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

17 June 2026

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IN THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case no: 2026-129269

Date of hearing: **17 June 2026**

In the matter between:

THULI MAVIS MAKUBU Applicant

and

TRANSNET SOC LIMITED t/a TRANSNET FREIGHT RAIL Respondent

EX TEMPORE JUDGMENT

SNYMAN, AJ

[1] This is yet another urgent application brought by employees in the service of a state-owned enterprise seeking to urgently intervene in decisions made by

such employers where there are specific dispute resolution processes prescribed by the Labour Relations Act 66 of 1995 (LRA) that must instead be followed.

[2] In the notice of motion, the applicant asks for what she describes as an interim relief under Part A, pending the final determination of Part B of the application. First, the applicant prays that what she calls her purported dismissal on 1 June 2026 be stayed and suspended, and that she be immediately reinstated pending determination of Part B She also asked that the dismissal be interdicted and that her salary and benefits continue to be paid pending Part B. Then in Part B, the applicant prays for a final declaratory order to be made that the dismissal is automatically unfair based on her making a protected disclosure, also based on discrimination against her, and lastly based on her exercising her rights under the LRA. These would all be individual instances of automatic unfair dismissal circumscribed under section 187(1) of the LRA. Then there is also a plethora of other relief prayed for in part B of the notice of motion, none of which is competent in proceedings such as these, which I will get to later in this judgment.

[3] Because the applicant is seeking interim relief with regard to these prayers in part A of her notice of motion, she must satisfy the following requirements as set out in *National Council of Societies for the Prevention of Cruelty to Animals v/s Openshaw* 2008 (5) SA 339 (SCA) at para 20:

> '… *(a)* A *prima facie* right. What is required is proof of facts that establish the existence of a right in terms of substantive law; *(b)* A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; *(c)* The balance of convenience favours the granting of an interim interdict; *(d)* The applicant has no other satisfactory remedy.'

[4] The application has been brought as one of urgency. Whilst the respondent has opposed the issue of urgency and considering that the applicant was dismissed on 1 June 2026 and the application was brought about a week later, I will accept that the applicant took expeditious action and this application as far as the requirements of immediate intervention is concerned,

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satisfies the requirements of urgency. It is, however, where it comes to the availability of substantial redress in the ordinary course that the applicant fails dismally. However, because this issue of substantial redress in the ordinary course ties in with the issue of jurisdiction pertinently at stake in this case, I will decide the matter as one of urgency so the matter in its entirety can be finally disposed of.

[5] It is in fact when it comes to the issue of jurisdiction that this application is doomed to fail. In this respect, it is simply not necessary to consider all the factual background set out by the applicant in the founding affidavit. All that is necessary to consider are a number of specific facts, relating to jurisdiction. Several of these facts are in the end undisputed and common cause considering a comparison of the respective affidavits. But insofar as there are disputed facts, and by virtue of the principles established in *Plascon Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A) at 634E-635C, the respondent's version on the facts must prevail.

[6] In the answering affidavit, the respondent has set out a long history of difficulties it had with the applicant. It is not necessary to set out all these difficulties in this judgment. Suffice it to say, the respondent ultimately adopted the view that despite all its attempts at intervention, the applicant refused to align with the respondent's operational requirements and exhibited a continued unfounded resistance to the respondent's management. This resistance caused the employment relationship to become strained. The respondent then instituted an incapacity process against the applicant based on incompatibility on 17 February 2026. This process continued over a number of months, with several hearings taking place between March and May 2026, in which the applicant participated. It appears that the applicant even challenged the lawfulness of these proceedings, without foundation.

[7] However, the last incapacity hearing based on incompatibility took place on 6 May 2026. It was presided over by an independent third-party chairperson. The finding by the chairperson of this incapacity hearing was delivered on 21 May 2026, in which it was recommended that the applicant be dismissed. The applicant was then dismissed by the respondent for incapacity based on

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incompatibility on 1 June 2026 and was presented with the outcome of the incapacity hearing along with her notice of dismissal. She was dismissed on one month's notice. The applicant is challenging her dismissal on the basis that she alleges that it is automatically unfair by virtue of section 187(1) of the LRA. She seeks to be reinstated as consequential relief for this alleged automatic unfair dismissal.

[8] In the answering affidavit, the respondent has specifically challenged the issue of jurisdiction, contending that the issue in dispute pursued by the applicant, in terms of which the applicant is challenging a dismissal for incapacity, is a challenge that must be done in terms of the dispute resolution processes prescribed by the LRA, and cannot be pursued to this Court directly. For the reasons to follow, there is undeniable substance in this challenge raised by the respondent.

