



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG.

Reportable

Case no: JA54/2021

In the matter between:

**DEPARTMENT OF INTERNATIONAL RELATIONS
AND COOPERATION**

Appellant

and

ALBERTUS JOHANNES LAUBSCHER

First Respondent

**THE GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL**

Second Respondent

COMMISSIONER INGRID DIMO N.O.

Third Respondent

Heard: 31 March 2022

Delivered: 25 August 2022

Neutral Citation: *Department of International Relations and Cooperation v Laubscher
and others JA54/2021*

Coram: Phatshoane ADJP, Savage and Phatudi AJJA

JUDGMENT

PHATSHOANE ADJP (SAVAGE AND PHATUDI AJJA Concurring)

Introduction

- [1] This appeal requires an answer to an important question whether an aborted disciplinary process constitutes a disciplinary action short of dismissal as contemplated in s 186(2)(b) of the Labour Relations Act 66 of 1995 (LRA) which provides that:

‘Unfair labour practice means any unfair act or omission that arises between an employer and an *employee* involving –

...

- (b) the unfair suspension of an *employee* or any other unfair disciplinary action short of dismissal in respect of an *employee*...

- [2] The appeal is with leave of the Labour Court (*per* Ramdow AJ) against the whole of its judgment and order reviewing and setting aside the arbitration award issued by Commissioner Ingrid Dimo (third respondent), under the auspices of the General Public Service Sectoral Bargaining Council (GPSSBC/second respondent), in terms of which the GPSSBC had found that it had no jurisdiction to consider the unfair labour practice dispute lodged by Mr Albertus Johannes Laubscher, the first respondent.

The background

- [3] Mr Laubscher (the employee) was a Director: Diplomatic Immunities and Privileges in the employ of the Department of International Relations and Co-operation, the appellant (the department). He had approximately 30 years of service with the department.

- [4] On 6 September 2016 the department served the employee with notice to attend a disciplinary hearing for misconduct allegedly committed when he was stationed at the South African Permanent Mission of the United Nations (UN) in New York, United States of America. The allegations were predicated on the approval of payments of certain medical expenses for himself and other employees. The department contended that, in so doing, the employee had contravened clause 2.2 of the Financial Delegation of Authority Guideline read with s 45(c) of the Public Finance Management Act¹. Instead of holding a disciplinary hearing, the parties agreed that the dispute be disposed of through a pre-dismissal arbitration as envisaged in s 188A of the LRA.
- [5] On 26 September 2016, for purposes of easy facilitation of the pre-dismissal hearing, the employee's attorneys requested the department to agree to a pre-dismissal arbitration conference and the exchange of statements. A further request was made on 5 October 2016 by his attorneys that the department provide further particulars to the charges and documents to enable the employee to prepare and answer to the allegations. The department did not adhere to the request. Its repeated failure culminated in the employee launching an application with the GPSSBC to compel it to furnish the requested documents. The GPSSBC did not rule on the application to compel but scheduled the pre-dismissal arbitration for 25 November 2016. However, the hearing did not proceed due to the unavailability of the arbitrator.
- [6] On 14 December 2016 the employee filed an application with the Labour Court to compel the GPSSBC to rule on his application to compel and to schedule the arbitration for the hearing. Further ancillary relief was also sought. On 19 December 2016 the employee's attorneys made a further request to the department to provide further particulars for the purposes of the pre-dismissal arbitration. Between 10 February 2017 and 21 February 2017 unsuccessful

¹ Act 1 of 1999.

attempts were made by the parties to hold a pre-dismissal arbitration conference and to resolve the matter.

- [7] On 20 March 2017 the employee sought to amend the notice of motion filed in the Labour Court application of 14 December 2016 in order to introduce two additional prayers: a declaratory order that the disciplinary hearing instituted by the department was invalid and an order interdicting the department from proceeding with the enquiry.
- [8] On 28 March 2017 the department withdrew all disciplinary charges levelled against the employee. This lies at the heart of this appeal. Since the department did not tender the employee's costs in respect of the application to compel that was pending before Labour Court, the employee proceeded with that application on an unopposed basis on 6 June 2017 and obtained the declaratory and the interdictory relief sought. However, he was deprived of his costs. The order made was academic as the charges levelled against the employee had already been withdrawn.
- [9] The withdrawal of the charges against the employee prompted him to file an unfair labour practice dispute with the GPSSBC in terms of s 186(2)(b) contending that he was subjected to a disciplinary hearing short of dismissal. In a statement of case he filed with the GPSSBC, concerning his alleged unfair labour practice claim, the employee detailed the above background and sought compensation premised on the following:
- 22.1 Laubscher is a senior employee of DIRCO and has been employed for a period of 35 (thirty-five) years with an unblemished disciplinary record and is a mere 30 (thirty) months away from retirement;
 - 22.2 DIRCO 's conduct has violated Laubscher's constitutionally protected right to fair labour practices;

