RULING

Case Number: **GATW**

Commissioner: **Maputle Mohlala**

Date of Award: **27 May 2025**

In the **PROCEEDINGS** between

(The Employer)

and

Construction Education Sector Training Authority

(The Employee)

DETAILS OF PARTIES AND EPRESENTATION

1. These proceedings come against the background of an application in terms of Section 188A (11) of the Labour Relations Act 66 of 1995 (as amended) (the LRA). The section provides that despite subsection (1), if an employee alleges in good faith that the holding of an inquiry contravenes the Protected Disclosures Act, 2000 (Act 26 of 2000), that employee or the employer may require that an inquiry be conducted in terms of this section into allegations by the employer into the conduct or capacity of the employee. The applicant attended the proceedings and was represented by Mr. Sifundo Ntshaba, an admitted attorney. The respondent was represented by Advocate Nase.

BACKGROUND TO THE APPLICATION

2. The employee lodged a referral with the CCMA based on section 188A (11). A disciplinary hearing that had commenced against her on charges of misconducted was halted by the chairperson through a ruling in which he stated that an inquiry in terms of section 188A (11) had to occur in terms of certain charges preferred against the employee. At the time that the chairperson rendered the ruling, he referred to six of the charges out of a total of twenty-two charges. The six charges were those that were raised by the employee as constituting protected disclosures. Those were charges 6, 7, 8, 15 and 17.

3. The charges read as follows:

Charge 6: “Violation of clause 13.12.1 of SCM Policy in respect of BID NO. 023-2018/2019 (Provision of IP MPLS Service). The employee is guilty of misconduct for breaching the following provisions: - Clause 13.12.1 provides that the ‘bid specification must stipulate whether a briefing session will be held and whether the briefing session is compulsory or non-compulsory. Bidders who do not attend a compulsory briefing session must be disqualified from the bid process’. The employee is guilty of misconduct in that: - You have failed to ensure compliance with the prescribed SCM processes in that the bid of Singatel (Pty) Ltd t/a NET 15, was evaluated and considered despite not attending the compulsory briefing session on 19 January 2018.”

Charge 7: “Violation of clause 13.12.1 of SCM Policy in respect of Bid No. 025-2017/2018 (LAN and VOIP infrastructure maintenance and support services). The employee is guilty of misconduct for breaching the following provisions: - Clause 13.12.1 provides that the ‘bid specification must stipulate whether a briefing session will be held and whether the briefing session is compulsory or non-compulsory. Bidders who do not attend a compulsory briefing session must be disqualified from the bid process’. In that: - You have failed to ensure compliance with the prescribed SCM processes in that the bid of Data Proof (Pty) Ltd, was evaluated and considered despite not attending the compulsory briefing session on 19 January 2018.”

Charge 8: Breach of SCM Policy which led to irregular expenditure by CETA for BID NO. 025-2017/2108 (LAN and VOIP infrastructure maintenance and support services). The employee is guilty of misconduct in that: - You have caused the CETA to incur irregular expenditure as the appointment and payment if Data Proof (Pty) Ltd was unlawful, as it did not attend the compulsory briefing session on 19 January 2018."

Charge 15: "Misrepresentation: Failure to act with honesty and integrity by failing to report known or suspected breaches in violation of the code of conduct. The employee is guilty of misconduct for breaching the following provisions: - Clause 2.4 CETA expects all its employees to always act with honesty, integrity, and fairness, in accordance with this code and our values; seek advice if there is doubt as to the proper cause of action, promptly raise known or suspected breaches of this code. In that: - You have misrepresented the facts and failed to report to the Bid Evaluation Committee that the following companies_ Singtel T/A Net15 and Data Proof (Pty) Ltd in respect of Bid No. 3-2018/2019 (Procurement of CETA Accredited providers), Bid No. 23-2017/2018 (provision of LAN and VOIP services) did not attend the compulsory briefing sessions and were evaluated and considered in violation of the SCM policy."

Charge 17: Irregular Appointment and abuse of SCM processes in the appointment of service provider for psychometric assessments (OMT). The employee is guilty of misconduct for breaching the following provisions: - Clause 2.4 CETA expects all its employees to always act with honesty, integrity, and fairness, in accordance with this code and our values; seek advice if there is doubt as to the proper cause of action, promptly raise known or suspected breaches of this code. In that: - You have allowed the Organisation & Management Technologies (Pty) Ltd (OMT) to be paid the amount of R43 125.00, which is double the amount of the purchase order thereby causing CETA to incur irregular expenditure in violation of the policy.

4. On 01 August 2024, I rendered a ruling in terms of which the parties had to submit written submissions on the interpretation and application of section 188A(11) as the respondent held the view that the CCMA was to only determine the issue in relation to protected disclosure as alleged, while the applicant held the view that the decision of the inquiry had the effect of terminating the disciplinary process that had commenced and that the CCMA should determine the matter in its entirety. Owing to the fact that there were issues around the charges not being specified in the parties' submissions and same not having been submitted to me, I rendered a ruling requiring the parties to attend the CCMA to make oral submissions on the issues I raised as requiring clarity. Prior to the set down of the matter, the respondent served the employee with additional/supplementary charges 23-64. As a result, thereof, the employee contended some of the charges from 23-64 also related to protected disclosures she had made to the respondent. The parties were then afforded an opportunity to supplement their written arguments to include the supplementary charges and to file their respective bundles of documents.

