

SOUTH AFRICA / JUDGMENT

Khan v South African Police Service and Others (121530/2024) [2024] ZALCJHB 488 (4 December 2024) [2024] ZALCJHB 488

COURT

Labour Court Johannesburg

BEFORE

L Vukeya

CASE / FILE NUMBER

121530/2024

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: 121530-2024

In

the matter between:

MAJOR

GENERAL FEROZ KHAN

Applicant

And

SOUTH

AFRICAN POLICE SERVICE

First

Respondent

THE

MINISTER OF POLICE

Second

Respondent

NATIONAL

COMMISSIONER: LT
GENERAL S.F. MASEMOLA
Third
Respondent
DIVISIONAL
COMMISSION: CRIME INTELLIGENCE:
LT
GENERAL S.D. KHUMALO
Fourth
Respondent

Heard: 06 November 2024

Delivered: 04 December 2024

JUDGMENT

VUKEYA, AJ

Introduction

[1] Major General Feroz Khan (applicant) approached the Court on an urgent basis seeking an order in the following terms:

‘1. That the court dispenses with the rules relating to the times and manner of service and to deal with the matter as one of urgency in terms of Rule 38 of the Labour Court Rules;

2. That the court interdict the first respondent from proceeding with the expeditious disciplinary process against the applicant scheduled for 25 October 2024, as set out in the Notice of Expeditious Process in terms of regulation 9(2)(b) of the South African Police Service Discipline Regulations, 2016 dated 17 October 2024, and issued to the applicant on 18 October 2024;

3. To declare that the first respondent may not proceed with the expeditious process or any other disciplinary proceedings against the applicant pending the finalisation of the section 188A (11) dispute referred by the applicant to the CCMA and/or the SSSBC.

4. alternatively to prayers 2 and 3 above, a Rule Nisi be issued calling upon the respondents to appear and show cause on a date and time to be determined by this Honourable Court why a final order should not be granted in the following terms:

4.1. Interdicting the first respondent from proceeding with the expeditious disciplinary process against the applicant scheduled for 25 October 2024, as set out in the Notice of Expeditious Process in terms of regulation 9(2)(b) of the South African Police Service Discipline Regulations, 2016 dated 17 October 2024, and issued to the applicant on 18 October 2024; and

4.2. Declaring that the first respondent may not proceed with the expeditious process or any other disciplinary proceedings against the applicant pending the finalisation of the section 188A (11) dispute referred by the applicant to the CCMA and/or the SSSBC.

5. Those respondents who may oppose this application be ordered to pay the costs of this application, jointly and severally, with costs on scale C, which costs include the costs of two counsel where employed.'

[2] At the commencement of the hearing, the applicant filed an amended notice of motion in which he prays for an order of the Court:

'1. Dispensing with the rules of this Honourable Court relating to the times and manner of service referred to therein and dealing with the matter as one of urgency in terms of Rule 38 of the Labour Court Rules;

2. Interdicting the first respondent from proceeding with the expeditious disciplinary process against the applicant scheduled for 25 October 2024, as set out in the Notice of Expeditious Process in terms of regulation 9(2)(b) of the South African Police Service Discipline Regulations, 2016 dated 17 October 2024, and issued to the applicant on 18 October 2024;

3. Declaring that the first respondent may not proceed with the expeditious process or any other disciplinary proceedings against the applicant pending the finalisation of the section 188A (11) dispute referred by the applicant to the CCMA and/or the SSSBC;

4. Alternatively to prayers 2 and 3 above, directing that the respondent convene a formal disciplinary hearing in respect of the charges against the applicant and that such disciplinary hearing shall be convened in terms of regulation 8 and regulation 11 of the South African Police Service Disciplinary Regulations, 2016; and

5. Those respondents who may oppose this application be ordered to pay the costs of this application, jointly and severally, with costs on scale C, which costs include the costs of two counsel where employed.'

[3] The applicant, an adult male Major General employed by the South African Police Services (SAPS) stationed at Counter and Security Intelligence, Crime Intelligence Division, seeks to interdict a process he refers to as an 'informal process' in terms of regulation 9 of the South African Police Discipline Regulations of 2016 (Regulations).