22.3 Laubscher's dignity has been impaired in the eyes of his peers and subordinates and has suffered humiliation as a result by having been subjected to disciplinary action short of dismissal;

22.4 Laubscher has had to expend a substantial amount of money in order to defend himself against [the] charges that have no merit, as clearly seen from the fact that DIRCO withdrew all charges against him.'

[10] The department filed a statement of response in which it raised several preliminary points and replied to each of the allegations traversed in the employee's statement of case. In respect of the merits, it denied that the charges were without substance and averred that they were withdrawn *bona fide* upon receipt of legal advice because the department had been inconsistent in the application of discipline. Furthermore, it stated that had the charges been pursued, the sanction of dismissal would have been merited.

The proceedings before GPSSBC in respect of the alleged unfair labour practice claim

[11] The resolution of the employee's alleged unfair labour practice dispute through conciliation before the GPSSBC was unsuccessful. At the ensuing arbitration, the commissioner upheld the department's preliminary points. The commissioner approached the dispute on the bases that the Labour Court had not awarded the employee his costs and consequently he was seeking an award of costs from the GPSSBC. She reasoned that: "[t]he Labour Court considered all factors and did not award relief for costs in favour of the applicant [the employee]". She held a view that the employee might have been forum shopping and concluded that the matter was *res judicata*. Insofar as there had been no sanction imposed, because the disciplinary enquiry had been aborted, she found that the employee's disciplinary action fell outside the ambit of s 186(2)(b). She accepted that the employee's dispute amounted to no more than malicious prosecution which the GPSSBC lacked jurisdiction to hear.

The review before the Labour Court

- [12] Dissatisfied with the ruling made by the GPSSBC, the employee filed a review application with the Labour Court contending that the commissioner had committed a gross irregularity in the conduct of the proceedings insofar as she ruled on the merits without oral evidence and had not properly or at all considered the documents presented to her. He further argued that the commissioner failed to comprehend that the proceedings that were pending before the Labour Court concerned a different course of action, namely the failure to award costs to the employee, as opposed to unfair labour practice that was before her for determination.

The judgment of the Labour Court on review

- [13] The Labour Court held that the phrase “disciplinary action short of dismissal” had always been obfuscated with a disciplinary ‘sanction’ short of dismissal such as *“suspension without pay, final written warning, reprimands, caution and discharge, fines all being sanctions short of an employee being formally dismissed”*. The court was of the view that because the department had instituted disciplinary action against the employee, in the form of the agreed s 188A pre-dismissal arbitration, and later withdrew the charges, the disciplinary step it took fell within the ambit of s 186(2)(b). The Judge *a quo* went on to state that the Labour Court was established as a court of law and equity with jurisdiction as defined in terms of s 157 of the LRA. He held a view that the employee enjoyed a constitutional right to fair labour practice and that the courts had *“to define and/or expand on these rights”*.
- [14] The Labour Court held that both parties had been legally represented and incurred costs in respect of the withdrawn enquiry. It found that had the enquiry proceeded to finality and the employee succeeded, he would have been entitled to his costs. It further held that the employee suffered reputational damage when the pre-dismissal arbitration and the ancillary application brought before the Labour Court

to compel the employer to furnish further particulars were stalled for a period of a year.

- [15] Without the benefit of having heard oral evidence, the Labour Court stated²:

"The withdrawal of the charges confirmed that the same lacked merit and may have been frivolous or vexatious or even malicious. There was a considerable delay from the date of finalization of the investigation and the taking of the disciplinary action. The applicant claimed [that] the allegations made were baseless and lacked merit. There were inconsistencies in the application of the disciplinary code and it may have bordered on malicious prosecution. It is quite clear that the Applicant suffered patrimonial loss occasioned by the delay in the finalisation of the disciplinary enquiry and incurred legal costs in the GPSSBC before the same was withdrawn. Any legal costs relating to the institution of the action in this court under case Number J2906/16 is excluded from any compensation awarded herein."

