



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

TDM 31/08/2026
Signature Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: 2026-201594

POLICE AND PRISONS CIVIL RIGHTS UNION

ON BEHALF OF MAJOR GENERAL FEROZ KHAN

Applicant

and

MINISTER OF POLICE

First Respondent

**ACTING NATIONAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE:**

LT GENERAL H.K. SENTHUMULE

Second Respondent

DIVISIONAL COMMISSIONER: CRIME INTELLIGENCE:

LT GENERAL S.D. KHUMALO

Third Respondent

MAJOR GENERAL J.B. KHUMALO N.O.

Fourth Respondent

Heard: 25 and 26 August 2026

Delivered: 31 August 2026

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicant (POPCRU), acting on behalf of its member (Khan) approached this Court on an urgent basis to interdict the Respondents from invoking Regulation 9(7) of the South African Police Service Discipline Regulations, 2016¹ (Regulations) pending the determination of an application for declaratory relief, premised on the provisions of sections 22 and 23 of the Basic Conditions of Employment Act² (BCEA) and a review of *inter alia* the decision to invoke Regulation 9(7)(a) and (b) and of the refusal of an application for legal representation and the postponement of the disciplinary proceedings.

[2] The application is opposed. The Respondents raised urgency, jurisdiction and *locus standi* as points *in limine*. I will deal with the points *infra*.

The Regulations

[3] Regulation 9 is central to the matter before me. The Regulations were promulgated to regulate discipline within the South African Police Service (SAPS), and their purpose is, *inter alia*, to provide a framework for the application of discipline in a prompt, fair, consistent, and progressive manner, as part of a line management function.

[4] Regulation 9 provides for an expedited process, and relevant for purposes of this judgment are the following provisions:

'Expeditious Process

- (1) A *supervisor* who is satisfied that the alleged *misconduct* is of a serious nature and or falls within the ambit of regulation 5(4) he or she must ensure that the expeditious process is initiated, and a full substantiated report is submitted to the National Commissioner or a person designated by him or her, which person may not hold a rank lower than that of Brigadier and assumes the power of the *employer* for purposes of this regulation.

¹ GN R1361, GG 40389, 1 November 2016.

² Act 75 of 1997, as amended.

- (2) The said person must-
- (a) on receipt of the full substantiated report satisfy himself or herself that the alleged *misconduct* is *misconduct* as contemplated in regulation 6(4) and that the nature of the *misconduct* justifies an expeditious procedure;
 - (b) if satisfied that the misconduct justifies an expeditious procedure he or she must notify the employee of the allegations of *misconduct* and instruct the employee to appear before him or her to answer to the allegations of *misconduct*. The notice must contain a description of the allegations of misconduct, that he or she has the right to be represented, the date and time when the *employee* must appear, and supporting documents and statements (if available). The notice period may not be less than five (5) *calendar days*, and it must be served in the manner set out in these Regulations. If not satisfied that the *misconduct* justifies an expeditious procedure he or she must refer the matter back to the *supervisor* for it to be dealt with in accordance with the normal procedure;
 - (c) when the *employee* appears before him or her, he or she must inform the *employee* of the allegations of misconduct and allow the *employee* to defend him - or herself against the allegations (as provided in the expeditious procedure). The said person may take any steps deemed necessary to finalise the matter provided for in these Regulations;

.....

- (7) If the *employee* fails to appear before the said person referred to in regulation 9(1) on the date set out in the notification or any other date determined -
- (a) the *employee* shall, from the date of such failure to appear, be deemed to be suspended without remuneration;
 - (b) the said person must postpone the matter indefinitely, and it shall only reconvene at the instance of the *employee* concerned, after liaising with such person: Provided that in the event that the *employee* fails to take steps to reconvene the matter within ten (10) *working days* of such date, the said person must record such failure and the *employee* shall forthwith be deemed to be discharged from the Service; and

- (c) in the event of the matter being reconvened the said person must inquire into the reasons for the employee's failure to appear and in the absence of good cause shown, confirm or set aside the suspension and finalise the matter,
- (8) If the alleged *misconduct* does not justify an expeditious procedure, the procedure as per regulation 8(1), (2), (3), (4) and (5) must be followed.'

