THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C03/2025

In the matter between:

RONALDO GIOVANNI KLEINSMITH Applicant

and

COMMISSION FOR CONCILIATION MEDIATION & ARBITRATION First Respondent

ELRIDGE EDWARDS N.O Second Respondent

ABSA BANK LTD Third Respondent

Heard: 4 February 2026

Delivered: 10 February 2026

JUDGMENT

JACOBS AJ

<u>Introduction</u>

[1] This is an opposed review application.

[2] The Applicant seeks an order:

2.1 Reviewing and correcting and/or setting aside the arbitration award issued by the Second Respondent under CCMA case number WECT20660-23 on 27 November 2024;

2.2 Alternatively, remitting the dispute to the First Respondent for an arbitration *de novo* before an arbitrator other than the Second Respondent;

2.3 Directing the further conduct of proceedings;

2.4 Costs; and

2.5 Further and/or alternative relief.

Historical context

[3] The history of the matter is common cause.

[4] The Applicant, Mr Kleinsmith, was first employed by the Third Respondent on 1 January 2008 as a sales consultant. After completing certain qualifications and qualifying for certain promotions, Mr Kleinsmith occupied the position of Private Wealth Banker in July 2021 when he was retrenched.

[5] In December 2022, Mr Kleinsmith was again employed as Private Wealth Banker. The employment contract concluded between the parties is dated 8 November 2022.

[6] On 7 November 2023, Mr Kleinsmith was notified of a scheduled disciplinary hearing. The verbatim charges were:

6.1 Gross misconduct in that you breached company policy and procedures when failed to declare an OBA [Outside Business Affiliation] for Opulence Advice and Consulting (Pty) Ltd.

6.2 Gross misconduct in that you breached company policy and procedures made use of an Absa unapproved Introducer.

6.3 Gross misconduct in that you breached company policy and procedures when it was discovered that you divulged client [Mr A Petersen and/or Mr

Jantjes] private, personal and/or confidential information to a third party.

[7] The first charge referred to Mr Kleinsmith's apparent failure to disclose his business interests in Opulence Advice and Consulting (Pty) Ltd (Opulence) upon his appointment in December 2022. The second and third charges related to incidents that transpired in or about March to April 2014.

[8] Mr Kleinsmith was found guilty of all three charges and was dismissed on 8 December 2023.

[9] Mr Kleinsmith referred an unfair dismissal dispute to the CCMA, and the matter served before the Second Respondent (the Commissioner) on 9 July and 5, 6 and 7 November 2024.

[10] The arbitration award which is the subject of this review application, was issued on 27 November 2024. In his award, the Commissioner found the dismissal of Mr Kleinsmith to have been fair.

The grounds for review

[11] The Applicant listed six grounds for review.

11.1 It was submitted that the Commissioner's finding that the Applicant's dismissal was substantively fair, was not a finding that a reasonable decision-maker could make, because the decision was not supported by the evidence and the decision was based on incorrect references to the evidence;

11.2 The Commissioner's analysis of evidence relating to the first charge was lacking in that the considerations of evidence and the finding were not *ad idem*;

11.3 Charges 2 and 3 relate to events in 2014, and the long delay was not considered by the Commissioner;

11.4 The manner in which the Commissioner dealt with Mr Engelbrecht's apparent inconsistent testimony;

11.5 The Commissioner's finding that Mr Kleinsmith was dishonest, was not supported by evidence; and

11.6 The Commissioner erred in his evaluation of the status of an individual (Felix) in relation to the second charge.

Jurisdictional issue

[12] Much of the material before court related to the second and third charges at the disciplinary hearing.

[13] The 11-year delay in Absa bringing the charges against Mr Kleinsmith, was repeatedly referred to during proceedings before the Commissioner. The validity of disciplinary action after the termination of the contract of employment which was in operation until 2021, was however raised for the first time in the heads of argument filed on behalf of Mr Kleinsmith.

[14] The court is obliged to raise and determine jurisdictional questions *mero motu,*[1] irrespective whether the issue was pleaded or not. The parties' representatives were accordingly requested to address the court in this regard.

