

SOUTH AFRICA / JUDGMENT

Ditsoane v Acwa Power Africa Holdings (PTY) (JS 259/2017) [2022] ZALCJHB 299 (24 October 2022) [2022] ZALCJHB 299

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JS 259/2017

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

reportable

Case no JS 259/2017

In

the matter between:

SEIPATI

JOYCE

DITSOANE

Applicant

And

ACWA

POWER AFRICA HOLDINGS (PTY) LTD

Respondent

Date

of hearing: 21 October 2022

Date

of judgment: 24 October 2022

JUDGMENT

VAN NIEKERK J

[1] This is an application to set aside a notice of withdrawal of the referral to this court of an unfair retrenchment dispute, the notice having been delivered by the applicant's erstwhile attorney on 24 October

2017. The applicant further seeks leave to supplement an application for condonation for the late referral of the dispute, and to file an amended statement of claim. The present application is brought only by the first applicant in the main action; the second

and third applicants are not party to the present proceedings. I refer to them collectively where appropriate as 'the applicants', and to the first applicant as 'the applicant'.

[2] The applicants were retrenched in October 2016, six years ago. They referred their dispute to the CCMA. After a failed conciliation on 5 December 2016, a dispute was referred to this court on 11 May 2017 in which the first and second applicants sought to have their retrenchments declared unfair. At about the same time, the applicant filed an application to condone the late referral of the dispute, and to join the third applicant. That application was opposed by the

respondent. On 22 May 2017, the respondent filed a notice to remove causes of complaint in accordance with Rule 23 of the Uniform Rules, read with Rule 11 of this Court's rules and clause 10.3 of the Practice Manual. The notice to remove causes of complaint set out what the respondent contended to the defects in the statement of claim, and called on the first and second applicants to amend their statement accordingly. Among the complaints raised were the fact that the referral had been made outside of the time period prescribed by the Act, and in respect of the third applicant, the respondent disputed that there had been any referral on her behalf to the CCMA for conciliation. On this basis, the respondent contended that this court thus had no jurisdiction to entertain her claim. Further, and in respect of the second and third applicants, the respondent contended that both had signed agreements in which they had accepted payments made in full and final settlement, and waived any claim arising out of or relating to the termination of their contracts of employment. The respondent also raised the defective nature of the statement of claim, contending that the statement of claim was vague and embarrassing in particular respects, and called upon the applicant to remove the causes of complaint. The applicant failed to do so and on 26 June 2017, the respondent served a notice of exception. The exception was set down for hearing on 3 November 2017.

[3] On 25 October 2017, the applicant filed a notice of withdrawal in terms of rule 13. The notice reads 'Kindly note that the Applicant hereby withdraws the matter altogether – Rule 13 (sic)'. This is the notice that is the subject of the present application.

- [4] On 26 October 2017, the applicant's current attorney of record addressed correspondence to the respondent's attorney acknowledging the date of hearing of 3 November 2017 that the applicant intended to amend their statement of case and to supplement the affidavit in respect of the application for condonation. The attorney proposed that the matter be removed from the role on 3 November 2017, to enable the applicant to amend her papers.
- [5] On 3 November 2017, the court granted an order by consent, in terms of which the hearing of the exception was postponed sine die, and the applicant afforded 10 days 'to file an affidavit explaining why the statement of case ought to be revived, failing which the statement of case will remain withdrawn in its entirety'.
- [6] The applicant failed to file an affidavit within the time limit established by the court order and instead, on 24 January 2018, filed the present application to set aside the notice of withdrawal. The applicant sought condonation for the late filing of the application. The respondent elected to abide by the decision of the court and on 31 January 2022, the applicant's failure to comply with the order dated 3 November 2017 was condoned, and the registrar directed

to enroll the present application on the interlocutory roll. The applicant seeks not only to set aside the notice of withdrawal, but to address issues relating to the exception and the defect in the statement of case.

- [7] The order issued on the November 2017 is clear. It obliged the applicant to file an affidavit explaining why the statement of case ought to be revived. The applicant has elected instead to file the present application, in the form of an application to set aside the notice of withdrawal. To the extent that the respondent submits that given the wording of the order this is fatal to the applicant's endeavours, it seems to me that in substance, the present application attempts to achieve the same end, at least to the extent that it proffers an explanation for the filing of the notice of withdrawal and the applicant's intentions at the time.
- [8] It seems to me that given what the applicant was required to do in terms of the court order granted on 3 November 2017, the test best applied in the current instance is that which is ordinarily applied to an application to reinstate or retrieve an archived file. The court must recognise the respondent's interest in finality but take into account all relevant factors, including the explanation that is proffered, the prospects of success in the main action, the respective prejudice to the parties and the interests of justice.
- [9] The applicant avers that there was a breakdown in communication between her and her erstwhile attorney, and that it was never her intention to withdraw her claim. Rather, she had withdrawn the attorney's mandate and had expected him to withdraw as her attorney of record. I accept that applicant's explanation is a reasonable explanation and that subjectively, she did intend to withdraw her claim. But that is not the end of the matter. I must also take into account the long period of delay since the notice was filed, all of that delay occasioned by the applicant. The applicant was dismissed in October 2016. Over a

period of six years, the matter has not progressed beyond the referral of a statement of claim which the applicant acknowledges is defective, and an exception to the statement of claim that remains to be determined. In these circumstances, there is little prospect of a trial date within the next few years. The prejudice to the respondent is obvious – it would be patently prejudicial to the respondent to have to have it defend the matter years after the event. I must also take into account the statutory purpose of efficient and expeditious dispute resolution, and the fact that this purpose would be frustrated were the matter to proceed. In so far as the applicant's prospects of success are concerned, they do not seem to me to be such so as to outweigh an inordinate delay and the prejudice that the respondent would suffer were the application to be granted.

- [10] In so far as the second and third applicant are concerned, they have failed to respond to the order granted on 3 November 2017 and in their case, the statement of claim must in terms of clause 1.2 of the order, be regarded as having been withdrawn in its entirety.
- [11] Finally, to the extent that the applicant in these proceedings seeks orders that would in effect, uphold the exception taken by the respondent and grant condonation for the late referral of the dispute, those matters have yet to be enrolled for hearing. The hearing on 3 November 2017 was concerned only with the exception, a proceeding that was postponed sine die in order to afford the applicant an opportunity to file an explanatory affidavit. The exception remains to be argued and determined, as does the application for condonation for the late referral of the dispute. It is not open to the applicant in these proceedings to seek substantive relief in respect of those matters. Indeed, this is a further consideration which militates against the granting of the present application, if only because it illustrates the inordinate delay that has characterised this matter from the outset, and the point that despite the lapse of five years since the applicant was ordered to explain her understanding of the notice of withdrawal, the proceedings have since not advanced at all. For all of the above reasons, the application to set aside the notice of withdrawal stands to be dismissed.
- [12] For the purposes of section 162, the requirements of the law and fairness are best served by each party bearing its own costs.

I make the following order:

1. The application is dismissed.

André van Niekerk

Judge of the Labour Court

REPRESENTATION

For the applicant:

RA Arcangeli

Instructed by:

Ndumiso Voyi Inc.

For the respondent:

M Edwards

Instructed by:

Cliffe Dekker Hofmeyr Inc.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCJHB/2022/299.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/ditsoane-v-acwa-unknown-topic-alcjhb-2022>

Prepared on 12 October 2026 · Esheria