Background

- [5] Khan is employed as the Head of Crime Intelligence and holds the rank of Major General.
- [6] On 28 June 2026 Khan was shot and subsequently hospitalised until 17 July 2026. On 29 July 2026, Khan's representative was served with a notice of an expedited disciplinary process as envisaged in Regulation 9(2)(b). The supporting material was also delivered, and proceedings were scheduled to commence on 12 August 2026. Khan was required to appear in person at an inquiry scheduled for 12 to 14 August 2026.
- [7] At the time the expedited process was initiated, Khan had a medical certificate stating he was booked off work until 3 August 2026. The dates he had to appear in terms of the Regulation 9(2)(b) notice were after the expiry of the period indicated on his medical certificate.
- [8] Khan did not appear on 12 August 2026, as was required, but instead POPCRU and his legal representatives appeared on his behalf. They presented two applications to the Fourth Respondent (presiding officer), to wit: an application for legal representation and an application for postponement. The Applicant sought a postponement until the expiry of Khan's medical incapacity and the reassessment of his condition. The application for legal representation was refused.
- [9] The presiding officer also rejected the postponement application and directed that the proceedings be convened the following day, 13 August 2026, and that Khan was required to attend, even if virtually.

- [10] Once again, Khan failed to appear. On 17 August 2026, the chairperson delivered a written decision, which forms the subject matter of the review application. Regulation 9(7) was invoked, and it exposed Khan to suspension without remuneration and the operation of the ten working day mechanism contemplated in Regulation 9(7)(b). The said period expired on 26 August 2026.
- [11] The presiding officer recorded that Khan, as the charged employee, was afforded a period of ten working days, expiring on 26 August 2026, within which to reconvene and/ or liaise with him in relation to the disciplinary proceedings. It was clearly recorded that should Khan fail to do so within the prescribed period, the disciplinary process shall proceed in accordance with the provisions of Regulation 9(7)(b).
- [12] The Applicant subsequently filed this urgent application, instead of liaising with the presiding officer.
- [13] The Applicant submitted that Regulation 9(7) must be used in exceptional circumstances and that there is no objective reason why this should have been invoked. It was submitted that the narrow issue is whether Regulation 9(7), with its extraordinary consequences of suspension without remuneration and potential deemed discharge, could lawfully and rationally be invoked against an employee whose non-attendance was medically explained, objectively supported by medical evidence, while he actively engaged with the process through his representatives. This will nevertheless be an issue to be canvassed under Part B of this application when the review of such decision is considered.
- [14] The Respondents' case is that the Applicant has instituted an urgent application to interdict the disciplinary process, rather than liaising with the presiding officer regarding when the disciplinary proceedings can be reconvened, as provided for in Regulation 9(7). The Applicant rather seeks to stop the process by seeking the Court's intervention. The Applicant uses the Court to stall the coming into operation of the regulatory provisions. All that Khan is required to do to avoid the drastic consequences of this non-

appearance is to liaise with the presiding officer as to when the disciplinary process will reconvene.

LABOUR COURT

Analysis

[15] As already alluded to, the Respondents raised points *in limine* that warrant closer consideration.

Jurisdiction

[16] The first issue to be considered is whether this Court has jurisdiction to grant the relief sought by the Applicant in part A of his notice of motion. This Court is not concerned with the merits of part B (the review application) as the Applicant does not seek to pursue the review application as an urgent matter.

[17] In part A, the Applicant seeks the following relief:

- '1. Pending the final determination of Part B of this application, including any application for leave to appeal and appeal prosecuted with reasonable expedition:
 - a. the operation and implementation of the decision and/or ruling of the Fourth Respondent dated 17 August 2026, invoking Regulation 9(7) of the South African Police Service Discipline Regulations, 2016 ("the impugned decision") in respect of Major General Feroz Khan, is suspended;
 - b. the Respondents are interdicted and restrained from invoking, implementing or giving effect to Regulation 9(7)(a) against Major General Khan pursuant to the impugned decision;
 - c. the Respondents are interdicted and restrained from suspending Major General Khan without remuneration, *alternatively* withholding any salary, remuneration, medical aid, benefits or other employment-related entitlements pursuant to the impugned decision;
 - d. the running of the ten-working-day period contemplated in Regulation 9(7)(b), and recorded by the Fourth Respondent as having commenced on 13 August 2026 and expiring on 26 August 2026, is suspended;

