(1) REPORTABLE: **YES**/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: **YES**/~~NO~~
(3) REVISED: **YES**/~~NO~~

12 June 2026

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

CASE Number: 2026 – 096701

In the matter between:-

VIRGIL SCOTT DAVIDS **Applicant**

and

THE MINISTER OF POLICE **First Respondent**

THE PROVINCIAL COMMISSIONER

WESTERN CAPE **Second Respondent**

This judgment was handed down electronically by circulation to the parties and legal representatives by email and by uploading onto CaseLines. The date and time for hand-down is deemed to be 12 June 2026.

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Summary:

Urgency – applicant satisfying considerations of urgency – matter heard as urgent application

Jurisdiction – s 157(1) – applicant failing to establish jurisdiction of the Court to grant the relief sought – Court not having general jurisdiction as relied on by applicant – Court having no jurisdiction to intervene in incomplete disciplinary proceedings under section 157(1) – Court having no jurisdiction to consider

case based on unfairness bought directly to Court – statutory process under LRA must be followed – matter falls to be dismissed for want of jurisdiction

Procedural fairness – Regulation 9 of SAPS Disciplinary Regulations considered – purpose of regulation is to allow attenuated process – constitutes a process distinct from ordinary disciplinary process – employer entitled to implement process – not for the Court to prescribe to employer what process to follow

Procedural fairness – Regulation 9 of SAPS Disciplinary Regulations considered – provision does not contemplate the calling of witness and cross examination – such right not part of basic tenets of fair disciplinary proceedings under LRA – whether procedural unfairness exists depends on the particular facts – refusal / failure to afford these rights not per se unfair

Procedural fairness – applicant requesting Court to finally determine whether conduct of respondent procedurally fair – procedural fairness *in casu* related to disciplinary proceedings for misconduct – bargaining council required to make such a final determination – not competent to request Labour Court to make such determination on final basis on motion

Alternative remedy – applicant has proper / prescribed alternative remedy available in the form of unfair dismissal proceedings in normal course as prescribed by the LRA

Interdict – final relief – applicant failing to establish clear right to final relief sought – applicant having proper alternative remedy – applicant failing to satisfy requirements for interdict – application dismissed

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JUDGMENT

SNYMAN, AJ

Introduction

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[1] This is yet another one of those urgent applications where this Court is being asked to micro-manage internal disciplinary proceedings in an individual employer (the respondents), whilst such disciplinary proceedings are still ongoing. Whilst I have understanding for why the applicant did what he did in bringing this application, the fact remains that such kind of intervention sought by the applicant is generally not appropriate and should be discouraged. The point must always be that where there are specific dispute resolution processes prescribed by the Labour Relations Act (LRA)[1], as is the case *in casu*, those processes should be followed without seeking to approach this Court directly to intervene on what is in reality nothing else but a first instance basis. That is not the function of this Court.

[2] The applicant is representing himself in these proceedings. I must say that I think he did quite a decent job of presenting his case. The case has been properly pleaded. Contrary to what is normally the case with self-represented litigants seeking urgent intervention from this Court, the applicant's approach to the case was to the point and made deciding the matter easier. Even though the applicant's notice of motion is somewhat convoluted, I was able to establish without much effort what the applicant is seeking in these proceedings. It is clear that the applicant is asking for final relief on an urgent basis. The applicant prays for this Court to intervene in the internal disciplinary proceedings currently in the process of being conducted against him, in terms of Regulation 9 of the South African Police Service Discipline Regulations (the Regulations).[2] The applicant is seeking an interdict against the proceedings being conducted in terms of Regulation 9, instead of it being conducted under Regulation 8 which concerns disciplinary proceedings in the ordinary course. In the alternative, the applicant seeks an order that the respondents be ordered to allow the calling of witnesses and the cross examination of those witnesses in the Regulation 9 disciplinary proceedings, if the matter proceeds on that basis.

[1] Act 66 of 1995 (as amended).

[2] The Regulations were promulgated under section 24(1) of the South African Police Service Act 68 of 1995, by way of GN 1361 as contained in *GG* 40398 of 1 November 2016.

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[3] Because the applicant is seeking final relief with regard to these prayers in the notice of motion, he must satisfy three essential requirements, which must all be shown to exist, being: (a) a clear right; (b) an injury actually committed or reasonably apprehended (prejudice); and (c) the absence of any other satisfactory remedy.[3]

[4] This matter came before me as an urgent application on 5 June 2026. It was opposed by the respondents, who filed an answering affidavit. After hearing argument by both parties, and considering tall he affidavits and heads of argument filed, I indicated that judgment will be given on 12 June 2026. This judgment is now handed down accordingly. For ease of reference in this judgment, I will refer to the respondents jointly as '*SAPS*'.

<u>Background facts</u>

[5] The background facts in this case are straight forward, and largely undisputed.

[6] The applicant is a warrant officer in SAPS. He was appointed by SAPS as a Chaplain, stationed at SAPS Vredendal.

[7] In a notice as contemplated by Regulation 8(1) dated 19 September 2025, the applicant was informed that he was being investigated for serious misconduct. The notice was signed by the Provincial Head: Human Resource Development, being Brigadier Mnymeni. On the same date, Captain L J van Rhyn was appointed to investigate this misconduct. The notice referred to the alleged misconduct as relating to sexual assault / sexual harassment pertaining to incidents which occurred at SAPS Vredendal on 24 July 2024, which had now been brought forward by three individual complainants. According to the applicant, he was presented with the aforesaid notice by Captain Van Rhyn on 2 October 2025.

[8] At his own request, and whilst these allegations remained undecided, the applicant was transferred to Vanrynsdoprp VISPOL, where he is currently

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[3] See *Setlogelo v Setlogelo* 1914 AD 221 at 227; *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter and Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) at para 20; *Mere v Tswaing Local Municipality and Another* (2015) 36 ILJ 3094 (LC) at para 4.

working. Needless to say, the applicant disputes that he has committed the misconduct concerned.

[9] Following the completion of the investigation, the Provincial Commissioner of SAPS decided to implement the expedited disciplinary process as contemplated by Regulation 9. In terms of Regulation 9(1), Brigadier K Y Mawela was appointed as the designated functionary to officiate this expedited process. In a notice dated 8 January 2026, the terms of appointment were specified, and Brigadier Mawela was directed to follow the prescribed processes under Regulation 9. Brigadier Mawela then satisfied himself by virtue of Regulation 9(2)(a) that the institution of expedited disciplinary proceedings were justified.

[10] In a formal disciplinary hearing notification dated 16 April 2026, the applicant was then summoned in terms of Regulation 9(2)(b) to appear at an expedited hearing process on 22 April 2026 before Brigadier Mawela. The notice set out all the charges against the applicant, and indicated what documentary evidence and statements would be relied upon in the proceedings, which were also attached to the notice. This notice was actually served on the applicant on 17 April 2026. Of importance to the matter *in casu* is that the hearing notification contained two charges as contemplated by Regulation 5(4), being a charge of sexual harassment under regulation 5(4)(v), and a charge of bringing the image of the Service in disrepute, as contemplated by Regulation 5(4)(x).