[4] The salient facts leading to this application can be summarised as follows: On 18 October 2024, the applicant was issued with a notice to attend a regulation 9 disciplinary process and in terms of this notice, he was summoned to an expeditious disciplinary hearing to take place on 25 October 2024 for allegations which he deems baseless.

- [5] According to the applicant, the hearing is merely an attempt to pay lip service to the requirements of fair employment processes and a stratagem aimed at removing him from his position in the Counter and Security Intelligence, Crime Intelligence Division. He is of the view that the expeditious process constitutes an occupational detriment instituted in retaliation to certain protected disclosures he made.
- [6] The applicant was summoned for this expeditious disciplinary action to face two charges, namely, defeating the ends of justice in terms of regulation 5(4)(h); and engaging in an act of misconduct which detrimentally affects the image of the SAPS or brings the SAPS into disrepute or which involves an element of dishonesty.
- [7] These allegations, according to the applicant, come as a result of an incident which occurred on 9 July
2021. He narrates briefly how he allegedly uncovered the commission of a crime involving the smuggling or the transportation of drugs involving senior police officials. This was done through the assistance of Sergeant Mogoboya who called him from the scene of the alleged crime and reported the incident to him.
- [8] According to the applicant, the police officers allegedly involved in the commission of the crime were arrested and charged, although he was not present when they were arrested. When the police officers were charged, the applicant was asked to give an affidavit, which he did. He also consulted with the State Attorney who was responsible for prosecuting the police officers. It seems that the charges against the police officers in respect of Booyens CAS98/7/2021, were not prosecuted and the Director of Public Prosecutions had provisionally withdrawn the charges against the accused police officers.
- [9] The applicant informed the Court that he spent hours consulting with the State Advocate at the office of the DPP in Johannesburg to have the matter reinstated. Almost two years later, he received a letter from the Independent Police Investigative Directorate (IPID) dated 6 June 2023, which required him to attend at their offices in order to make a warning statement. Indeed, he provided a warning statement setting out the facts of the incident and answering certain questions posed to him, he states.
- [10] One year later, on 7 June 2024, IPID recommended that disciplinary steps be taken against the applicant and certain other individuals who attended the scene. However, the IPID report was never furnished to him, despite his repeated requests. It was only furnished to him for the first time after 16:00 on Friday, 18 October 2024, when he received the notice to attend the regulation 9 process. In terms of an annexure to the notice, the investigating office incorrectly stated that the content of the IPID Report was conveyed to the applicant to understand what IPID alleged before he could provide his side of the story. That had not happened, according to the applicant.

- [11] He states that the delay in instituting disciplinary proceedings against him for alleged misconduct that occurred more than three years flies in the face of a need for expedited proceedings, as contemplated in regulation 9. It is his evidence that he is being targeted and victimised by certain members within SAPS because of certain investigations he is currently conducting.
- [12] The applicant further avers that he has made protected disclosures in respect of those investigations and the facts relating thereto to his superiors. The disclosures made constitute protected disclosures in terms of the Protected Disclosures Act[1]. These protected disclosures were made prior to receiving the notice. He strongly contends that the expeditious process instituted against him constitutes an occupational detriment, and it is in retaliation for the disclosures he made.
- [13] After receiving the notice, the applicant referred a dispute in terms of section 188A (11) of the Labour Relations Act[2] (LRA) to the Safety and Security Sectoral Bargaining Council (SSSBC) on 22 October 2024. It is the applicant's version that, in terms of the disclosures, he reported sensitive investigations about the possible involvement of his immediate Commander, Lieutenant

General S.D. Khumalo (the fourth respondent) in acts of criminality, abuse of secret service funds and nepotism.