- e. the Respondents are interdicted and restrained from deeming Major General Khan to have been discharged from the South African Police Service pursuant to Regulation 9(7)(b);
 - f. the Respondents are interdicted and restrained from recording, processing, implementing or otherwise giving effect to any deemed discharge of Major General Khan pursuant to the impugned decision;
 - g. Major General Khan shall not be regarded as having failed to take any step contemplated in Regulation 9(7)(b) during the period in which the orders granted under Part A remain operative.
 - h. Major General Khan's absence from the disciplinary proceedings during the currency of his medically certified incapacity shall, pending the final determination of Part B, be treated as absence on authorised sick leave, and his remuneration and benefits shall continue to be paid accordingly.
2. Pending the final determination of Part B, the Respondents are interdicted and restrained from proceeding further with the Regulation 9(2)(b) disciplinary proceedings against Major General Khan arising under case/reference number CI HQ DR 40/05/2026.
 3. To the extent that any salary, remuneration or employment benefit has already been withheld pursuant to the impugned decision, the Respondents are directed forthwith to restore payment thereof pending the determination of Part B.'

[18] The Applicant pleaded that:

'the present matter directly concerns the exercise of public power against one of the Applicant's members and threatens his employment, his remuneration, his contractual entitlement to remuneration under the incapacity leave granted to him, and his constitutional right to fair labour practices. In addition, the applicant has a direct institutional interest in ensuring that disciplinary powers exercised by SAPS against its members remain within the limits of the empowering Regulations and the Constitution.'

[19] On jurisdiction, the Applicant submitted that Khan's primary claim is contractual. The impugned decision strips him of remuneration assured to him by the grant of incapacity leave. It was made clear that this is not '*an unfair*

dismissal claim disguised as a review” and that the Applicant does not ask this Court to determine whether a dismissal is fair under the LRA. The issue is that Regulation 9(7) purports to alter Khan’s remuneration and employment status and creates a mechanism capable of terminating his employment by operation of the Regulation. As the matter concerns a contract of employment, the Court has jurisdiction under section 77(3) of the BCEA.

[20] The Respondents disputed this Court’s jurisdiction and stated that the Applicant has no remedy for this Court to intervene or interdict incomplete disciplinary proceedings; accordingly, this Court has no jurisdiction to determine whether the disciplinary hearing should be interdicted pending the review application. The Labour Court does not have any jurisdiction to intervene or adjudicate any alleged unfairness, unlawfulness, illegalities or irregularities pertaining to any conduct or failure of any party to the employment relationship, where it comes to incomplete disciplinary proceedings. Regulation 9(7) is the product of a collective agreement, and matters specific to the Regulations fall within the jurisdiction of the Safety and Security Sectoral Bargaining Council (SSSBC). The Respondents further submitted that the provisions of Regulation 9(7) are triggered by the operation of law and that there is no ‘decision’ which could be the subject of an application for review.

[21] The Applicant’s answer is that the Respondents’ characterisation of the matter as an attempt to interdict an incomplete disciplinary process, misconstrues the application. This is so because a decision has already been taken under Regulation 9(7), with consequences for Khan’s remuneration and imminent discharge. In argument, I canvassed the issue of jurisdiction with Mr Dollie, for the Applicant, and he submitted that this is not an unfair dismissal dispute but a contractual claim, and that, therefore, this Court has jurisdiction. Mr Mphahlele, for the Respondents, submitted that the Regulations constitute a collective agreement that binds the Applicant and the Respondents, and that this is not a case premised on a contractual claim.

[22] In my view, this is a classic case of ‘disavowal’ - a litigation strategy where an employee attempts to bypass the statutory dispute resolution procedures set

out in the LRA, by explicitly denying or 'disavowing' any reliance on the LRA. In employing the disavowal strategy, an internal disciplinary process, a dismissal or suspension, is framed as a breach of contract or an 'unlawful' act, so that the employee could rush directly to the Labour Court on an urgent basis, where all or any reference to 'fairness' or the LRA is then renounced.