5. On the supplementary charges, the employee raised protected disclosure in respect of charges 26, 29, 30, 43, 45, 46, 47,48,49,51 and 62. Charges 23, 24, 27,28,31-42,44,50 and 52-61 were not raised as relating to any direct protected disclosure. As regards the first charge sheet, charges 1-5, 9-14, 16,18,19 and 22 were not raised as relating to any direct protected disclosure.

6. The charges under attack by the employee as relating to alleged protected disclosures read as follows:

Charge 26: Breach of Clause 7.1.1 of the CETA Contract Management Policy, 2021 and Gross Dereliction of Duties.

You are guilty of misconduct and gross dereliction of duties for breaching the following provisions: -

- Clause 7.1.1 of the policy states that "The Head of Supply Chain or his/her designate …must keep an updated Contract Register which indicates the contract owner for each contract to listed.'
- Clause 7.2.1 of the policy states that the Head of Supply Chain or his/her designate is the contract manager at the CETA. The contract manager's responsibilities include:
  - Contract register
  - Documentation and record-keeping.
- Clause21.3 of the Contracts Management policy prescribes that "The Head of Supply Chain or his/her designate **must ensure that correct owners evaluate the performance of contracts in place**. The Head of Supply Chain or his/her designate **must update the contracts register with the results and summarise the results of the performance management and submits it to the CEO quarterly.**

  In that: You as the designated head of Supply Chain Management, failed to develop effective and efficient contract management processes and/or failed to implement processes within the SCM unit to manage the performance of service providers by neglecting to ensure that contract owners evaluate the performance of contracts in place and/or update the contracts register with the results and summarise the results of the performance management and submit it to the CEO on a quarterly basis (See Contracts Register for 2022/2023).

The following suppliers' performance was not evaluated nor reviewed:

Thato-Entle Training and Projects (Pty) Ltd

AMANI/Tholisiwe Consortium
NHMLK Property Trading and Projects; and
EZG VEST Coinvest, among others.

Charge 29: Breach of CETA Contract Management Policy, 2021.

- Clause 10.5 provides that 'The SLA must be finalized within 60 days after the acceptance of the bid by the service provider. The service provider may commence with work before the finalization of the SLA but not before the GCC and SBD7 was signed by both parties to ensure the contractual arrangements are in place. In that: - You have failed to ensure that a service level agreement between CETA and Coinvest is concluded before the expiry of the 60 (sixty) day period for Bid: **Customisation and Management of the Existing CETA biometric Learner Attendance System and Periodic Disbursements for a period of sixty (60) months (Bid No.0042-2021/2022)** as stipulated in the clause above.

Charge 30: Gross Negligence and breach of clause 16A8.5 of the National Treasury Regulations (RFP 025-2020/2021). You are guilty of misconduct for breaching the following provisions: - Clause 16A8.5 of Treasury Regulations provides that: "An official in the supply chain management unit who becomes aware of a breach of or failure to comply with any aspect of the supply chain management system must immediately report the breach of failure to the accounting officer or accounting authority, in writing."

In that: -

i. According to AGSA findings on COAF No. 37 of 2022 with regards to the ISO certificates for record keeping management, Dataproof Communications, the winning bidder, submitted certificates relating to a company called Futgenx Technology (Pty) Ltd and not themselves as required by the terms of reference.
ii. Based on this failure to meet the mandatory requirements, Data Proof Communications (Pty) Ltd should have been disqualified on criterion 1 and thus CETA has not complied with the requirements of section 4(2) of the PPPFA.
iii. Due to the issues noted above, the entity had not complied with the requirements of the PFMA, the Treasury regulations and the PPR and thus the expenditure incurred on this Bid would amount to irregular expenditure to be disclosed in the annual financial when the expenditure has been incurred.
iv. The amount to be paid to Dataproof amounted to R315 214.92 that should have been avoided, was ultimately disclosed as irregular expenditure.

Furthermore, in that:

v. You failed to report to the accounting authority the breach and violation of SCM processes with regard to RFP027-2020/2021 awarded to Dataproof Communications (Pty) ltd, despite having knowledge of inaccurate ad irregular evaluation and adjudication thereon since November 221 until June 2024.
vi. Due to your gross negligence, dereliction of duties and lack of oversight, the CETA incurred an irregular expenditure due to violation caused by your failure to discharge your responsibility as enshrined in Section 56 and 57 of the PFMA as SCM Practitioner.
vii. You violated the National Treasury's Code of Conduct for the SCM Practitioners and the CETA Code of Conduct.

Charge 43: Gross negligence and dereliction of duties in that you failed to detect and/or deliberately breached the SCM Policy, National Treasury SCM Instruction Note and Treasury Regulations in the Appointment of 3 GEMS CHEMICALS (Pty) Ltd (RFQ0095-2021/2022)

You are guilty of misconduct and dereliction of duties for breaching the following provisions: -

Formal written quotations (R30 000.01- R1 000 000.00)

- Paragraph 13.4.1 of the SCM Policy states that, "The SCM unit must invite quotations from as many suppliers as possible, with a minimum of 5 potential suppliers which are listed the CSD, but at least three written quotations must be obtained for acquisitions between R2 000 and R30 000".
- SCM Policy Paragraph 13.4.3 states that, "Request for quotations must also be publicized on the CETA website for a minimum of 3 days."
- Paragraph 3.3.3 of the National Treasury Practice Note 8 of 2007/08 states the following: "If it is not possible to obtain at least three (3) written price quotations, the reasons should be recorded and approved by the accounting officer/authority or his/her designate."
- Treasury regulations 16A6.4 states that "if in a specific case it is impractical to invite competitive bids, the accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from the competitive bids must be recorded and approved by the accounting officer or accounting authority.
- Section 51(1) of the PFMA states that "An accounting authority for a public entity must ensure that public entity has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective."

