



EMPLOYMENT

Nxele v Chairperson of the Disciplinary Hearing: Mudau NO and others, [2026] 6 BLLR 628 (LC): Clarifying the operation of section 188A(11) of the Labour Relations Act 66 of 1995

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The Labour Court in *Nxele v Chairperson of the Disciplinary Hearing: Mudau NO and others* considered yet another chapter in the protracted dispute between Mr Nxele and the Department of Correctional Services (“DCS”). The matter arose after the applicant challenged the extension of his precautionary suspension and sought to halt an internal disciplinary hearing following his invocation of section 188A(11) of the Labour Relations Act 66 of 1995 (“LRA”).

While the Court dismissed the challenge to the extension of the suspension on jurisdictional grounds, the judgment is noteworthy for its detailed consideration of section 188A(11), particularly in light of recent Labour Appeal Court (“**LAC**”) judgments concerning whistleblower protection under the Protected Disclosures Act 26 of 2000 (“**PDA**”).

The Court rejected the applicant’s challenge to the extension of his suspension, holding that he had failed to establish a proper jurisdictional basis for the Labour Court to grant the declaratory relief sought. The Court reiterated that its jurisdiction is limited by statute and that it does not possess a general supervisory power over all employment-related disputes. It further held that the Public Service Precautionary Suspension Guide is a policy instrument incapable of founding a contractual claim and that, in any event, the relevant regulatory framework authorised the chairperson to determine whether a suspension should continue beyond the prescribed 60-day period.

Section 188A(11) of the Labour Relations Act 66 of 1995

The more significant aspect of the judgment concerns the Court’s treatment of section 188A(11) of the LRA. The provision allows an employee or employer to require a pre-dismissal arbitration where the employee alleges in good faith that the holding of an internal disciplinary inquiry contravenes the PDA.

In considering the effect of a section 188A(11) request, the Court revisited its earlier decision in *Nxele I*. In that case, the Labour Court held that once an employee invokes section 188A(11), the request is effectively peremptory. The employer is obliged to institute a pre-dismissal arbitration, and any pending internal disciplinary proceedings must cease. The Court emphasised that the provision serves an important protective function by safeguarding employees who make protected disclosures and by avoiding parallel litigation.

Subsequent decisions sought to confirm this approach. In *Mtweta v Transnet Freight Rail and Operating Division of Transnet (SOC) Limited*, relying on *Mamodupi v Property Practitioners Regulatory Authority and Another*, the Labour Court held that a mere allegation of a protected disclosure was insufficient. According to that approach, an employee was required to demonstrate, at least prima facie, that a protected disclosure had been made and that a causal link existed between the disclosure and the alleged occupational detriment. The Court further held that a disciplinary chairperson was obliged to halt proceedings only where the employee had already approached the CCMA, bargaining council or Labour Court for relief under the PDA.

The present judgment notes, however, that the LAC has since provided authoritative clarification in *Nxele IV*. The LAC confirmed that an employee invoking section 188A(11) bears no obligation to prove that the disciplinary proceedings in fact contravene the PDA. Rather, it is sufficient that the employee only allege, in good faith, that such a contravention exists. The threshold is therefore lower than that suggested in *Mtweta*. The focus is on the bona fides of the allegation rather than proof that an occupational detriment has occurred.

The Court also considered the question of who determines whether the jurisdictional requirements for a section 188A(11) inquiry have been met. In *Matlala v Foskor Proprietary Limited and Others*, the Labour Court held that this determination fell to the arbitrator appointed under section 188A. However, the LAC’s subsequent decision in *Industrial Development Corporation of South Africa v Modika* clarified that the initial jurisdictional determination belongs to the CCMA or relevant bargaining council itself. The administrative body’s decision to accept or reject a section 188A(11) referral constitutes the relevant jurisdictional ruling and remains reviewable on ordinary review principles. Courts should therefore refrain from anticipating or usurping that determination.

Applying these principles, the Court held that the General Public Service Sectoral Bargaining Council (“**GPSSBC**”) had not yet made a decision on the applicant’s section 188A(11) request. At the time of the hearing, the bargaining council had merely acknowledged receipt of the referral. It was therefore inappropriate for the Court to compel the conversion of the disciplinary hearing into a section 188A(11) inquiry or to otherwise interfere with a determination that falls within the statutory competence of the GPSSBC.

The Court concluded that once a section 188A(11) referral has been lodged, internal disciplinary proceedings are, at the very least, paused pending the CCMA or bargaining council’s decision. Should the referral be accepted and enrolled, the internal disciplinary process falls away and is replaced by a pre-dismissal arbitration. If the referral is rejected, the employee may

challenge that decision or submit to the disciplinary process. The applicant's request for final interdictory relief was accordingly dismissed.

The judgment provides important guidance on the operation of section 188A(11) and the interaction between the LRA and the PDA. Most significantly, it confirms that an employee invoking section 188A(11) is not required to establish the merits of an alleged protected disclosure at the outset. Instead, the employee need only allege in good faith that the disciplinary process constitutes an occupational detriment. The judgment further clarifies that the CCMA or bargaining council, rather than the employer, disciplinary chairperson or Labour Court, is responsible for making the initial jurisdictional determination regarding the referral. In doing so, the Court reinforces the protective purpose of section 188A(11) while respecting the statutory functions assigned to dispute-resolution bodies.



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