[23] Distilled to its essence, Part A of the relief sought seeks an order to interdict and restrain the Respondents from invoking, implementing or giving effect to Regulation 9(7)(a) against Khan, from suspending him without remuneration, from deeming Khan to have been discharged from the SAPS pursuant to Regulation 9(7)(b) and from proceeding further with the Regulation 9(2)(b) disciplinary proceedings against him. Although couched as a contractual claim, the relief sought does not arise from a breach of contract but rather from the institution and application of the Regulations, which provide the framework for disciplinary action within the SAPS.

[24] The Labour Appeal Court (LAC) in *Passenger Rail Agency of South Africa and Others v Ngoye and Others*³ held that:

'While there are provisions in the legislation, notably section 77(3), that endow the Labour Court with authority to adjudicate contractual claims. In my view, these provisions must be interpreted by having regard to the objectives sought to be achieved by the labour law dispensation as a whole. I do not believe that the intention of the legislature in enacting section 77(3) was to give the Labour Court jurisdiction over disputes that arise from dismissals and ULPs which should, in the first instance, be categorised as unfair dismissal disputes or unfair labour practice disputes and dealt with by the CCMA. In dealing with employment disputes, our first point of reference should be the constitutional right to fair labour practices, which is given effect in the LRA.'

(My emphasis)

The motive for litigants choosing to follow an alternate route to that which is set out in the LRA is seemingly to be awarded a quicker remedy than that which is available in terms of the LRA. However, it appears that litigants are not aware of the requirements that must be met to qualify for a contractual

³ (2024) 45 ILJ 1228 (LAC) at paras 28 and 29.

remedy such as specific performance or damages. This is potentially the reason for the proliferation in the use of contractual recourse. In this regard, I refer to what was said by this Court more than five years ago in *Toyota SA Motors (Pty) Limited v Nzuza and others*:

“...it appears to have become fashionable for dismissed employees to come to the Labour Court in terms of the BCEA and claim breach of contract seeking either specific performance or damages. I do not know the reason that has given rise to this, but the risk associated with claims made in terms of the BCEA, as in this matter before this Court, is enormous. Firstly, unlike in the LRA the claimant must prove an unlawful breach and not unfairness for the termination of the employment; next in terms of the LRA reinstatement is generally compulsory where a dismissal is found to be substantively unfair, specific performance consequent upon a breach is not, and generally it is a discretionary relief.” ‘

[25] In *SA Broadcasting Corporation (SOC) Limited v Commission for Conciliation, Mediation and Arbitration and Others*⁴, the Court was faced with a matter in which the employer denied having dismissed an employee and instead submitted that it was a termination of the contract. The Court held that:

‘The point in *limine* amounts to an assertion that an employer is entitled to elect to treat an act of alleged misconduct by an employee either as a breach of contract, or a breach of a disciplinary rule. In the former case, the employee may not claim to have been dismissed in the sense that ‘dismissal’ is defined in s 186 of the LRA, and may certainly not claim to have been unfairly dismissed. Any recourse by the employee, so the argument goes, is thus confined to a contractual remedy, a remedy that the CCMA is not empowered to grant. This proposition only has to be stated in those terms to illustrate how profoundly unsound it is.

The definition of ‘dismissal’ in s 186 of the LRA expressly includes circumstances where the employer “has terminated employment with or without notice.” Whether the employer casts the termination in the contractual language of acceptance of the repudiation of a contract of employment and

⁴ (2020) 41 ILJ 493 (LC) at para 12.

an election to cancel the contract, this is no more or no less than a termination of employment, with or without notice (i.e. a summary termination), which in turn, by definition, constitutes a dismissal for the purposes of s 186. This is a matter over which the CCMA exercises jurisdiction, at least where the reason for dismissal is misconduct, a reason that is not in dispute in the present instance (see s 191(5)).

I find it disconcerting to have to record such a trite principle – to any labour lawyer, this is a statement of the manifestly obvious. Were the SABC's point in *limine* to be upheld, it would be open to employers to avoid the statutory consequences of an unfair dismissal simply by casting a termination of employment in common law contractual terms. The inadequacies of the law of contract to protect employees against a termination of employment without a fair reason and without following a fair procedure is the *raison d'être* of the statutory protection against unfair dismissal. This protection has its roots in the power imbalance inherent in the employment relationship and the remedial constitutional right to fair labour practices, a fact acknowledged many times over by this court, the LAC and the Constitutional Court.