- Section 56 of the PFMA provides that "the accounting authority of a public entity may in writing delegate any of the powers entrusted or delegated to the accounting authority to an official in that public entity or instruct an official in that public entity to perform any if the duties assigned to the accounting authority in terms of this Act, subject to limitations and conditions imposed."
- Section 83(3) of the PFMA provides that "An official of a public entity to whom a power or duty is assigned in terms of section 56 commits an act of financial misconduct if that official willfully or negligently fails to exercise that power or perform that duty.
- Section 127 of the Constitution of the Republic of South Africa provides that "When an organ f state in the national or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

In that: -

- On or about January 2022, the RFQ for the procurement for Provincial Senior Managers recruitment support and Board Candidates' details verification service was sent to thirty (30) suppliers. However, only one supplier responded to the RFQ. You failed to record the reasons for such circumstance for the appointing authority to consider the same and approve or not approve thereof. Such misconduct on your part was contravention of paragraph 13.4.1 of the SCM Policy, fir which you as the SCM Manager evaluated this response.
- There was non-adherence to the advertisement timeframes as stated on the RFQ as it was advertised for two (2) days instead of the minimum of three (3) days. The RFQ was advertised on 11 January 2022. You failed to document and submit reasons to the delegated official to approve on the date you publicized the RFQ invitation.
- You were neither authorised through a memorandum on or before advertisement to advertise for less than three days, nor did you record written reasons or grounds for advertising for less than three (3) days and have such deviation approved on 11 January 2022.
- As a result of your gross negligence and dereliction of duties, the non-compliance caused the CETA to have non-compliance with its SCM Policy."

Charge 45: Bringing CETA and CETA Accounting Authority into disrepute.

You are guilty of misconduct in that: On or about 21 June 2024. You contacted and/or sent an email titles: Reporting SCM Concerns to the Accounting Authority members/ Board and to unauthorised third parties and/or the media, thereby undermining the Accounting Authority's integrity, processes and without affording the Accounting Authority a reasonable time to address the allegations and as a result of your conduct, brought the name of the organisation into disrepute.

Charge 46: Derivative Misconduct- Failure to report violation of SCM Policies.

You are guilty of misconduct as follows:

- Regulation 16A8.5 of the Treasury Regulations for Public Entities states that 'An official in the supply chain management unit who becomes aware of s breach of or failure to comply with any aspect of the supply chain management system must immediately report the breach or failure to the accounting officer or accounting authority, in writing.' In that: -
  - on or about September 2021, in your SCM Management role, you became aware of various wrongdoings within the supply chain management unit of the CETA and failed to report to the Accounting Authority within a reasonable time but waited for more than two years to report the same allegations to the accounting authority you were aware of at such time.
  - You were complicit and/or had intentions to deceive and mislead the accounting authority to taint and bring the name of the CETA into disrepute.

Charge 47: Fraud, Forgery, Falsification of Records, and Impersonating the Chief Executive Officer on Bid 005-2021/2022.

You are guilty of misconduct, gross negligence and dereliction of duties in your failure to comply with and violated the National Treasury 's Code of Conduct for the SCM Practitioners and the CETA Code of Conduct:

- Clause 5.3 of the CETA Code of Conduct and Ethics Policy provides that "employees must make sure that any decision made by them on behalf of the CETA is made with the necessary authority and mandate of the CETA."
- Clause 5.4.1 of the CETA Code of Conduct and Ethics Policy provides that "the CETA expects employees to perform the duties conscientiously, honestly and with integrity."
- Clause 5.6.2 of the CETA Code of Conduct and Ethics Policy provides that "the CETA shall not tolerate any fraud by its employees such as deception, forgery, false representation and concealment of the materiality of facts".

In that:

- On or about 2 December 2021, you were the one who initially sent an email to the CEO attaching the BAC Report which had already been signed by BAC members on 02 December

2021, those being Mr. Samuel Mnisi, Ms. Kgomotso Motang and the BAC Chairperson at the time, Ms. Lerato Marx.

- You then thereafter changed the 02 December 2021 already signed BAC Report, and sent another version of the BAC Report again on 03 December 2021, despite BAC Members already having signed one on 02 December 2021.
- When you resent the changed BAC Report and resent it to BAC Members on 3 December 2021, Mr. Samuel Mnisi and Ms. Lerato Marx re-signed same.
- On 3 December 2021, the CEO requested you to forward BAC Report you had changed to al BAC members to sign it, "where they have not".
- You disobeyed this order and thereafter manipulated and deleted all electronic signatures of the BAC members and transposed the CEO's signature to create the impression that the BAC members had not signed the approved BAC report, and that the CEO had illegally usurped SCM powers and approved same unilaterally.
- You, with mala fide and the intention to deceive, wrote to the Accounting Authority on 21 June 2024 and supplied the above untrue, inaccurate, fraudulent and unlawfully forged BAC Report against the CEO, in a concerted effort to evade accountability.

Charge 48: Gross dereliction of duties and failure to perform administrative compliance on Bid 005-2021/22 for Promotional Material, resulting in irregular expenditure being incurred.