- [14] These investigations that he is seized with fall squarely within the mandate of his component. Regrettably, Lieutenant General Khumalo has decided to proceed in a manner designed to cause occupational detriment to him, the applicant avers. The applicant asserts that it was Lieutenant General Khumalo who commissioned the investigation which has now led to the expeditious hearing. Khumalo has, according to the applicant, dug up the incident from over three years ago in order to secure his dismissal from the service.
- [15] The applicant contends that the expeditious process is in and of itself flawed as it has widely been used to secure the speedy dismissal of members of SAPS without a proper hearing or disciplinary process and it has been regarded as an abuse of the rights of SAPS members to a fair hearing. Given that over three years have lapsed since the incident, the applicant is of the view that there is no valid basis for an expeditious hearing to be held. Should SAPS indeed wish to discipline him on allegations of misconduct that took place three years ago, there is no reason why a formal disciplinary enquiry in the ordinary course cannot be convened. There is no urgency and therefore no basis for expedition.
- [16] The applicant was also of the view that the only urgency is that his dismissal is a foregone conclusion and those who seek to dismiss him seek to do so expeditiously without affording him a proper hearing before an independent chairperson with reference to proper evidence. His main concern is that the expeditious hearing does not allow him sufficient opportunity to prepare a defence or to question those individuals who have given statements and the process does not allow him to challenge the evidence of those individuals.

- [17] the applicant therefore undertakes to submit to a disciplinary hearing in the normal course in terms of regulation 8, where his accusers can give evidence and can be cross-examined on their conduct at the scene, and where he will be legally represented and the outcome is not a foregone conclusion.
- [18] The fourth respondent opposed the application and in an answering affidavit deposed to by Lieut. General SD Khumalo on behalf of all the respondents, it was disputed that that the application was extremely urgent. The respondents contended that the applicant's extreme urgency was based on the fear of dismissal and the fear that the expeditious disciplinary process might be biased.
- [19] The applicant's fear, according to the respondents, is baseless since the expeditious disciplinary process was agreed upon between the respondents as the employer and the union, POPCRU, of which the applicant is a member. According to the respondents, an alternative remedy exists for the applicant other than the relief he seeks in the notice of motion and that is that he can still approach the SSSBC for arbitration.
- [20] Furthermore, the respondents aver that the applicant's referral to the SSSBC, in terms of section 188A (11) was made after he had been charged for misconduct. It avers further that this referral is defective because the applicant had never made a disclosure in terms of the Protected Disclosures Act, be it before or after he received the notice of the disciplinary hearing.
- [21] Secondly, section 188A provides for pre-dismissal arbitration, a procedure that only an employer can agree to with the consent of the employee or in accordance with a collective agreement. Even the applicant's referral to the SSSBC in terms of section 188A(11) contains no allegations that any disclosures were made as alleged, coupled with proof to whom such disclosures were made, in accordance with the Protected Disclosures Act. It is therefore the respondents' contention that because the applicant has not made disclosures in terms of the Protected Disclosures Act, he has failed to show that he was acting in good faith.
- [22] Regarding the delay in instituting the disciplinary hearing, it is the respondents' version that the applicant's allegation, that the respondents were aware of the allegations against him as investigated by IPID as far back as three years ago and that the disciplinary process has been delayed deliberately by the respondents, is false.
- [23] The respondents admit that the charges levelled against the applicant relate to an incident that had occurred three years ago. However, the respondents state that they only became aware of this incident and the subsequent investigations surrounding the incident on or about 10 July 2024. The respondents deny that there was any delay in instituting disciplinary action against the applicant and avers that it was not aware of the charges against the applicant until 10 July 2024.

- [24] The respondents deny that the applicant is a target for dismissal for any of the reasons as alleged by him. It submits that the expeditious disciplinary process was agreed upon through a collective agreement between the employer and its employees as represented by their respective unions. This process is being consistently applied whenever the need arises and it also meets the requirements for natural justice. The respondents argued that in terms of regulation 9(2)(b), the notice period may not be less than five calendar days. Therefore, The applicant's complaint that he does not have sufficient time to prepare a defence is not credible since he was afforded more than the prescribed five calendar days before the commencement of the disciplinary process.
- [25] According to the respondents, the applicant was charged with misconduct in terms of regulation 5(4)(h) for defeating the cause of justice and regulation 5(4)(x) in the act of misconduct which detrimentally affects the image of the SAPS or brings the service into disrepute or which involves an element of dishonesty. In terms of regulation 5(4), these two referred misconducts warrant the institution of the expeditious procedure as provided for in regulation 9.
- [26] It is common cause that the expeditious disciplinary process forms part of the collective agreement that was reached between the respondents as the employer, and all the unions that were admitted to the SSSBC, for which the applicant is a member. The Regulations apply to the employer and all its employees falling within the registered scope of the SSSBC. It is also common cause that on 18 October 2024, the applicant was served with a notice to attend an expeditious disciplinary process hearing on 25 October 2024.

