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

FOURTH RESPONDENT'S SHORT HEADS OF ARGUMENTS

1.

These short heads of arguments are delivered in compliance with the Honourable Court Direction dated 18 February 2015, wherein Respondent's are directed to file its short heads on or before 12 March 2015 dealing with four issues as per paragraph 1(a) to (d) thereof.

2.

WHETHER AN ORDER FOR REINSTATEMENT OF AN EMPLOYEE IS COMPETENT IN CIRCUMSTANCES WHERE SUCH EMPLOYEE HAD RESIGNED PRIOR TO THE GRANT OF SUCH ORDER

2.1 It is submitted that it appears there is no hard and fast rule in this regard in that much depends upon the totality of the matter which may include the nature of the dispute and circumstances surrounding the employee's conduct, the manner in which the resignation was done, length of service of the employee, record of employment and trust relation.

The applicable test

2.2 The appropriate test in considering whether a constructive dismissal occurred in disputes of said nature is set out in *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen 7 others.* Once it has been found that constructively dismissal took place, it seems that the question of remedy remains to be assessed at the hand of the Sidumo test.

2.3 Section 186(1)(e) of the LRA defines a constructive dismissal thus:

"Dismissal means that –

e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee."

2.4 *Section 193(2)(b) requires an arbitrator to reinstate an unfairly dismissed employee unless –*

"the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable."

The appropriate remedy

2.5 The Arbitrator has a wide discretion in this regard. It is the arbitrator's sense of fairness that must prevail. Section 193 of the LRA prescribes reinstatement as the primary remedy for unfair dismissal. Arbitrators are to consider the effect of Section 193(2)(b) and subsection to "the circumstances surrounding the dismissal." The Arbitrator's findings should be reasonable, based on evidence and facts presented before him/her.

Present matter

2.6 It is clear that n the present matter, it is submitted that the dispute before the Second Respondent was unfair dismissal based on misconduct, but not constructive dismissal.

2.7 It was common caused that the Applicant dismissed the Fourth Respondent on 24 March 2011 for misconduct *"AWOL – 4 days or longer"* after duly constituted disciplinary enquiry.

See Fourth Respondent opposing affidavit page 24 Annexure "PA1D"

2.8 Procedure was not in dispute. The Second Respondent was therefore called upon to determine whether dismissal of Fourth Respondent by the Applicant was substantively fair or not.

2.8 It was further not in dispute the Fourth Respondent submitted a resignation letter which resignation was not accepted by the Applicant, thus the disciplinary enquiry proceeded as charged where the Fourth Respondent pleaded not guilty to the alleged misconduct/charges.

2.9 After considered evidence and facts presented before him, the Second Respondent concluded that dismissal of the Fourth Respondent by the Applicant was unfair with the order of reinstatement which we submit is a reasonable

decision based on evidence and facts present before him, as per his award.

3.

WHETHER THE DISMISSAL OF A REVIEW APPLICATION BY THE LABOUR COURT, ON THE BASIS THAT THE RECORD OF ARBITRATION PROCEEDINGS IS INCOMPLETE, IS DENIAL OF THE APPLICANT'S RIGHT TO FAIR ADMINISTATETION JUSTICE

3.1 In the present case, the Applicant's review application was not dismissed on the basis that the record of arbitration was in complete. It is submitted that the Applicant's review application was dismissed for undue delay to prosecute its matter and/or failure to take assertive steps to prosecute its review application.

3.2 It is further submitted that the proper basis for the dismissal of an action of a party due to a delay in prosecuting it was set out by the Appellate Division (as it then was) in the *Pathescope (Union) of SA Ltd v Mallinick* 1927 AD 292. In that case, Stratford AJA (as he then was) remarked about applications of this nature as follows:

> "*That a plaintiff may, in certain circumstances, be debarred from obtaining relief to which he would ordinarily be entitled because of unjustifiable delay in seeking it is a doctrine well-recognised in English Law and adopted in our Courts. It is an application of the maxim vigilantibus non dormientibus lex subventiunt. The very nature of the doctrine necessitates its being state in general terms . . . .*
> *Thus, the Court is left free in the circumstances of each case to judge the equity of granting the relief in face of the delay in asking for it. Where there has been undue delay in seeking relief, the Court will not grant it when in its opinion, it would be inequitable to do so after the lapse of time constituting the delay. And in forming an opinion as to the justice of granting the relief in the face of the delay, the Court can rest its refusal upon potential prejudice, and the prejudice need not be to the Defendant in the action but to third parties. . . . (underlining – own emphasise)*

3.3. In *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC), the Constitutional Court commented on and sanctioned the practical considerations that inform the approach adopted by our Courts to applications of this nature thus:

"Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principles can cogently be taken…."

