**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CASE NO: CCT228/14**

In the matter between:-

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| **TOYOTA SA (PTY) LTD** | **APPLICANT** |
| and | |
| **COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION** | **FIRST RESPONDENT** |
| **COMMISSIONER: TERRENCE SERERO** | **SECOND RESPONDENT** |
| **RETAIL AND ALLIED WORKERS UNION** | **THIRD RESPONDENT** |
| **MOKOMA MAKHOTLA** | **FOURTH RESPONDENT** |

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## APPLICANT'S SHORT HEADS OF ARGUMENT

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1.

The Applicant files these short heads of argument in accordance with the above Honourable Court's directions dated 18 February 2015, in order to deal with the four issues raised by the Honourable Mr. Chief Justice on behalf of the above Honourable Court in paragraphs 1(a) to (d) of the aforesaid directions.

2.

The Applicant proposes first to deal with the issues raised in paragraph 1(c),(d) and (b), which are interlinked and accordingly, will impact upon the determination of each of these issues, and thereafter the issue raised in paragraph 1 (a) of the directive.

3.

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

The termination of the Fourth Respondent's employment (March 2011), the issue of the arbitration award (September 2011) and the institution and hearing of the review proceedings (2011 - 2014) span over a period of time in which the onus/obligation to keep and produce a proper and complete record of arbitration proceedings have been amplified.

4.

At the time of the conduct of the arbitration (2011), the obligation to keep a record of the arbitration proceedings was governed only by s115(2)(cA)(iii)(bb), s115(2A) and s115(6)(c) of the Labour Relations Act 66 of 1995 (hereinafter "the LRA"), which provides that the Commission for Conciliation, Mediation and Arbitration (hereinafter "the CCMA") may make rules regulating, *inter alia*, the practice and procedure of arbitration proceedings, and that a rule so made takes effect from the date of publication, unless a later date is specified.

5.

The Rules for the Conduct of Proceedings before the CCMA, published in terms of s115(2A) of the LRA were published in Government Gazette 23611 of 25 July 2002 and later again under GN R1448 in Government Gazette 25515 of 10 October 2003

(and amended from time to time thereafter). At all material times throughout the hearing of the arbitration in 2011, Rule 36(1) of the CCMA rules, placed an obligation on the CCMA to keep a record of any evidence given in an arbitration hearing, any sworn testimony given in the proceedings before the Commissioner and any arbitration award or ruling made by the Commissioner. Rule 36(2) provided that the Commissioner may keep such record by legible handwritten notes or by means of an electronic recording.

6.

In terms of Rule 36(3), a party to a dispute was entitled to request a copy of the transcript of a record or a portion of a record kept in terms of Rule 36(2) on payment of the costs of transcription.

7.

The materiality of evidence being given and considered in order to reach a reasonable administrative decision by the arbitrating Commissioner is demonstrated by, *inter alia*, the provisions of s138(2) of the LRA where the Commissioner's discretion to determine the appropriate form of the proceedings is circumscribed by the party's right to give evidence, call witnesses and question the witnesses of the other party. Section 142(1)(f)(iii) of the LRA confers upon an arbitrating Commissioner the power (subject to prior authorisation) to enter premises and to take a statement in respect of any matter relevant to the resolution of a dispute.

8.

Section 142(9)(a) and (b) of the LRA provides that a Commissioner's finding with regard to the contempt of any party/participant in the proceedings before the CCMA is to be referred to the Labour Court together with the record of the proceedings for decision in terms of s142(11) of the LRA regarding such contempt.

9.

In terms of the Code of Conduct for Commissioners promulgated in terms of the LRA and published under GN 918 of 2014 (effective 1 December 2014), items 4.26 and 4.27 places an obligation on Commissioners to ensure that they have suitable audio recording equipment available and in good working order as tools of their profession and to ensure that all proceedings required to be audio recorded are properly recorded and such recordings are stored securely according to standard operating procedures applicable within the CCMA from time to time.

10.

Item 5.4 of the aforesaid Code, obliges Commissioners to ensure that arbitration proceedings are recorded in accordance with the policy of the CCMA. They are thus required to be recorded.