You are guilty of gross misconduct ad gross dereliction of duties for contravening the following legal prescripts:

- Section 13.4.13 of the CETA SCM Policy, 2021 provides that "the SCM unit must confirm the tax compliance status for all price quotations/competitive bids from prospective suppliers."
- Regulation- 16A8.5 of the Treasury Regulations for Public Entities- states that "An official in the supply chain management unit who becomes aware of s breach of or failure to comply with any aspect of the supply chain management system must immediately report the breach or failure to the accounting officer or accounting authority, in writing.'

In that:

- On or about 2 December 2021, when you circulated the approved BAC report to the BAC members for signature, you failed in your duties as an SCM Manager to ensure that Five Star Communications was tax compliant at the time of the Bid submission and you failed to inform and advise the BEC and BAC members of this fact. There was no indication by you on the approved BEC and BAC signed reports that there were tax non-compliance issues with the BAC's recommended bidder to be appointed by the accounting authority.
- It was only on 07 December 2021 that the SCM unit and you advised that Five Star Communications was not tax compliant and requested the bidder to submit proof of tax compliance, you stating that failing which its bid would be disqualified.
- In this case it was for you to ensure that as the BAC was concluding on the recommended appointment if Five Star Communications, to advise the BAC of the tax compliance status and whether the directors of a recommended bidder to be awarded are not barred from doing business with the State.
- This is clearly one of your failures to do your job diligently and professionally without conflict of interests.
- It was your failure that caused the Administrator to re-sign the appointment letter on 09 December 2021, as Five Star Communications became tax compliant on such a date.
- You revealed the above to the accounting authority on 21 June 2024 and misrepresented that the CEO contravened the SCM policies, and he had had signed the appointment letter; when there is no evidence to that effect. As such you are guilty of seeking to avoid accountability as the SCM Manager and use mala fides and intention to deceive to mislead the Accounting Authority of the CETA.
- Contrary to your untrue state of events in your communication to the Accounting Authority on 21 June 2024, the Five Star appointment letter was signed by the duly delegated authority, the Administrator on 03 December 2021 and re-signed on 9 December 2021.
- You negligently failed to perform administrative compliance as required and to comply with section 13.4.13 of the CETA SCM Policy of 2021 and failed to do your duty to inform the BAC of the tax compliance status of the recommended bidder during the BAC meetings you attended as the SCM Manager, which information you should have known at the time of the Bid Committee sittings".

Charge 49: Fraud, Forgery, Falsification of records and impersonating the Chief Executive Officer- 001-2021/2022.

You are guilty of gross misconduct for the contravention of: -

- Clause 5.3 of the CETA Code of Conduct and Ethics Policy provides that "employees must make sure that any decision made by them on behalf of the CETA is made with the necessary authority and mandate of the CETA''.
  Clause 5.4.1 of the CETA Code of Conduct and Ethics Policy provides that "the CETA expects employees to perform their duties conscientiously, honestly and with integrity."
- Clause 5.6.2 of the CETA Code of Conduct and Ethics Policy provides that "the CETA shall not tolerate any fraud by its employees such as deception, forgery, false representation and concealment of the materiality of facts."

In that: -

- On or about 25 November 2021, in your SCM Management role, you committed fraud, and/or forgery, and/or falsified documents, or impersonated the Chief Executive Officer (CEO) of the CETA by sending a fake cancellation letter of Bid No. 01-2021/2022 (for the Appointment of a service provider to review and develop quality assurance systems, capacitate and support quality assurance in its function) to the National Treasury via an email names- scmtenders@ceta.co.za while knowingly or ought to have known that the CEO did not sign such a cancellation letter and/or that the bid was not cancelled by the CETA.

Charge 51: Violation of the CETA Code of Conduct Ethics Policy.

You are guilty of gross misconduct and gross dereliction of duties for failing to comply with these prescripts:

- Clause 5.4.1 of the CETA Code of Conduct and Ethics Policy provides that "the CETA expects employees to perform their duties conscientiously, honestly and with integrity.'
- Clause 5.6.2 of the CETA Code of Conduct and Ethics Policy provides that "the CETA shall not tolerate any fraud by its employees such as deception, forgery, false representation and concealment of the materiality of facts."

In that: -

- On or about 21 June 2024, you, with mala fide and with the intention to deceive, defraud, falsely represented and conceal the true materiality of facts, wrote to the Accounting Authority and supplied the above untrue, inaccurate and unlawfully forged information in as far as the following is concerned, with the intention to evade accountability:
  - Fraud. Forgery, falsification of records, and impersonating the chief executive officer in respect of Bid 005-2021/22- Appointment of a service provider for the supply of promotional material;
  - Gross dereliction of duties and failure to perform administrative compliance in respect of Bid 005-2021/22 for promotional material resulting in irregular expenditure being incurred.

Charge 62: Contravention of Suspension Conditions

You are guilty of misconduct for contravention of the following legal prescripts:

- Paragraph 6.7 of your notice of suspension dated 08 June 2023 provides that: "You are hereby prohibited to make any official contact with members of staff at CETA and/or the Accounting Authority and/or service providers and/or associate entities".

In that: -

- On or about 21 June 2024, you contacted and/or sent an email titled: Reporting SCM Concerns to the Accounting Authority members individually and to unauthorised third parties and/or the media in contravention of your suspension.
- On the same day, on or about 21 June 2024 and again on 25 July 2024, you caused the same correspondence/letter to be transmitted to the Office of the Minister of Higher education and Training, which is an Executive Authority, in contravention of your suspension.
- You have been involved in instigating a revolt against CETA leadership whilst on suspension; ad roaming around CETA internal offices without HR supervision, in contravention of your suspension conditions.

