



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JS259/2017

In the matter between:

SEIPATI JOYCE DITSOANE

Applicant

and

ACWA POWER AFRICA HOLDINGS

Respondent

Heard: 9 May 2025

Delivered: 13 August 2025

JUDGMENT

ENGELBRECHT, AJ

Introduction

[1] According to a notice of set-down issued by the Registrar of this Court on 1 April 2025, there was, on 9 May 2025, to be an application for condonation for the late filing of a statement of claim before me. However, when the matter was called on

the appointed day, it was confirmed that the applicant (Ms Ditsoane) did not, in fact, seek to have her condonation application adjudicated upon; rather, she sought to have an application to permit the filing of a supplementary founding affidavit in the condonation application be adjudicated upon. That application was launched on 29 April 2025.

[2] The respondent (ACWA) asserted that the application for the filing of the supplementary founding affidavit was not properly before me, and that Ms Ditsoane was confined to presenting the condonation application only. Having regard to the complex litigation history in this matter, I exercised my discretion to hear the application for supplementation. In doing that, I do not condone the manner in which Ms Ditsoane's legal team have proceeded in this matter, bringing the application at the eleventh hour when it had in fact been anticipated for more than seven years, having regard to correspondence from Ms Ditsoane's attorneys. However, it was clear to me that Ms Ditsoane did not wish to proceed with the condonation application before the application to supplement was heard and, if I refused to entertain the application for leave to supplement, yet another delay in this matter that has dragged on for almost a decade would have ensued. ACWA had taken the opportunity to answer the application for leave to supplement, and Ms Ditsoane had replied. I decided to grasp the nettle.

[3] The application that forms the subject matter of this hearing is therefore an application for leave to supplement the founding affidavit in the condonation application that is pending before this Court.

Background

[4] After her retrenchment in November 2016, Ms Ditsoane referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The dispute was conciliated on 5 December 2016. On that date, a certificate of non-resolution was issued, and the matter was subsequently referred to arbitration, ostensibly on the basis that the commissioner recorded that the dispute was to be so referred. When the matter was set down for arbitration, ACWA brought a substantive application raising a preliminary point that the CCMA lacked

jurisdiction to hear the dispute. The matter was argued on 9 March 2017, and on 14 March 2017, the arbitrator issued a ruling confirming that the CCMA lacked jurisdiction. Eventually, 58 days later, on 11 May 2017, Ms Ditsoane's attorneys filed her statement of claim with this Court. Having regard to section 191(11)(a) of the Labour Relations Act¹ (LRA), which stipulates that the referral of a dispute relating to the dismissal of an employee based on operational requirements must occur within 90 days after the CCMA has certified that the dispute remains unresolved, the statement of claim was filed 67 days late.

[5] In the condonation application, which is sought to be supplemented, Ms Ditsoane does not explain why it took so long to file the statement of claim with this Court after the ruling was issued, and it became clear that she was to approach this Court.

[6] Subsequently, Ms Ditsoane terminated the mandate of her former attorneys, and they withdrew the dispute. Ms Ditsoane then brought an application to set aside the notice of withdrawal and sought leave to supplement the condonation application. After initially meeting no success with the Labour Court and the Labour Appeal Court (LAC), the Constitutional Court revived Ms Ditsoane's chances. It upheld an appeal against this Court's judgment refusing to set aside the withdrawal.

[7] ACWA was not persuaded that the Constitutional Court judgment dealt with the issue of supplementation of the condonation application, and demanded that a substantive application to supplement be brought. That is how the application to supplement came before me.

Grounds for leave to supplement

[8] Ms Ditsoane argues that the supplementary affidavit will address or fully explain the sequence of events from the time that the unfair dismissal dispute was enrolled at the CCMA for con/arb on 5 December 2016, until the issue of the jurisdictional ruling. In doing so, she frankly accepts that the condonation application

¹ Act 66 of 1995, as amended.

is lacking in certain respects, including dealing with the period of delay, providing particularity on certain periods of delay, the question of prejudice and the discussion of interests of justice. Her explanation for these failures is that her former attorneys failed her in many ways, relying on the fact that she had to ‘*go all the way to the Constitutional Court so as to revive the case after same was withdrawn by the said attorneys without my approval*’.