Urgency

- [27] In terms of Rule 38 of the Labour Court Rules[3], a party who applies for urgent relief must file an application that complies with the requirements of the rules relating to applications generally. The applicant must file an affidavit in support of the application. Such an affidavit must contain the reasons for urgency

and why urgent relief is necessary, and the reasons why the requirements of the rules were not complied with, if that is the case. If a party brings an application in a shorter period than that provided for in terms of section 68(2) of the LRA, the reasons why a shorter period of notice should be permitted, must also be provided.

- [28] Similar provisions can be found in Rule 6 (12) of the Uniform Rules of Court which requires the applicant, in its founding affidavit, to set forth explicitly the circumstances under which it avers render the matter urgent and the reasons why it claims that it could not be afforded substantial redress at a hearing in due course. In *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*[4] at paragraphs 6 and 7, it was held as follows regarding the issue of “substantial redress at a hearing in due course”:

[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. 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.

[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able [to] obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his cases in that regard.'

[29] The applicant contended that he would not be able to obtain substantial redress if he brings this application in the ordinary course. It is common cause that the application first served before Mahalelo AJ on an extremely urgent basis, and it was removed from the roll with the disciplinary hearing being halted pending the finalisation of the application. The order dated 25 October 2024 also stated that the application was to be re-enrolled to proceed on 5 November after the filing of the relevant papers.

[30] Indeed, the disciplinary hearing was halted and the application then served before me on 5 November 2024 and urgency was still an issue. It is important to mention that although the respondents agreed to put the disciplinary hearing on hold, it still intended to proceed in terms of regulation 9. The applicant, therefore, contends that this application is urgent because if it were to follow the ordinary course, the expeditious

process would proceed and he might be dismissed as that is the whole motive of his employer. He therefore requires the intervention of the Court prior to the commencement of the expeditious process hearing.

[31] According to the applicant, he has been conducting certain investigations concerning high-ranking police officials, which he has reported to his superiors in the form of protected disclosures. The expeditious process has been instituted in order to secure his dismissal and bring an end to the investigations.

[32] On the question of whether the matter is urgent, the respondents stated in their affidavit that the matter was not urgent because the time that was given to the applicant to prepare for his disciplinary hearing was in accordance with the provisions of regulation

9. It further stated that the applicant has failed to show good cause for this application to be granted. According to the respondents, the applicant will obtain substantial redress at a hearing in due course. It was submitted that the application ought to be struck off the roll for lack of urgency.
- [33] Although I am disinclined to agree with the applicant that he will be dismissed if the regulation 9 disciplinary hearing proceeds, I agree with him that he will not obtain substantial redress at a hearing in due course. The question at this point is not whether he will be dismissed or not but what will happen if the application is not heard and determined on an urgent basis. If the application is enrolled in the ordinary course, the disciplinary hearing will have been finalised when the application finally makes its way to the court roll for hearing. It is clear that the respondents are hell-bent on finalising the disciplinary hearing and my view is therefore that the applicant will not obtain substantial redress at a hearing in due course.
- [34] I am of the view that the rules of this Honourable Court relating to the times and manner of service are dispensed with and the matter is dealt with as one of urgency in terms of Rule 38 of the Labour Court Rules.
- [35] I now deal with the merits of the application.