3.4 The application of the *vigilantibus* doctrine as set out above has also been held to be based on the Superior Courts' inherent power to regulate their own proceedings, from which the power of the Courts to prevent an abuse of its processes is derived.

3.5 The Court is empowered to grant applications on the basis of the above considerations. In doing so, the Court exercises judicial discretion, based on the facts and circumstances of each given case and the overriding principles of justice and equity, to refuse relief to which an applicant party might ordinarily have been entitled due to the culpability of that party for the delay in seeking the relief in question.

3.6 In exercising its discretion as above, the Court is called upon to consider, *inter alia*, the extent of the delay, the explanation proffered therefore and the prejudice to respondent (as well as to any third) parties. In Cassimjee, the Supreme Court of Appeal remarked that no hard and fast rules have been developed in this regard. Whilst, in general, the longer the delay the greater the likelihood of prejudice would be, there may be instances where the delay might be relatively slight but serious prejudice is caused and *vice versa*. Provided a careful examination of all relevant factors and circumstances is undertaken in denying a party the right to proceed with its claims any further, the discretion will have been properly exercised by the Court.

3.7 There are some additional requirements that the Court has to exact in order to exercise its discretion in favour of granting dismissals. These are to be considered on a case by case basis and include, *inter alia*, that an applicant party place the dilatory party on terms, solicit the intervention of the Registrar of the Court, file an application to compel, or exercise some measure of "*self help*", whenever any of these steps is appropriate before filing an application to dismiss. In *Sishuba and General Industrial Workers Union of Africa & another,* the Court emphasized that none of these additional steps take away from the duties of the *dominus litus,* as the party primarily responsible for the progression of the matter to the nest level of its prosecution.

3.9 Taking all facts before it, the Court

5.

WHO BEARS THE ONUS/OBLIGATION TO PRODUCE A PROPER AND COMPLETE RECORD OF PROCEEDINGS IN ANTICIPATION OF THE PROSECUTION OF REVIEW PROCEEDINGS

5.1 It is trite that the responsibility to ensure that a proper and complete record of proceedings in anticipation of the prosecution of review proceedings before the Courts rests with the Applicant.

5.2 In *Boale v National Prosecuting Authority & Others* [2003] 10 BLLR 988 (LC) para 5:

> *"It is trite that there is duty on an Applicant to provide a review Court with a full transcript of the proceedings he wishes to have reviewed. The Applicant has failed to provide this Court with the full transcript of the proceedings that he wished to have reviewed. Where an Applicant fails to provide a full transcript of the proceedings the review application must be dismissed. The only exception would be where the tape cassettes are missing or where the parties are unable to reconstruct the record."*

5.3 The same approach was adopted in *Fidelity Cash Management Services (Pty) Ltd v Muvhango* SA (2005) JOL 14293 (LC), where it was held that:

"*The court should be placed in a position to assess the different versions as they were placed before a commissioner through a full transcription of the record or a satisfactory reconstruction thereof.*"

5.4 The approach to be adopted when dealing with an incomplete record was set out in the case of *Life Care Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v CCMA & Others* [2003] 5 BLLR 416 (LAC) 1116, where the Labour Appeal Court held:

> *"[14] This is not to say that much purpose was served by placing the untranscribed notes before the Court a quo. It is properly to be expected that Court, as in this Court that hand written documents will be accompanied by typed written transcription or copies. The commissioner's hand writing affords ample reason for the settled practice."*

5.5 The Court held further that:

> *"[17] The reconstruction of the record (or part thereof) is usually undertaken in the following way, the tribunal (in this case the commissioner) and the representatives in this case is ready for the employee and Mr Mvelengwa for the employer to come together, bring in their extent notes and such other documentation as may be relevant. He then endeavoured to the best of their ability and recollection to reconstruct as full and accurate a record of the proceedings as the circumstances allow. This is then placed before the relevant court with such reservations as the participants may wish to note. Whether the product of their endeavours is adequate for the purposes of appeal or review is for the court hearing same to decide, after listening to argument in the event of a dispute as to the accuracy or completeness."*

6.

WHAT ARE THE CONSEQUENCES IN REVIEW PROCEEDINGS WHEN THE COMMISSION FOR CONCONCILIATION MEDIATION AND ARBITRATION OR THE PARTIES TO THE DISPUTE ARE UNAVAILABLE TO PRODUCE A PROPER AND COMPLETE RECORD OF THE PROCEEDINGS.

6.1 It is submitted as correctly stated by the Labour Court on its judgments, the LRA, the Rules of the Labour Court and its current Practice Manuel placed a firm emphasis on speedy dispute resolution. In said circumstances, the parties are to reconstruct the record amongst others.

6.2 It is submitted that the Applicant failed and/or elected not to engage remedies available including but not limited to institute an application to compel 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.

DATED AT PRETORIA ON THIS THE _____ DAY OF MARCH 2015

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