[26] The same principles apply where an employee seeks to avoid the statutory consequences of an unfair disciplinary process, suspension or dismissal by framing the dispute in contractual terms.

[27] The Labour Court derives its jurisdiction from section 157(1) and (2) of the LRA and its powers from section 158 thereof. In *Natal Sharks Board v SA Commercial Catering and Allied Workers Union and Others*⁵ the Court held that '*Powers and jurisdiction are separate concepts that should not be confused.*'

[28] In *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd and Another*⁶ the Court held that:

'I must accordingly turn to the question whether this court has jurisdiction to entertain the present application. This question is intimately intertwined with the question whether the applicant has a right to have the court intervene and come to his assistance at this stage. I might, at the outset state that if the

⁵ 1997 18 ILJ 1324 (LC) at p1327 I.

⁶ 1998 19 ILJ 635 (LC) at p638 E-F.

court has the jurisdiction it would have the power to grant an appropriate remedy. But because it has a power does not mean that it has jurisdiction. This proposition is sometimes overlooked.'

[29] In *Shezi v SA Police Service and Others*⁷(*Shezi*) the Court considered the issue of jurisdiction and held that:

'This court is a creature of statute. Its inherent powers, authority and standing are equal to that of a Division of the High Court, but only in relation to matters under its jurisdiction (see section 151 (2) of the LRA). There is a misconception that the court has jurisdiction over all disputes that arise in the context of an employment relationship. It does not.'

[30] The question is whether, absent a specific statutory provision that delineates the Labour Court's jurisdiction, intervention in internal suspension disputes and incomplete disciplinary proceedings are matters that arise in terms of the LRA or another law, and which are to be determined by the Labour Court.

[31] The Applicant did not point to any specific provision in the LRA, save for broad reference to sections 157 and 158 of the LRA and to sections 22 and 23 of the BCEA, which confer jurisdiction on this Court to interfere in internal suspensions or incomplete internal disciplinary hearings.

[32] As alluded to, the pertinent question is whether this Court has jurisdiction to intervene in internal suspensions or incomplete internal disciplinary hearings.

[33] The jurisdiction of the Labour Court is specifically circumscribed and determined in section 157 of the LRA and it does not include general jurisdiction to intervene, *in medias res* and on an urgent basis, in any conduct of an employer, relating to *inter alia* the conducting of discipline or suspension etcetera, in the event that it is pleaded that such conduct is unfair or unlawful.

[34] In *Steenkamp and Others v Edcon Ltd (National Union of Metalworkers of SA intervening)*⁸(*Edcon*), the Constitutional Court considered whether the Labour Court had jurisdiction to determine if a dismissal was unlawful, as opposed to being unfair. As the LRA created special rights and obligations that do not

⁷ (2021) 42 ILJ 184 (LC) at para 9.

⁸ (2016) 37 ILJ 564 (CC) at para 130.

exist at common law, including the right of an employee not to be unfairly dismissed, it also created principles applicable to those rights, as well as special processes and fora for their enforcement. The Court confirmed that 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. It was held that:

'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.'

[35] In *Cibane and Another v Premier, Province of Kwazulu-Natal and Another*⁹ (*Cibane*) the LAC confirmed that, outside the scope of any statutory provision that specifically confers jurisdiction on the Court, the Labour Court has no jurisdiction, in any general sense, to determine the unlawfulness of employer conduct. The position was finally clarified by the LAC, which pertinently revisited *Booyesen*, with due regard to what was decided in *Edcon*. Specifically referring to the *dicta* in *Edcon*, the LAC held that:

'It is clear from this passage that outside of the scope of any statutory provision that specifically confers jurisdiction on the Court, the Labour Court has no jurisdiction, in any general sense, to make any determination of the unlawfulness of employer conduct.'

[36] The LAC held that:

'In summary: to the extent that *Booyesen* 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. As with every matter that serves before the Labour Court, jurisdiction is a matter to be determined in every case by reference to the pleadings and an enabling statutory provision, in the form of the LRA or other jurisdiction conferring statute, that extends jurisdiction to the Court to adjudicate the dispute disclosed by the pleadings.'

