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

[redacted]

Signature   31 July 2026
Date

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case no: **2026-128420**

In the matter between:

ERIC DUMISANI MBUYISA,	**First Applicant/Plaintiff**
SIBUSISO ZENZINKOSI BROOK SITOLE	**Second Applicant/Plaintiff**
FALAKHE BRUCE SITHOLE	**Third Applicant/Plaintiff**

and

ETHEKWINI MUNICIPALITY	**First Respondent**
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**Second Respondent**
COMMISSIONER HILDA GROBLER (*N.O.*)	**Third Respondent**

Heard: **25 June 2026**

Delivered: **31 July 2026**

Summary (Urgent interdict to halt disciplinary enquiry pending review of CCMA ruling refusing to convene S 188A(11) disciplinary enquiry – struck off the roll for lack of urgency – costs awarded on attorney own client scale)

JUDGMENT

LAGRANGE, J

Introduction

[1] The applicants in this matter ('Mbuyisa', 'Sitole' and 'Sithole') applied for a rule *nisi* preventing the first respondent ('the municipality') from proceeding with disciplinary enquiries, pending the outcome of a review of rulings issued by the third respondent ('the arbitrator') on 25 May 2026. In the event the rulings are set aside they seek an order that the second respondent ('the bargaining council' or 'SALGBC') has jurisdiction to adjudicate the dispute between the applicants and the municipality in terms of section 188A(11) of the Labour Relations Act 66 of 1995 ("the LRA") and setting the matter down for hearing accordingly.

[2] Section 188A(11) reads:

> *'Despite subsection (1), if an employee alleges in good faith that the holding of an inquiry contravenes the Protected Disclosures Act, 2000 (Act 26 of 2000), that employee or the employer may require that an inquiry be conducted in terms of this section into allegations by the employer into the conduct or capacity of the employee.'*

[3] The first ruling concerned Mbuyisa and Sitole and the second concerned Sithole. The factual circumstances underpinning both were essentially the same. The arbitrator, found in respect of Sithole that he did not even claim to have made a protected disclosure but had instructed Mbuyisa to report a conversation that the latter claimed to have had with an unidentified member of

the so-called ‘taxi mafia’ at the Pearls Hotel in Umhlanga. Having not been the person reporting the alleged protected disclosure, he was not entitled to invoke s 188A(11). The arbitrator found, following the LAC judgment in *IDC v Modika & others that* Mbuyisa and Brook had failed to establish any of the conditions identified in that judgment that an applicant under s 188A(11) must satisfy. Accordingly she ruled that their application under the section was without substance and there was no basis on which the bargaining council could schedule a s 188A(11) inquiry.

<u>Brief chronology</u>

[4] The events giving rise to the present dispute commenced on 22 October 2018 when the eThekwini municipality's Bid Evaluation Committee recommended the appointment of Blacks Joint Venture (BJV) for Contract E9412 at a contract value of R4,166,158.50. Subsequently, on 11 February 2019, the Bid Adjudication Committee approved Contract E9422 for the maintenance and construction of streetlights. Twenty-four service providers were appointed to the panel, with work allocations to be made in accordance with a predetermined pricing hierarchy and within an overall contract value of R114,035,080.00.

[5] On 28 November 2019, Mbuyisa, a Superintendent within the Electricity Unit, received a phone call from an unidentified individual instructing him to attend a meeting at the Pearls Hotel in Umhlanga. At the meeting, certain individuals identifying themselves as taxi industry representatives allegedly demanded that municipal projects falling within his area of responsibility be allocated to companies associated with them. They further informed him that his superior, Mr M Mthembu (‘Mthembu’), was allegedly aware of the arrangement and conveyed information concerning his private residence and his wife's place of employment, which was understood by Mr Mbuyisa as a threat. Mthembu was the head of the Electricity Unit at the municipality.

[6] On 3 December 2019, Mr Mbuyisa reported the incident to his immediate superior, Mr Sibusiso Sitole. Following discussions with Mr Sitole and a union representative, Mr Wiseman Mgilane, he attended Ethekwini Central Police

Station and, on 5 December 2019, deposed to a sworn affidavit setting out the circumstances of the alleged intimidation. According to Mbuyisa, he emailed it to Mthembu. The text of the affidavit reads:

> *'This protected disclosure is done with an advise from my union representative Mr. Wiseman Mgilane (SAMWU) and that of Mr. Sithole my immediate supervisor.*
>
> *I hereby report the incident that I encountered on 28 November 2019 whereby I received a call giving me an ultimatum summoning me to a meeting at the Pearls Hotel in Umhlanga. The unknown caller seemed to know most of my work details, as in who I was, what I do in the position I occupy at work. I was not given an option to attend this meeting, I was told to come. Indeed I honored the meeting where they introduced themselves as the taxi bus of well-known Ethekwini taxi family. NB. Name is withheld through the advice of my union representative Mr. Wiseman Mgilane, but will reveal during the sitting with the employer Mr. Mthembu. In the meeting I was told that they needed to work with me on all municipal projects at the lighting division that I am in charge of and that they have service providers that they are in cooperation with them and that I should not worry because my boss Mr. Mthembu knows about this meeting.*
>
> *I told them that I was merely a low level staff working with already appointed service providers. That is where threatening started, they told they know my address, my wife's work address and they left.*
>
> *Next day was 29 November 2019 way I had to switch on Christmas decorative lights in town. On Monday, 2 September 2019 I reported the incident to my union that I was forced to do unlawful act of which I refused.*
>
> *Union advised me to tell my manager Mr. S Sithole about the incident which I did on 3rd December 2019. He also advised me to have a written statement to my employer Mr Mthembu since his name was mentioned at that meeting.*
>
> *This is the main reason I report this in of protected disclosure of information through my union representative Mr. Wiseman Mgilane who shall submit this disclosure to my employer head of electricity Mr. Max Mthembu.'*

(*Sic* – emphasis added)

[7] The municipality contends that there is no documentary or other objective evidence demonstrating that the 2019 affidavit was ever served on, delivered to, or brought to the attention of municipal management. In reply, the applicants rely largely on an explanation regarding the migration of municipal information technology systems and the resultant loss of records. No confirmatory affidavit from the individual allegedly responsible for transmitting the disclosure appears to have been produced. On the papers, the respondent's allegation therefore remains substantially unanswered.

[8] Later, concerns emerged regarding expenditure under Contract E9422. During February 2020, Mr Sitole was reportedly advised of substantial over-expenditure on the contract and instructed that further work allocations should cease. Despite these concerns, work continued to be allocated under the contract during the period that followed.

[9] A municipal investigation was subsequently undertaken by the Business Risk Control Unit. Although the applicants contend that this investigation did not implicate them in wrongdoing, further investigations were later initiated. In October 2021, Mr Mthembu presented a regularisation report to the Bid Adjudication Committee in relation to expenditure under Contract E9422. It is alleged that his report significantly understated the extent of the irregular expenditure which, according to later forensic findings, exceeded R200 million.

[10] A criminal case was opened during October 2022 concerning irregularities related to Contract E9412. This was followed by a comprehensive forensic investigation conducted by the City Integrity and Investigations Unit (CIIU).

[11] On 17 April 2023, the CIIU finalised the forensic report under reference INV 001/07/2020. The report concluded that Contract E9412 had resulted in irregular expenditure amounting to approximately R 18 million, while Contract E9422 had generated irregular expenditure of about R250,000. The report recommended disciplinary action and consequence management against several officials, including Mthembu and the applicants. The applicants' replying affidavit does not engage in any detail with the specific factual findings contained in the forensic report.

[12] Between April and November 2024, the municipality served formal disciplinary charges on the applicants. The allegations concerned, *inter alia,* failures to monitor contract values, authorisation of expenditure exceeding approved budgets, and failures to provide documentation required by investigators. The applicants deny any wrongdoing on their part.

[13] Separate disciplinary proceedings for each applicant commenced during April 2025 and continued thereafter. It was only on 23 April 2026 that the applicants referred their matter to the South African Local Government Bargaining Council in terms of section 188A(11) of the Labour Relations Act. The applicants state that it was only during April 2026, that they obtained legal advice concerning the legal significance of the 'disclosure affidavit'. The applicants claim that, even though the enquiries might have been initiated in April 2025, the enquiry only commenced a year later. They argue that there is no requirement that they had to raise the alleged protected disclosure within a specified time-limit. The municipality contends that the applicants' delay in raising the disclosure shows they were not acting in good faith.

[14] The applicants explain that proof of delivery of the affidavit to Mthembu is missing because the municipality migrated its computer systems from Groupwise to Outlook in 2023. This migration completely wiped historical local data from employees' active computers. While a master data backup exists, it is restricted and only accessible by the respondent's centralized administration. The applicants claim that because Mr. Mthembu is no longer employed by the municipality, they cannot easily obtain a confirmatory affidavit from him acknowledging receipt. The municipality disputes the migration explanation, which it claims is a fabricated excuse, noting that a forensic search of immutable master backups found no trace of the disputed document.

[15] The applicants contend that the disciplinary proceedings constituted an occupational detriment arising from Mr Mbuyisa's 2019 disclosure and sought an inquiry by an independent arbitrator in place of the employer-led disciplinary process.

[16] On 25 May 2026, the third respondent (the arbitrator') dismissed the applications. The Commissioner found that the applicants had failed to

establish that the 2019 affidavit was communicated to the municipality or any authorised representative thereof. In the absence of proof that the disclosure had been brought to the employer's attention, the Commissioner concluded that the requirements for a protected disclosure had not been established.

[17] Following an indication by the municipality that the disciplinary proceedings would continue notwithstanding a pending review application, the applicants launched urgent proceedings in the Labour Court on 3 June 2026. They sought interim relief staying the disciplinary proceedings pending a review of the Bargaining Council's rulings. The application was enrolled for hearing on…………

<u>Evaluation</u>

Urgency

[18] The first question is whether the applicants acted with sufficient speed in launching the urgent application. Firstly, did they act promptly after receiving the adverse ruling on their requests for a section 188A (11) inquiry ?

[19] On 15 April 2026, the applicants formally learned of the arbitrator's ruling, which stated that the bargaining council lacked the jurisdiction to force a Section 188A(11) conversion without the employer's prior consent. The following morning, the applicants' attorneys took immediate action by drafting and transmitting a formal letter to the municipality's evidence leader and the disciplinary chairperson to request an urgent stay of the internal disciplinary enquiry, pending a review of the rulings. On 17 April 2026, he delivered a formal written response that refused the stay and confirmed that the internal hearings would proceed as scheduled. Later that day, the applicants' attorneys finalized, signed, and served the current court application to halt the internal disciplinary process. In this limited respect, the applicants cannot be said to have been dilatory in approaching the court.

[20] However, another facet of urgency concerns the timing of the application, in the context of the disciplinary proceedings. The question is whether the request for the section 188A(11) enquiry was long overdue and should have been acted

upon at least a year earlier, when the applicants were charged. The municipality points out that the existence of an alleged protected disclosure was kept under wraps for a year and that the applicants only acted on it, when they could see the enquiries were getting underway. The applicants' response is that they only became aware of the legal significance of Mbuyisa's affidavit on obtaining legal advice in April 2026, on the strength of which the section 188A(11) request was made.

[21] This explanation seems inherently implausible. It is readily apparent from the text of the affidavit that Mbuyisa knew full well at the time he made the affidavit that he believed, on the advice of his union, that he was making a protected disclosure and that it had to be conveyed to his employer. It seems most improbable he would have been unaware of the implications of making a protected disclosure, when the sole value of making a protected disclosure is to protect the employee from retaliatory disciplinary action. It seems far more likely that the protected disclosure referral was only made once it was deemed necessary to stop the enquiry progressing.

[22] In any event, Mbuyisa provides no explanation why he did not raise the protected disclosure when he was charged in 2025. If he genuinely believed the charges were trumped up as retaliation for the disclosure he made six years earlier, it is wholly improbable that this improper reason for charging him would only have occurred to him a year after he was charged. It was not necessary for him to take legal advice before he could entertain the belief that the real motive of the municipality for charging him was because of his alleged whistleblowing, especially if he viewed the charges as ones that were trumped up. No explanation is provided why he had a revelation after a year that it might be worth getting advice on whether the alleged protected disclosure could avail him a defence. In all likelihood this was simply a poor attempt to justify the delay in acting.

[23] The applicants correctly point out that there is no time limit in s 188A(11) for requiring such an enquiry within a certain time period. However, it stands to reason that since that enquiry would be a substitution for the employer's internal enquiry, once an employee is charged and believes the reason for

being charged is an ulterior one arising from them making a protected disclosure, they should act quickly to prevent the enquiry proceeding.

[24] In *Mtweta v Transnet Freight Rail and Operating Division of Transnet (SOC) Limited* [1]and *Lindokuhle Tsibani v The Estate Agency Affairs Board and Others*[2], the applicants in those matters had launched similar urgent applications two months and more than three months respectively after receiving charges. In both instances, this court dismissed the applications for lack of urgency. In this instance, Mbuyisa delayed for nearly a year, despite allegedly having expressly made a protected disclosure and believing that was the reason for the disciplinary action taken against him.

[25] In the circumstances, he ought to have acted soon after the charges were proferred, not a year later. For this reason, his application must fail for lack of urgency.

<u>Issues bearing on costs</u>

[26] Although the applications stand to be struck off the roll for lack of urgency, there are other aspects of the application which have a bearing on costs and must be mentioned.

Sithole and Sitole had no basis for being parties to the application

[27] Even on the applicants' own version, only one of them alleged he made a protected disclosure, namely Mbuyisa. Only he could exercise the right to require a section 188A(11) enquiry. There is no provision for one employee who makes a protected disclosure to act as an implicit proxy for others. If a protected disclosure is clearly made jointly by a group of employees that is another matter, but this was not the pleaded case. In the circumstances, their participation in the application was highly opportunistic to say the least

Absence of a prima facie right to a section 188A(11) enquiry

[28] For the sake of completeness, assuming that the application had been brought with sufficient urgency, Mbuyisa ought not to have succeeded in my view,

[1] (J 58/2024) (2024) ZALCJHB 17 (29 January 2024)

[2] (2021) ZALCJHB 150 (24 June 2021),

because he would not have been able to establish a *prima facie* right to the enquiry. This is also relevant to the question of a cost order. What would have Mbuyisa have to demonstrate to make out a *prima facie* right to the section 188A(11) inquiry, if the application was urgent? There are conflicting Labour Appeal Court judgments about the pre-requisites an employee must meet before being entitled to require a section 188A(11).

[29] Following the wording of the provision, in *National Commissioner Department of Correctional Services v Nxele and Another*[3], the LAC held that:

> '*[14] There is no obligation on an employee who seeks to rely on section 188A(11) to prove that the holding of the disciplinary hearing constitutes a contravention of the PDA. Rather, what is required is that the employee alleges in good faith that the holding of an inquiry does so.*'

[30] By contrast, in *Industrial Development Corporation of South Africa v Modika and Others*[4], the LAC reaffirmed jurisdictional pre-requisites that an employee must meet to satisfy the threshold to obtain a section 188A(11) enquiry[5], which were first enunciated in the Labour Court decision in *Mamodupi v Property Practitioners Regulatory Authority and Another*[6]. In *Mamodupi* the court described the jurisdictional requirements to be met thus:

> '*[45] … Accordingly, in my view the provisions of the subsection*[7] *are evocable if the following jurisdictional facts are present in the order set out below:*
>
> *45.1 The employee must make a protected disclosure;*
> *45.2 Thereafter, the employer must subject the employee who already made a protected disclosure to an occupational detriment;*
> *45.3 Once so subjected, an employee must allege honestly and sincerely so that a causal connection does exist between his or her protected disclosure and the occupational detriment. Differently put, it is because of having made a protected disclosure that an employer chose to respond by an occupational detriment.*

[3] [2025] 5 BLLR 472 (LAC)

[4] (A2026/037072) [2026] ZALAC 21 (17 March 2026)

[5] At paragraphs 37, 47-49 and alluded to elsewhere in the judgment

[6] J68/23) [2023] ZALCJHB 19 (13 February 2023)

[7] I.e. S 188A(11)

> *[47][8] In my view <u>if any of the above stated jurisdictional facts is absent, subsection 188A (11) cannot be invoked</u>. Therefore, to my mind, the council; accredited agency and the commission must refuse to entertain the request that an inquiry be conducted in terms of this subsection if any of the jurisdictional facts are absent.'*

[31] Even if the less demanding standard of *Nxele*, is applied to Mbuyisa it is difficult to see how he could succeed, even on a *prima facie* basis of establishing his right to a section 188A(11) enquiry. It is most improbable that he could have *bona fide* believed that the municipality waited six years and initiated a wide-ranging and lengthy forensic investigation which led to several employees being charged, including himself, just for the sake of punishing him for his disclosure so long ago, which appears to have had no adverse consequence for the municipality at all. Even less so could he have met the pre-conditions endorsed in *Modika*, which would almost require him to prove he actually did suffer an occupational detriment, before he would be entitled to an independent disciplinary enquiry.

<u>Costs</u>

[32] Bearing in mind the discussion above, I am not persuaded that this was anything more than a highly speculative and application, which was patently late, obviously with no prospect of success as far as Sitole and Sithole are concerned, and with virtually none in the case of Mbuyisa. It hardly bears repeating that this court has time and again warned applicants who wish to halt disciplinary enquiries on an urgent basis, that such applications should not be undertaken lightly. If parties engage in such high risk litigation, there is no reason in law or fairness why such gambles should be at the expense of the parties who are compelled to oppose them.

[33] Accordingly, the municipality should not be out of pocket as a result of opposing this application.

<u>Order</u>

[8] NB, it appears that there was a numbering typographical error. Paragraph 47 should be paragraph 46.

1. The application is struck off the roll for lack of urgency.

2. The Applicants are jointly and severally liable for the First Respondent's costs incurred in opposing the application, including the costs of counsel, which are payable on an attorney own client scale, the one paying the others to be absolved.

[redacted]

Lagrange J

Judge of the Labour Court of South Africa

Appearances:

For the Applicants: --- S R Mhlanga of Mahlanga Incorporated.

For the Respondent: --- S Tshangana
Instructed by: --- Mojela Hlazo Attorneys Inc