11.

Item 6.7 obliges Commissioners to cooperate with the CCMA to ensure that a record of the arbitration proceedings in respect of which a review is instituted is filed with the Court timeously.

12.

In the CCMA Guidelines: Misconduct Arbitrations, published under GN 602 in Government Gazette 34573 of 2 September 2011 (effective 1 January 2012) item 20.1 obliges the arbitrating Commissioner to welcome the parties and advise them of the arbitrator's appointment to the case and that the proceedings would be recorded.

13.

Item 31 provides that the purpose of the hearing of evidence is to record the evidence led by the witnesses and to give each party the opportunity to question the witnesses to challenge their testimony. Items 42.1 and item 42.2 provides that the arbitrator must ensure that the testimony given by the witnesses is recorded either electronically or digitally and he is required further to take notes of the evidence given and keep such notes in a file.

14.

The obligation to take a record, keep it safe and produce it for transcription accordingly is squarely on the CCMA.

15.

This must be so given that there is no automatic right to legal representation, particularly in matters of alleged unfair dismissals where misconduct is alleged (no doubt the majority of disputes before the CCMA) and accordingly, it would be inequitable to require the litigant in such matters (oft times the most economically vulnerable party to the employment relationship) to conduct the matter, give evidence and at the same time keep a record of the evidence at the arbitration,

including the evidence being given by him and his cross-examination at the hands of the Respondent party.

16.

There are further no public policy considerations mitigating against the obligations of the CCMA to keep and produce such a record, given that there are no substantial costs involved in creating and storing electronic records. The costs of transcription rest in terms of the CCMA rules on the party requesting the record (Rule 36(3)).

17.

There is no onus on an Applicant in review proceedings thus to produce a proper and complete record, in the sense of the creation of such a record. The only obligation in terms of Rule 7A of the Labour Court Rules is in terms of Rule 7A(5) and (6) is to make copies of such portions of the record as may be necessary for the purposes of the review and certify each copy as true and correct, and thereafter in terms of Rule 7A(6) of the Labour Court Rules, to furnish the Registrar and each of the other parties with a copy of the record or a portion of the record as the case may be, together with a copy of the reasons filed by the administrative body.

18.

If such an Applicant avails himself of the provisions of Rule 36(3) of the CCMA Rules, the CCMA will attend to the transcription thereof against the payment of costs by the Applicant in the review. If the Applicant simply uplifts a copy of the recordings delivered by the CCMA to the Labour Court in accordance with the Labour Court

Rules, as is more often the practice, then the Applicant will bear the responsibility of ensuring its safe custody in terms of Rule 7A(5), which the Registrar of the Labour Court oversees, and thereafter to ensure that a copy of the record so transcribed is provided to the other parties.

19.

There is accordingly no obligation or onus on an Applicant in the review proceedings to produce a proper and complete record of the proceedings other than to ensure the safe custody of such recordings, and the proper and correct transcription thereof either through the avenue of the CCMA in terms of the CCMA Rules, alternatively through private transcription pursuant to the provisions of Rule 7A(5) of the Labour Court Rules.

20.

**WHAT ARE THE CONSEQUENCES IN REVIEW PROCEEDINGS WHEN THE CCMA OR THE PARTIES TO THE DISPUTE ARE UNABLE TO PRODUCE A PROPER AND COMPLETE RECORD OF THE PROCEEDINGS AND IS THE DISMISSAL OF A REVIEW APPLICATION BY THE LABOUR COURT ON THE BASIS THAT THE RECORD IS INCOMPLETE A DENIAL OF THE APPLICANT'S RIGHT TO ADMINISTRATIVE JUSTICE**

Section 33(1) of the Constitution of the Republic of South Africa Act 108 of 1996 provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

21.

Without a record of the evidence and the conduct of the proceedings before the arbitrating Commissioner, there is no basis on which a Court on review can adjudicate whether the administrative action in the form of the arbitration award was reasonable or whether the procedural defects in the conduct of the hearing or misconduct by the arbitrator took place on the basis of an objective record of the proceedings.

22.