[11] Upon receipt of this disciplinary hearing notice, the applicant on 19 April 2026 requested the Provincial Commissioner to convert the expedited disciplinary process sunder Regulation 9 to a disciplinary process in the ordinary course under Regulation 8. According to the applicant, there was precedent for this kind of converting where it came to serious allegations such as rape, corruption and extortion. The deadline given by the applicant to accede to this request was 20 April 2026. There was no response forthcoming from the Provincial Commissioner to this request.

[12] The applicant then launched urgent proceedings to challenge the Regulation 9 disciplinary process in the High Court in Cape Town, under case number 2026-092423. The case was heard on 23 April 2026. The High Court decided

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that it had no jurisdiction to decide the case as pleaded by the applicant and that the matter had to be dealt with by this Court. However, and as a result of these High Court proceedings, the disciplinary hearing set down for 22 April 2026 was postponed to 28 April 2026.

[13] According to the applicant, and following these abortive High Court proceedings, he communicated with Brigadier Mawela on 25 April 2026 by way of WhatsApp, enquiring whether witnesses would be called in the disciplinary proceedings on 28 April 2026 and whether he would be allowed to cross examine those witnesses. Brigadier Mawela answered on 26 April 2026 that no witnesses would be called, and no cross examination would take place.

[14] Whilst it was not disputed that Brigadier Mawela gave this answer to the applicant, SAPS explained that this view expressed by Brigadier Mawela is not a final determination. According to SAPS, the applicant will be legally represented in the hearing, and the issue of witnesses could still be canvassed in the hearing itself, depending on how the chairperson decided to conduct the hearing, which was in the prerogative of the chairperson to do.

[15] The current urgent application then followed on 29 April 2026. The disciplinary proceedings against the applicant have been postponed pending the outcome of the current application.

<u>Urgency</u>

[16] I intend to first deal with the issue of urgency, as SAPS has contended that the matter is not urgent. According to the applicant, the disciplinary hearing notice issued to him on 17 April 2026 was the was the catalyst for the application, as this is what initiates the Regulation 9 process, with which the applicant has an issue. I accept this contention. Before this notice, there was effectively only an investigation, which first had to determine whether disciplinary action would be instituted. The disciplinary hearing notice of 17 April 2026 would constitute that determination, and also determined what process would be applied. From that point on, and if the applicant wanted to challenge the proceedings, he would have to with due expedition approach this Court. I believe he did.

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[17] I am thus convinced that the applicant indeed acted with due expedition, even though his first attempt at challenging the process was misguided. He was before the High Court within a week after receiving the notice. When those proceedings failed, he sought to enquire from the chairperson whether witnesses would be called and if he could cross examine them. Following the response on 26 April 2026 that this would not be the case, the current application followed three days later, which is surely sufficiently expeditious conduct to satisfy the requirements of urgency. It is clear that throughout the period after 17 April 2026, the applicant was actively attending to the matter.

[18] Overall considered, the manner in which the applicant attended to this matter, was prompt and immediate action which I consider to be line with the requirements to establish urgency. SAPS was afforded sufficient opportunity to oppose and answer the application. The facts relating to the matter were simple and straight forward. And when the matter was argued, urgency was not really placed in issue. Pursuant to the principles set out in *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another*[4], I will accept that the applicant took sufficiently prompt and urgent action, and satisfies the requirement that the application was in effect brought at the earliest appropriate opportunity. It is in any event in my view important that this matter be disposed of on the merits, considering that it also concerns an issue of jurisdiction, and there is a pending disciplinary process that hinges on the outcome of this matter. I will thus decide the application as one of urgency.

<u>Analysis</u>

[19] It is trite that the case this Court would be required to decide is determined on the basis of what the applicant has pleaded in the founding affidavit. In the founding affidavit, the applicant pleads: '*I have a prima facie right to fair disciplinary process in terms of section 23 of the Constitution. Furthermore, I have the right to test the credibility of the evidence of the witnesses under cross examination*'. The applicant further pleads that he will suffer irreparable harm, because he will lose the right to cross examine witnesses which creates

[4] (2016) 37 ILJ 2840 (LC) at paras 21 – 26. See also *Jiba v Minister: Department of Justice and Constitutional Development and Others* (2010) 31 ILJ 112 (LC) at para 18; *Transport and Allied Workers Union of SA v Algoa Bus Co (Pty) Ltd and Others* (2015) 36 *ILJ* 2148 (LC) at para 11.

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the risk of an adverse finding based on untested evidence. The applicant further contends that SAPS will suffer no prejudice if the disciplinary proceedings are converted to proceedings under Regulation 8. And lastly, the applicant has raised a complaint concerning the undue delay occasioned by SAPS in instituting the disciplinary proceedings against him, however considering the basis upon which I will dispose of this matter, as set out below, I do not see any need to decide this particular issue and will not consider it further.

[20] Where it comes to the issue of jurisdiction, the applicant specifically relies on section 157(1) of the LRA, pleading that '*The present matter concerns a dipsute arising from my employment with the South African Police Service and relates to the procedural fairness of disciplinary proceedings instituted against me under the Disciplinary Regulations of the SAPS*'. The applicant also states that he challenges the '*rationality*' of the decision by SAPS to apply Regulation 9, and not Regulation 8, thus implying some sort of legality review.

[21] The pleaded case of the applicant unfortunately faces some significant jurisdictional challenges. In *Du Plessis v Public Protector and Others*[5] the Court said:

> 'Jurisdiction cannot be assumed or implied. It either exists or it does not. Jurisdiction is the power of the Court to decide a matter that has been brought before it. If the Court does not have the power to do so, it cannot consider the matter, no matter what the merits or equities may be …'

[22] In *Gcaba v Minister for Safety and Security and Others*[6], the Court described the concept of 'jurisdiction' as follows: '*… The specific term 'jurisdiction', which has resulted in some controversy, has been defined as the 'power or competence of a court to hear and determine an issue between parties …*'. And in *Makhanya v University of Zululand*[7], the Court also dealt with the meaning of jurisdiction as follows: *'…. Judicial power is the power both to uphold and to dismiss a claim. It is sometimes overlooked that the dismissal of a claim is as much an exercise of judicial power as is the upholding of a claim.*

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[5] (2020) 41 ILJ 919 (LC) at para 20. See also *Makhanya v University of* Zululand (2009) 30 ILJ 1539 (SCA) at para 23; *SA Maritime Safety Authority v McKenzie* (2010) 31 ILJ 529 (SCA) at para 8.
[6] (2010) 31 ILJ 296 (CC) at para 74.
[7] (2009) 30 ILJ 1539 (SCA) at para 23.

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A court that has no power to consider a claim has no power to do either (other than to dismiss the claim for want of jurisdiction).'

[23] As set out above, it is clear that the applicant has specifically pleaded, as a source of jurisdiction of this Court, reliance on section 157(1) of the LRA. The section reads:

> 'Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.'

