

**IN THE LABOUR COURT OF SOUTH AFRICA**  
**SITTING IN DURBAN**

NOT REPORTABLE  
CASE NO                **D153/03**

DATE HEARD: 2005/02/09

DATE OF JUDGMENT: 2005/02/11

In the matter between

**DUMISANI MKHUNGO**

**APPLICANT**

and

**TOYOTA SOUTH AFRICAN MOTORS**

**RESPONDENT**

---

**JUDGMENT DELIVERED BY  
THE HONOURABLE MADAM JUSTICE PILLAY  
ON 11 FEBRUARY 2005**

---

ON BEHALF OF APPLICANT:

Mr. S. Mhlanga

ON BEHALF OF RESPONDENTS:

Mr. M. Maeso  
Shepstone & Wylie  
Attorneys



JUDGMENT 11 FEBRUARY 2005PILLAY D, J

- [1] This application for review is brought in terms of all the sub sections of sections 145(2)(a) of the Labour Relations Act No 66 of 1995.
- [2] The applicant was dismissed for "gross insubordination: disobeying reasonable and lawful job instructions, inciting her employees, resulting in unprocedural work stoppage."
- [3] The second respondent arbitrator found that the third respondent, the employer, had failed to prove the second charge. The review proceeds only against the finding that the third respondent had proved the first charge against the applicant.
- [4] The full transcript of the arbitration has not been found. The transcribed evidence of the third respondent's witnesses is not before me. As much turns on the credibility of the witnesses on both sides, I am hamstrung in making a proper assessment without a full transcribed record. The typed notes of the arbitrator are not sufficient to assess the quality of the evidence of the witnesses to the extent that is required for the grounds of review in this case. For this reason alone the review could be dismissed.
- [5] Neither party, however, raised any concerns about the absence of a full record. Consequently, I will consider the merits of the review.

[6] The third respondent's version:

On 12 December Mr A R Armstrong saw the applicant during working hours not going about his duties. He was sitting on a table swinging his legs. He told the applicant to start working but he refused to do so, telling Armstrong to "Hamba, suga, suga." The applicant received an instruction from Dean Furman, the production manager to wait outside his door until human resources staff arrived. The applicant refused to do so. He was further instructed to return to Furman's office at 3.00 pm with a representative. He failed to do that too.

[7] The applicant's version:

The applicant denies that Armstrong told him to work. Armstrong merely asked him what he was doing and he replied that he was waiting for two other members of his team who had gone to fetch components and equipment for his job. Armstrong declared that he would sort the applicant out and left. He did not give the applicant any instructions to return to work or tell him specifically what work he should do.

Furman called the applicant to his office.

When he got there he found that Furman

was on the telephone to the human

resources department. He did not speak to

Furman. He waited until tea and left. At

3.00 pm Armstrong told him to report to

Furman who told him to get a representative

and he was to be suspended.

He found a shop steward just before clocking-off time.

The shop steward said he would attend to the matter

the next day.

[8] The first ground of review was that the arbitrator misconstrued the charges. The applicant alleges that there was only one job instruction, as evident from the minutes of the inquiry (page 100 of the record). This is obviously a typographical error as the charge sheet, page 94 of the record, refers to "job instructions". Moreover, evidence was led at the inquiry and at the arbitration about at least three instructions that the applicant refused to obey. The first was his refusal to return to work; the second was his refusal to wait outside Furman's office until the human resources staff arrived; the third was his failure to attend with his representative at Furman's office at 3.00 pm on 12 December 2003. This appears to be the principal ground of the review and it fails.

[9] The second ground of review relates to the arbitrator's "handling of the instruction to do other things." I cannot apply my mind to the 18 issues raised in support of this ground in the absence of the full transcript of the proceedings. They are vigorously contested in the respondents' opposing affidavit. A replying affidavit filed by Mr *Jafta* for the applicant is of no assistance to the Court as it is hearsay and not the direct evidence of the applicant. Furthermore, the grounds set out in paragraphs 10.1 to 10.18 are grounds of appeal, not grounds of review.

[10] At the best of times a reviewing court has great difficulty

in assessing the credibility of witnesses from the record. That difficulty is compounded in this case because there is no transcript. Whether the applicant was issued with instructions, what these instructions were and whether he had a reasonable explanation for not obeying them, turns on the credibility of the witnesses. Nevertheless, it is common cause that even if the instructions were issued, the applicant did not comply with it. It is not possible on the record before me to consider all the elements that constitute the offence of insubordination.

[11] From the portion of the transcript that was available to the Court, it would appear that the applicant was an evasive witness during cross-examination. Almost every question had to be repeated or clarified for him. He seldom answered a question directly.

[12] In all the circumstances, the application for review falls to be dismissed.

[13] The Court retains a discretion as to whether to order a rehearing of a matter. From the limited insight that I have been afforded into this case, it seems to me that the applicant should not be afforded a rehearing of the matter. There is no explanation as to why the full transcript has not been placed before the Court. It may well be that the record is available and the Court could come to a better decision on the merits of the matter if a full record was placed before it. However, as the first ground seems more contrived than real and as the second ground makes out a case for an

appeal, there is no basis to refer the matter back for a hearing.

[14] In the circumstances, the application is dismissed with costs.

---

Pillay D, J  
28 April 2005