ISSUE TO BE DECIDED

7. The issue to be decided is, firstly, whether the CCMA has jurisdiction to arbitrate, through an Inquiry by Arbitrator, the entirety of the charges preferred against the employee, and, secondly, whether the specific charges in both the initial charge sheet and the supplementary charges constitute protected disclosures. The employee seeks that the CCMA assume jurisdiction to arbitrate, through an inquiry by Arbitrator, the entirety of the charges, while the employer contends that the CCMA only has to determine whether the specific charges constitute protected disclosures and that the rest of the other charges and those not held to constitute protected disclosures must be proceeded with in the employer's convened internal disciplinary hearing against the employee.

ANALYSIS OF THE PARTIES SUBMISSIONS AND ARGUMENTS

8. The referral of this dispute is in terms of section 188A (11) of the LRA. Subsection (1) of this section provides that 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. Subsection (11) provides that: despite subsection (1), if an employee alleges in good faith that the holding of an inquiry contravenes the Protected Disclosures Act, 2000 (Act 26 of 2000), that employee or the employer may require that an inquiry be conducted in terms of this section into allegations by the employer into the conduct or capacity of the employee.
9. The Protected Disclosures Act (PDA) has been enacted to make provision for procedures in terms of which employees and workers in both the private and the public sector may disclose information regarding unlawful or irregular conduct by their employers or other employees or workers in the employ of their employers; to provide for the protection of employees or workers who make a disclosure which is protected in terms of this Act; and to provide for matters connected therewith.

10. Section 1 of the Protected Disclosures Act defines "disclosure" to mean any disclosure of information regarding any conduct of an employer, or of an employee or of a worker of that employer, made by any employee or worker who has a 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 Chapter II of the Employment Equity Act, 1988 (Act 55 of 1998), or the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); or
    (g) That any matter referred to in paragraphs (a) to(f) has been, is being or is likely to be deliberately concealed.
11. An occupational detriment is defined, inter alia, to include, in relation to an employee or a worker (a) being subjected to any disciplinary action. A protected disclosure means a disclosure made to-
    (a) A legal advisor in accordance with section 5;
    (b) An employer in accordance with section 6;
    (c) A member of Cabinet or of the Executive Council of a province in accordance with section 7;
    (d) A person or body in accordance with section 8; or
    (e) Any other person or body in accordance with section 9, but does not, subject to section 9A, include a disclosure- (i) in respect of which the employee or worker concerned commits a criminal offence by making that disclosure, or (ii) made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5.
    (f) In terms of section 6 (1) of the Protected Disclosures Act, any disclosure made in good faith – (a) and substantially in accordance with any procedure authorised by the employee's or worker's employer for reporting or otherwise remedying the impropriety concerned and the employee or worker has been made aware of the procedure as required in terms of subsection (2)(a)(ii); or (b) to the employer of the employee or worker, where there is no procedure as contemplated in paragraph (a), is a protected disclosure.

12. I now turn to deal with, firstly, the issue of whether the CCMA can assume jurisdiction to have an inquiry by arbitrator on the entirety of the charges preferred against the employee. Put otherwise, whether a section 188A (11) referral may lead to the CCMA hearing the matter as if it has been referred to it in terms of Section 188A (1).

13. Mr. Ntshaba contended, in essence, on behalf of the employee that the employee seeks to have all charges against her dealt with by the CCMA arbitrator as opposed to the partial referral ordered by the internal disciplinary hearing chairperson. In this regard, Ntshaba contends that the internal disciplinary hearing must be terminated on all charges and seeks an inquiry by arbitrator. He submitted that the comprehensive nature of the employee's disclosure, covering a multiple instance of potential misconduct across various tenders and procurement processes, suggests that all subsequent disciplinary charges are likely interconnected with the disclosed information. The employee stands to suffer irreparable harm if the CCMA decides to deal with only certain charges as opposed to dealing with the entire charge sheet. If the disciplinary hearing proceeds, the right granted by section 3 of the PDA and given the shielding mechanism by section 188A (11) will be rendered meaningless.

14. Ntshaba further argues that the employee has no adequate alternative remedy at her disposal to prevent the disciplinary proceedings, a clear case of occupational detriment, from continuing other than the relief that she seeks that her disciplinary hearing be dealt with by the CCMA in terms of section 188A (11). The only appropriate remedy is for all charges to be dealt with by the CCMA in terms of section 188A (11) to ensure a comprehensive and fair consideration of all charges considering the protected disclosure. The timing and nature of the charges suggest they may be retaliatory, constituting occupational detriment under the PDA. Other charges, while not directly mentioned in the disclosure, are part of the broader context of procurement irregularities that the employee sought to expose.

15. On the other hand, Advocate Nase submitted on behalf of the employer that the employer retains the right to discipline internally and that this right must be protected in order to give effect to the right to fair labour practices of employers. The allegation of procedural fairness as raised by the employee is not substantiated. There is nothing procedurally unfair in an employer exercising its right to discipline an employee charged with gross misconduct, gross negligence and dereliction of duties. Convenience alone is not enough to take away the employer's right to discipline its employees. The allegation that the CCMA will ensure a fairer and more efficient resolution of the matter is baseless. The employee has neither shown nor alleged that the internal disciplinary hearing will be unfair nor that it is not efficient. There is no allegation made that the employee will be financially prejudiced by the concurrent processes. Nase also submitted that there are no allegations made of a causal connection or link between the disclosure and the disciplinary hearing.

