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: In chambers

Delivered: 31 March 2026

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for hand-down is deemed to be 31 March 2026.

JUDGMENT - APPLICATION FOR LEAVE TO APPEAL

JACOBS AJ

Introduction

[1] This is an opposed application by the Third Respondent for leave to appeal against the whole of this court's judgment and order of 10 February 2026.

Test for Leave to Appeal

[2] The test to be applied in considering an application for leave to appeal is well known.

[3] Leave to appeal will only be granted if a court is of the opinion that the appeal would (not may), have reasonable prospects of success and/or there are compelling reasons why the appeal should be heard.[1] Stated differently, the test is whether there is a reasonable prospect that another court would come to a different conclusion, not whether there is a possibility that another court could come to a different conclusion.

[4] The Labour Appeal Court in *Martin and East*[2] warned that:

> "...The statutory imperative of the expeditious resolution of labour disputes necessarily requires that appeals be limited to those matters in which there is a reasonable prospect that the factual matrix could receive a different treatment, or where there is some legitimate dispute on the law..."[3]

The application

[1] Superior Court Act 10 of 2013, section 17(1); Also see eg: *Martin and East (Pty) Ltd v NUM* (2014) 35 ILJ 2399 (LAC)

[2] *Supra*

[3] Also see: *Mgedezi Gasbat Nxumalo v The National Bargaining Council for the Chemical Industry (NBCCI) and Others* (JR 1170/2023) [2016] ZALCJHB 212 (15 June 2016)

[5] Several grounds of appeal were raised in support of this application. Both the Applicant and Third Respondent submitted comprehensive submissions in support and in opposition of the application for leave to appeal.

Ground 1 – A fairness issue was mischaracterised as a jurisdictional issue and the incorrect standard on review was applied

[6] The question to be considered related to the Third Respondents authority to pursue disciplinary action against Mr Kleinsmith for alleged misconduct during an earlier period of employment. The test on review when a legal issue such as jurisdiction is considered, involves a determination of correctness, and not reasonableness.[4]

[7] The inquiry whether an employer has the authority, or jurisdiction, to institute disciplinary action is a legal question and not an issue susceptible to subjective opinion. The inquiry was not whether the exercise of disciplinary power was fair as the Third Respondent suggests, but rather whether the power to act existed at all.

[8] The Third Respondent's point of departure is the assumption that Absa had the authority to act. The authority to act is a legal prerequisite which has to exist before the fairness of any pursuant action may be evaluated. Absa's common law and contractual authority to discipline were found to have ended when the contract which this authority derived from, terminated.

[9] The question whether Absa had the power to institute disciplinary action was not a fairness issue, but a question of law.

Ground 2 - Contractual rights were conflated with the employer's right to maintain discipline

[4] *Ukweza Holdings (Pty) Ltd v Nyondo and Others* (PA2/19) [2020] ZALAC 7; [2020] 6 BLLR 544 (LAC); (2020) 41 ILJ 1354 (LAC); Also see eg: *Exxaro Coal (Pty) Ltd v Chipana and Others* (JA161/17) [2019] ZALAC 52; [2019] 10 BLLR 991 (LAC); (2019) 40 ILJ 2485 (LAC) (27 June 2019); *Eskom Holdings SOC Ltd v National Union of Mineworkers obo Kyaya and others* [2017] 8 BLLR 797 (LC)

[10] The finding in *Public Investment Corporation v More and Others*[5] that a disciplinary hearing is held within the ambit of the LRA and that dismissal is the exercising of a statutory right to terminate an employment relationship on the grounds recognised by the LRA, was acknowledged.

[11] The statutory right to terminate an employment relationship on the grounds recognised by the LRA can however not exist in absence of an employment relationship, which will always be based on an employment contract, whether expressed, implied, verbal or written. The statutory right to terminate an employment relationship is derived from the employment contract.

[12] Contractual rights were specifically distinguished from the employer's right to maintain discipline. An employer's common law, statutory or contractual rights to discipline an employee cannot exist or be exercised outside a valid employment contract.

<u>Ground 3 - Clause 13.1 of the 2022 employment contract was misinterpreted</u>

[13] Clause 13.1 of the 2022 employment contract is unambiguous and was evidently included by the Third Respondent to limit the parties' rights and obligations to those rights and obligations incidental to the employment relationship which came into effect on 1 December 2022.

[14] The intention of the parties when concluding the 2022 contract, was clearly to start with a clean slate. Mr Kleinsmith would not have been entitled to demand benefits such as recognition for long service and seniority based on the earlier employment contract. Clause 13.1 is obviously not meant to operate selectively, and it clearly does not allow for unilateral additions, amendments or extensions to the contract – that would create an absurd situation.

[15] The language, purpose and context of clause 13.1 is not open for creative interpretation. Clause 13.1 is an expressed exclusion of rights and obligations that may have existed by virtue of any historical or ulterior contract or arrangement.

[5] (JR 2121/2022) [2025] ZALCJHB 159; (2025) 46 ILJ 1775 (LC)

Ground 4 - Reasoning is internally contradictory and irreconcilable with *Public Investment Corporation v More*

[16] This aspect is closely related to ground 2, above.

[17] Although misconduct does not prescribe with the passage of time, the right to act on perceived misconduct, however lapses with the termination of the contract from which the right to discipline is derived.

[18] The rights incidental to a terminated contract do not automatically revive upon the later conclusion of a new contract, especially if the new contract expressly excludes the incorporation of historical rights. This is not what *Public Investment Corporation v More* implies.

Ground 5 – Implying a waiver where none could legally exist

[19] A waiver was not implied. The contract concluded in December 2022 clearly expressed the intention to limit the parties' rights and obligations to those rights and obligations incidental to the 2022 contract.

[20] In this instance, a prior right to discipline was extinguished by the termination of the contract it was derived from. Whether the provision in question is labeled as a waiver or a contractual exclusion, may be semantic differentiation. The provisions of the 2022 contract intentionally excluded any rights or obligations that the parties may have been entitled to by virtue of any historical or ulterior contract or arrangement.

Ground 6 – Misdirection on a material and undisputed fact

[21] The record of the evidence adduced at the arbitration hearing showed that Mr Kleinsmith and Opulence ceased working for Absa when Mr Kleinsmith was appointed in December 2022. An invoice was submitted in January 2023 for services rendered 3 to 4 months earlier, prior to Mr Kleinsmith's employment on 1 December 2022. Opulence did not render services to Absa after 1 December 2022.

[22] The *Sidumo*-test was applied to the Commissioner's findings concerning the first charge, and a sanction short of dismissal was imposed in accordance with the Commissioner's finding that Absa's actions were too harsh in relation to this charge.

Other possible compelling reasons for the appeal to be heard

[23] The Third Respondent suggests that the questions raised in its application for leave to appeal are of broader importance to labour law in South Africa and warrant appellate guidance.

[24] In *Martin and East,*[6] the LAC made it clear that leave to appeal is not simply there for the taking, and also emphasised that:

> "…*The Labour Relations Act was designed to ensure an expeditious resolution of industrial disputes. This means that courts, particularly courts in the position of the court a quo, need to be cautious when leave to appeal is granted, as should this Court when petitions are granted*."

[25] The issues relevant to this matter are not new. The issues involve established legal principles which are dealt with sufficiently in sources such as authoritative judgements.

[26] Parties approach the Labour Court to get finality on an issue. This court cannot grant leave to appeal merely to see what the Labour Appeal Court may determine.

Conclusion

[27] In the circumstances, leave to appeal cannot succeed.

Order

1. The application for leave to appeal is dismissed.

2. The Third Respondent will pay the Applicant's costs.

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[6] *Supra*

[redacted]

W Jacobs

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: - Adv C de Kock & Adv D Seale

Instructed by: - CK Attorneys

For the Third Respondent: - Adv L Mukome

Instructed by: - Phatshoane Henney Attorneys