⁹ (2025) 46 ILJ 2587 (LAC) at para 24 and 32.

[37] It is evident from *Cibane* that the LAC clarified the position to be that there is no general rule 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.

[38] In *Mabhena v Theewaterskloof Municipality and Others*¹⁰ the Court followed *Cibane* and held as follows:

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 unfairness, unlawfulness, illegalities or irregularities pertaining to any conduct or failure of any party to the employment relationship where it comes to incomplete internal disciplinary proceedings. What the applicant in any litigation proceedings, where intervention from the Labour Court is sought, must do, is to substantiate the jurisdiction of the Labour Court by specifically matching the cause of action or issue in dispute, to a specific provision as contained either in the LRA itself or in any other related employment law, such as for example the Employment Equity Act (EEA) or Basic Conditions of Employment Act (BCEA). The applicant must also specifically indicate on what provision in any of these items of legislation the applicant relies. If that cannot be done, or is not done, then there is no jurisdiction. (Footnotes omitted)

[39] *In casu* Khan effectively seeks to stay his internal disciplinary process and the consequences of Regulation 9(7), pending an application for review of the said process as well as an application for declaratory relief in terms of the BCEA. Although this Court has jurisdiction to adjudicate disputes under the BCEA, as provided for in section 77(3) of the BCEA, it has no jurisdiction to intervene in incomplete internal disciplinary hearings or suspension disputes.

[40] In any event, Khan's reference to sections 22 and 23 of the BCEA does not assist him in this urgent application and the relief sought in Part A. This is because the dispute is evidently about Regulation 9(7), its operation and application, and not about whether Khan has a right to sick leave.

¹⁰ (2026/128968) [2026] ZALCCT 106 (30 June 2026) at para 52.

[41] Section 23(1) of the Constitution guarantees everyone the right to fair labour practices. The LRA was enacted to give effect to the said section. To the extent that the Applicant placed reliance on the Constitution, such reliance cannot assist the Applicant by virtue of the application of the principle of subsidiarity. The LRA gives effect to section 23 of the Constitution, which makes direct reliance on the Constitution in disputes under the LRA impermissible. The prohibition of unfair conduct in the workplace is regulated by the LRA, pursuant to the Constitutional imperative in section 23, which gives effect to this right. It follows that the Applicant cannot rely on the Constitution directly to assert his rights set out in the LRA, without challenging the constitutionality of the LRA. This is made clear by the Constitutional Court in *My Vote Counts NPC v Speaker of the National Assembly and Others*¹¹:

‘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 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 ...’

[42] It was confirmed, once again, that the LRA has created a statutory dispute resolution process to determine substantive and procedural fairness of dismissals and that disputes about procedures followed in disciplinary proceedings ought to be determined by the institutions created for that purpose. It was held that¹²:

‘This approach is consistent with the structure of the LRA as it applies to workplace discipline. The Act replaced the onerous procedural requirements in disciplinary enquiries developed by the industrial court under the 1956 LRA with a focus on informal workplace disciplinary processes and arbitration as the primary means to ensure fair employer conduct (see *Avril Elizabeth*

¹¹ 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.

¹² *Id* fn 7 at para 21.

Homes [2006] 9 BLLR 833 (LC)). As the court has previously observed (*Ngobeni v Prasa Cres and others* [2016] 8 BLLR 799 (LC)), urgent applications where this Court is asked to intervene in disciplinary hearings run the risk of bypassing the statutory dispute resolution structure as established by the LRA, in the form of the CCMA and bargaining councils. One of the primary functions of those structures is to determine the substantive and procedural fairness or otherwise of dismissals. This court, and in particular the urgent court, has regrettably become the means through which process-related grievances are sought to be aired, more often than not as an element of a legal strategy in which every step of a disciplinary process is subjected to challenge. This Court ought to be cautious not to become a willing accomplice to strategies of this nature. Genuine disputes about fair procedure in the exercise of workplace discipline ought to be determined at the lowest possible level primarily by the institutions created for that purpose.'

[43] In *George v Nyoka and Others*¹³ the Court also dealt with an urgent application to intervene in disciplinary proceedings. The Court remarked on the stratagem to approach this Court on an urgent basis to intervene in workplace disciplinary hearings as follows:

'The Court deems it necessary to outline all of the above for the simple reason that these antiquated shenanigans, exhausting as they are, in the end come back to bite the employees when claiming urgency in this Court. This Court has consistently rebuked such truant like antics, which are in most instances aided and encouraged by legal representatives. My colleague van Niekerk J recently delivered a trio of judgments that concerned attempts at halting internal disciplinary hearings, and in all instances, costs were awarded against recalcitrant applicants. These judgments are amongst numerous others delivered in this Court from the urgent roll, which have consistently set out the law and the difficulties the applicants face when approaching the court on an urgent basis with applications to stay internal proceedings. These frivolous applications have caused strain on the limited judicial resources of this Court. This message has clearly not filtered through to employees or their legal representatives.'

¹³ [2023] 7 BLLR 654 (LC) (10 March 2023) at paras 3 and 4.

These antics are truly exhausting, not only to the court's resources but also because in the end, they turn out to be financially draining for the already financially depleted municipalities or government departments and its entities. This is particularly so since in most internal disciplinary enquiries held in all spheres of government, legal practitioners are engaged to act as initiators or chairpersons in those enquiries. I am not even taking into account all the other officials who are taken away from their real work, in order to attend to these stop-start disciplinary enquiries. These antics are an antithesis of the primary purpose and objectives of the Labour Relations Act (LRA), primary of which is to have labour disputes resolved expeditiously. They do not have a place either in the workplace or in this Court, if the primary objectives of the LRA are to be achieved.'

[44] The LRA envisages a disciplinary hearing as a quick, efficient process, not to be impeded by onerous procedural requirements. The LRA protects the right not to be unfairly dismissed and provides remedies to employees who are unfairly dismissed. The fairness of a dismissal, be it substantive or procedural, is to be decided consequent to dismissal through the statutorily designed dispute resolution mechanisms. I reiterate what the Court held in *Avril Elizabeth Home*: true justice lies in an employee's right to an expeditious and independent review of the employer's decision to dismiss, with reinstatement as the primary remedy when the substance of the employer's decision 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 but also to acknowledge that the elaborate procedural requirements developed prior to the LRA, as it now applies, were inefficient and inappropriate. If the fairness of a dismissal is disputed, arbitration is the primary forum for determining the dispute through a more formal process.

[45] In my view, the Respondent's point on the lack of jurisdiction has merit.

Urgency

[46] Even if I am wrong on the issue of jurisdiction, there is another reason why this application must fail.

[47] Rule 38 of the Rules for the Conduct of Proceedings in the Labour Court provides for urgent applications. An applicant who approaches the court on an urgent basis essentially seeks indulgence and preference to prevent prejudice or harm if the conduct complained of continues. Central to a determination of whether a matter is urgent is whether the applicant has in the founding affidavit, set forth explicitly, the circumstances which render the matter urgent, and the reason why substantial relief cannot be attained at a hearing in due course. Thus, it is required of an applicant to adequately set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary.¹⁴

[48] In *Mojaki v Ngaka Modiri Molema District Municipality and others*¹⁵ the court referred with approval to the following dictum from *East Rock Trading 7 (Pty) Ltd & another v Eagle Valley Granite (Pty) Ltd & others*¹⁶:

'An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.'

[49] The principles regarding urgency have been developed and considered by the courts, and on numerous occasions the courts have made it clear that self-created urgency is not to be entertained by an urgent Court.

¹⁴*Transport and Allied Workers Union of SA vs Algoa Bus Company (Pty) Ltd* (2015) 36 ILJ 2148 (LC).

¹⁵(2015) 36 ILJ 1331 (LC) at para 17.

¹⁶(11/33767) [2011] ZAGPJHC 196 (23 September 2011) at para 6.

[50] In *Soobedar and another v Minister of International Relations and Cooperation and another*¹⁷ the Court restated the principles applicable to urgent applications and held that:

‘The principles applicable to urgency are trite as can be gleaned from various decisions of this and other courts. An applicant that approaches the court on an urgent basis essentially seeks an indulgence, and to be afforded preference in order to prevent prejudice and harm that may materialise or persist, if the conduct complained of continues. Central to a determination of whether a matter is urgent is whether the applicant has in the founding affidavit set forth explicitly the circumstances which render the matter urgent, and the reason why substantial relief cannot be attained at a hearing in due course.’