The absence of a record eviscerates the right of a litigant to enforce the right to administrative justice by comprising his ability to challenge the lawfulness, reasonableness and procedural regularity of the administrative process and ultimate action (in the form of the decision/award).

23.

This infringement upon the right to lawful, reasonable and procedurally fair administrative action is further compounded by the fact that the reviewing Court often substitutes the decision of the arbitrating Commissioner to achieve the statutory imperative imposed upon functionaries operating within the prescribed dispute resolution mechanisms governed by the LRA to ensure the speedy resolution of labour disputes. This is in contra-distinction to the provisions of s8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000 which allows for substitution only in exceptional circumstances.

24.

By comparison s145(4)(a) of the LRA empowers the Labour Court to determine the dispute. This can only be done on the basis of a proper and complete record.

25.

Even the obligation on the Commissioner to keep a record in the form of legible handwritten notes, does not authorise the recordal of the evidence in a summary fashion.

26.

The fact that a Court on ordinary judicial review assesses the rationality and reasonableness of an administrative decision based on, inter alia, the material before the administrator is evidenced by s6(2)(f)(ii)(cc) of the Promotion of Administrative Justice Act 3 of 2000, which provides that administrative action is reviewable if not rationally connected to the information before the administrator. So too does the Labour Court when assessing the reasonableness of the award, or the conduct of the proceedings or that of the arbitrator.

27.

Where a record is not available to assess firstly the information before the arbitrator, and accordingly the rationality of the resulting decision, then that ground review is no longer available to a litigant. On the same basis, the Labour Court sitting as the Court of review assess the reasonableness of the award of the arbitrating Commissioner by having regard to the evidence properly before the Commissioner.

28.

His conduct in his capacity as an arbitrator, as well as any regularity in the proceedings is also determined on the record of the proceedings.

29.

The consequences accordingly of a party to the dispute being unable to produce a proper and complete record of the proceedings are clear. The parties are denied the ability to enforce their right to administrative justice and accordingly are denied the right in toto.

30.

The consequences of being unable to produce a proper and complete record of the proceedings, is that the right to just administrative action is no longer defensible and accordingly unenforceable.

31.

The prevailing jurisprudence under the LRA imposes an obligation on the parties to the review application, to produce the record of the arbitration even if through reconstruction (oft a fruitless exercise providing only fertile ground for further disputes to arise), and if this is unsuccessful, sanctions the Applicant with the dismissal of the review application unless some prospects of success are evident from the arbitration award or the available record. The judgment from which this application stems is evidence of this approach and carries with it an implied obligation to keep verbatim and legible notes of the proceedings, an obligation

without legal foundation. It is an approach inimical to the speedy resolution of labour disputes.

- Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v Commission for Conciliation, Mediation & Arbitration & others (2003) 24 ILJ 931 (LAC)

32.

The consequence of an absent or materially defective record should rather be akin to those cases where on appeal a portion or the whole of the record is missing through no fault of the litigant.

33.

Comparable cases to those in a Labour Court context on review, must be those emanating from such criminal appeals, where the State bears the obligation to keep a record and is responsible for the safe custody thereof.

34.

In the review context, the administrative tribunal, being the CCMA, is statutorily obliged to keep the record and is responsible for its safe custody.

35.

In such comparable cases, where an appeal lies against a criminal conviction, and where the State is responsible for the record and its safe custody, the Appeal Court has determined that the Appellant’s right of appeal trumps any considerations of

inconvenience and general prejudice to be suffered by the remittal of the matter for rehearing. The matter is remitted for hearing de novo, alternatively for the re-hearing of the portions of the evidence, if appropriate in the circumstances.

- JMYK Investments CC v 600 SA Holdings (Pty) Ltd 2003 (SA) 470 (W) at paragraph 5;
- Beaumont v Anderson 1949 (3) (SA) 562 (N);
- Department of Justice v Hatzenberg 2002 (1) (SA) 103 (LAC) at paragraph 10; and
- S v Joubert 1991 (1) (SA) 119 (A); and
- S v Steyn 2001 (1) (SA) 1146 (CC) at paragraph 11.

36.

