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
RETAIL AND ALLIED WORKERS UNION	Third Respondent
MAKOMA MAKHOTLA	Fourth Respondent

THIRD & FOURTH RESPONDENT'S STATEMENT OF FACTUAL FINDINGS OF THE CCMA AND THE LABOUR COURT NECESSARY FOR THE HEARING AND RELEVANT POTIONS OF THE RECORD TO THE IMPUGNED FINDINGS

1.

These bellow submissions are delivered in compliance with the Honourable Court Direction dated 25 March 2015, wherein Respondent's are directed to file statement setting out factual findings of the CCMA and the Labour Court necessary for the hearing together with only those portions of the record relevant to the impugned findings.

Statement of fact based on factual finding of the CCMA

2.

It is the Third and Fourth Respondents submission that the parties statement of facts

led at the CCMA and its factual finding appears and/or accurately recorded on its Arbitration Award, which contents thereto was not challenged by the Applicant in its review application. To avoid duplication, the Honourable Court is referred thereto. A copy of the Commissioner's Award is attached to Fourth Respondent's opposing papers pages 36 - 42 marked *"PA2"*.

2.1 It was common cause that the Applicant dismissed Makoma for the following alleged misconduct:

AWOL – In that you did not report for work from Monday the 28/02/2011 till Thursday the 03/03/2011 without advising the company of your whereabouts and (or) failing to provide acceptable reasons to management. You have reported for duty on the 04/03/2011.

2.2 The Commissioner was called upon to determine whether Makoma dismissal by the Applicant was substantively fair or not;

2.3 The Applicant's relevant version and/or evidence appear and/or correctly recorded on paragraphs 2.2 to 2.11 of the Commissioner's Award;

2.4 Makoma's evidence appears and/or correctly recorded on paragraphs 4.1 to 4.7 of the Commissioner's Award;

2.5 The Commissioner analysis of evidence and facts before him appears on paragraphs 5.1 to 5.8 of the Award;

2.5 The Commissioner's findings and/or conclusion based on evidence and facts presented before him appears on paragraphs 6.1 to 6.5 of the Award.

3.

It is further submitted that the following evidence of Makoma was not challenged but common cause in that:

3.1 On Monday morning 28 February 2011, Makoma telephonically contacted a Senior Manager within the division Mr. Hawkins, whom was his initial superior and notified him that he would be unable to report for duty;

3.2 The following Tuesday 1 March 2011, Makoma further send an SMS to his superior Mrs Mukhavuli confirmed that it will take 3 days for him to address issues that led to his absence.

3.3 Mrs Mukhavuli thereafter send an SMS to Makoma confirmed receipt thereto. Makoma thereafter send a further SMS to Mrs Mukhavuli apologized for inconvenience caused;

3.4 On Friday 4 March 2011, Makoma accordingly reported and proceeded with his duty. Further, went to Mrs Mukhavuli and orally apologized for inconvenience caused. Subsequent thereafter, Mrs Mukhavuli served him with notice to appear at the disciplinary enquiry charged as above;

3.5 Dismay by the charges and in anger, Makoma submitted a resignation letter. However Mrs Mukhavuli on Monday 7 March 2011, told him that the company rejected his resignation. Therefore, he should appear at the disciplinary enquiry.

3.6 Makoma appeared at disciplinary enquiry and despite disputed the charges and submitted above evidence, Makoma was found guilty with sanction of dismissal. A copy of disciplinary sanction is attached to Fourth Respondent's opposing papers page 24 marked *"PA1D"*.

4.

<u>The CCMA finding and/or award</u>

4.1 Based on above evidence and facts presented before it, the CCMA found that Makoma dismissal was unfair with the order of reinstatement.

4.2 It is further submitted with respect that the CCMA dealt with all issues before it at arbitration hearing and its Award is well reasoned and cannot therefore be said that the CCMA and/or Commissioner committed any reviewable irregularities.

Statement of fact based on factual finding of the Labour Court

On/or about 19 October 2011, the Applicant instituted a review application with its principal attack and/or ground alleged that the Commissioner prevented its representative to cross-examine Makoma. A copy of Applicant's review papers is attached to Fourth Respondent's opposing papers pages 43 – 51 marked *"PA3"*.

5.1 On 20 October 2011, the Third and Fourth Respondent served and filed its notice to oppose the review application.

5.2 On 18 November 2011, the CCMA delivered its Notice of compliance in terms of Rule 7A(3), which included a disc record of arbitration and relevant supporting documents and further notified the parties that compliance had been delivered.

5.3 Despite Applicant accordingly notified about 18 November 2011 thereto, it failed to comply in terms of Rule 7A(6) as of 1 February 2012. Therefore, a letter dated 1 February 2012 was served to Applicant demanding it to comply in terms of Rule 7A(6) within further 10 days. Failure which, dismissal application would be instituted.

5.4 On 3 February 2012, Respondents received Applicant's letter confirmed to have uplifted the record from the Honourable Court and undertook to comply once the record transcribed.

5.5 On 12 March 2012, Respondent received Applicant's incomplete Rule 7A(6) compliance, without relevant transcribed record as required. Therefore, a further letter dated 12 March 2012 was accordingly served to Applicant demanding to be provided with outstanding transcribed record.

5.5 On 19 March 2012, Respondents received Applicant's letter alleged that the

record of arbitration contained 20 minutes worth of recording and was pro-active in having Commissioner's hand written notes.