The merits of the application

- [36] Defeating the course of justice is one of the forms of misconduct listed under regulation 5 (4) which may warrant the institution of the expeditious procedure as provided for in regulation 9. In terms of regulation 9, a supervisor who is satisfied that the alleged misconduct is of a serious nature and/or falls within the ambit of regulation 5(4), must ensure that the expeditious process is initiated.
- [37] Regulation 9 (2) (b) provides that, if satisfied that the misconduct justifies an expeditious procedure, the National Commissioner or any person designated by him 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.
- [38] In terms of this procedure, the notice period may not be less than five calendar days, and it must be served in the manner set out in the 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. It is common cause that on 18 October 2024, the applicant was informed of a disciplinary hearing which was due to take place on 25 October 2024, and this period is not less than 5 days.
- [39] As already stated earlier in this judgement, it is common cause that regulation 9 of the Regulations is a product of a collective

agreement between the respondents and all the unions that were admitted to the SSSBC, for which the applicant is a member. In a judgment penned by Mpati JA in Provincial Commissioner, Gauteng: SA Police Service and another v Mnguni[5], the Supreme Court of Appeal said the following at paragraph 20:

‘The Regulations in terms of which the disciplinary and appeal procedures that led to the dismissal of the respondent were conducted were promulgated by the Minister for Safety & Security pursuant to the provisions of s 24(1)(f) of the South African Police Service Act 68 of 1995. The section empowers the Minister to make regulations regarding ‘labour relations, including matters regarding suspension, dismissal and grievances’. The regulations are a product of an agreement reached between the National Commissioner of SAPS, as employer, and all the unions admitted to the Safety & Security Sectoral Bargaining Council (reg 2). Their purpose is set out in regulation 3, and is, inter alia, to support constructive labour relations in the police service, to ensure that supervisors and employees share a common understanding of misconduct and discipline, to provide a user-friendly framework in the application of discipline, and to prevent possible arbitrary actions by supervisors towards employees in the event of misconduct. Clearly, therefore, the disciplinary and appeal procedures that culminated in the respondent’s dismissal, including the dismissal itself, involve employment relations, which are expressly regulated by s 23 of the Constitution and s 185 of the LRA.

[40] The purpose of the Regulations is properly set out in the above case and it is not necessary to re-emphasize it, save to state that over and above this purpose, the main objective should be to promote labour practices that will be fair to both the employer and the employee. What will be fair in circumstances where the applicant who is a member of a trade union which has signed a collective agreement with his employer and admitted to SSSBC does not want his imminent disciplinary hearing to be conducted in terms of regulation 9 which forms part of the collective agreement? Perhaps if one looks at the different possible regulations applicable to SAPS disciplinary hearings one might be in a position to answer this question.

[41] The procedure in terms of regulation 9 is distinguishable from that in terms of regulations 8 and 11. In terms of regulation 8, a supervisor has to ensure that the investigation into the allegations of misconduct of an employee is completed within 30 calendar days or as soon as practically possible thereafter. If the supervisor is satisfied that the alleged misconduct is of a serious nature and justifies the holding of a disciplinary hearing he or she must refer the outcome of the investigation to the employer representative within seven working days to initiate a disciplinary enquiry. The employee must be informed of the alleged misconduct and the pending investigation whereafter the employer representative must, within 15 working days, charge the employee with misconduct by serving a written notice to attend the disciplinary hearing in the form determined by the National Commissioner.

[42] Regulation 8 allows the employee to exercise his or her right to representation by a fellow employee, union representative or union official, and the right to bring witnesses to the hearing. The employee also gets an opportunity to examine any physical or documentary

evidence or any report that may be produced in evidence. He is allowed to have access to any statement or report relating to the subject matter of the hearing and one copy of any document that will be presented as evidence during the hearing. In terms of this procedure, evidence may be led on the conduct giving rise to the hearing and the employee or the representative of the employee may question any witness called by the employer representative.

- [43] In terms of regulation 11, the employer must appoint a person as the chairperson of the hearing, such person must be an employee. An employee may be represented at the hearing by a fellow employee or a person employed by a recognised trade union. The employer representative will lead evidence on the conduct giving rise to the hearing and the employee or the representative of the employee may question any witness called by the employer representative. The employee will be given an opportunity to lead

evidence where after the employer representative may question any witnesses called.

- [44] Whereas, with respect to regulation 9, although the employee is given an opportunity to defend himself against the allegations, this is not a hearing but a meeting between the parties. This meeting has no particular procedure to be followed and provides the designated person a very wide discretion to direct the process. The employee may not lead evidence and be cross-examined. The purpose of this procedure is not to allow the employee to lead evidence and to be cross-examined but to put allegations to the employee and to afford him an opportunity to respond to the allegations.