16. I have noted the case law cited by the parties on this point. However, I find the case law to be more relevant to deciding whether a protected disclosure has been made against which an employee has to be protected against occupational detriment. None of the case law suggests that where a referral has been made in terms of section 188A

(11) that the council or the accredited agency or the Commission has to take over jurisdiction of disciplining an employee facing allegations of misconduct in a disciplinary hearing at the workplace. The halting and termination of disciplinary hearing that the case law speak to is in instances where all the charges are found to constitute occupational detriment. However, it cannot be the case that if there are other charges that do not and have not been alleged to be constituting occupational detriment that the employer is denied the right to continue with the balance of such charges not attracting occupational detriment.

17. Section 188A (1) states that an employer may, with the written consent of the employee or in accordance with a collective agreement request an inquiry by arbitrator. There are no other provisions in the LRA or in section 188A that provides for how an inquiry by arbitrator can be requested. In this matter, the employer has not requested an inquiry by an arbitrator in which it would have sought the consent of the employee or based its request on a collective agreement or an agreement derived from an employment contract of an employee earning more than the prescribed threshold in terms of section 6(3) of the Basic Conditions of Employment Act 75 of 1997 (as amended) (the LRA).

18. The purpose of section 188A (11) is not to force an inquiry by arbitrator on the parties. As correctly found in **Nxele v National Commissioner: Department of Correctional Services and Others (2018) 39 ILJ 1799,** the purpose of section 188A (11) is to provide a buffer to a continuation of an occupational detriment equivalent to an interdict necessitating a halt of the internal proceedings. The focus of Section 188A (11) inquiry is on whether charges preferred against the employee constitutes occupational detriment or not. If it is found that all of them do, then the entire disciplinary hearing terminates, and vice versa. I cannot agree with Ntshaba that the Commission must clothe itself with jurisdiction to deal with the matter its entirety. Though he states that in terms of section 188A (11), it is legally incorrect as this section does not impose inquiry by arbitrator on the parties, but concerns itself into the inquiry of whether the charges preferred against the employee constitutes occupational detriment.

19. I accordingly find that the CCMA has no jurisdiction to hear the matter based on all charges that have been preferred against the employee. The only role that I play in this regard is to pronounce on whether the charges constitute occupational detriment or not. I cannot, nor can the CCMA hear the matter on all charges that have not been alleged to constitute occupational detriment in the absence of a subsection (1) referral. To do so will amount to the CCMA clothing itself with jurisdiction that it does not have and will undermine the right of the employer to discipline its employees- a direct contravention of the right to fair labour practices as enshrined in the Constitution of the RSA.

20. I now turn to deal with whether the specific charges isolated as allegedly constituting protected disclosures constitute occupational detriment or not.

21. Ntshaba submitted that charges 5-8 relate directly to issues reported in the protected disclosure, clearly falling under section 188A (11). The timing of the disciplinary action initiated four years after the disclosure suggests a retaliatory motive. The sudden addition of numerous charges after the CCMA process was invoked indicates an attempt to overwhelm the employee. The Labour Court in **Tshishonga v Minister of Justice and Constitutional Development & Another (2007) 4 BLLR 327 (LC)** held that the context of the disclosure is crucial in determining whether subsequent actions constitute occupational detriment. The employee's disclosure related to systemic issues in procurement processes. All subsequent charges, even if not directly mentioned in the disclosure, fall within this broader context and should be viewed as potentially retaliatory. But for the employee's protected disclosure, the disciplinary charges would not have been brought especially considering the significant time lapse and the sudden proliferation of charges. Given the comprehensive nature of the disclosure and its relation to the employee's core duties, there should be a presumption that any subsequent disciplinary action is linked to the disclosure.

22. In concluding his submissions, Ntshaba submitted that the employee made a valid protected disclosure under the PDA, covering systemic issues in CETA procurement processes; all disciplinary charges against her constitute occupational detriment as defined in the PDA; there is a clear and sufficient casual link between the protected disclosure and all charges warranting the application of section 188A(11) to the entire disciplinary process; the interests of justice and purpose of whistleblower protection legislation require that all charges be heard in a single forum under the auspices of the CCMA.

23. Nase, on the other hand, submitted that the interpretation of section 188A (11) is aptly summarised by Judge Moshoana in **Mamodupi v Property Practitioners Regulatory Authority and Another (J68/23) [2023] ZALCJHB 19** where it was held that "[46] The occupational detriment must be retaliatory in form and can be connected to the making of the protected disclosure. Accordingly, in my view the provisions of the subsection are evocable if the following jurisdictional facts are present in the order set out below:

    45.1 The employee must make a protected disclosure;

    45.2 Thereafter, the employer must subject the employee who already made a protected disclosure to an occupational detriment;

    45.3 Once so subjected, an employee must allege honestly and sincerely so that a causal connection does exist between his or her protected disclosure and the occupational detriment. Differently put, it is because of having made a protected disclosure that an employer chose to respond by an occupational detriment.

