CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 107/23

In the matter between:

SEIPATI JOYCE DITSOANE Applicant

and

ACWA POWER AFRICA HOLDINGS (PTY) LIMITED Respondent

Neutral citation:	*Ditsoane v ACWA Power Africa Holdings (Pty) Ltd* [2023] ZACC 44
Coram:	Maya DCJ, Kollapen J, Mathopo J, Mhlantla J, Rogers J, Schippers AJ, Theron J and Tshiqi J
Judgments:	Rogers J (unanimous)
Heard on:	No hearing
Decided on:	12 December 2023
Summary:	Notice of withdrawal of case — filed without client's authority — ratification and ostensible authority not proved Labour Court – revival of withdrawn case

---

ORDER

On appeal from the Labour Court, Johannesburg:

1. Leave to appeal is granted.
2. The appeal succeeds.
3. The Labour Court's order of 24 October 2022 is set aside and replaced with an order in the following terms:

   "(a) The notice of withdrawal served by Mulima Denga Attorneys on 25 October 2017 is set aside as unauthorised.

   (b) Insofar as needs be, the applicant's statement of case is revived.

   (c) There is no order as to costs."

4. The parties are to bear their own costs in this Court and in the Labour Appeal Court.

JUDGMENT

ROGERS J (Maya DCJ, Kollapen J, Mathopo J, Mhlantla J, Schippers AJ, Theron J and Tshiqi J concurring):

Introduction

[1] The applicant, Ms Seipati Joyce Ditsoane, seeks leave to appeal a judgment of the Labour Court. The effect of the Labour Court's judgment is to bar the applicant from pursuing her claim against the respondent, ACWA Power Africa Holdings (Pty) Ltd, for unfair dismissal. The Chief Justice directed the parties to file written submissions. The applicant was subsequently directed to file a full record. We are deciding the case without an oral hearing.

[2] The applicant began employment with the respondent in November 2015. On 27 October 2016, the respondent issued a retrenchment letter to the applicant stating that she was to be dismissed with effect from 30 November 2016. The applicant referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). On 5 December 2016, the CCMA issued a certificate that the dispute remained unresolved.

Litigation history

[3] On 11 May 2017, the applicant referred her unfair dismissal claim to the Labour Court. At that stage she was represented by Mulima Denga Attorneys (MDA). The respondent, which has at all material times been represented by Cliffe Dekker Hofmeyr (CDH), served a notice complaining that the statement of case was excipiable and that the referral was out of time. The applicant promptly served an application to condone the late referral. The respondent delivered an exception. The condonation application was set down for hearing on 3 November 2017 and the exception on 17 November 2017.

[4] On 24 October 2017, the applicant consulted with another firm of attorneys, Ndumiso Voyi Incorporated (NVI), to get a second opinion on her case. NVI advised her that she had good prospects of success but that her statement of claim needed to be substantially amended. On the same day, the applicant informed MDA that she would be changing attorneys and that they should file a notice of withdrawal.

[5] The next day MDA, evidently having misunderstood their instructions, sent an email to CDH, copied to the applicant. In this email, MDA stated that the applicant had informed them the previous evening that her husband had advised her to get the services of another lawyer "and that we should withdraw the matter henceforth". Later that day,

MDA delivered a notice in terms of rule 13(1) of the Labour Court's rules,[1] purporting to withdraw the applicant's case.

[6] On 26 October 2017, NVI, unaware of what MDA had done, wrote to CDH attaching a notice substituting themselves as the applicant's attorneys; stating that she intended amending her statement of claim and to supplement her condonation application; and proposing that the matter enrolled for hearing on 3 November 2017 be removed from the roll. CDH replied that MDA had delivered a notice withdrawing the case; that the applicant would need to bring a substantive application to demonstrate why the notice of withdrawal should be set aside and the case revived; that the applicant would have to tender wasted costs for 3 November 2017; and that only if the case was revived would she be entitled to bring an application to amend her statement of case and supplement her condonation application.

[7] On 1 November 2017, NVI contacted MDA to query the notice of withdrawal, stating that the applicant's instruction had only been that MDA should withdraw as her attorneys. MDA acknowledged its error and later confirmed this under oath.

[8] On 3 November 2017, the Labour Court made an order purportedly by consent. In terms of this order, the condonation application was postponed *sine die* (without a fixed new date), with the applicant to pay the wasted costs. The order provided, further, that the applicant was granted leave, within 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". How this order came to be made is not altogether clear:

(a) According to the applicant, NVI and CDH merely agreed that the matter would be removed from the roll, with the applicant to pay the wasted

[1] Rule 13(1)(a) states:

> "A party who has initiated proceedings and wants to withdraw the matter must deliver a notice of withdrawal as soon as possible."

costs. There was no agreement putting the applicant to terms to explain why the statement of case should be revived.