This Honourable Court in the case of S v Steyn (supra) at paragraph 11 opined that the paucity of information before a Court materially impacts upon its ability to assess the petition for leave to appeal. The risk of injustice resulting as a consequence, is simply too great compounded by the material and human resources available in the lower Courts. The same risk arises on a consideration of the said resources at the level of the CCMA. Parties are often not legally represented or not permitted to be legally represented, and Commissioners are not required to be qualified legal practitioners. The result of the absence of a record in a review application ought to be remittal for rehearing, either in toto or in part.

37.

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

In casu, not only had the Fourth Respondent resigned prior to any order for reinstatement by the arbitrating Commissioner, but had resigned with an effective date of 31 March 2011, prior to any purported termination by the Applicant of the Fourth Respondent's contract of employment and accordingly, prior to any communication to the Fourth Respondent of the termination of the employment relationship (see in particular the case of Edcon v Steenkamp & Others, judgment of the Labour Appeal Court under case numbers JS648/11, JS51/14 and JS350/14, delivered on 3 March 2015, for the principle that a dismissal in terms of s186 constitutes a termination of the employment relationship, irrespective of the lawfulness or fairness of the actual notice of termination of the contract of employment).

38.

The termination of the contract of employment by way of resignation, other than in the context where the resignation emanates from the employer rendering continued employment intolerable (and accordingly in the context of it constituting a dismissal in terms of the LRA) is not governed by the LRA and accordingly the common law principles governing the legal requirements for a resignation, the nature thereof, and the effective date thereof, are applicable.

39.

The termination of a contract of employment by resignation is a unilateral termination, which does not require the acceptance thereof by the employer. The resignation is effective once communicated to the employer.

- Sihlali v SA Broadcasting Limited (2010) 31 ILJ 1477 (LC).

40.

In casu, the notice of resignation was given on 7 March 2011 (dated 1 March 2011), wherein the Fourth Respondent stated it would be effective 31 March 2011. The purported dismissal in terms of s186 of the LRA took place only on 21 April 2011 when the outcome of the disciplinary hearing was communicated.

41.

At no stage did the Fourth Respondent contend that the resignation was given involuntarily and accordingly constituted a dismissal in terms of the provisions of s186(1)(e) of the LRA. Accordingly the common law applies.

42.

The resignation was communicated on 7 March 2011, effective 31 March 2011.

43.

In the premises, the contract of employment was terminated by the Fourth Respondent prior to the date of purported dismissal.

44.

That resignation was never withdrawn and certainly not with the consent of the Applicant.

45.

A reinstatement order has the effect of restoring the status quo prior to dismissal.

- Coca-Cola (Pty) Ltd v Ngwane N.O. & Others (2013) ILJ 3155 (LC).

46.

The reinstatement is to reinstate the employment contract which existed before the dismissal. If such contract expired before the decision concerning the unfairness of the dismissal is made, reinstatement is incompetent. By parity of reasoning, if the determination of the fairness of the dismissal is made after the contract of employment was in any event terminated by the employee by way of resignation, then reinstatement is incompetent.

- Tshongweni v Ekurhuleni Metropolitan Municipality (2010) 31 ILJ 3027 (LC)

47.

Quite apart from the aforegoing, the communication of a resignation constitutes an election by the employee in terms of s193(2)(a) of the LRA not to pursue a claim for reinstatement.

48.

In any event, the act of resignation is something more than a question of an election given that it renders reinstatement to a contract of employment existing before the date of dismissal impossible, where such contract had in any event terminated prior to any possible reinstatement order.

DATED AT DURBAN ON THIS THE 5th OF MARCH 2015.

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C A NEL

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and

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**AND ARBITRATION** **FIRST RESPONDENT**

**COMMISSIONER: TERRENCE SERERO** **SECOND RESPONDENT**

**RETAIL AND ALLIED WORKERS UNION** **THIRD RESPONDENT**

**MOKOMA MAKHOTLA** **FOURTH RESPONDENT**

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## LIST OF AUTHORITIES

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- Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v Commission for Conciliation, Mediation & Arbitration & others (2003) 24 ILJ 931 (LAC)
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