- [16] The court had regard to the fact that the employee had some 30 months left before his retirement and found that he had *"suffered a great degree of humiliation, loss of dignity and reputational damage – all at the tail end of his career...he was put through an ordeal which was uncalled for"*³.
- [17] The court concluded that the GPSSBC was incorrect in ruling that it had no jurisdiction to deal with the employee's unfair labour practice claim. The court reasoned that it was in as good a position to dispose of the dispute as the commissioner, and on that basis, it awarded the employee R498 738 compensation, equivalent to his 6 months' salary. Costs were awarded in respect of both the aborted pre-dismissal arbitration proceedings on Scale D of the Magistrates' court tariff, which included counsel's fees, and the costs of the review application.

² *Laubscher v General Public Service Sectoral Bargaining Council (GPSSBC) and Others* [2020] 10 BLLR 1053 (LC) at para 53.

³ *Ibid* at para 57.

The issues on appeal arising for determination

- [18] The issue central to the appeal is whether the Labour Court correctly determined that the GPSSBC was endowed with jurisdiction to determine the unfair labour practice dispute lodged by the employee. The crux of that enquiry, and a basis upon which leave to appeal was granted, is a consideration of the question whether an aborted disciplinary process constitutes a disciplinary action short of dismissal as contemplated in s 186(2)(b) of the LRA and therefore an act or omission which would qualify as an unfair labour practice within the meaning of the Act. Insofar as the Labour Court found that there had been an unfair labour practice against the employee, it should also be considered whether it was competent for it to adjudicate that dispute.

The discussion

- [19] Before us, the issues had crystallised into the question whether the Labour Court was correct in concluding that an aborted disciplinary process constitutes a disciplinary action short of dismissal within the meaning of s 186(2)(b) of the LRA. If it was correct, in so holding, it follows that the matter would have to be remitted to the GPSSBC to determine the question of fairness of the labour practice and provide appropriate relief in the event the bargaining council finds unfairness in the treatment accorded to the employee. If the opposite is so, that would be the end of the matter.

- [20] In the context of s 23(1) of the Constitution,⁴ the Constitutional Court in *National Education Health & Allied Workers Union v University of Cape Town & others*⁵ held:

The concept of fair labour practice must be given content by the legislature and thereafter left to gather meaning, in the first instance, from the decisions of the

⁴ The Constitution of Republic of South Africa Act 108 of 1996.

⁵ 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC); (2003) 24 ILJ 95 (CC) para 34.

specialist tribunals including the LAC and the Labour Court. These courts and tribunals are responsible for overseeing the interpretation and application of the LRA, a statute which was enacted to give effect to section 23(1). In giving content to this concept the courts and tribunals will have to seek guidance from domestic and international experience. Domestic experience is reflected both in the equity-based jurisprudence generated by the unfair labour practice provision of the 1956 LRA as well as the codification of unfair labour practice in the LRA. International experience is reflected in the Conventions and Recommendations of the International Labour Organisation. Of course, other comparable foreign instruments such as the European Social Charter 1961 as revised may provide guidance.'

- [21] The Labour Relations Amendment Act⁶ removed the residual unfair labour practices that were previously codified in Part B of Schedule 7 of the LRA and placed them in the amended Chapter 8 of the LRA, which previously catered for unfair dismissals only. The Explanatory Memorandum⁷ prepared by the Ministerial Legal Task Team in January 1995 does not provide an explanation on what would constitute a disciplinary action short of dismissal. In *SA Police Union & another v National Commissioner of the SA Police Service & another*,⁸ the Labour Court noted that:

'The 1995 legislation, particularly in its amended form after 2002, dramatically reduced the scope of the unfair labour practice jurisdiction by codifying the concept in s 186(2) of the LRA, restricting its application to unfair conduct related to the provision of benefits, promotion, demotion, probation, training, suspension, disciplinary action short of dismissal, contractual rights to re-engagement and the detrimental treatment of whistle-blowers.'

- [22] Section 3 of the LRA requires that any person applying the Act must interpret its provisions - (a) to give effect to its primary objects; (b) in compliance with the Constitution; and (c) in compliance with the public international law obligations of

⁶ Act 12 of 2002.