[15] The test on review concerning a jurisdictional point, is whether the decision of the arbitrator is reviewable on objectively justifiable grounds. The test is that of correctness, and not one of reasonableness.[2]

[16] If Absa lacked the right to act against Mr Kleinsmith in 2023 for alleged misconduct in 2014 under an earlier employment regime, the second and third charges would be *ab initio* void, and therefore not capable of being considered in a disciplinary hearing or by the Commissioner at arbitration.

[17] It is trite that prescription does not apply to disciplinary misconduct. An employer is entitled to act in response to apparent misconduct when it is discovered, even if the misconduct occurred some time in the past.

[18] It is also trite that, once an employment contract terminates, the employer

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[1] *Couto v Commission for Conciliation, Mediation and Arbitration and Others* (JR2442/23) [2025] ZALCJHB 24

[2] *Ukweza Holdings (Pty) Ltd v Nyondo and Others* (PA2/19) [2020] ZALAC 7; [2020] 6 BLLR 544 (LAC); (2020) 41 ILJ 1354 (LAC)

cannot continue with disciplinary proceedings against an employee.[3] An employer will retain the right to discipline an employee only until the requisite notice requirements have been satisfied.[4] It follows that an employer can also not institute disciplinary proceedings against an employee after the employment contract terminates.

[19] Mr Kleinsmith's appointment on 1 December 2022 brought with it a new employment relationship, founded on a new employment contract. Mr Kleinsmith was required to comply with normal application formalities, and a comprehensive agreement was signed prior to commencement of his employment.

[20] In argument during the arbitration hearing, Absa argued that the dismissal was fair because of Mr Kleinsmith's short service of one year.

[21] The rights derived from contract by the employer, which contract was terminated in 2021, are not revived merely because another contract is concluded between the same parties 16 months later. The very comprehensive agreement which came into effect on 1 December 2022, at par 13.1 thereof, determines that:

> *'This agreement sets out the whole agreement between the parties relating to your employment and supersedes all previous agreements and representations (whether oral or in writing) in connection with your employment.'*

[22] Ms Makome, for Absa, referred the court to the judgement in *Public Investment Corporation v More and Others*,[5] and the ruling that a disciplinary hearing is

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[3] <u>See eg</u>: *Toyota SA Motors (Pty) v CCMA and Others*[3] (2016) 37 ILJ 313 (CC); [2016] 3 BLLR 217 (CC); 2016 (3) BCLR 374 (CC) at para 142; *Sihlali v SA Broadcasting Corporation Ltd* (2010) 31 ILJ 1477 (LC)

[4] <u>See eg</u>: *Standard Bank of South Africa Limited v Chiloane* (JA 85/18) [2020] ZALAC 58; [2021] 4 BLLR 400 (LAC); (2021) 42 ILJ 863 (LAC)

[5] (JR 2121/2022) [2025] ZALCJHB 159; (2025) 46 ILJ 1775 (LC) at par [90] to [94]

held within the ambit of the LRA. The court in *Public Investment Corporation*,[6] pointed out that dismissal is not the enforcement of a contractual right to terminate, but the exercising of a statutory right to terminate an employment relationship on the grounds recognised by the LRA.

[23] The labour law mechanism provided for to investigate a *prima facie* case of alleged misconduct and its impact on a continued employment relationship, can however not exist in absence of an employment contract, whether verbal or written. The statutory right to terminate an employment relationship on the grounds recognised by the LRA, is founded in the employment contract.

[24] It is common cause that Mr Kleinsmith was dismissed by Absa for operational reasons in July 2021. This no-fault dismissal terminated the employment contract in operation at the time. The employer's right to institute disciplinary action against Mr Kleinsmith for alleged misconduct during the period of operation of that contract, also terminated therewith.

[25] The second and third charges against Mr Kleinsmith were for breaching company policy and procedures under a different employment regime. If the alleged misconduct had a criminal aspect to it, or Absa had suffered damages as result thereof, Absa would not have been without recourse to criminal and civil actions.

[26] The second and third charges against Mr Kleinsmith are *ab initio* void and could not be considered in a disciplinary hearing or in arbitration proceedings before the Commissioner.

<u>The first charge</u>

[27] Although charges 2 and 3 have become irrelevant to the dispute, the Commissioner's ruling concerning charge 1 still requires determination.

[28] The first charge against Mr Kleinsmith related to his apparent failure to declare an OBA for Opulence, a company which he was a director of.