- [45] The designated person may ask questions only to seek clarity but may not interrogate or cross-examine the employee as the meeting is not a hearing. Once the meeting is finalised, the designated person must consider the evidence namely, the report, the version of the employee, as well as any documents and statements that may be available and make a finding within five calendar days.

- [46] The respondents argued that there was nothing procedurally incorrect with regulation 9 and placed reliance on the matter of POPCRU and Others v Minister of Police[6] wherein the applicants were hauled before an expedited disciplinary hearing and took a view that the provisions of regulation 9 were unconstitutional. In this matter, the court remarked that: "[t]here is nothing unlawful about the procedure agreed in the collective agreement".

- [47] The respondents also relied on the case of Lorenzo Van Wyk and Another v SAPS 8 Others[7], wherein the court stated as follows in paragraph 25 of the judgment:

‘As to the other ground of attack on the use of the expedited disciplinary process, without hearing oral evidence and relying on

written statements, despite many alleged disputed evidentiary issues, there is nothing to suggest that the expeditious enquiry was not conducted in accordance with the Regulation 9 of the SAPS disciplinary regulations, which is also encapsulated in a collective

agreement. The procedure does not require oral testimony to be given, but members who appear before such an enquiry are entitled to defend themselves against the charges and the chairperson must consider their evidence. Moreover, there was no specificity provided as to what conflicting evidence appeared from the record before the chairperson. In the circumstances, I am not satisfied that the applicants have demonstrated they were prejudiced in the manner the expeditious process was applied.'

- [48] Although I agree with the above remarks, it is important to mention that the disciplinary hearings in the above two matters had already been concluded, and in both instances, the resultant awards became the subject of a review. In the case in consideration, the applicant is seeking an order to exclude the applicability of the expeditious disciplinary hearing in favour of a more inquisitorial disciplinary process where he can cross-examine witnesses of the employee and also call witnesses who can also be subjected to cross-examination.
- [49] The respondent has submitted that the expeditious disciplinary process meets the three basic requirements of natural justice in the conduct of disciplinary hearings in that the employee should know the nature of the accusation against him/her; the employee should be given an opportunity to state his/her case and that the tribunal should act in good faith. I do not differ with this opinion, however, there are circumstances where the process can result in injustice and prejudice to one of the parties.
- [50] If one takes cognisance of the circumstances of the alleged criminal case which is the genesis of this application and its peculiar background, it becomes necessary to determine whether the regulation 9 expeditious disciplinary procedure will bring about a fair result or one which will be prejudicial to either of the parties. The circumstances I am referring to are, namely, the manner in which the incident occurred; the possible involvement of high-ranking officers of SAPS in the alleged commission of a crime; the transportation and possible smuggling of drugs by these high-ranking officers and the possibility of police involvement in a syndicate operation involving the transportation of drugs.
- [51] My view is that none of the parties will suffer any prejudice if regulations 8 and 11 procedures are followed. This will prevent a situation where the referee also becomes a player and the process will allow for a proper ventilation of the issues between the applicant and his employer. The issues seem very fragile and peculiar to be dealt with in the form of a meeting where no leading of evidence is allowed and no cross-examination of witnesses takes place. The inquisitorial nature of regulations 8 and 11 is, in my view, the most suitable procedure to apply to achieve fairness and avoid prejudice, more so if an independent adjudicator is appointed.
- [52] It may be so that the procedure in terms of regulation 9 is the subject of a collateral agreement entered into between the employee's trade union and his employer. I am also mindful of its binding effect on all the parties,

however, regulation 5 (4) suggests that the nature of the offence may warrant the institution of the expeditious procedure as provided for in regulation 9 or it may not. This will therefore depend on the circumstances of each case. My view is that the very nature of the offence and its surrounding circumstances justify a deviation from a procedure in terms of regulation 9 to ensure proper ventilation of the issues.

