RULING

Case Number: ***ECPE759-23 / ECPE4382-22***
Commissioner: ***Karen Charles***
Date of Ruling: ***07 June 2023***

In the **Inquiry by Arbitrator** between

M. Twani and Vuyo Lufele
(Union/Applicant)

and

National Union of Metal Workers of South Africa
(Respondent)

Union/Applicant's representative:
Union/Applicant's address:

Respondent's representative:
Respondent's address:

DETAILS AND BACKGROUND TO THE APPLICATION

1. The applicants were represented by Solly Montshioa, a member of the community and the respondent by Mr Dirk Groenewald, Counsel from the Cape Bar.

2. The arbitration was set down for the 29 to 31 May 2023.

3. At the outset, I *mero motu* queried the *locus standii* of Solly to represent the applicants at the arbitration.

4. He then made an application in terms of Rule 25(6) of the CCMA rules to represent the applicants. I considered this application and granted it.

5. As a *point in limine*, Groenwald submitted that the respondent was unaware of what the alleged protected disclosure was and that the applicants have, to date, not made them aware of what the nature of the protected disclosure is and upon which they call for protection against an occupational detriment.

6. He referred to the recent judgment of Mamodupi Mohlala-Molaudzi v Property Practitioners Regulatory Authority (Case no J68/23) [2023] ZALCJHB 19 (13 February 2023, in which the learned judge stated, at paragraph 23:

   "*In practical terms any request in terms of section 188A (11) must be accompanied by the proof of the protected disclosure made, which must predate the charge sheet- commencement of the disciplinary action.....decision makers on such requests must ensure that 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 process? 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..."*

7. Groenewald queried whether such jurisdictional fact would be cured through adducing evidence at the formal stage or whether this was a prerequisite before an arbitration could be heard.
8. Montshioa submitted that the evidence would illustrate the protected disclosure alleged.
9. The parties conceded that this was a novel process and they themselves required clarity on the issue.

ANALYSIS OF THE LAW AND THE SUBMISSIONS MADE

10. The historical context to this matter has been lengthy and burdened with referrals, separately, then jointly and then withdrawals and thereafter a ruling on consolidation of the applicants matters.

11. It all forms part of the detailed bundles before me, the substantive detail of which is not necessary for resettlement into this ruling.

12. Suffice to state that before me is a consolidated referral under section 188A(11) of the LRA.

13. The section reads:

"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."

14. The Protected Disclosures Act 26 of 2000, as amended, (PDA) protects employees against punishment for disclosing information related to suspected or alleged misconduct or other criminal activity by their employers.

15. Section 1 of the PDA defines a protected disclosure as the disclosure of information by an employee regarding any conduct of an employer or any of its employees, which is criminal or morally shameful.

16. Section 3 of the PDA prescribes that an employee who has made a protected disclosure may not be subjected to any occupational detriment by the employer as a result of having made such a protected disclosure. Such occupational detriments could include disciplinary action, harassment or intimidation or any decision or action by the employer that would adversely affect an employee.

17. The aforementioned case referred to by Groenewald is the most recent and relevant to the issue to be decided.

18. While that may be so, it is germane to consider what is the purpose of this particular clause and its context.

19. Prinsloo J in Tsibani v Estate Agency Affiars Board and Others 2021 ZALCJHB (24 June 2021) interpreted section 188A(11) as being the entitlement of an employee, "*who is about to be subjected to an internal disciplinary process and who alleges in good faith that the intended disciplinary hearing contravenes the PDA, to instead request an inquiry be conducted in terms of section 188A*." This inquiry is then made into "*conduct or capacity of the employee conducted in terms of section 188A"*.

20. She went further state "*that section 188A(11) does not envisage the holding of two parallel hearings. Section 188A provides for an inquiry into allegations relating to an employee's conduct or capacity and for such an inquiry to be conducted by an arbitrator, in accordance with the provisions of the said section. If the inquiry relates to allegations relating to an employee's conduct, the section 188A inquiry will happen instead of an internal disciplinary hearing. The arbitrator conducting the inquiry, will make findings on the conduct of the employee and must, in light of the evidence presented and considering the criteria of fairness, rule as to what action, if any may be taken against the employee…….. "are not intended or designed to compel an employer or an employee to subject him or her or itself to two simultaneous and parallel disciplinary processes."*

21. The learned judge goes further, at paragraph 72, to add that "*Section 188A(11) is not designed or intended to determine whether the facts constitute a protected disclosure as contemplated by the PDA or not, and if not, for an internal disciplinary hearing to proceed. The section provides for an inquiry into allegations pertaining to the conduct or capacity of an employee*."