[24] In terms of section 157(1), the jurisdiction of the Labour Court is specifically circumscribed and determined by statute, being the LRA itself. The crisp question is whether this section allows intervention by this Court *in medias res* on an urgent basis where it comes to pending disciplinary proceedings internally in an employer, in circumstances where it is contended that such proceedings would be unfair or unlawful. Answering this question involves some historical context. Previously, and by virtue of the authority in *Booysen v Minister of Safety and Security and others*[8], it was considered that section 157(1) allowed the Labour Court to intervene to restrain any alleged illegalities, irregularities or unfairness in incomplete workplace proceedings, provided that exceptional circumstances exist that would justify such intervention. The Court in that case had said:[9] '*… the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However such an intervention should be exercised in exceptional cases …*'.

[25] But the jurisprudence in this regard has since progressed following *Booysen*. The first development concerned instances where the challenge was based on '*unlawfulness*'. Following the judgment of the Constitutional Court in *Steenkamp and Others v Edcon Ltd (National Union of Metalworkers of SA intervening)*[10], where the Court decided that: '*… invalid dismissals and a declaratory order that a dismissal is invalid and of no force and effect fall outside the contemplation of the LRA. Such an order cannot be granted in a case based on the breach of an obligation under the LRA concerning a*

[8] (2011) 32 *ILJ* 112 (LAC).
[9] Id at para 54.
[10] (2016) 37 *ILJ* 564 (CC) at para 136.

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dismissal …', it was then accepted by the Labour Court that where the challenge to the disciplinary proceedings was based on allegations of unlawfulness or illegality, it did not have the jurisdiction to so intervene.[11] This approach was then considered by the LAC in *Cibane and Another v Premier of Province of Kwazulu-Natal*[12] where the Court specifically referred to *Edcon supra* and decided:[13]

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

The Court then concluded:[14]

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

[26] In my view, *Cibane* has now clarified the issue of jurisdiction of the Labour Court under section 157(1) where it comes to intervening *in medias res* in internal disciplinary proceedings in an employer that are not completed. The Labour Court does not have any general jurisdiction to intervene and / or adjudicate any alleged unlawfulness, illegalities or irregularities pertaining to

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[11] In *Democratic Municipal and Allied Workers Union of SA and Others v City of Johannesburg* (2020) 41 ILJ 912 (LC) at para 7 it was said: '*… The effect of this judgment is that when an applicant alleges that a dismissal is unlawful (as opposed to unfair), that applicant has no remedy under the LRA and this court has no jurisdiction to make any determination of unlawfulness. If a remedy is sought under the LRA, the applicant must categorise the alleged unlawfulness as unfairness ….* And in *Neumann v Western Cape Education Department and Others* (2021) 42 ILJ 561 (LC) at para 13 the Court held: '*… Since the decision of the Constitutional Court … there is now serious doubt whether a dismissal or other forms of employer conduct or action can be challenged under the LRA on the basis of unlawfulness. See also National Education Health and Allied Workers Union and others v University of South Africa and another* 2022) 43 ILJ 2351 (LC) at para 15. See further *Shezi v SA Police Service and Others* (2021) 42 ILJ 184 (LC) at para 12.

[12] (2025) 46 ILJ 2587 (LAC).

[13] Id at para 27.

[14] Id at para 32. This approach has recently once again been confirmed by the LAC in *Kgomotso v South African Police Service and Others* [2026] 5 BLLR 438 (LAC) at para 45 where it was said: '*… It is therefore evident to me that the cause of action was based on unlawful dismissal, which is outside the provisions of the Labour Relations Act …*'.

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any conduct or failure of any party to the employment relationship where it comes to incomplete internal disciplinary proceedings.[15] Fortunately for the applicant, *in casu*, he has at least not sought to contend that the pending disciplinary proceedings are invalid or unlawful.

[27] But what about urgent intervention in the case of alleged unfairness. That is really the cornerstone of the applicant's case. He contends that allowing the Regulation 9 proceedings to continue rather than converting it into a disciplinary process in the ordinary course under Regulation 8, would deprive him of his right to a fair hearing. Added to this is a case that even if the Regulation 9 disciplinary process continues, the failure to call witnesses and allow the applicant to cross examine those witnesses in the hearing equally infringes on his right to a fair hearing. In my view, and for the reasons to follow, I do not believe that this Court is competent to intervene even on these grounds.

[28] One issue must be dealt with from the outset. The applicant has pleaded reliance on section 23 of the Constitution where it comes to his right to a fair hearing. By virtue of the application of the principle of subsidiarity, this approach is not permissible. The concept of the prohibition of unfair conduct in the workplace is regulated by the LRA, pursuant to the Constitutional imperative in section 23, and the LRA gives actual effect to this right.[16] It follows that the applicant cannot rely on the Constitution directly to assert his right to procedural fairness. He is bound to find his salvation in the LRA. This is made clear by way of the following dictum in *My Vote Counts NPC v Speaker of the National Assembly and Others*[17]:

> 'First, allowing a litigant to rely directly on a fundamental right contained in the Constitution, rather than on legislation enacted in terms of the Constitution to

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[15] See also *Baloyi v Public Protector and Others* (2021) 42 *ILJ* 961 (CC) at para 24, where it was held: '*… Crucially, s 157(1) does not afford the Labour Court general jurisdiction in employment matters …*'

[16] In *SA Airways (SOC) Ltd (In Business Rescue) and Others v National Union of Metalworkers of SA on Behalf of Members and Others* (2020) 41 ILJ 2113 (LAC) at para 38 it was said: '*… The constitutional right to fair labour practices finds legislative expression in the LRA. Its scope covers the interests of both employers and employees …*'. See also *Public Servants Association on behalf of Ubogu v Head of the Department of Health, Gauteng and Others* (2018) 39 ILJ 337 (CC) at para 42; *Safcor Freight (Pty) Ltd t/a Safcor Panalpina v SA Freight and Dock Workers Union* (2013) 34 *ILJ* 335 (LAC) at para 18.

[17] 2016 (1) SA 132 (CC) at para 160. See also *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* 2022 (4) SA 1 (CC) at para 102; *SA National Defence Union v Minister of Defence and Others* (2007) 28 *ILJ* 1909 (CC) at paras 50 – 51.

> give effect to that right, would defeat the purpose of the Constitution in requiring the right to be given effect by means of national legislation. Second, comity between the arms of government enjoins courts to respect the efforts of other arms of government in fulfilling constitutional rights. Third, allowing reliance directly on constitutional rights, in defiance of their statutory embodiment, would encourage the development of two parallel systems of law …'

[29] So, once the applicant's right to fair hearing is a right found in and regulated by the LRA, which it clearly is, then the applicant faces another insurmountable obstacle. This obstacle is created by virtue of the reality that the LRA does not bestow rights in a vacuum. Where the LRA bestows a right, it equally prescribes a specific process that must be followed to give effect to such right, or to enforce that right.[18] As pertinently said in *Edcon supra*:[19]

> 'The scheme of the LRA is that, if it creates a right, it also creates processes or procedures for the enforcement of that right, a dispute-resolution procedure for disputes about the infringement of that right, specifies the fora in which that right must be enforced and specifies the remedies available for a breach of that right.'