[53] One of the prayers of the applicant is for the Court to declare that the first respondent may not proceed with the expeditious process or any other disciplinary proceedings against the applicant pending the finalisation of the section 188A (11) dispute referred by the applicant to the CCMA and/or the SSSBC. Section 188A of the LRA provides as follows:

(1) An employer may, with the consent of the employee or in accordance with a collective agreement, request a council, an accredited agency or the Commission to appoint an arbitrator to conduct an inquiry into allegations about the conduct or capacity of that employee.

...

(11) Despite subsection (1), if an employee alleges in good faith that the holding of an inquiry contravenes the Protected Disclosures Act, 2000 (Act No. 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.

(12) The holding of an inquiry by a arbitrator in terms of this section and the suspension of an employee on full pay pending the outcome of such an inquiry do not constitute an occupational detriment as contemplated in the Protected Disclosures Act, 2000.’

[54] The meaning of “disclosure” in the context of the Protected Disclosures Act is any disclosure of information regarding any conduct of an employer or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of the following: (a) that a criminal offence has been committed, is being committed or is likely to be committed; (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject; (c) that a miscarriage of justice has occurred, is occurring or is likely to occur; (d) that the health or safety of an individual has been, is being or is likely to be endangered; (e) that the environment has been, is being or is likely to be damaged; (f) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act[8]; or (g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed.

[55] The respondent referred the Court to the case of Mamodupi v Property Practitioners Regulator Authority and Another[9] where the court held that:

[48] ... Making a protected disclosure does not of itself insulate an employee from discipline...

- [51] ...Any request in terms of subsection 188A (11) must be accompanied by the proof of the protected disclosure made, which must predate the charge sheet – commencement of a disciplinary action.... Therefore, given the adverse effect that may visit an employer, by being forced into an arbitration like process, when it could have followed a cheaper process, decision makers on such requests must ensure that the jurisdictional requirements exist in order to invoke the statutory power... Accordingly, how can an employee who has not made a protected disclosure be protected from an employer's internal processes? Therefore, the only way to ensure that an employee deserves protection is by at least submitting proof of the protected disclosure and to prima facie show the necessary connection...'
- [56] Although the applicant would like the Court to find that he has made protected disclosures, he has not provided the Court with sufficient proof that this requirement has been complied with. The provisions of subsection 188A (11) are peremptory in that every request for its application must be accompanied by proof of the protected disclosures made. Non-compliance with this requirement should not be easily condoned especially in circumstances where the applicant was in a position to comply but did not.
- [57] It is therefore my respectful view that an order in terms of paragraph 4 of the amended notice of motion, which is an alternative to prayers 2 and 3 is justified because dealing with the disciplinary hearing of the applicant in this manner will prevent any possible arbitrary action against him by his supervisors. Furthermore, the process will promote labour practices that will be fair to both the employer and the employee.
- [58] In the result, I make the following order:

Order

1. The applicant's non-compliance with the rules of this Honourable Court is condoned and the application is heard as urgent.
2. The respondents are directed to convene a formal disciplinary hearing in respect of the charges against the applicant and that such a disciplinary hearing shall be convened in terms of regulation 8 and regulation 11 of the South African Police Service Disciplinary

Regulations, 2016.

3.

L Vukeya

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant:

Instructed by:

For the respondents:

- [1] Act 26 of 2000.
- [2] Act 66 of 1995, as amended.
- [3] Rules Regulating the Conduct of the Proceedings of the Labour Court: GN 4775 of May 2024 (effective 17 July 2024).
- [4] (11/33767) [2011] ZAGPJHC 196 (23 September 2011) at paras 6 – 7.
- [5]
- [2013] ZASCA 2;(2013) 34 ILJ 1107 (SCA) at para 20.
- [6] Unreported judgment case no: JR919/20, delivered on 17 September 2020.
- [7] Unreported judgment case no: C 449/2021, delivered 16 August 2024.
- [8] Act no 4 of 2000.
- [9] (J68/23) [2023] ZALCJHB 19 (13 February 2023) at paras 48 and 51.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCJHB/2024/488.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/khan-v-south-african-police-service-and-others-unknown-topic-alcjhb-2024>

Prepared on 11 October 2026 · Esheria