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[6] *Supra*

[29] Mr Kleinsmith seeks for the Commissioner's ruling with reference to change 1, to be reviewed and set aside on the basis that the sanction was too harsh.

Relevant background to charge 1

[30] Opulence was established in February 2022 with Mr Kleinsmith as director. Opulence provided business leads to Absa during the period of May 2022 to December 2022 and would earn commission from Absa for each referred home loan that was approved.

[31] Opulence submitted invoices to Absa on 23 September 2022, 21 October 2022 and 17 January 2023. The last invoice was submitted after Mr Kleinsmith was again employed by Absa on 1 December 2022.

[32] Mr Kleinsmith conceded that he knew that he had to declare his interest in Opulence when his employment with Absa commenced on 1 December 2022. During the pre-employment process, Mr Kleinsmith declared his interest in Opulence when he submitted his application for risk assessment on 17 September 2022. After his appointment, he did not declare his OBA on C-Zone, a platform used to evaluate and manage risk and compliance relevant to potential conflicts of interest for Absa-employees.

[33] Although an invoice was submitted in January 2023, the work done by Opulence to qualify for the commission claimed in this invoice, was undertaken 3 to 4 months earlier – prior to Mr Kleinsmith's employment on 1 December 2022. After Mr Kleinsmith's employment on 1 December 2022, Opulence ceased doing work for Absa.

The arbitration award

[34] In concluding that Mr Kleinsmith was indeed guilty of charge 1, the Commissioner found that Mr Kleinsmith omitted to declare his OBA on C-Zone because he knew he would forfeit the lucrative business generated by Opulence.

[35] The Commissioner found that, although Mr Kleinsmith had not declared his OBA on C-Zone, he did disclose this fact in his risk assessment and Absa appointed him after assessing the potential risks.

[36] The Commissioner pointed out that Absa had not shown what the impact was of Mr Kleinsmith not reporting the OBA on C-Zone, or why rectifying this oversight was not possible.

[37] The Commissioner also found that Absa did not allege or prove any actual risk arising from the situation and concluded that Absa's actions were too harsh.

[38] The Commissioner further found that, despite not being charged with dishonesty, Mr Kleinsmith had been dishonest. This finding was however made after the Commissioner had considered the second and third charges and his finding that Kleinsmith was guilty of those charges.

Evaluation

[39] The Commissioner's finding that Mr Kleinsmith omitted declaring the OBA on C-Zone because he would forfeit the lucrative business generated by Opulence, fails to account for the common cause fact that Mr Kleinsmith and Opulence ceased working for Absa when Mr Kleinsmith was appointed in December 2022. The inference drawn by the Commissioner is not based on evidence and is not reasonable.

[40] The Commissioner's findings that, although Mr Kleinsmith had not declared the OBA on C-Zone, he did disclose his interests earlier and Absa had appointed him after assessing the possible risks, are reasonable.

[41] The Commissioner's findings that Absa had not shown what the impact was of Mr Kleinsmith not reporting the OBA on C-Zone, or why rectifying this oversight was not possible, are also reasonable.

[42] The Commissioner's finding that Absa did not allege or prove any actual risk arising from the situation and his conclusion that Absa's actions were too harsh, are reasonable.

[43] The record before court is comprehensive and the court is in a position to make an appropriate order.

[44] In the result, the following order is made:

<u>Order</u>

1. The arbitration award issued by the Second Respondent under CCMA case number WECT20660-23 on 27 November 2024 is reviewed and set aside.

2. The award is substituted with the following order:

   2.1. The second and third charges against the Applicant are declared *ab initio* void.

   2.2. The dismissal of the Applicant was substantively unfair.

   2.3. The Third Respondent is ordered to reinstate the Applicant retrospectively from the date of his dismissal on the same terms and conditions of employment that existed prior to his dismissal and without any loss of benefits.

   2.4. The Third Respondent is ordered to pay the Applicant backpay from the date of dismissal to the date on which he reports for duty, within 14 days of this order.

   2.5. The Applicant is issued with a written warning.

3. There is no order as to costs.

[redacted]

W Jacobs

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: - Adv D Seale

Instructed by: - CK Attorneys

For the Third Respondent: - Adv L Mukome

Instructed by: - Phatshoane Henney Attorneys