[51] Emanating from the provisions of Rule 38 and the principles set out in the authorities referred to, it is evident that urgency is not there for taking, and an applicant seeking urgent relief must adequately and in detail, set out the reasons why the matter before the court should be treated with urgency.

[52] The Respondents challenge the urgency of this application and submit that the Applicant must explicitly set forth the reasons why Khan claims he could not be afforded substantial redress in due course. The Respondents’ case is that Khan had a substantial redress at a hearing in due course in that Regulation 9(7)(b) compels the presiding officer to postpone the matter indefinitely if the employee was not in attendance on 12 August 2026. The disciplinary hearing would only reconvene at Khan’s instance, after liaising with the presiding officer.

[53] The Applicant’s case, on the other hand, is that Khan has no substantive, adequate remedy if the Regulation is permitted to run its course, as he will face a change in his employment status. Furthermore, his absence due to sick leave is converted into unpaid suspension.

[54] In my view, Regulation 9(7)(c) provides a clear alternative to Khan to avoid the consequences of Regulation 9(7)(b). Khan had to contact the presiding officer and arrange to appear, and he had to do so before the expiry of the

¹⁷ (2021) 42 ILJ 1761 (LC) at para 19.

ten-working-day period. The Regulation provides that, in the event the matter is reconvened, the presiding officer must inquire into the reasons for the employee's failure to appear, and that the suspension may be confirmed or set aside, depending on whether good cause is shown. The facts Khan seeks to canvas in his application before this Court, should have been raised with the presiding officer.

- [55] Khan was given a 10-day period to contact the presiding officer, which is a substantive remedy to avoid the consequences he seeks to interdict with this application. In fact, Mr Dollie submitted that submissions were indeed made a day before the expiry of the 10-day period. This is indicative not only that Khan had an alternative remedy, but that he was aware of it and indeed exercised it.
- [56] If Khan's employment status is amended by the termination of his services, he has a clear remedy to approach the SSSBC to challenge the fairness thereof, and if he seeks to challenge the conversion of his sick leave to unpaid suspension, that is a dispute that is specifically catered for in the LRA and over which the SSSBC has exclusive jurisdiction to adjudicate.
- [57] The urgent roll in this Court has become increasingly, and regrettably, populated by applications seeking, in one way or another, intervention in workplace disciplinary hearings. The present application is no different. I am not convinced that this matter is urgent.

Costs

- [58] The last issue to be decided is costs.
- [59] Insofar as costs are concerned, this Court has broad discretion under section 162 of the LRA to make orders for costs in accordance with the requirements of the law and fairness.
- [60] In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and others*¹⁸ it was emphasised that:

¹⁸ 2012 33 ILJ 2117 (LC) at p2119 H.

“.....unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in this court, whether as applicant, in launching proceedings or as respondent opposing proceedings.”

- [61] Mr Mphahlele submitted that the Applicant must be ordered to pay the costs of this application on a punitive scale. The application was brought on extremely truncated timelines, even though the Applicant has substantial redress in due course. Mr Dollie submitted that the Applicant came to Court in good faith, seeking protection for Khan and that a cost order should not be appropriate.
- [62] In my view, this is a matter in which the interests of justice will be best served by granting a cost order. It is doubtful that earnest thought and consideration went into the decision to approach this Court on an urgent basis in the circumstances set out *supra*. The taxpayers of this country cannot be expected to bear the cost of defending a matter in which the Applicant failed to establish jurisdiction or urgency.
- [63] The Respondents are entitled to costs. I can see no reason to deviate from the general rule that the costs should follow the result, more so where the Applicant made it clear that the claim was not pursued in terms of the LRA, but that it was a contractual dispute.
- [64] In the premises, the following order is made:

Order:

1. The application is struck off the roll for lack of jurisdiction, alternatively for lack of urgency;
2. The Applicant is to pay the costs on a party-and-party scale.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate M Dollie

Instructed by: Muhammed Vally Attorneys Inc t/a MVip Attorneys

For the Respondents: Advocate S Mphahlele

Instructed by: State Attorney, Pretoria