⁷ (1995) 16 ILJ 278.

⁸ (2005) 26 ILJ 2403 (LC) para 77.

the Republic. Section 203(3) provides that: “[a]ny person interpreting or applying this Act must take into account any relevant code of good practice”.

[23] Over the years our Labour Courts have understood the reference to “any other unfair disciplinary action short of dismissal” in s 186(2)(b) to include disciplinary action in the form of verbal and written warnings or any action intended to correct the employee’s conduct as opposed to dismissal which is a penalty of the last resort.⁹

[24] The views expressed by the Labour Court in *Special Investigation Unit v Commission for Conciliation Mediation and arbitration and Others*¹⁰ (SIU) are persuasive. The facts in SIU are distinguishable from the present. There, the crisp issue before the commissioner was whether the failure to institute disciplinary proceedings following upon a complaint and investigations against an employee constituted an unfair labour practice as contemplated in s 186(2) of the LRA. It was held that the mere fact that an employee is aggrieved by the lodging of a complaint or the institution of some form of investigation against him or her cannot be construed as disciplinary action, let alone one that is short of being a dismissal. Insofar as there had been no disciplinary action, the commissioner had no jurisdiction over the matter. The Labour Court further found in that matter that alternative remedies had been available to the employee, including lodging a grievance or approaching the court for relief. The employee was not entitled to approach the CCMA as he had neither been suspended nor disciplined, and the CCMA clearly lacked jurisdiction where there was no live dispute between the parties.

[25] In the present case, the Labour Court attempted to distinguish between what it termed disciplinary ‘action’ and a disciplinary ‘sanction’ in order to justify a construction that the aborted pre-dismissal process constituted disciplinary ‘action’

⁹ See: *Kock v Commission for Conciliation, Mediation & Arbitration & others* (2019) 40 ILJ 1625 (LC) para 39; *National Union of Commercial Catering & Allied Workers v Commission for Conciliation, Mediation & Arbitration, Western Cape & another* (1999) 20 ILJ 624 (LC) para 21.

¹⁰ Unreported judgement under case no: JR509/2014 delivered on 21 April 2017 paras 15 - 16.

short of dismissal. This amounts to a strained interpretation of the statutory provision if regard is had to Schedule 8 item 3 of the LRA which the Labour Court referred to in its judgment but had not properly paid attention to its wording.

- [26] Schedule 8 item 3 bears the heading: “*Disciplinary measures short of dismissal*”. The word ‘measures’ when used as a noun means “*a plan or course of action taken to achieve a particular purpose.*”¹¹ Item 3 enjoins all employers to adopt disciplinary rules that establish the standard of conduct required of their employees. The form and content of the disciplinary rules vary according to the size and nature of the employer's business. In general, a larger business will require a more formal approach to discipline.¹² The Code goes on to state that our courts have endorsed the concept of corrective or progressive discipline. The purpose of discipline is recognised as a means by which employees are able to know and understand what standards are required of them. Efforts should be made to correct employees' behaviour through a system of graduated disciplinary measures such as counselling and warnings.¹³ Schedule 8 item 3(3) then puts the import of the phrase “disciplinary action short of dismissal” in s 186(2)(b) beyond doubt. It states:

‘(3) Formal procedures do not have to be invoked every time a rule is broken or a standard is not met. Informal advice and correction is the best and most effective way for an employer to deal with minor violations of work discipline. Repeated misconduct will warrant warnings, which themselves may be graded according to degrees of severity. More serious infringements or repeated misconduct may call for a final warning, or other action short of dismissal. Dismissal should be reserved for cases of serious misconduct or repeated offences. (my emphasis)

- [27] The phrase “short of dismissal” in s 186(2)(b) is linked to the “disciplinary action”. On the plain reading of the phrase “short of dismissal” in s 186(2)(b), conjunctively with item 3 of the code of good practise, it refers to a sanction less severe than dismissal. It means therefore that the employee would have been subjected to

¹¹ Oxford Languages, Oxford University Press, languages.oup.com.

¹² Schedule 8 Item 3(1).

¹³ Ibid Item 3(2).

discipline resulting in a sanction other than dismissal. A disciplinary enquiry which had not commenced or has been abandoned without the imposition of a disciplinary penalty on an employee cannot be equated to a disciplinary action short of dismissal as contemplated in s 186(2)(b) of the LRA. It follows that the unfair labour practice as set out in s 186(2)(b) does not embrace the dispute which the employee had referred to the GPSSBC for resolution. The Labour Court erred in finding differently.