Legal principles

[9] In motion proceedings, only three sets of affidavits are ordinarily allowed: the founding or supporting affidavit(s), the answering affidavit(s), and the replying affidavit(s). Moreover, an applicant must stand or fall by his or her founding papers, and a proper case for the relief that is sought must be made out in the founding papers.

[10] This does not mean that it is impossible for further affidavits to be filed, but a party that wishes to file a further affidavit, or to supplement his or her papers, is seeking an indulgence from the Court and, unless there are proper reasons placed before the Court as to why such an indulgence must be granted, an application to supplement an originally filed application must be refused. Simply put, a further affidavit cannot be filed as of right. Of course, the Court must exercise its discretion to allow the filing of further papers with a measure of flexibility, and ultimately it must take into account considerations of fairness to the parties. Overall, as my brother Justice Tlhotlhamajane explained in *Mokoena v Old Mutual Life Assurance*:²

- 10.1. leave to file a further affidavit out of sequence may be allowed in exceptional circumstances;
- 10.2. the applicant for supplementation must give a satisfactory explanation to avoid conclusions of *mala fides* or remissness; and
- 10.3. when considering whether to allow further affidavits, prejudice is not the test; fairness is.

Evaluation

² (JS 123/2016) [2019] ZALCJHB 54 (19 March 2019) at para 7.

[11] The circumstances of this case are indeed exceptional. The case has already received the attention of the Constitutional Court in *Ditsoane v ACWA Power Africa Holdings (Pty) Ltd.*³ The Constitutional Court upheld Ms Ditsoane's appeal against a Labour Court judgment that would have barred her from pursuing her claim against ACWA. In the course of its judgment, the apex questioned ACWA's '*conduct in resisting the applicant's attempts to get her case back on track*'.⁴

[12] The case has been marred by significant delay. The intention of the Constitutional Court was clearly for Ms Ditsoane to be placed in a position to have the merits of her case determined. The first step was the judgment of the Constitutional Court. The second must be that the condonation application be heard and disposed of. In circumstances where the questionable conduct of Ms Ditsoane's erstwhile attorneys formed the subject matter of the Constitutional Court's judgment, it seems to me that it would be unfathomable to find now that Ms Ditsoane must live with the inadequate basis for condonation that has been put up in the condonation application that they prepared.

[13] At this stage, the question is not whether or not condonation ought to be granted, but whether Ms Ditsoane ought to be granted leave to supplement. Fairness, the overriding consideration here, dictates that she must. This will enable ACWA to fully engage with the application for condonation, and will enable the Court hearing the condonation application to adjudicate upon the matter with the benefit of properly formulated papers.

[14] I have some sympathy with the position adopted by ACWA that Ms Ditsoane ought to have acted more swiftly in bringing forward her application to supplement the condonation application; after all, the Constitutional Court had already handed down its judgment on 12 December 2023, and the application to supplement was only made in April 2025. This meant that ACWA was placed under pressure to file an answer in a short space of time, and not give the time ordinarily afforded to a respondent to answer an application. However, given the history of the matter, it

³ (2024) 45 ILJ 467 (CC)

⁴ *Ibid* at para 41.

seems to me that it would have been more reasonable for ACWA to not oppose the application for supplementation, and to reach the important questions of condonation and, if condonation were granted, the merits of the case.

[15] In the circumstances of the case, I make the following order:

Order

1. Any non-compliance with the Rules of this Court in bringing the application for leave to supplement the applicant's condonation application in respect of the late filing of her statement of case is hereby condoned.
2. The applicant is given leave to supplement her founding affidavit in support of her application for condonation for the late filing of her statement of case.
3. There is no order as to costs.

M Engelbrecht
Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant:

Instructed by:

For the respondent:

Instructed by: