IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC CASE NO: …….
LAC CASE NO: JA 92/14
LC CASE NO: JR 2627/11

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

FOUNDING AFFIDAVIT

I, the undersigned,

RENITA PUNCHOO

do hereby make oath and state:

1.

I am an adult female, employed by the Applicant as an Industrial Relations Specialist, duly authorised to depose to institute this application on behalf of the Applicant.

2.

Save where the context indicates the contrary, or where otherwise stated, the facts herein deposed to, are within my personal knowledge and belief, true and correct. Legal submissions are made on the advice of the Applicant's legal representatives. Where I quote various witness testimony, I do so from the record of the arbitration proceedings delivered in the matter.

3.

The Applicant is TOYOTA SA MOTORS (PTY) LTD, a company with limited liability, duly registered in terms of the company laws of the Republic of South Africa and which carries on business at 15 Prospecton Road, Prospecton, Durban.

4.

The First Respondent is the COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION, a juristic person established in terms of s112 of the Labour Relations Act 66 of 1995 (hereinafter "the Act"), with its head office at 127 Fox Street (Cnr. Eloff), Johannesburg.

5.

The Second Respondent is TERRENCE SERERO, a Commissioner of the Commission for Conciliation, Mediation and Arbitration duly appointed as such in terms of s117 of the Act and employed in his capacity as such at the CCMA offices situated at 127 Fox Street (Cnr. Eloff), Johannesburg.

6.

The Third Respondent is the RETAIL AND ALLIED WORKERS UNION (RAWU), a trade union duly registered in terms of s96 of the Act and which has its principal place of business situated at 5th Floor, Suite 531, Carl Kling Building, 262 Vermeulen Street, Pretoria Central, also care of Carrim Attorneys, 19 Pretorius Street, 2nd Floor, Pretoria, with facsimile number 086 565 1891.

7.

The Fourth Respondent is MAKOMA MAKHOTLA, an adult male whose full and further particulars are to the Applicant unknown, but who is (and has at all material times been) represented by RAWU and whose address for the purposes of these proceedings is accordingly, care of RAWU.

8.

The Applicant contends that the proposed appeal (in respect of which leave is being sought herein from this Honourable Court), concerns two issues which involve matters of general public importance, are rooted in the Constitutional rights of employers and employees to fair labour practices (s23 of the Constitution of the Republic of South Africa Act 66 of 1995, hereinafter 'the Constitution"), the

Applicant's rights to Administrative Justice (s33 of the Constitution) and Access to Courts (s34 of the Constitution), and accordingly, would justify the grant of leave to appeal in terms of both s17(1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013.

9.

Those issues are:-

9.1. The extent of the powers and/or obligations of the Labour Court in fulfilment of its supervisory duties and the exercise of its direction when determining applications to make arbitration awards an order of Court in terms of s158(1)(c) of the Act, to decline to make an Arbitration Award an Order of Court, alternatively to partially enforce such award in circumstances where the Arbitrator made a material error of law, alternatively where the validity of a reinstatement order appears *ex facie* the common cause facts to have been incompetent / beyond the jurisdiction of the CCMA impacting upon the validity of the award itself;

9.2. the Labour Court's denial of a litigant's right to administrative justice and access to Court by dismissing an application for review on the basis of a record being incomplete, notwithstanding the fact that attempts were made by both litigants to reconstruct the record, and on the basis that a litigant should, notwithstanding the ostensible recording thereof by the CCMA, be penalised for not having kept sufficient notes to substitute as a record when the administrative body (the CCMA) failed in its statutory obligation in terms of the Act to keep a record of the proceedings alternatively, to keep any such

record as may have been made, safe for the purposes for a litigant exercising its right to review. Ancillary to this, but important for the purposes of the conduct of proceedings in the Labour Court (and of general public importance), is clarity regarding the process to be followed by litigants *before* applying for the dismissal of a review application in circumstances where Rule 12 of the Labour Court Rules makes no provision for an order first compelling compliance with the Rule 7A before an application to dismiss is launched and where Rule 7A(4) affords the administrative body such courtesy, and accordingly, what procedure should in fact be adopted in terms of Rule 11(3) of the Labour Court Rules when seeking relief barring a litigant proceeding with its case. (Lastly, to the extent that the provisions of Rule 7A(8) provide that the Applicant in a review must within 10 days from when the Registrar has made the record available for collection (which practically means only available for purposes of transcription) deliver its notice to stand by the Notice of Motion or supplementary affidavit, how those provisions ought to be complied with and accordingly, their proper meaning (if sense can be made thereof).

10.

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.

11.

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

12.

The Applicant's Disciplinary Code and Procedures categorises absence without leave and a reasonable explanation for 4 days or longer, as a category 4 offence and the recommended sanction for a first infraction is dismissal.

13.

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

14.

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:-

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

14.2. 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 not feeling well. Hawkins disputed that the Fourth Respondent had requested him to inform his superior of his absence;

14.3. 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;

14.4. 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 Code in that the Fourth Respondent was clearly absent without leave and without reasonable explanation for a period of 4 or more days;

14.5. 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 annexed hereto marked "**A**";

14.6. His immediate superior informed him that notwithstanding the aforegoing, he would be disciplined and accordingly, a disciplinary hearing was convened eventually for the 24 March 2011. The decision to dismiss was taken on that

date, but the Fourth Respondent was only informed in writing of this decision on 21 April 2011. It was on this day that he referred an alleged unfair dismissal dispute to the CCMA.

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

14.8. At the Arbitration hearing it was put to the Applicant's witnesses (contradictorily) first that he had given notice of resignation correctly yet was still charged, then secondly, that he tendered resignation in anger, however:-

(i) No constructive dismissal dispute was referred in terms of which an employee would ordinarily contend that the resignation was ineffective and not voluntarily given and accordingly invalid; and

(ii) More importantly, the terms of the resignation letter make it plain that it was not tendered in anger nor would it sustain a claim for constructive dismissal even had such a claim been pursued (which it had not been).

14.9. It did not appear from the record of the Arbitration proceedings (such as it was), that oral evidence was tendered by the Fourth Respondent that he had in fact given the notice of resignation in anger. No allegation was ever made that he had withdrawn it (necessarily with the consent of the Applicant).

15.

Notwithstanding the aforegoing, the arbitrator:-

15.1. without determining the true reason for the Fourth Respondent's absence without leave, and accordingly, without determining whether such explanation was in fact reasonable;

15.2. notwithstanding a prior infraction for being absent without leave (which the arbitrator ignored in finding the Fourth Respondent did not have a "dismal disciplinary record in this regard) and notwithstanding that the recommended sanction for a first infraction was dismissal, he determined that a dismissal would only be justified in the event of "habitual absenteeism", a criteria not provided for in the Disciplinary Code; and

15.3. granted retrospective reinstatement (including 6 months back pay) in terms of the arbitration award dated (19 September 2011) at a time when reinstatement was no longer possible, the Fourth Respondent's contract having in any event terminated by the act of resignation given prior to the purported dismissal (which had effectively taken place long after the notice period of his resignation had expired on 31 March 2011). Irrespective of the date of purported dismissal, there was simply no contract to reinstate. There was no employment status quo to restore as at September 2011, as the Fourth Respondent had through his own conduct terminated such contract. Resignation was not an act that required the Applicant's acceptance or co-

operation. Any alleged rejection / non-acceptance thereof was accordingly, ineffective.

16.

The arbitrator could not ignore the act of resignation and accordingly could not competently restore the status quo of employment through a reinstatement order where the employment relationship had been terminated by the employee in the interim. This impacted upon the validity of the award. The arbitrator exceeded his jurisdiction.

17.

At the arbitration hearing both the Applicant and Third and Fourth Respondents were represented by employee and Union Official, respectively. Insofar as the Applicant was concerned, it was accordingly not legally represented.

18.

It was common cause that the Arbitrator had ostensibly attended to recording the arbitration proceedings mechanically.

19.

In November 2011, the CCMA delivered the purported record of the arbitration proceedings to the Labour Court for the purposes of transcription. When the record was delivered a single compact disc was part thereof. It was transmitted to the transcribers for transcription. It transpired, however, that only 20 minutes worth of recording for the entire arbitration were recorded on the compact disc. Despite

numerous communications to the CCMA, requests and reminders to attempt to locate the balance of the mechanical recordings, no further recordings were ever provided. No clarity was ever provided by the CCMA as to whether or not there had been a failing on the part of the Arbitrator to record the full hearing at all, alternatively whether there had been a mechanical failing with the recording equipment or the downloading process, or whether the tape recordings had simply been lost by the CCMA.

20.

Finally, a reconstruction meeting was held between the parties on 28 November 2012, and the Applicant's and Third and Fourth Respondent's legal representatives agreed that the parties' representative's notes taken at the arbitration (such as they were), would be transcribed and the arbitrator would be requested to transcribe Arbitrator's notes (such as they were) as the transcribers were simply unable to decipher his handwriting (despite repeated attempts).

21.

The Applicant duly attended to transcribing its representative's notes and those of the Fourth Respondent. Those were delivered on 31 January 2013 to the Third and Fourth Respondent's attorneys with a request that they peruse the notes (considering that they were transcribed from handwritten notes and there might accordingly very well be errors) and the Fourth Respondent revert to the Applicant with regard to whether it accepted the notes.

22.

The arbitrator's notes were typed by him and furnished to the Applicant. Without the Third and Fourth Respondent's attorneys ever reverting to the Applicant regarding the correctness of their representative's notes and accordingly, with whether it was satisfied that the Applicant could now file them as part of the record, and without any formal notice, on or about 7 August 2013, it instituted an application to dismiss the Applicant's review as a first order and a second order making the arbitration award an order of Court with the Applicant to pay the costs.

23.

Without first complying with the provisions of Rule 12 of the above Honourable Court Rules or Rule 11(3) read together with Rule 30A of the High Court Rules, the Third respondent acting on behalf of the Fourth Respondent, and notwithstanding the fact that the their representatives never reverted to the Applicant with whether or not it accepted the transcription of its representative's handwritten notes and accordingly whether it consented to the filing thereof as part of the record, launched an application to dismiss the Applicant's application for review and for a second Order prayed, making the arbitration award an Order of Court in terms of s158(1)(c) of the Labour Relations Act 66 of 1995.

24.

The Applicant proceeded to file a further Rule 7A(6) notice with the balance of the record, inclusive of the Arbitrator's notes which had in the interim been provided (the first notice in terms of Rule 7A(6) having been delivered with the first part of the

available record in March 2012) and its supplementary affidavit in terms of Rule7A(8). It opposed the application to dismiss the review by, inter alia, setting out all the steps taken by the Applicant over the period November 2011 to January 2013. There were many!

25.

The Honourable Acting Justice Fourie, in an *ex tempore* judgment handed down on 9 July 2014 (a copy of which is annexed hereto marked "B") found that:-

(i) The law was clear in that the lack of a record in the arbitration proceedings did not in itself constitute a separate ground of review (paragraph 5 of the judgment);

(ii) The facts of the present matter were distinguishable from the case of *Balasana v Motor Bargaining Council & Others (2011) 32 ILJ 297 (LC)* in that in the aforesaid matter the arbitrator did not record the proceedings and did not keep a proper note and never told the parties that he had not been recording the proceedings or keeping a proper note whereas in the present case the proceedings were recorded. The Court a quo further found that there was no allegation that the Arbitrator did not record the proceedings properly rather it appeared that somehow large chunks of the evidence seemed to have gone missing (paragraph 6 of the judgment - There was never any factual basis for this finding by the Court a quo given that there was never any evidence that the Arbitrator had recorded the hearing <u>properly</u>.

Manifestly he did not and/or the CCMA did not fulfil their statutory obligations to keep the recording safe);

(iii) Nothing prevented the parties from keeping proper notes or recordings of the arbitration proceedings themselves and one should be slow to place full blame at the door of the Arbitrator or the CCMA. He found further that in the Balasana case, the Arbitrator had failed to inform the parties that he was not keeping a note or record (paragraph 7 of the judgment);

(iv) This was not the fact in the present case. It concerned a more "commonplace" scenario where there was simply not, after some effort, a proper record on which to judge the merits of the review. The Applicant in these circumstances must then "proceed and take its chances on the record as it stands and if it cannot prove the ground, prove that the award should be reviewed and set aside, then the award stands." (Paragraph 8 of the judgment);

(v) On the available record, the prospects of success on review seemed to be poor (paragraph 8 of the judgment);

(vi) This was a relevant factor in the Rule 11 application (the application to have the review dismissed and made an Order of Court) and had there been a prospect of "quickly supplementing the record", the Court would have been inclined not to grant the application at that stage but to perhaps put the parties on terms as to further the conduct of the review application. However, in this matter there was a reconstructed record which was not going to improve and the Applicant in the review proceedings had "done nothing for almost 18

months to improve the record". The prospects of success did not militate against dismissing the review application on the grounds of delay (paragraph 9 of the judgment);

(vii) The Applicant had done nothing for 18 months in prosecuting the review and should not be surprised accordingly when the Court took a robust approach and dismissed the review on the grounds of the delay. As a consequence, it followed that the Court was entitled to grant an order in terms of not only prayer 1 dismissing the review, but without anything further, grant relief making the arbitration award an Order of Court (paragraphs 10 and 11 of the judgment).

26.

From the facts set out hereinabove, it is evident that the learned judge of the Court a quo was in the first instance completely wrong on the facts by finding that the Applicant had done "nothing for 18 months" to prosecute the review. The Applicant had taken numerous and serious steps in reconstructing the record and accordingly prosecute the review application.

27.

Furthermore, and more importantly for the purposes of the application for leave to appeal to this Honourable Court, the Court a quo was grossly wrong in finding that there was an obligation on a litigant before the CCMA to take its own notes for fear that the "commonplace" situation would arise where the Arbitrator failed to keep a proper record alternatively, where the CCMA mislaid the record and accordingly, that the litigant must be prejudiced in its rights to administrative justice (s33 of the

Constitution) and in its right to access to courts in terms of s34 of the Constitution, by being compelled to argue the review on the record as it appeared (irrespective of whether it was incomplete or simply absent).

28.

The dictates of administrative justice can never require a participant in a hearing before an administrative tribunal to assume responsibility for the production of the record of the proceedings in circumstances where that duty rested statutorily on the administrative tribunal and its functionaries. To deny the Applicant and litigants generally, the right to review an administrative decision based on its failure to take precautionary measures to guard against an administrative tribunal's procedural failures, constitutes a violation of the Applicant's rights in terms of s33 and s34 of the Constitution.

29.

The Honourable Mr. Acting Justice Fourie was also grossly wrong in finding that there were no prospects of success in the review, in circumstances where it was common cause (and made as a positive averment in the application in terms of s158 (1)(c) of the Act) that the Fourth Respondent had resigned his employment in terms of a written notice to the Applicant. The Court a quo should have immediately recognised that the Arbitrator was incapable of granting reinstatement relief (which has the purpose and effect of restoring the status quo, being an employment relationship) in circumstances where such relationship had in the intervening period (in casu with effect 31 March 2011) been terminated by the employee himself.

30.

Certainly, the Court a quo ought at least to have appreciated that the relief in terms of s158(1)(c) did not flow automatically from a dismissal of the review application (even if such were justified, which it clearly was not).

31.

In the exercise of the Labour Court's discretion, and in fulfilment of its supervisory function, it was obliged to exercise its discretion to make the arbitration award an order of court, judiciously and with regard to the validity or otherwise of the arbitration award.

32.

Ex facie the common cause facts before the Court a quo, as well as those appearing in the arbitration award, the award was invalid in that the Arbitrator exceeded his powers in granting reinstatement relief to an employee who had at the material time resigned.

33.

Moreover, on the common cause facts of the matter, considering the three versions presented by the Fourth Respondent, and the common cause fact that he had been absent without permission, it was indisputable that the Fourth Respondent was guilty of the infraction (which did not have as a requirement that he be habitually absent before dismissal could result). The prospects of succeeding on review on the basis that the Arbitrator's decision was not one which a reasonable decision maker could make, were patent from the available record.

34.

The Honourable Mr. Acting Justice Fourie, dismissed the application for leave to appeal on 15 September 2014 (a copy of which is annexed hereto marked “C”), again (and incorrectly so) on the basis that the Applicant had taken no “substantial steps” for 18 months to prosecute the review application (when same was clearly not true). The Court a quo in refusing leave to appeal found that there was little purpose served in granting leave to appeal where the record itself was defective and could not be improved and no reviewable irregularities appeared from the award or the partial record.

35.

For the reasons aforesaid, clearly this finding is also incorrect. The principal reason for the Court a quo refusing leave to appeal appears to be that the Court a quo again, reinforced its earlier finding, that the **Applicant had been to blame “in failing to keep proper notes and therefor being unable to reconstruct a record” (paragraph 6 of the judgment refusing leave to appeal).** Again, presumably based on the assumption that it was “commonplace” that the CCMA regularly failed in its duties to keep a record of the proceedings as statutorily obliged to in terms of s115(2)(cA)(iii)(bb) read together with Rule 36(1) and (2) of the Rules of the Conduct of Proceedings before the CCMA.

36.

On 3 December 2014, the Labour Appeal Court dismissed the Applicant’s application for leave to appeal (a copy of which is annexed hereto marked “D”).

36.

Not only does the Applicant have reasonable prospects of success before this Honourable Court but there are compelling reasons why this Honourable Court should entertain the appeal. The issues raised also concern matters of general public importance and the appeal to this Honourable Court is in the interests of justice.

37.

Whilst there is presently a debate surrounding proposed rule changes to the Labour Court Rules, as far as I am aware, no draft revision to the rules has been published for comment.

38.

There are numerous competing decisions concerning the interpretation to be applied to Rule 7A in respect of the time periods applicable to the prosecution of the review, and the rights and remedies available to litigants in the event of an alleged failure to prosecute the review timeously, and similarly, concerning what remedy should be granted a litigant, if it is effectively denied its right to review due to a failure on the part of the CCMA to properly keep a record of the proceedings as statutorily obliged to do.

39.

Moreover, there is no proper definitive authority concerning the extent of the powers and duties of the Labour Court when adjudicating an application to make an

arbitration award an order of Court in terms of s158(1)(c) of the Act where *ex-facie* the award and the common cause facts available to the Labour Court, the validity of the award insofar as it relates to the competency of the relief itself is concerned is in issue (albeit it not pertinently raised), when exercising any discretion to grant relief in terms of s158(1)(c), and notwithstanding even the dismissal of a review (if justified).

40.

In the premises, it is respectfully submitted that the application for leave to appeal should be granted and that the costs of this application be costs in the appeal.

WHEREFORE the Applicant humbly prays for an Order in terms of the Notice of Motion prefixed hereto, further and/or alternative relief as the above Honourable Court deems meet.

_____

DEPONENT

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at on this _____ day of DECEMBER 2014 and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

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COMMISSIONER OF OATHS