[30] The aforesaid puts paid to the applicant's reliance on the right to a fair hearing as a basis for intervention. This would include the suggestion that the decision by SAPS to institute disciplinary proceeding sunder Regulation 9 and not Regulation 8 is somehow unreasonable and should be set aside, which case notionally would concern a review in terms of section 158(1)(h).[20] The point is whether it is a direct challenge of the disciplinary proceedings based on a right

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[18] As held in *Chirwa v Transnet Ltd and Others* (2008) 29 ILJ 73 (CC) at para 41: *'… It is my view that the existence of a purpose-built employment framework in the form of the LRA and associated legislation infers that labour processes and forums should take precedence over non-purpose-built processes and forums in situations involving employment related matters. …'*. Also, in *Gcaba* (*supra)* at para 56 it was similarly said: *'… Once a set of carefully crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system …'*.

[19] Id at para 130. See also *Chirwa* (*supra*) at para 68; *Gcaba (supra)* at para 69; *Hendricks v Overstrand Municipality and Another* (2015) 36 ILJ 163 (LAC) at paras 12 and 27; *SA Social Security Agency v Hartley and Others* (2023) 44 ILJ 1334 (LC) at para 3; *Mohlomi v Ventersdorp/Tlokwe Municipality and Another* (2018) 39 *ILJ* 1096 (LC) at para 40; *O'Connor v Department of Education, Eastern Cape and Others* (2024) 45 ILJ 1041 (LC) at para 44.

[20] Section 158(1)(h) reads *'The Labour Court may … review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law*'.

to procedural fairness, or a review challenge tied to procedural unfairness[21], such a challenge would not be competent and it must be pursued in terms of the ordinary dispute resolution processes under the LRA. In simple terms, the applicant must participate in the disciplinary proceedings, and if an adverse outcome results and he considers what happened in the disciplinary proceedings to be unfair, he must refer an unfair dismissal or unfair labour practice dipsute (depending on whether the outcome of the hearing is dismissal or a lesser sanction) to the applicable bargaining council. In that forum, the applicant would be able to make out a case that his right to procedural fairness was violated and he could then obtain relief, under the LRA. The following *dictum* in *Zungu v Premier of the Province of KwaZulu-Natal and Others*[22] is apposite, where the Court held as follows:

> 'The Labour Appeal Court was correct in upholding the Labour Court's decision that it did not have jurisdiction in the matter. This is because the claim by the applicant relating to the Premier's decision not to appoint her, and the contention that this was unlawful, falls squarely within the definition of dismissal in s 186(1)*(b)* of the LRA. The dispute should have been referred to conciliation and ultimately to arbitration under s 191 of the LRA. Therefore, the applicant cannot bypass the dispute-resolution process envisioned in the LRA. The applicant was obliged to follow the dispute-resolution process in chapter VIII of the LRA but did not do so.'

[31] Two further references in this regard bear mention. In *Shezi v SA Police Service and Others*[23] the Court decided that: '… *Where the employer conduct complained of is alleged to be unfair, the court is precluded from granting final relief since it has no jurisdiction in respect of matters that concern the procedural fairness of disciplinary proceedings. At most, the court has jurisdiction to grant interim relief. Even then, the court has held that it is not desirable that disputes about the exercise of workplace discipline be dealt with*

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[21] The Court *Leshabane v Minister of Human Settlements and Others* (2024) 45 ILJ 833 (LC) at para 46 decided: '*… insofar as this court may be empowered to consider a legality challenge by an employee of the state such as the applicant in casu, such entitlement is always subject to such an employee being required, if not obliged, to instead utilise the prescribed dispute-resolution processes under the LRA, like any other employee …*'. And in *Magoda v Director-General of Rural Development and Land Reform* and Another (2017) 38 ILJ 2795 (LC) at para 11 it was held: '*… The principle emerging from Hendricks (and related case law) is that s 158(1)(h) reviews (including legality review) are only permissible where there is no other remedy available under the LRA …*'.

[22] (2018) 39 ILJ 523 (CC) at para 20. See also *Member of the Executive Council for Education, North West Provincial Government v Gradwell* (2012) 33 ILJ 2033 (LAC) at para 46.

[23] (2021) 42 ILJ 184 (LC) at para 14.

on a piecemeal basis, particularly by way of the review of every decision taken by the employer in the disciplinary process …'. And in *National Union of Metalworkers of SA on behalf of Members v BMW (SA) (Pty) Ltd*[24] the Court had the following to say:

> '… it would be quite inappropriate to finally decide an issue like procedural fairness in an unfair dismissal dispute by way of motion proceedings. There are many case by case factual nuances that would or could be relevant in deciding whether a dismissal is procedurally fair. It must always be considered whether an employee, overall, was given a fair opportunity to state his or her case prior to dismissal. This is best dealt with by way of *viva voce* evidence, hence arbitration is prescribed. For example, an employee could be considered to be procedurally fairly dismissed even if there was no disciplinary hearing at all, depending on circumstances. The current process of arbitration is also relatively expeditious, with most disputes being finally arbitrated in under six months from when the dispute was first referred to the CCMA / bargaining council. There is simply no need for urgent Court intervention in this respect. So therefore, NUMSA was compelled to have pursued its claim that its members were unfairly dealt with in the disciplinary proceedings instituted against them, by way of a referral to the CCMA / bargaining council. It was not competent to approach this Court directly. As such, and by virtue of its failure to follow what is the described dispute resolution processes under the LRA, NUMSA simply has no right to the declaratory relief sought in its amended notice of motion.'

[32] In summary regarding the above, the applicant is effectively crying at the wrong funeral. It is simply not competent for him to seek to assert his right to procedural fairness in the manner that he did. This Court has no jurisdiction to intervene at this stage and afford the applicant relief based upon a final determination of procedural unfairness, which is what the applicant is asking for. The applicant's right to procedural fairness flows from the LRA, and the LRA has prescribed a specific process that must be followed in giving effect to that right. The applicant can always raise any case of procedural unfairness before the bargaining council, and if his case is sustained, he will obtain relief under the LRA. All said, the disciplinary proceedings must be allowed to run its course, and any fairness challenges that may result from it must be addressed

[24] (2025) 46 ILJ 2712 (LC) at para 47.

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by way of the dipsute resolution processes specifically prescribed by the LRA. This Court should simply not intervene at this stage, stated by the Court in *BMW supra*[25] as such:

> '… Of critical importance for consideration in this case is that this right so afforded by the LRA, is directly and specifically linked to prescribed process where it comes to its enforcement. Or in other words, the LRA specifically prescribes in what manner such right must be asserted. This prescribed method of assertion does not include the Labour Court, as Court of first instance …'

[33] But even if I am wrong in this regard, and this Court still retains the power to intervene, I am compelled to say that the applicant's challenge in any event has no substance. He has simply illustrated no clear right to the relief sought. My reasons for this conclusion now follow.

[34] As I have touched on above, the right to procedural fairness that would accrue to the applicant is a right squarely founded on the LRA. This is specifically provided for in section 188(1)(b), which stipulates that a dismissal for misconduct (which is what the case *in casu* is about) must also be procedurally fair. What would be considered, as a general proposition, to be procedurally fair, is then provided for in the Code of Good Practice (the Code) as contained in Schedule 8 to the LRA. The Code was substantially amended on 4 September 2025.[26] What would be a fair procedure is now regulated in item 11.[27] It contemplates an even further departure from the notion of formal criminal law type disciplinary hearings, in which witnesses must always be called and cross examined. The relevant parts of item 11 read:

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[25] Id at para 45. See also *O'Connor v Department of Education, Eastern Cape and Others* (2024) 45 ILJ 1041 (LC) at para 44, where the Court held: '*In short, the LRA has a unique scheme where it comes to resolving disputes that arise in the scope of the employment environment … The LRA creates a right to a fair dismissal and a fair labour practice, and then provides for a prescribed dispute-resolution process to give effect to such right. … At a level of policy, this court should always strive to give primacy to these prescribed dispute-resolution processes of the LRA and the notions underlying it*'.

[26] The Code was amended on 4 September 2025 GN 3470 in *GG* 53294 of 4 September 2025.

[27] The predecessor to item 11 was item 4(1), which read: *Normally the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or a fellow employee. After the enquiry the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.*'

> '(1) The purpose of a fair procedure is to ensure a genuine dialogue and an opportunity for reflection before any decision is taken.
>
> (2) A fair procedure is one in which an employee has been given an adequate and reasonable opportunity to respond to the allegation of misconduct.
>
> (3) An investigation or enquiry does not have to be formal. Its nature should be appropriate to the circumstances, including the type of allegation and the nature and size of the employer.
>
> (4) Usually, before a decision is taken to dismiss, the employee should be-
>
> *(a)* notified of the allegations of misconduct, preferably in writing;
>
> *(b)* given an opportunity within a reasonable period of time to prepare and make representations on both the misconduct allegations and the appropriate sanction;
>
> *(c)* allowed the assistance of a fellow employee or trade union representative;
>
> *(d)* where reasonably possible, provided with the opportunity to converse in a language that the employee is comfortable with. …'

[35] With the above provisions of Item 11 being given proper consideration, can it be said that it is essential or indispensable for a fair hearing *in casu* that it must be directed that witnesses be called in the disciplinary proceedings and be cross-examined. And added to this, would it be appropriate or even competent for this Court to prescribe to SAPS that it should rather institute disciplinary proceedings under Regulation 8 and not Regulation 9? In my view, and just on the application of Item 11 as quoted above, the answer to this must be in the negative.

[36] Having due regard to what is provided for in Item 11, a proper conspectus of the Regulations itself remains necessary. It is obviously a prescribed disciplinary process in SAPS that must be followed and adhered to. In *Provincial Commissioner, Gauteng: SA Police Service and Another v Mnguni*[28] the Court held, specifically referring to the Regulations:

[28] (2013) 34 ILJ 1107 (SCA) at para 20.

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> 'The regulations in terms of which the disciplinary and appeal procedures that led to the dismissal of the respondent were conducted were promulgated by the Minister for Safety & Security pursuant to the provisions of s 24(1)*(f)* of the SA Police Service Act 68 of 1995. The section empowers the minister to make regulations regarding 'labour relations, including matters regarding suspension, dismissal and grievances'. The regulations are a product of an agreement reached between the National Commissioner of SAPS, as employer, and all the unions admitted to the Safety & Security Sectoral Bargaining Council (regulation 2). Their purpose is set out in regulation 3, and is, inter alia, to support constructive labour relations in the police service, to ensure that supervisors and employees share a common understanding of misconduct and discipline, to provide a user-friendly framework in the application of discipline, and to prevent possible arbitrary actions by supervisors towards employees in the event of misconduct. …'

Even the newly amended Code recognises the primacy of these kinds of arrangements, considering Item 2(3) of the Code which reads: '*This Code does not alter the rights and obligations created under a collective agreement'*.

[37] It is necessary to refer to some of the principles upon on which the Regulations are based, as found in Regulation 4. The essence of the general fair treatment of employees in disciplinary proceeding is found in Regulation 4(d), which is quite similar to Item 11(4) of the Code. The basic tenets of a fair process by virtue of this provision in the Regulations is a fair hearing (referring to the opportunity to state one's case), timeous and proper notice of allegations of misconduct, written reasons for any decision taken, and the right of recourse against any decision taken. Significantly, the calling of witnesses is not considered an essentiality for a fair process, by definition. Regulation 4(h) prescribed that the proceedings should not emulate court proceedings. And lastly, the right to representation is prescribed by way of Regulation 4(j).

[38] Where it comes to what would constitute misconduct, there is a detailed exposition in Regulation 5(3) of all kinds of different misconduct that would warrant disciplinary action. In turn Regulation 5(4) identifies what forms of misconduct would entitle SAPS to opt for the expedited (attenuated) disciplinary process under Regulation 9. A conjunctive reading of Regulations 5(3) and 5(4) leaves be convinced that the misconduct listed under Regulation 5(3) is not different or distinct to the misconduct listed under regulation 5(4).

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Regulation 5(4) simply constitutes specifically defined instances of misconduct falling under the broader ambit of the misconduct identified under regulation 5(3). In fact, the case *in casu* illustrates the point. It has been alleged the applicant committed sexual assault / sexual harassment. Sexual harassment is misconduct identified under Regulation 5(3)(m). But it is also misconduct identified under Regulation 5(4)(v). That means that it is the kind of misconduct that could competently be referred to an expedited disciplinary process under the Regulations. So, in simple terms, Regulation 5(3) circumscribes serious misconduct. Regulation 5(4) then determines which of this serious misconduct may be expeditiously dealt with under Regulation 9.

[39] When the charges against the applicant are considered, as it appears from the notice presented to him on 17 April 2026, it is clear that the substance of the charges against him concerns alleged sexual harassment committed by him on 24 July 2024. This would be the kind of misconduct for which the expedited disciplinary process under Regulation 9 is competent. Further, there is charge of bringing SAPS into disrepute, which is equally a charge found under Regulation 5(4)(x) for which such proceedings would be competent. Accordingly, SAPS was well within its rights under the Regulations to decide to opt for the expedited disciplinary process as contemplated by Regulation 9.

[40] It is of course true that SAPS may decide not to utilise the provisions of Regulation 9 and instead opt for disciplinary proceedings in the ordinary course, as contemplated by Regulation 8 as read with Regulation 11. This is because charges in terms of Regulation 5(4) would be covered by Regulation 5(3) as well. But this is an election that lies entirely within the discretion / choice of SAPS. Once it is competent to make the election, it is not for any employee, such as the applicant, to insist on the procedure under Regulation 8 being followed. And similarly, it would not be for this Court to micro-manage the process and prescribe to SAPS what process it should follow. Not only would this Court not have jurisdiction to do so, as I have discussed earlier, but it would be inappropriate and, in my view, quite wrong for this Court to micro-manage internal disciplinary processes of SAPS under the Regulations, based on what the Court may believe would be fair. As said in *BMW supra*: '*… In simple terms, it is not for this Court in micro-manage internal disciplinary proceedings in an individual employer, be it on an urgent basis, or otherwise*

…'.[29] This was also made clear in *Minya v SA Post Office and Others*[30], as follows:

> 'From a plethora of such cases that are routinely brought on an urgent basis, it has become increasingly apparent that this court is more often than not, called upon to micro-manage these internal proceedings, and that every little complaint about internal disciplinary proceedings, whether real or perceived, has by default, become an "exceptional circumstance". It has long been stated that the powers of this court under the Labour Relations Act (LRA) do not include the micro-management of workplace discipline or every dispute arising out of the workplace. This is so in that the prerogative to maintain discipline remains that of the employer, and further since the framework of the LRA is such that it is dispute specific.'

[41] The applicant referred me to *Khan v South African Police Service and Others*[31]. In that judgment, the Court recognised that the procedure in terms of Regulation 9 is distinguishable from that in terms of Regulation 8 as read with Regulation 11, and that in terms of Regulation 8 and 11, an employee would be allowed to bring witnesses to the hearing and to challenge the evidence of witnesses by way of cross examination.[32] In my view, this finding by the Court is correct. The Court then also correctly identifies what Regulation 9 is all about, finding that:[33]

> 'Whereas, with respect to regulation 9, although the employee is given an opportunity to defend himself against the allegations, this is not a hearing but a meeting between the parties. This meeting has no particular procedure to be followed and provides the designated person a very wide discretion to direct the process. The employee may not lead evidence and be cross-examined. The purpose of this procedure is not to allow the employee to lead evidence and to be cross-examined but to put allegations to the employee and to afford him an opportunity to respond to the allegations.
>
> The designated person may ask questions only to seek clarity but may not interrogate or cross-examine the employee as the meeting is not a hearing. Once the meeting is finalised, the designated person must consider the

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[29] Id at para 59. See also Shezi *(supra)* at para 14.
[30] (2021) 42 *ILJ* 141 (LC) at para 2. See also *Mlaba v Minister of Home Affairs and Another* (2024) 45 ILJ 139 (LC) at para 47.
[31] (121530/2024) [2024] ZALCJHB 488 (4 December 2024).
[32] Id at paras 41 – 43
[33] Id at paras 44 – 45

evidence namely, the report, the version of the employee, as well as any documents and statements that may be available and make a finding within five calendar days.'

[42] The aforesaid conclusions by the Court in *Khan* as to the clear meaning and import of Regulation 9 in my view cannot be faulted. Reading this Regulation, as will be more fully dealt with below, clearly envisages such a dispensation, considering the clear text thereof and applying the principles of interpreting documents as set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[34], being: *'… Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. ….*'. However, and with respect to the Court in *Khan supra*, what the Court then did next cannot be sustained. I am aware that in terms of the principle of *stare decisis*, I have to follow previous judgments by this Court, unless I consider the judgment to be '*clearly wrong*'.[35] In this case, other than the correct findings I have quoted above, I would differ from the judgment of *Khan*, for the reason that I believe it to be clearly wrong, and I decline to follow it. The reasons for my view in this regard now follow.

[43] In *Khan*, the Court accepted that the disciplinary process in terms of Regulation 9 met the basic requirements of procedural fairness, deciding that:[36] '*The respondent has submitted that the expeditious disciplinary process meets the three basic requirements of natural justice in the conduct of disciplinary hearings in that the employee should know the nature of the*

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[34] 2012 (4) SA 593 (SCA) at para 18. See also *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) at para 66.

[35] See *Public Servants Association on behalf of Liebenberg v Department of Defence and Others* (2013) 34 ILJ 1769 (LC) at para 22; *SA Transport and Allied Workers Union and Another v Garvas and Others* (2012) 33 ILJ 1593 (CC) at para 114; *Gcaba v Minister for Safety and Security and Others* (2009) 30 ILJ 2623 (CC) at para 58; *Chizunza v MTN (Pty) Ltd and Others* (2008) 29 ILJ 2919 (LC) at para 7; *National Education Health and Allied Workers Union v University of Cape Town and Others* (2003) 24 ILJ 95 (CC) at para 26; *National Union of Metalworkers of SA v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 ILJ 1634 (LC) at para 22; *Eskom v Hiemstra NO and Others* (1999) 20 ILJ 2362 (LC) at para 17.

[36] Id at para 49.

accusation against him/her; the employee should be given an opportunity to state his/her case and that the tribunal should act in good faith. <u>I do not differ with this opinion, however, there are circumstances where the process can result in injustice and prejudice to one of the parties</u> …' (emphasis added). It this emphasised portion of the judgment that leads to the anomaly I have an issue with. Based on this reasoning, the Court in *Khan* then reasoned that considering the particular circumstances of the case at hand and what it may involve, it could be unfair to have a disciplinary hearing under Regulation 9[37]. The Court then concluded:[38]

> 'My view is that none of the parties will suffer any prejudice if regulations 8 and 11 procedures are followed. This will prevent a situation where the referee also becomes a player and the process will allow for a proper ventilation of the issues between the applicant and his employer. The issues seem very fragile and peculiar to be dealt with in the form of a meeting where no leading of evidence is allowed and no cross-examination of witnesses takes place. The inquisitorial nature of regulations 8 and 11 is, in my view, the most suitable procedure to apply to achieve fairness and avoid prejudice, more so if an independent adjudicator is appointed.
>
> It may be so that the procedure in terms of regulation 9 is the subject of a collateral agreement entered into between the employee's trade union and his employer. I am also mindful of its binding effect on all the parties, however, regulation 5 (4) suggests that the nature of the offence *may* warrant the institution of the expeditious procedure as provided for in regulation 9 or it may not. This will therefore depend on the circumstances of each case. My view is that the very nature of the offence and its surrounding circumstances justify a deviation from a procedure in terms of regulation 9 to ensure proper ventilation of the issues.'

[44] The above reasoning in *Khan*, with respect, cannot be correct. As I have already said above, it is not for this Court to decide for an on behalf of SAPS what provisions of the Regulations to apply based on the basis of what the Court may believe to be the nature of the case or in order for it to be fair. This Court cannot prescribe to SAPS, especially on the basis of what the Court believes to be fairest option and the least prejudice to the parties, how it must

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[37] Id at para 50.
[38] Id at paras 51 – 52.

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conduct its own disciplinary proceedings and how it should have exercised its election under the Regulations. At the very best, and I doubt whether even this may be competent considering the approach I have summarized above, it could be ascertained whether the qualifying requirements of invoking Regulation 9 have been met, namely whether it relates to misconduct as contemplated by Regulation 5(4) and whether the procedural pre-requisites under Regulation 9 itself have been fulfilled. But it simply cannot be permissible for this Court to say to SAPS that it was perfectly entitled to invoke Regulation 9, but in the circumstances, it should not have done so. This approach was recently confirmed by the LAC in *Kgomotso v South African Police Service and Others*[39] where the Court, when delaying with similar objections to those raised by the applicant *in casu* about why the process under Regulation 8 should be followed and not that under Regulation 9, made the following clear:

> 'The election of which process to follow is that of the employer. Both the chairperson of the disciplinary enquiry and the arbitrator were satisfied that the regulation 9 process was sanctioned by the appellant's supervisor; that the misconduct attributed to the appellant fell within the definition of 'serious misconduct', as contemplated in regulation 5(4)(x) and that Lt General Riet, who was assigned to preside over the process, was of a rank higher than a brigadier. Whatever the appellant's personal perceptions of the individuals involved in this process were, those views are immaterial and irrelevant, provided that there was compliance with the statutory prescript of regulation 9.'

[45] This brings me to what is the real thrust of the applicant's case is. According to him, fairness dictates that Regulation 9 be applied so as to include that witnesses must be called and to cross examine those witnesses. For this he relied on the judgment in *Schouten v Safety and Security Sectoral Bargaining Council (SSSBC) and Others*[40]. That judgment concerned a review application, in which the bargaining council arbitrator had *inter alia* found that the expedited disciplinary process adopted by SAPS in that case was procedurally fair. The Court in *Schouten* however made no finding on the issue of whether the procedure adopted under Regulation 9 was inherently unfair or

[39] [2026] 5 BLLR 438 (LAC) at para 104.
[40] (C44/2022) [2025] ZALCCT 36 (29 May 2025).

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should be read or applied differently. Instead, the Court had an issue with SAPS in that particular case relying only on witness statement in the hearing without affording the employee to question these witnesses. The Court decided:[41]

> 'Prima facie, it was unfair to deny the applicant an opportunity to confront his accusers and to put questions to them. In a case such as the present one, which turns on a direct dispute of fact between the SAPS witnesses and the applicant, I do not see how the chairperson could have arrived at a fair outcome without hearing the witnesses and permitting cross-examination. There is no fair manner of weighing up and assessing written evidence in support of one version against oral evidence in support of an irreconcilable version.'

[46] Properly considered, the judgment in *Schouten* does not support the applicant's case. The Court in *Schouten* evaluated the findings of an arbitrator with regard to procedural fairness based on the facts of that particular case. In fact, as I will discuss later in this judgment, any disciplinary process, no matter what form it takes, is always subject to being scrutinised to determine whether it is procedurally fair, in the context of and having due regard to the facts of each and every individual case. The Court in *Schouten* in fact concluded that considering the particular facts in that case, it was unfair not to have called witnesses, and in my view, this reasoning cannot be faulted.[42] However, the Court never found that in order to be fair, Regulation 9 must always be read to allow the calling of witnesses and cross examination, *per se*. The Court in *Schouten* was at pains to emphasise that its finding of procedural unfairness was: '*… in the circumstances of this case …*'. All said, *Schouten* cannot support the applicant's case of an unfettered right for witnesses to be called and to be cross examined even in expedited proceedings under Regulation 9.

[47] In the end, the entitlement to call witnesses and to cross examine such witnesses is not one of the basic tenets of procedural fairness under the LRA where it comes to internal disciplinary proceedings. This is evident from what is not provided for in Item 11 of the Code, as quoted earlier in this judgment. This notion was in any event made clear in *Avril Elizabeth Home for the*

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[41] Id at para 19.
[42] This appears to be what the Court found in paragraph 20 of the judgment.

Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration and Others[43], as follows:

> '… The rules relating to procedural fairness introduced in 1995 do not replicate the criminal justice model of procedural fairness. They recognize that for workers, true justice lies in a right to an expeditious and independent review of the employer's decision to dismiss, with reinstatement as the primary remedy when the substance of employer decisions is found wanting. For employers, this right of resort to expeditious and independent arbitration was intended not only to promote rational decision making about workplace discipline, it was also an acknowledgment that the elaborate procedural requirements that had been developed prior to the new Act were inefficient and inappropriate, and that if a dismissal for misconduct was disputed, arbitration was the primary forum for determination of the dispute by the application of a more formal process. …'

[48] Similarly, and in *Public Allied Workers Union of SA on Behalf of Netshikhudini v Commission for Conciliation, Mediation and Arbitration and Others*[44], the Court expressed the following view:

> 'There are a number of other reasons why the application ought to be refused. The right to a fair procedure established by the LRA is elaborated by the code of good practice. The code envisages that an employee who is accused of misconduct is afforded an opportunity, in an informal setting, to respond to the employer's allegations. The Act does not envisage, as the applicant appears to contend, an elaborate court-like hearing at which the rules applicable in a court of law necessarily apply …'

[49] In the specific context of attenuated disciplinary proceedings where the misconduct charge was decided on the basis or representations submitted by the parties without the calling of any witnesses, the Court in *BMW supra* decided:[45]

> 'Insofar as the attenuated disciplinary process itself is concerned, there is nothing in law that compels BMW to hold an in person and oral disciplinary

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[43] (2006) 27 *ILJ* 1644 (LC) at 1651I – 1652B. See also *Strydom v Arcelormittal SA* (2024) 45 ILJ 931 (LC) at para 30; *Broadcasting Electronic Media and Allied Workers Union and Others v SA Broadcasting Corporation and Others* (2016) 37 ILJ 1394 (LC) at para 17; *Kelly Group Ltd v Khanyile and Others* (2013) 34 ILJ 2035 (LC) at paras 22 – 23.
[44] (2022) 43 ILJ 2812 (LC) at para 10.
[45] Id at para 54.

> hearing before deciding to dismiss an employee. The right to be heard, in this context, in essence involves three considerations. The first is that the employee should know the nature of the accusation against him or her, the second is that the employee must be given an opportunity to state his or her case, and the third is that the employer acts in good faith. These three principal objectives have found their way into item 4 of schedule 8 of the LRA. Not only is there nothing in the entire item 4 of schedule 8 that makes an in person / oral disciplinary hearing compulsory, but item 4(1) actually stipulates there does not need to be a formal enquiry in order to comply with the employee's right to state a case. It is quite acceptable, where circumstances so dictate, to conduct the disciplinary process by way of representations.'

[50] The concept of an attenuated disciplinary process by way of the exchange of submissions / statements was also considered in *Broadcasting Electronic Media and Allied Workers Union and Others v SA Broadcasting Corporation and Others*[46], where the Court held as follows:

> 'Although the process adopted by the SABC in this case is different from that it normally adopts, I do not think that it can be said that it is not a 'formal disciplinary hearing'. It envisages a hearing chaired by an independent and experienced chairperson on the panel of a respected dispute-resolution agency. It envisages a hearing, albeit on paper without hearing oral evidence or argument. In my view it satisfies the requirements set out in the Code of Good Practice: Dismissal of the Labour Relations Act 66 of 1995 and set out by my brother Van Niekerk on the well-known case of *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation & Arbitration & others …'*

[51] Considering once again the Regulations itself, it does not encompass such right under the basic requirements for fairness under Regulation 4. Whilst Regulation 8 as read with Regulation 11 provides for the calling of witnesses and cross examination, that process is specifically distinct and separate from the expedited process in Regulation 9, and those provisions simply cannot be

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[46] (2016) 37 ILJ 1394 (LC) at para 17. See also *Mathabathe v Nelson Mandela Bay Metropolitan Municipality and Another* (2017) 38 ILJ 391 (LC) at para 23, where Court had the following to say: '*… In my view, the applicant was afforded a right to be heard on terms that satisfy the requirements of the code of good practice. The applicant was afforded an opportunity to state her case, which she did with the assistance of counsel. The second respondent considered the applicant's submissions, and made a decision. He communicated that decision to the applicant and advised her of her right to pursue the matter further. …*'. See also para 25 of the judgment

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read into Regulation 9. In *Phahlane v South African Police Services and Others*[47] the Court held:

> 'When one considers the regulations it is clear that regulation 9 provides for circumstances where a disciplinary hearing, as envisaged by regulation 8, may be bypassed. Regulation 11 specifically sets out the conduct of a disciplinary hearing, it does not apply to the conduct of an expeditious process …'

[52] The point is this. There is nothing inherently unfair in Regulation 9. It is the product of collective bargaining and statutory enforcement. It meets the three essences for procedural fairness under the LRA. There is no need to read anything into it to ensure a fair procedure.

[53] I must stress one thing in particular. The right of SAPS to invoke and apply the disciplinary process under Regulation 9 does not guarantee it of a finding of procedural fairness where it comes to the overall assessment to be conducted by an arbitrator as to whether SAPS had discharged its onus to prove the dismissal of an employee was procedurally fair. What it does guarantee is that it cannot be said, as the basis for a finding of procedural fairness, that SAPS should have allowed the calling of witnesses and cross examination *per se*, and that the failure to do so is unfair without more. There may be a case where even under the expedited process, and as the enquiry unfolds, it should have become apparent to the chairperson what *viva voce* evidence may be necessary to properly decide the matter. But that is course something for the chairperson to decide. If the decision that is made by the chairperson is that a witness not be called and that compromises the fairness of the disciplinary hearing, then that may be the basis for an arbitrator finding procedural unfairness to exist. But this is an issue that must be decided by the arbitrator on the particular facts of that case at that point in time, and not by this Court directly on an urgent basis. As dealt with earlier in this judgment, that is exactly what happened in *Schouten supra*. The following dictum in *BMW supra* is apposite:[48]

> 'In the end, the fact is that the duty (onus) is on an employer to prove that the dismissal of an employee for misconduct is fair. In this context, it is up to the

[47] (JR1671/21) [2023] ZALCJHB 280 (18 October 2023) at para 46. See also para 77 of the judgment.
[48] Id at para 58.

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> employer to decide how to conduct the disciplinary proceedings, and having made such a decision, it would have to prove to an arbitrator that what it decided to do was fair. It follows that BMW is entitled to adopt the attenuated disciplinary process in the manner that it did, and it would then be up to BMW to establish and prove to an arbitrator deciding the fairness of the dismissal of the employees (if employees are indeed dismissed) that the process it decided to adopt qualifies as being fair in line with the guiding principles in item 4 of schedule 8 of the LRA.'

[54] Thus, I believe the applicant has failed to demonstrate the existence of a right to call witnesses and to cross examine in his expedited disciplinary hearing under Regulation 9, which could serve as basis for the relief he seeks. These rights are not essential to satisfy the notion of procedural fairness in SAPS internal expedited disciplinary proceedings, especially considering the clear terms of Regulation 9. There is nothing to indicate that the applicant will not have a fair and proper opportunity to state his case, and as said by SAPS, he will be allowed presentation, and the chairperson will decide on how the process unfolds once the hearing gets underway. In short, the calling of witnesses and cross examination is not a *sine qua non* for a fair disciplinary hearing under Regulation 9.

[55] And lastly, should the applicant still be dissatisfied concerning the procedural fairness of the process he had been subjected to, after the conclusion of the disciplinary hearing and should he be dismissed, he has the right to challenge it when referring an unfair dismissal dispute to the bargaining council. He can raise all his complaints with the arbitrator, and should the arbitrator believe that on the particular facts of his case that witnesses should have called and cross examination allowed, then a finding of procedural unfairness can be entered in his favour, and he can obtain relief. He thus has a perfectly suitable alternative remedy at his disposal. It must also be emphasised that this alternative remedy is not only suitable, but it is actually prescribed.

[56] In the end, I am convinced that the applicant has failed to demonstrate a clear right to the relief he seeks, and has an alternative remedy available. As such, the other considerations for the granting of the interdict and declaratory relief he is asking for, becomes moot.

<u>Conclusion</u>

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[57] For all the reasons as set out above, I conclude that overall considered, this Court does not have the jurisdiction to consider the applicant's application and grant him the relief sought, especially considering that final relief is sought. The applicant's reliance on section 157(1) as source conferring jurisdiction, is misplaced, and this Court does not have jurisdiction to entertain the applicant's pleaded case in this matter, based on this provision. Where it comes to the applicant's reliance on his rights to a fair procedure under the LRA as basis for intervention, he must also fail, because he is compelled to follow the prescribed dispute resolution processes under the LRA and not approach this Court directly. And finally, the applicant had failed to demonstrate that he a clear right to the relief he seeks, in that it is not essential to his right to procedural fairness under the LRA that witnesses must be called and he must be entitled to cross examine such witnesses, in his disciplinary proceeding sunder Regulation 9. His application must fail and thus falls to be dismissed.

<u>Costs</u>

[58] This then only leaves the issue of costs. In this respect, and in terms of section 162(1) of the LRA, I have a wide discretion. I know there are many instances relating to these kinds of applications where this Court has expressed its dissatisfaction about these applications being brought in the first place, and have punished litigants with costs orders. I have done so myself on many an occasion. But the point remains that, as said in *Union for Police Security and Corrections Organisation v SA Custodial Management (Pty) Ltd and Others*[49]:

> 'In the labour context, the judicial exercise of a court's discretion to award costs requires, at the very least, that the court must do two things. First, it must give reasons for doing so and must account for its departure from the ordinary rule that costs should not be ordered. Second, it must apply its mind to the dictates of the fairness standard in s 162, and the constitutional and statutory imperatives that underpin it …'

[59] In this instance, I do not think the applicant was acting *mala fide* or deploying a stratagem to either scupper or delay the disciplinary proceedings. I am satisfied of his bona fides. He is a lay person, but nonetheless conducted proper research into his matter and came up with what is certainly an arguable

[49] (2021) 42 ILJ 2371 (CC) at para 35.

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case. In fact, he has done better than many a legal representative that I had the unfortunate experience of coming across in matters such as these. His papers were succinct, and he only focused on the real issues, not becoming embroiled in irrelevant and emotive considerations, which is also often the case in applications such as these. Overall, he conducted the litigation in a proper manner. In the end, he was simply misguided, and for that, he should not be punished with a costs order. Fairness dictates that no order as to costs be made.

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

Order

1. The application is heard as one of urgency.

2. The applicant's application is dismissed.

3. There is no order as to costs.

S Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: In person

For the Respondent: Advocate K Ngqata

Instructed by: State Attorneys – Cape Town

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Date of hearing: 5 June 2026

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