 50 and 51.

<sup>30</sup> See: *S v Ruldolph* 2010 (1) SACR 262 (SCA) regarding the meaning of exceptional circumstances. See also: *Booyesen v Minister of Safety and Security and Others* [2011] 1 BLLR 83 (LAC).

2. The order of the Labour Court is set aside and replaced with an order dismissing the urgent application with no order as to costs.
3. There is no order as to costs.

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G. N. Moshwana

Acting Judge of the Labour Appeal Court of South Africa

Tokota AJA and Djadje AJA concurring.

APPEARANCES:

For the Appellant : Mr T Manchu with Ms S Lindazwe

Instructed by: Werksmans, Sandton

For the Respondent : Mr Modika in person