5.6 Since then and for about 7 months, Applicant failed to attend to the matter let alone notified Respondents about steps if any, taken regarding progress of its review. Therefore on 2 October 2012, a further letter was served to Applicant requested parties to meet and endeavour reconstruction of the record for the review to proceed.

5.7 On 6 November 2012, Respondents received Applicant's letter alleged to be difficult to reconstruct the record in light of lack of notes. Therefore, proposed that the parties should consent for the matter to be referred back for *de novo* hearing.

5.8 On 9 November 2012, a letter was forwarded to Applicant not only declined Applicant's proposed *de novo* hearing, but further insisted that the parties should meet and endeavour to reconstruct the record to supplement part of the alleged 20 minutes recording (which had not been served and/or filed) as we believed that the Honourable Court could be in position to finalize the review application on documents before the Court.

5.9 The parties finally met on 28 November 2012 to endeavour reconstruction of the record. However the process did not proceed let alone an attempt thereto done, as the Applicant argued that as its principal attack on the award contends that the Commissioner prevented its representative from cross-examining Makoma, the Commissioner's hand written notes may serve no purpose as he might not have noted said concerns therein. A copy of minutes of said reconstruction meeting is attached to Fourth Respondent's opposing papers pages 63 – 63 marked *"PA8"*.

5.10 Despite allegation disputed and further referred to its arbitration written closing heads, which proved contrary to its alleged ground, Applicant maintained that reconstruction process should not go further. It then became evident that Applicant had no intention to execute its review application, but using delaying

tactics to frustrate Respondents. Respondent however provided Applicant with its arbitration hand written notes.

5.11 Despite Applicant concluded that it could not rely on contents of Commissioner hand written notes, on 20 January 2013, Respondents received a letter from Applicant confirmed that Commissioner's arbitration hand written notes have been delivered to the Honourable Court, would be uplifted and forwarded for transcription. Once completed, Respondents would be accordingly served with copy thereto.

5.12 On 31 January 2013, Respondents received Applicant's further letter together with copies of Respondent's transcribed arbitration notes.

5.13 Since then and/or for a further 7 months thereafter, Applicant failed to take any assertive action to prosecute its review application let alone contact Respondents thereto. It therefore became further evident that Applicant abandoned its case moreover it was about 2 years without assertive action taken in prosecution of its review application as above stated.

6.

Respondent's application to dismiss the review

On 8 August 2013, Third and Fourth Respondents accordingly instituted and served not only an application to dismiss the Applicant's review application due to excessive delay in prosecution, but further an application to make the Commissioner's arbitration award an Order of court.

6.1 Subsequent thereafter on 27 August 2013, Respondent's received similar copy Applicant's incomplete Rule 7A(6) compliance.

6.2 Respondents application to dismiss the review application and Section 158(1)(c) application were set-down for hearing for 9 July 2014.

Factual finding of the Labour Court

The matter before the Labour on 9 July 2014 was Respondents application to dismiss the review application and Section 158(1)(c) application.

7.1 During court proceeding, a copy of Applicant's Rule 7A(8) compliance dated 4 July 2014, was handed to Respondents by Applicant's Attorneys of record, which copy was not filed on record. Notwithstanding that Applicant's further Rule 7A(6) was served on 27 August 2013.

7.2 In its defence to Respondent's applications before the Labour Court, Applicant contended and/or argued that as it has already complied with Rule 7A(8) compliance, the Labour Court should not entertain Respondents application and consider its review.

7.3 Despite Applicant's Rule 7A(8) papers not on the Court file, the Applicant's Attorneys confirmed in court when asked for clarity by the court that there was no further or new grounds and/or arguments on its Rule 7A(8) papers.

7.4 After heard and considered parties evidence and facts presented before the Court, the Labour Court upheld Respondents application wherein Applicant's review application was dismissed with costs due to excessive delay to prosecute its matter. Further, the CCMA Arbitration Award was made an Order of Court.

7.5 It is submitted that by careful examination of the above factors and circumstances that led to Respondents dismissal application, the Labour Court exercised its discretion properly in dismissing the review due to undue delay to prosecute the matter.

7.6 It is further submitted that the failure by the Applicant to account for the entire period of the delay was fatal to its case, notwithstanding that Labour disputes by

their very nature must be resolved expeditiously and be brought to finality so that the parties can organize their affairs accordingly.

7.6 Insofar as the Applicant attempt to blame the CCMA for the delay and/or the arbitration record, it is submitted that the Applicants had remedies available including but not limited to institute an application in terms of Rule 7A(4) of Labour Court Rules and/or to approach the Judge President for a direction on further steps and/or conduct of the review application in terms of paragraph 11.2.4 of the Court a quo Practice Manual. However, for its own reasons, elected not to comply.

7.7 In the circumstances, it is submitted that the Applicant have not shown any reasonable or justifiably basis on which to criticize the Labour Court, let alone succeed in overturning the said Judgment on appeal, irrespective of how the appeal is to be approached. Applicant's application for leave to appeal hereto should therefore be dismissed with costs.

DATED AT PRETORIA ON THIS THE 07 DAY OF MAY 2015

CARRIM ATTORNEYS
Fourth Respondent's Attorneys
19 Pretorius Street, Second Floor
Pretoria 0002
Tel: 012 326 7414
Fax: 086 565 1891
Ref: Mr Carrim/RAWU 12513CC
C/o MM Baloyi Attorneys
14th Floor Marble Towers
Cnr. Jeppe & Von Weillig Streets
Johannesburg
Tel: 011 333 7753
Fax: 011 333 7735