    45.4 In my view if any of the above stated jurisdictional facts is absent, subsection 188A (11) cannot be invoked. Therefore, to my mind, the council; accredited agency and the Commission must refuse to entertain the request that an inquiry be conducted in terms of this subsection if any of the jurisdictional facts are absent. Entertaining

such requests without evidence of the jurisdictional facts being present, simply implies that the right of employers disciplining their employees internally will be lost for very flimsy reasons. Such implies that the right to fair labour practices of employers will be limited at a stroke of a pen contrary to sections 34 and 36 of the Constitution of the Republic of South Africa, 1996..."

46 Nase argues further that the first two jurisdictional facts exist. That is, the employee made a protected disclosure on 22 August 2019 and the employer commenced a disciplinary process in June 2023. The last jurisdictional requirement does not exist. That is, the employee has not honestly and sincerely in good faith alleged that a link exists between the 2019 disclosure and the 2023 disciplinary enquiry in respect of the other charges. The employee's alleged disclosure was triggered by or only made after audit queries. The inescapable conclusion is that the CETA had already started the process of looking into the employee's conduct and to avoid liability, the employee dishonestly and with motive to protect her interests made a protected disclosure. It does not follow in this case therefore that there was an honest and sincere disclosure, which was followed by charges as a result of or due to such disclosure.

47 There are no sincere and honest allegations of a causal connection made in respect of all the charges. The third jurisdictional fact does not exist. Nase concluded his submissions by stating that Judge Moshoana makes the point that 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. He further noted that "In my view an employee cannot simply spring a surprise backed by nothing that a protected disclosure was made and hope to gain an advantage of the legal provision outlined in section 188A (11).

48 Nase further argues that the employee's disclosure was made after a period of 19 months when the employee addressed the chairperson of the CETA risk and audit committee. Given her experience and knowledge of supply chain legislation, prescripts, regulations and practice notes, she ought to have reported her SCM concerns immediately in terms of Treasury Regulation 16A8.5. She was aware of the wrongdoings within the SCM unit but negligently and recklessly contravened this provision by not doing anything with the information she had for more than 18 months before she made the disclosure. The inescapable conclusion is that the disclosure was made only for purposes of escaping liability.

49 In conclusion, he argues that the jurisdictional requirements were not met in respect of each charge and therefore the hearing must proceed. On the pleaded facts, the CCMA ought to determine whether the jurisdictional facts have been met. CETA holds the view that the employee has not satisfied the jurisdictional requirements. As a result, all the charges ought to be dealt with by means of an internal disciplinary process.

50 The onus is on the employee alleging that his or her protected disclosure has led to him/her being subjected to an occupational detriment like a disciplinary action. Of critical importance is for the employee to establish a causal connection or link between the disclosure made in good faith and the disciplinary hearing.

51 In relation to charge 6: "Violation of clause 13.12.1 of SCM Policy in respect of BID NO. 023-2018/2019 (Provision of IP MPLS Service), Ntshaba argues that the employee, upon discovering during the audit preparation that the necessary briefing sessions were not attended, reported the irregularity to the Audit Committee through a protected disclosure. She indicated that a bidder who had not attended the briefing session was eventually awarded the contract. The designated company was not listed on the official attendance register, raising serious questions about the legitimacy of the award. Furthermore, she reported that the CFO had added the said company to the register post-factum. At that time, the bid documents relevant to this situation were kept in the CFO's office which indicates irregular handling of the procurement process. The employee communicated all of these discoveries and concerns directly to the CEO, ultimately aiming to prompt corrective actions within the procurement system. However, rather than addressing the fundamental issues raised regarding the evaluation process and the interactions of the BAC and CFO, these disclosures have been transformed into a charge against her. This charge constitutes retaliation against her for acting responsibly in reporting irregularities. The charge serves to penalise the employee for whistleblowing efforts.

52 Nase argues that the employee addressed a document named Formal Disclosure of Improprieties Pertaining to Violation of Procurement at the CETA for the attention of the chairperson of the CETA audit and risk committee on 22 August 2019. The disclosure related to incidences that occurred more than a year and half ago being from 31 January 2018. Therefore, by law she was required to report these immediately and the disclosure was contrived and not made in good faith.

53 Ntshaba does not indicate when the preparations for the audit were held and when the disclosure was made. On the other hand, Nase argues that it was made on 22 August 2019 which was a year and half after the alleged incident. It is thus probable that the disclosure was made in August 2019. The employee is a custodian of contracts entered into with service providers as the SCM Manager. She ought to have known way before August 2019 that there were improprieties and reported same within a reasonable time or immediately as required by policy. It is reporting immediately or within a reasonable time that will suggest that the disclosure was made in good faith. There is no

explanation as to why the disclosure was only made a year and half ago when the contracts sat in the employee's office. If she knew that the contract was in the CFO's office, she ought to have indicated such irregularity immediately within a reasonable time or immediately. Her failure to disclose such immediately or within a reasonable time and only did so when the audits were about to commence does not show any good faith in the disclosure. She would have known that the audit committee was to discover those irregularities and to escape liability, she sought to make disclosures. It cannot, therefore, be said that she had made this disclosure in good faith. As a result, this charge must be the focus of the internal disciplinary hearing and does not constitute occupational detriment.

54 As regards charges 7 and 8 on Misconduct related to Non-Evaluation and Irregular Expenditure, Ntshaba argues that the employee was not part of the BEC and the charges cannot justifiably be attributed to her actions or oversight. The charges against the employee represent a continuation of the CEO's campaign to victimize the employee for raising protected disclosures regarding SCM irregularities. The apparent intent behind these charges is to shift the focus away from the systemic issues she highlighted, including the CEO's interference in procurement decisions and the manipulation of processes that led to the irregular awarding appointment of vendors. As per her disclosures, the employee pointed out multiple instances where improper conduct and systemic weaknesses were present within SCM practices. Instead of addressing the concerns, the CETA has resorted to bringing forth charges that frame her actions in a negative light. The timing and nature of these charges correlate directly with her whistleblower status.

