

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No. CCT 228/14

In the matter between:

TOYOTA SA MOTORS (PTY) LTD

Applicant

and

CCMA

First Respondent

COMMISSIONER: TERENCE SERERO

Second Respondent

RETAIL & ALLIED WORKERS UNION

Third Respondent

MAKOMA MAKHOTLA

Fourth Respondent

THIRD RESPONDENT FURTHER HEADS OF ARGUMENT AS DIRECTED

INTRODUCTION:

1. These short heads of argument are filed in compliance with the Honourable Chief Justice directive dated 18 February 2015 in terms of which the parties directed to file short heads on four specific issues.

2. The Third Respondent does not intend to respond *seriatum* to the Applicant's short heads, but will accordingly deal with specific issues as per the said directive. The Third Respondent therefore submits the following:

Whether an order for reinstatement of an employee is competent in circumstances where such employee had resigned prior to the grant of such order.

3. The Third Respondent submits with respect that in the present case, it is undisputed that the dispute before the Second Respondent was unfair dismissal based on misconduct.

4. It was common cause that the Applicant dismissed the Fourth Respondent for misconduct subsequent a disciplinary enquiry 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

5. Notwithstanding that the Fourth Respondent submitted a resignation letter for reasons stated on the opposing affidavits, which resignation was not accepted, thus the disciplinary enquiry proceeded as scheduled where the Fourth Respondent appeared, pleaded not guilty to the alleged misconduct but found guilty with the sanction of dismissal.

6. It was further not the Applicant's case at arbitration that the First Respondent lacked jurisdiction as the Fourth Respondent resigned.

7. It is further submitted that the Arbitrator has wide discretion with regard to granting any order, provided that the said conclusion is reasonable, appropriate based on evidence and facts presented before the Arbitrator in terms of Section 193 of the Act.

Whether the dismissal of a review application by the Labour Court, on the basis that the record of the arbitration proceedings is incomplete, is a denial of the applicant's right to fair administrative justice

8. It is submitted that the doctrine of *vigilantibus non dormientibus lex subvenit* (the law assists those who are vigilant, not those asleep upon their rights) has been accepted by our Courts and is an established principle of our law. Applicants are therefore under a duty to act as reasonable litigants and to exercise their rights vigilantly and diligently.

9. It has also been widely accepted by the Labour Court that employees are entitled to a speedy resolution of disputes, which have been initiated against them as it would be unfair to have a sword hanging over their heads for an indefinite period.

10. It is upon an applicant as the *dominus litus* in the review proceedings to uplift arbitration record from the Registrar of Labour Court after compliance by CCMA of Rule 7A (3) of the Labour Court Practice Manual and have it transcribed.

11. An applicant in a review has multiple avenues to follow if the arbitration record is found to be incomplete upon upliftment of the transcribed record. He/she can compel the originating body (CCMA or the Bargaining Councils) to file the missing record; or ask for the extension of time from Respondent, if that is refused, then apply to the Court for said extension, institute an application to compel in terms of Rule 7A(4) of Labour Court Rules and/or 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.

12. In the present case, the applicant failed to exercise the above options, and relies on the defense of an incomplete record. Therefore, the dismissal of its review application for failure to take assertive steps to prosecute its review cannot be regarded as denial of its right to fair administrative justice.

13. It is further submitted that review proceedings by their very nature are urgent, and the Act sought to introduce simple, quick, cheap and non-legalistic approach to the adjudication of unfair dismissals, so that the affairs of the parties may not be prejudiced by a lengthy review process while the employee's future is uncertain in the circumstance.

14. A denial of the applicant's right to fair administrative justice by its nature connotes that Applicant had followed assertive steps set out above to no avail and at the end the Labour Court still dismissed its review based on the record of the arbitration proceedings being incomplete, which is not the case in the current matter.

15. It is further submitted that during reconstruction meeting occasioned by the Third Respondent's insistence, the Applicant unequivocally maintained that the exercise to endeavor reconstructing the record would be futile since it believed that the Commissioner might not have noted the Appellant's alleged objection that its representative was denied an opportunity to cross examine the Fourth Respondent without any attempt thereto..

16. It is further submitted that the Applicant's assertion was categorically clear that it went to the reconstruction with *mala fide* intentions and that it was using delaying tactics to frustrate the Fourth Respondent in pursuing the matter to finality.

17. To proffer Applicant's fair administrative justice would have allowed it to approach the Judge President of the Labour Court to give direction for further

conduct of the review amongst others. This it did not do, but rather relaxed and allowed time to pass by without any assertive steps taken. The Applicant therefore allowed the sword to chop its chances of pursuing the matter to finality, and so cannot cry foul of administrative injustice.

Who bears the onus/obligation to produce a proper and complete record of proceedings in anticipation of the prosecution of review proceedings

18. The responsibility to ensure that a proper and complete record is placed before the Court rests with the Applicant. Failure to place before the Court a complete record by the Applicant could result in the dismissal of the review applicant on that ground alone.

19. In *Boale v National Prosecuting Authority & Others* [2003] 10 BLLR 988 (LC) para 5, the Court held that:

“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”

20. 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.”

What are the consequences in review proceedings when the Commission for Conciliation, Mediation and Arbitration or the parties to the dispute are unable to produce a proper and complete record of proceedings

21. It is submitted that at the very least, the Court may dismiss the review upon received such application by the Respondent if the Applicant failed to take assertive steps as above stated. In doing so, the Court had to regard the conduct of the parties and their willingness to endeavour reconstructing the incomplete record was done genuinely and *bona fide*, weigh the imminent prejudice likely to be suffered by the willing party to have the record reconstructed.

22. The missing and/or incomplete record should not stifle and delay the prosecution of the matter unless the Applicant has proven that it took all reasonable steps unsuccessful.

CONCLUSION

23. The Third Respondent submits that the Applicant’s application for leave to appeal ought to be dismissed in that on the information before the Honourable Court,

there exists no reasonable prospect that the above Honourable Court may overturn the Labour Court and Labour Appeal Court Order in dismissing the Applicant's review application by virtue of its undue delay in prosecuting its matter.

DATED AT PRETORIA ON THIS THE _____ DAY OF MARCH 2015

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*Received copy hereof on this
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