[28] In any event, the s 188A pre-dismissal arbitration process, which as counsel for the employee correctly submits, is a disciplinary action subject to a regulated and agreed to process, because it is conducted with the employee's consent.¹⁴ It is therefore inconceivable that an employee would agree to that process and upon its withdrawal, claim that he had been subjected to a disciplinary process short of dismissal.

[29] The LRA delineates matters which are subject to the jurisdiction of the Labour Court.¹⁵ The Labour Court does not have jurisdiction to adjudicate an unresolved dispute if the dispute is one to be resolved through arbitration. Section 191(5)(a)(iv) of the LRA states that if an unfair labour practice remains unresolved after conciliation, the CCMA or the bargaining council must arbitrate the dispute. The fact that the Labour Court is a court of equity, does not in any sense supplement the jurisdiction of the court. The Labour Court and this Court are superior courts of law required to apply the law with due regard to considerations of fairness and the rules of natural justice.¹⁶

[30] In *Member of the Executive Council for Education, North West Provincial Government v Gradwell*,¹⁷ this Court said:

¹⁴ Section 188A(1) of the LRA.

¹⁵ See s 157 read with 158 of the Labour Relations Act 66 of 1995 (LRA).

¹⁶ See: *3M SA (Pty) Ltd v SA Commercial Catering & Allied Workers Union & others* (2001) 22 ILJ 1092 (LAC) para 17.

¹⁷ (2012) 33 ILJ 2033 (LAC) para 46.

'Disputes concerning alleged unfair labour practices must be referred to the CCMA or a bargaining council for conciliation and arbitration in accordance with the mandatory provisions of section 191(1) of the LRA. The respondent in this case instead sought a declaratory order from the Labour Court in terms of section 158(1)(a)(iv) of the LRA to the effect that the suspension was unfair, unlawful and unconstitutional. A declaratory order will normally be regarded as inappropriate where the applicant has access to alternative remedies, such as those available under the unfair labour practice jurisdiction. A final declaration of unlawfulness on the grounds of unfairness will rarely be easy or prudent in motion proceedings. The determination of the unfairness of a suspension will usually be better accomplished in arbitration proceedings, except perhaps in extraordinary or compellingly urgent circumstances. When the suspension carries with it a reasonable apprehension of irreparable harm, then, more often than not, the appropriate remedy for an applicant will be to seek an order granting urgent interim relief pending the outcome of the unfair labour practice proceedings.'

[31] The Labour Court, as already alluded to, found that the GPSSBC had jurisdiction to determine the employee's alleged unfair labour practice dispute. Albeit it was incorrect in so holding, this is where its enquiry ought to have ended. The Labour Court was not required to determine whether the department had committed an unfair labour practice against the employee, without the benefit of the evidence, when the employee had sought remittal of the matter to the GPSSBC if it were found that the GPSSBC had the requisite jurisdiction.

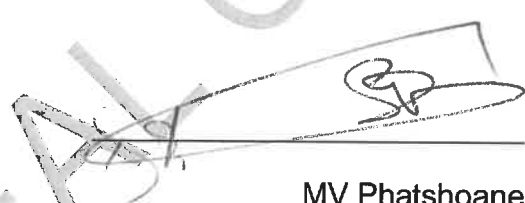
[32] As stated above, the unfair labour practice as set out in s 186(2)(b) does not embrace the dispute which the employee had referred to the GPSSBC for resolution. The commissioner misdirected herself in the assessment of the issues placed before her. Yet, her conclusion that the GPSSBC lacked jurisdiction cannot be faulted. Regard being had to all the facts and circumstances of this case, as well as the requirements of law and fairness, a costs order does not appear to be justified, both in respect of this appeal and the hearing in the Labour Court.

[33] I make the following order:

Order

1. The appeal is upheld.
2. The order of the Labour Court is set aside and in its place is substituted the following:

“The review application is dismissed with no order as to costs”.



MV Phatshoane
Acting Deputy Judge President of the Labour Appeal Court

Savage and Phatudi AJJA concur in the judgment of Phatshoane ADJP.

APPEARANCES:

FOR THE APPELLANT:

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FOR THE FIRST RESPONDENT:

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