22. At paragraph 73, Prinsloo J distinguished this remedy from that "*section 186 (2) (d), 191(1)(a) or 191(13) of the LRA) in the event an employee alleges that he or she has made a protected disclosure and is subjected to an occupational detriment as a result of that.*"

23. In essence, this section was introduced to ensure that when an employee is of the view that an internal hearing would contravene the PDA, then that employee may request that inquiry into any allegations of misconduct (or incapacity) be conducted by the CCMA, externally so to speak.

24. The requirements are that "*if an applicant, in good faith, holds a view that the instituting of the disciplinary enquiry against her offends the PDA, section 188A(11) is correctly invoked*".

25. The machinery of section 188A(11) is not designed or intended to determine whether the facts constitute a protected disclosure as contemplated by the PDA. (Ndlangana v Mine Health Safety Council and Others J770/22 unreported).

26. It is into this milieu of insight, that I must determine whether the applicant has satisfied the *prima facie* factual test (Mohlala-Molaudzi case supra) that a protected disclosure was made and that the occupational detriment was retaliatory in form and connected to the employee's disclosure and that he in entitled to the invocation of section 188A(11).

27. Moshoana J in Mohlala-Moaudzi (supra at paragraph 18) recorded that there are necessary jurisdictional facts that must be in place before the section can be invoked.

28. These are that :

    28.1 the employee must make a protected disclosure,

    28.2 the employer must subject the employee to an occupational detriment;

    28.3 That there must be a causal connection between his / her protected disclosure and the detriment.

29. In order for that factual determination to be made, the learned judge prescribed that the referral must be accompanied by proof of the disclosure which must predate the charge sheet or commencement of disciplinary action.

30. It is trite that the proof of disclosures was not attached to the referrals.

31. The attachment of the applicants' charge sheets is insufficient compliance with the requirement for proof of the protected disclosure. Surely that disclosure is within the personal knowledge of the applicants, who are wholly relying upon it in order to seek the protection and process of the section 188A (11).

32. It is noteworthy that the applicants had intended to assemble a lofty bundle of documents, including the minutes of the meetings wherein the protected disclosures were made.

33. Suffice to state that at the stage of the pre-arbitration and on the first date of the arbitration, there was no written disclosures.

34. It has been suggested by Moshoana J, (with which view I respectfully concur), that the rationale behind this requirement is to ensure that the section 188A (11) process is not exploited and that the enshrined right to internal cost effective discipline is still protected with some vigilance.

35. The question that begs answering at this juncture is whether this omission to attach the disclosure can be mended through evidence in the arbitration proceedings. In other words, whether the applicants can lead evidence of the disclosure during the course of its case and make known proof of the disclosure.

36. It was suggested by Groenewald that this may expedite the process and avoid yet another referral and ultimately give effect to speedy justice.

37. I am of the view, within the context of the purpose of the section and its import and consequence for all the parties, that this failure cannot be rectified at this late juncture.

38. The application for section 188A (11) is not a matter of right or an easy referral such as section 191(1); but rather comes as a request before the CCMA in the form of the referral (Form 7.19). The CCMA exercises its powers within the framework of its administrative functions in approving and setting down the dispute for arbitration/ inquiry.

39. This is a weighty application of its powers because of the implications of the approval. This halts the internal disciplinary process and "*equates an interdict in that its invocation halts unlawfulness*" (Mohlala-Moaudzi at paragraph 19).

40. Our law is clear on the fact that before a statutory power is exercised, there must be reasonable, lawful application of the mind and of course, in terms of a fair procedure. (Section 33 of the Constitution).

41. And in casu, in order to give adequate rational consideration to the request, there must be proof of the disclosure at the time of making such request.

42. This is to ensure that before the CCMA (decision maker), accedes to the request to section 188A (11), it does so having fulfilled its obligations to the precepts of rationality and lawfulness by applying its mind as to whether the jurisdictional requirements have been established in the disclosure made.

43. It can make no such decision on whether the employee requires protection and the invocation of the section in the absence of such attachment. And the failure to have due consideration to these prerequisites before triggering section 188A (11) could open the door to a review application in terms of section 158(1)(g) of the LRA.

44. Until this jurisdictional impairment has been cured by a fresh referral with the protected disclosures attached or at the very least details of where, when and to whom the disclosure was made, the CCMA is ousted of jurisdiction to hear the merits on the alleged misconduct of the applicants.

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45. The CCMA has no jurisdiction to arbitrate this dispute as it is set out in the referral;

46. The matter is dismissed.

Signature: _____

Commissioner: ***Karen Charles***