55 Nase argues in this regard that the second protected disclosure was made on 21 June 2024 and submits that it was also contrived. It revealed that the in 2019, the SCM Team reported that it detected irregularities on tenders Bid 025-2017/18, 023-2017/18, 022-2017/18. The second disclosure revealed that it related to the CEO's involvement in the appointment of Five Star Communications-including and/or limited to Bid No. 05-2021/22- Appointment of a service provider for the supply of promotional materials for CETA; CEO's involvement in the appointment of RFQ 0095-2021/2022 -Seeking Provincial Senior Managers Recruitment Support and Board Candidates Details Verification Services; Bid No. 01-2021/2022 – Appointment of service providers to review and develop quality assurance systems to capacitate and support quality assurance in its functions; Participation in the tenders with other organs of state; Cancellation of Contracts; and Other Concerns to the (then) CEO.

56 Nase accordingly argues that the employee has failed to meet jurisdictional requirements to establish a proximate cause between the alleged protected disclosure and the disciplinary hearing. The difference in timing between the alleged protected disclosure and the disciplinary hearing is three years and couple of months. The employer instituted disciplinary hearing against the employee as a consequence of findings made in various investigation reports at the employer's offices, especially in the SCM Unit. Thus, the reason to institute hearing is not to victimize the employee, but as a result of the investigation reports.

57 The employee made the protected disclosure during the audit period of tenders. An inference can be drawn that the employee realised that Audit may revel the irregularities which have occurred and implicate her. When the investigation commenced, the employee had not made a disclosure. There is no honest and sincere allegation of a causal connection existing between her protected disclosure and the occupational detriment. The employee's alleged disclosure was triggered by or only made after audit queries. The inescapable conclusion is that CETA had already started the process of looking into her conduct and to avoid liability the employee made a protected disclosure. It is not that there was an honest and sincere disclosure then she was charged following the disclosure.

58 Ntshaba failed to deal with Nase's submissions that the disclosure was contrived and not made in good faith given its timing. Nase asserted that the disclosure was made during the audit period of tenders. I am persuaded that they were made in fear of the fact that the audit committee was to find the irregularities and implicate the employee. Thus, the employee did not make the disclosure in good faith but only to avoid liability. Nase further asserted that this disciplinary action against the employee on these charges emanated from investigations conducted by the employer. Surely, the employee would be privy to the findings of the investigations and will be able to defend herself against such charges. If there is any charge on which she will claim double jeopardy, she will be within her rights to address same in the disciplinary hearing. I accordingly find that this preferring of this charge against the employee does not amount to occupational detriment.

59 In respect of charge 15 "Misrepresentation: Failure to act with honesty and integrity by failing to report known or suspected breaches in violation of the code of conduct, Ntshaba argues double jeopardy that charges 6 and 7 have the same foundational set of facts as this charge and that the same incidents have been reported to the Audit Committee in accordance with the employee's protected disclosure.

60 The issue of disclosure in good faith has been dealt with above and warrants no repetition. The employee had disclosed in fear of being implicated and not honestly and sincerely as she was supposed to do within a reasonable time and/or immediately. This charge, just like the preceding charges dealt with here, should form part of the disciplinary hearing and the disciplinary action cannot be regarded as an occupational detriment in this regard.

61 Charge 17 concerns Irregular Appointment and abuse of SCM processes in the appointment of service provider for psychometric assessments (OMT). Ntshaba submits a defence to this charge rather than showing a protected disclosure having been made in good faith and its connection to the disciplinary hearing. As a result, this charge establishes no causal connection between any disclosure and the disciplinary hearing. It, too, must be dealt with in the disciplinary hearing. The employee will be within her rights to raise any defence she has in that regard as Ntshaba raises it in his submissions.

62 Accordingly, the charges on which the employee claimed that she had made protected disclosures as per the first charge sheet, are to form part of the disciplinary hearing for the employee to answer thereon.

63 I do not intend to deal with each charge on its own based on the requirement that the disclosure must be made in good faith. As can be seen above, the timing of the disclosure has been held to have not been made sincerely and honestly and thus to the extent that Ntshaba argues that the employee has made protected disclosures and thus the preferring of the charges should be considered an occupational detriment, such argument cannot hold. Ntshaba has chosen to offer defenses to charges instead of establishing a causal connection between the disclosure and the disciplinary action as constituting an occupational detriment. He is well within his rights to advance such defenses in the internal disciplinary hearing.

64 I accordingly find that the disclosures in their entirety, given the timing in which they were made, were not made sincerely, honestly and in good faith and thus cannot be regarded as protected disclosures to be protected against occupational detriment. The employee must face all charges in the disciplinary hearing and provide her defenses accordingly.

Ruling

65 The CCMA does not have jurisdiction to arbitrate this matter in the absence of a Section 118A (1) referral.

66 The specific charges alleged to be forming part of protected disclosures were not made in good faith and thus the employee cannot be protected against a disciplinary hearing on those charges.

67 The employer is within its right to proceed with the disciplinary hearing on all charges preferred against the employee.

M.Mohlala
CCMA Commissioner PT