IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC CASE NO:CCT 228/14

In the matter between:-

TOYOTA SA MOTORS (PTY) LTD	Applicant
and	
CCMA	First Respondent
COMMISSIONER TERRENCE SERERO	Second Respondent
RAWU	Third Respondent
MAKOMA MAKHOTLA	Fourth Respondent

APPLICANT'S STATEMENT OF FACTS RELEVANT TO FACTUAL FINDINGS OF THE CCMA AND LABOUR COURT PERTINENT TO THE ISSUES IN THE APPEAL

1.

Being absent from work without authority (AWOL) without advising the Applicant of an employee's whereabouts *and failing to provide acceptable reasons* to Management for 4 days or longer is a category 4 disciplinary infraction according to

the Applicant's Disciplinary Code, for which dismissal is considered the recommended sanction for a first offence.

2.

The Fourth Respondent was employed by the Applicant in the position of Training Manager & Special Projects. At the time of the termination of his contract of employment he had been employed with the Applicant for a period of approximately 5 years.

3.

On 28 February 2011, the Fourth Respondent did not report duty. He was absent without leave for a period of 4 days, returning to work on 4 March 2011.

4.

The Fourth Respondent had received a prior warning in respect of being absent without leave on two occasions in March 2007.

5.

It was common cause at the arbitration hearing before the Arbitrator (the Second Respondent), and before the Labour Court at the hearing of the Third Respondent's application to dismiss (acting on behalf of the Fourth Respondent) that the Applicant's review together with relief in terms of s158(1)(c) of the Act making the Arbitration Award an Order of Court, that:-

5.1 Two shifts into the Fourth Respondent's period of absence (on the evening of Tuesday 1 March 2011), he sent his relevant manager, Ms. Mukhavhuli, an SMS informing her that he was in the Drakensberg ("by himself") "clearing his mind";

5.2 The Fourth Respondent whilst absent, telephoned Mr. Hawkins (not his superior and accordingly not an individual having any authority to grant the Fourth Respondent permission to be on leave) and informed him that he was absent. (Hawkins contends he was told by the Fourth Respondent he was not well. The Fourth Respondent disputed this. Fourth Respondent claimed that he asked Hawkins to relay the message about his absence to his immediate superior, Hawkins said he recalled no such request).

5.3 On his return to work (4 March 2011), he informed his superior that in fact he had been involved in attempting to retrieve girls who had been forced to participate in a female initiation ceremony/process. He could not remember the details of the police station where he had allegedly laid a criminal complaint regarding the incident.

5.4 On 4th day of March 2012, the Applicant served the Fourth Respondent with a notice to attend a Disciplinary Enquiry in respect of the breach of its Disciplinary Code in that the Applicant contended the Fourth Respondent had been absent without leave and without reasonable explanation for a period of 4 or more days;

5.5 On 7 of March 2012, the Fourth Respondent gave notice of his resignation (dated 1 March 2011) and indicated his last working day in terms of his contract of employment would be 31 March 2011. A copy of that resignation letter is attached to the petition for leave to appeal to this Honourable Court marked "**A**".

5.6 The Fourth Respondent's immediate superior informed him that notwithstanding the aforegoing, he would be disciplined and accordingly, a disciplinary hearing was finally convened for the 24 March 2011.

5.7 The decision to dismiss was taken on that date, and the Fourth Respondent informed on that day of his dismissal. He stated in his referral to the CCMA on 21 April 2011, that he was orally informed of his dismissal, but it appears he was also acknowledged in writing the outcome of the disciplinary hearing.

5.8 Notwithstanding paragraph 5.7 above, the Fourth Respondent was again informed in writing of the outcome of his disciplinary hearing on 21 April 2011, and afforded 48 hours to appeal and reminded therein of his right to refer the dismissal dispute to the CCMA for resolution within 30 days.

5.9 On 21 April 2011 the Fourth Respondent referred an alleged unfair dismissal dispute to the CCMA for resolution.

- See pages 17 and 19 of the Applicant's bundle before the CCMA filed herewith

5.10 At no stage, did the Fourth Respondent contend that he had withdrawn his notice of resignation and the Applicant had accepted such withdrawal;

5.11 At the Arbitration hearing it was put to the Applicant's witnesses both that the Fourth Respondent had given notice of resignation correctly yet was still charged (cross examination of J Hawkins), and secondly, that he tendered resignation in anger (cross examination of Onica Mukhabhauli the Fourth Respondent's immediate supervisor).

- See available record of the arbitration in the form of transcribed Commissioner's notes, Applicant's and Fourth Respondent's representative's notes.

5.12 No constructive dismissal dispute was ever referred by the Fourth Respondent.

5.13 It did not appear from the record of the Arbitration proceedings that oral evidence had been tendered by the Fourth Respondent that he had in fact given the notice of resignation in anger.

6.

The Applicant's application for review was instituted on or about the 19th of October 2011.

7.

On 18 November 2011, the CCMA notified the Applicant that the record as set out in *that* notice had been dispatched to the Registrar.

8.

On 30 November 201 the Applicant's legal representatives requested their correspondent attorneys to uplift the record and courier it to the Applicant's legal representatives.

9.

On 6 February 2012, the Applicant delivered its first notice in terms of Rule 7A(6) (pages 66 and 67 of the Fourth Respondent's papers filed in opposition to the application to this Honourable Court for leave to appeal. Incorrectly referred to in it's the Fourth Respondent's table of contents as dated 6 February 2014). The document evidences the correct date as being 2012.

10.

On 21 February 2012, the CCMA filed a further notice in compliance with Rule 7A(3). It is incorrectly dated 21 February 2011 (before the arbitration award) but the date stamp of the Labour Court confirms the document was delivered in 2012. (Copy filed as part of the Applicant's extracts from the record, delivered herewith).

11.

During the period 29 February 2012 to 23 August 2012 the Applicant took various steps to obtain the balance of the recordings from the CCMA, if any, which were

supposed to have been made and to have the Commissioner's (indisputably illegible handwritten notes) transcribed by the appointed transcribers. The details of those steps, supported by the correspondence evidencing the steps, are set out in the Applicant's opposing affidavit filed in opposition to the Fourth Respondent's application to dismiss the Applicant's review. The Applicant's said opposing affidavit is delivered herewith.

12.

On 23 August 2012, the Applicant requested the CCMA to set the matter down for a reconstruction meeting. Eventually, the parties agreed to schedule a reconstruction meeting outside the ambit of the CCMA. That was held on 28 November 2012. The minutes of that meeting are filed as part of the Fourth Respondent's documents in opposition to the application for leave to appeal in this Honourable Court, at pages 62 to 63.

13.

At that meeting it was agreed that the Commissioner would be asked to have his handwritten notes transcribed into a typed document. It was further agreed that the Applicant would attend to transcribing the Applicant's representative's notes from the arbitration and that of the Fourth Respondent's legal representatives.

14.

On or about 29 January 2013 the Applicant's attorneys' received notification from the CCMA that the commissioner's notes had been transcribed and were available

for collection. (Page 65 of the Fourth Respondent's documents filed together with his opposing affidavit before this Honourable Court).

15.

On 31 January 2013, the applicant addressed correspondence to the Fourth Respondent's attorneys attaching transcriptions of the parties' respective legal representative's handwritten notes and requesting the Fourth Respondent's legal representatives to confirm that they were "comfortable with" the contents thereof.

16.

The Fourth Respondent's legal representatives filed not response to the Applicant's attorneys confirming that the contents of the transcribed notes accorded with the notes in their possession and accordingly could be filed as an accurate representation of those notes.

17.

On or about 6 August 2013 the Fourth Respondent's served an application to dismiss the Applicant's review and for an order making the arbitration award an order of Court in terms of s158 of the Labour Relations Act 66 of 1995.

18.

On 27 August 2013, (pages 1 to 2 of the Applicant's extracts from the record filed herewith) the Applicant served a further Rule 7A(6) notice attaching the transcribed Commissioner's notes, and the transcription of the parties' handwritten notes,

notwithstanding that the Fourth Respondent had never reverted to the Applicant as requested confirming the latter transcriptions were in order.

19.

The Fourth Respondent persisted with its application for dismissal of the Applicant's review. The Applicant opposed that relief.

20.

During or about 4 July 2014, and before the scheduled hearing of the application to dismiss the review, the Applicant proceeded to file its notice in terms of Rule7A(8) (a) and (b) with supplementary founding affidavit dealing with the substantive grounds of review raised in relation to the reasonableness of the arbitration award based on the evidence and the Commissioner's failure to resolve the disputes of fact concerning the various versions proffered by the Fourth Respondent in relation to his absence, as well as the paucity of the record and how this impacted upon the Applicant's ability to review the award based on the allegation that the Commissioner had curtailed the Applicant's cross examination of the Fourth Respondent surrounding his various reasons proffered by the Fourth Respondent for his absence, as well as the fact that the Commissioner had introduced a new criteria into the definition of the misconduct (namely habitual absenteeism) which was not relevant to the charge.

21.

Per the *ex tempore* judgment of the Labour Court handed down on 9 July 2014, the Labour Court had the various transcriptions referred to hereinabove as well as the arbitration award before it, the founding and supplementary affidavits in the review application.

Dated at Durban this the 4th day of May 2015.

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APPLICANT'S ATTORNEYS

MACGREGOR ERASMUS ATTORNEYS

114 Bulwer Road

Glenwood,

Durban

c/o Macgregor Erasmus Attorneys

Office No. N102A

Thrupps Illovo Centre

204 Oxford Road

Illovo, Sandton