[9] In *Du Plessis v Public Protector and Others* (2020) 41 ILJ 919 (LC) at para 20 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. …*' In *Gcaba v Minister for Safety and Security and Others* (2010) 31 ILJ 296 (CC) at para 74 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 …*'

[10] The jurisdiction of the Labour Court is found in Section 157 of the LRA, which reads:

> '(1) 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.
>
> (2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right

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entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from-

(a) employment and from labour relations;

(b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and

(c) the application of any law for the administration of which the Minister is responsible.'

[11] What is clear from the above is that the jurisdiction of the Labour Court is specifically circumscribed and determined by statute, being the LRA itself. In this regard, section 157(1), even though it provides that the Labour Court has exclusive jurisdiction under that section, does not constitute a general jurisdiction that the Labour Court can exercise in all instances where a litigating party approaches the Labour Court and pleads a dispute is one related to an employment matter. . In *Baloyi v Public Protector and Others* (2021) 42 *ILJ* 961 (CC) at para 24, it was held: '… *Crucially, s 157(1) does not afford the Labour Court general jurisdiction in employment matters …*' In order for the Labour Court to have jurisdiction, the issue for determination must be specifically provided for in the LRA or in any other related employment law. It is this critical issue that renders all the relief that the applicant seeks in a notice of motion, other than the relief relating to the automatic unfair dismissal, which is specifically provided for in the LRA itself, entirely incompetent for the simple reason, this Court has no jurisdiction to consider it as it cannot arise from the LRA. There is no pleaded reliance on any other employment law.

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[12] Jurisdiction is determined on the basis of the case as pleaded by the applicant, which pleaded case in motion proceedings is determined by reference to the notice of motion and founding affidavit. In the notice of motion and founding affidavit, the applicant has at least pertinently and specifically pleaded a case of an automatic unfair dismissal resulting from her dismissal on 1 June 2026 and is seeking reinstatement as a remedy. As alluded to in the applicant's founding affidavit, automatic unfair dismissals are defined and determined in section 187(1) of the LRA. But just like any other alleged unfair

dismissal, it must be pursued and prosecuted by way of section 191 of the LRA. Considering the respondent (Transnet) brackets is subject to the jurisdiction of a bargaining council, the prescribed process requires a referral in terms of section 191(1) to the bargaining council for conciliation and if that fails, a referral to the Labour Court for adjudication under section 191(5)(b). If there is no referral to conciliation followed by unsuccessful conciliation or the expiry of 30 days, then no referral to the Labour Court is competent and it will not have jurisdiction to adjudicate the matter.

[13] In *National Union of Metalworkers of SA v Intervalve (Pty) Ltd and Others* (2015) 36 ILJ 363 (CC) at para 40 it was held as follows: '*Referral for conciliation is indispensable. It is a precondition to the Labour Court's jurisdiction over unfair dismissal disputes …*'. And in *Association of Mineworkers and Construction Union and Others v Ngululu Bulk Carriers (Pty) Ltd (In Liquidation) and Others* 2020) 41 ILJ 1837 (CC) at para 16 it was said: '*Although unfair dismissal disputes such as the ones we are concerned with here fall within the jurisdiction of the Labour Court, the exercise of that jurisdiction is deferred until a dispute has been conciliated. The LRA is structured in a manner that obliges parties to disputes to first make use of non-litigation dispute-resolution mechanisms, before approaching courts. Of importance in this regard is s 191, which requires dismissed employees to refer disputes about the 'fairness of a dismissal to conciliation' …*' However, and in this case, the applicant under Part B referred an automatic unfair dismissal dispute directly to this court for adjudication without a referral first to conciliation.

[14] Because there has been no referral to the bargaining council for conciliation, a direct approach to this court is simply not acceptable, and this court will have no jurisdiction to decide the applicant's claim under Part B in the ordinary course. Therefore, without any competent case under Part B, the applicant's application for interim relief must fail on this basis alone. The case under Part B is hopeless, and must therefore, even at this juncture, also fail. As a result, the applicant faces an insurmountable obstacle. She came to this court directly without making any attempt to follow the prescribed dispute resolution

process under the LRA for such an unfair dismissal dispute. As said above, this process required the applicant to first refer a dispute to the bargaining council for conciliation and if consolation ultimately failed, to then by way of referral to this court in the ordinary course, refer that dispute for adjudication, as this court is the final determinator of automatic unfair dismissal disputes. The LRA does not allow a direct approach to this court.

[15] In *Chirwa v Transnet Ltd and Others* (2008) 29 ILJ 73 (CC) at para 41 the Court said: '*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. At the least, litigation in terms of the LRA should be seen as the more appropriate route to pursue. Where an alternative cause of action can be sustained in matters arising out of an employment relationship, in which the employee alleges unfair dismissal or an unfair labour practice by the employer, it is in the first instance through the mechanisms established by the LRA that the employee should pursue her or his claims …'* Following on, and in *Gcaba supra at para 56* the Court held: *'… 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. This was emphasized in Chirwa by both Skweyiya J and Ngcobo J. If litigants are at liberty to relegate the finely tuned dispute-resolution structures created by the LRA, a dual system of law could fester in cases of dismissal of employees …*'

[16] So therefore, the applicant is compelled to have pursued a claim that she was unfairly dealt with and automatically unfairly dismissed on all the grounds that she alleged in her notice of motion and founding affidavit by way of a referral to the bargaining council. It is not competent to approach this court directly. As such, and by virtue of a failure to follow what is the prescribed dispute resolution processes under the LRA, the applicant simply has no right to the relief sought in her notice of motion, both in respect of part A and part B.

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[17] The applicant, faced with the difficulty of being unable to establish a right to the relief sought, then argues that because of her particular hardship she would suffer as a result of the dismissal, including her loss of salary, benefits and medical aid benefits, as well as her medical condition, this court should nonetheless come to her assistance. This approach is erroneous. Logically speaking, this kind of argument suggests that on the mere existence of particular personal circumstances and / or hardship on the part of the applicant, it effectively creates a right to relief when none exists in the 1st place. This surely cannot be. If the right does not exist in the first place, no amount of hardship can save the situation as one of the primary requirements for obtaining relief remains absent. All considered, it is not necessary to consider the applicant's personal circumstances. The applicant has not exited the starting block of establishing her right to the relief she is seeking. As such, she has not proven a prima facie right to the relief sought. That should be the end of the matter, no matter what the consequences may be when it comes to her particular personal circumstances.

[18] Therefore, and in sum, the applicant has failed to make out the case for the relief sought by her. She's failed to establish a prima facie right to the relief sought. Insofar as she seeks to rely upon an unfair dismissal, she is compelled to follow the prescribed dispute resolution processes established by the LRA, which entails, in the first instance, and as I have said, a referral of the dispute to the Bargaining Council for conciliation, which she never did. As such, her own personal circumstances upon which she placed so much reliance cannot come to her assistance. For all the reasons set out above, the applicant's application must fail, as she simply has not established even a prima farce right to the relief sought. Her application thus falls to be dismissed.

[19] When it comes to the issue of costs, in terms of Section 163(1) of the LRA, I have a wide discretion. The Constitutional Court has provided some guidance as to how this discretion needs to be exercised. In *Union for Police Security and Corrections Organisation v SA Custodial Management (Pty) Ltd and Others* (2021) 42 ILJ 2371 (CC) at para 35 where that Court said: *'In the labour context, the judicial exercise of a court's discretion to award costs requires, at*

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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 …'

[20] In applying my discretion in line with the *dictum* in *SA Custodial Management* as aforesaid, I must emphasize that in bringing this application, the applicant took up the valuable time and abused the already stretched resources of this court. And in the applicant doing so, she compelled the respondent to defend the case out of the constrained taxpayer's purse, which is not acceptable. What in reality happened in this case is an abuse of process. This court has consistently said that this kind of unfounded litigation is deserving of costs orders. The applicant must be told in no uncertain terms, hopefully also serving as an example to others, that exercising a right of access to the courts must be done in a responsible and proper manner. I fully align myself with the following recent *dictum* in *Mokoena v Merafong Municipality and Others* (2020) 41 ILJ 234 (LC) at para 36: '*In casu, the applicant brought a meritless application to this court and fairness dictates that the respondents cannot be expected to endure enormous costs defending litigation where more thought and consideration had to be put in before approaching this court on an urgent basis. This is more so where the costs incurred by the respondents are paid from taxpayers' money and I can see no reason why the taxpayers should be burdened with the costs in this application …*'.

[21] I thus conclude that this is an appropriate case where the exercise of my discretion under section 162(1) of the LRA must lead to a finding that the applicant being ordered to pay the costs of the application. The respondent has indicated that costs on the scale of party and party scale B would be acceptable and I am inclined to agree.

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

<u>Order</u>

1. The application is heard as one of urgency in terms of Rule 38.

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2. The applicant's application is dismissed
3. The applicant is ordered to pay the costs of the application on the party and party scale B.

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S Snyman

Acting Judge of the Labour Court of South Africa

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