(b) The attorney at CDH who dealt with the matter in November 2017 is no longer with that firm, so CDH cannot positively assert that the order was in all respects by agreement. What CDH says is that the respondent's attorney was present at court on 3 November 2017 whereas the applicant's attorney was not.

[9] According to the applicant, it was only on 18 January 2018 that she learnt that an order had been made on 3 November 2017 putting her to terms to file an affidavit explaining why her statement of case should be revived. This seems to be borne out by the fact that on 19 January 2018 CDH sent a copy of the order to NVI and on 21 January 2018 apologised to NVI for only bringing the order to the latter's attention sometime after the order was handed down. In the same letter, CDH agreed that the 10-day period for filing the revival application would only run from 19 January 2018.

[10] On 24 January 2018, the applicant served an application (interlocutory application) to set aside the notice of withdrawal filed by MDA. She also claimed relief in respect of condonation and the exception, but that is not now germane. The respondent opposed the interlocutory application. One of the grounds of opposition was that the interlocutory application had not been served within 10 days from 3 November 2017. In the light of CDH's letter of 21 January 2018, this ground of opposition is puzzling, to say the least.

[11] The interlocutory application was set down for hearing on 28 January 2022. The applicant's uncontested evidence is that the four-year delay was due to the Labour Court's congested rolls and not to any fault on her side. On 21 January 2022, the applicant served an application to condone her failure to deliver the interlocutory application within 10 days from 3 November 2017. In view of the agreement between NVI and CDH that the 10 days would run from 19 January 2018,

this condonation application should have been unnecessary. Unsurprisingly, the respondent did not oppose condonation. When the matter was called on 28 January 2022, condonation was argued on an unopposed basis. On 31 January 2022, the Labour Court delivered a short judgment granting condonation.[2]

[12] The seemingly unnecessary step of condonation led to a further delay of nearly nine months. Again, the applicant's uncontested evidence is that this delay had nothing to do with her. Eventually, the interlocutory application was argued on 20 October 2022. In its judgment delivered on 24 October 2022,[3] the Labour Court (Van Niekerk J) dismissed the interlocutory application with no order as to costs. The Labour Court refused leave to appeal, as did the Labour Appeal Court.

[13] In this Court, the respondent filed a notice to abide the application for leave to appeal, adding that if this Court granted leave it would oppose the appeal. However, this Court's uniform practice is to deal simultaneously with an application for leave to appeal and any resultant appeal. In response to the Chief Justice's directions, both parties filed submissions on the merits of the proposed appeal.

The Labour Court's judgment

[14] Although the applicant sought the setting aside of the notice of withdrawal, the Judge treated her application as being, in substance, a revival application as contemplated in the order of 3 November 2017. The test to be applied, said the Judge, was the test ordinarily applied by the Labour Court in an application to reinstate or retrieve an archived file. The Court had to recognise the respondent's interest in finality but should also take into account all relevant factors, including the explanation proffered, the prospects of success in the main action, the respective prejudice to the parties and the interests of justice.

[2] *Ditsoane v ACWA Power Africa Holdings (Pty) Ltd* (JS 259/2017) [2022] ZALCJHB 1.

[3] *Ditsoane v ACWA Power Africa Holdings (Pty) Ltd* (JS 259/2017) [2022] ZALCJHB 299.

[15] The Judge recorded the "breakdown in communication" that had occurred between the applicant and MDA which led to the latter filing the notice of withdrawal. The Judge accepted that her explanation was reasonable and that she had not intended to withdraw her claim.

[16] But that, the Judge continued, was not the end of the matter. He also had to take into account "the long period of delay since the notice was filed, all of that delay occasioned by the applicant". More than six years had passed since her dismissal, and her case had not progressed beyond the referral of a statement of claim. The applicant acknowledged that her statement of claim was defective and an exception against it was still pending. In those circumstances, "there is little prospect of a trial date within the next few years". According to the Judge, the prejudice to the respondent was obvious – it would have to defend the case "years after the event". Also to be taken into account was the "statutory purpose of efficient and expeditious dispute resolution", which would be frustrated if the matter were allowed to proceed.

[17] As to the applicant's prospects of success, the Judge did not regard them "to be such as to outweigh an inordinate delay and the prejudice that the respondent would suffer were the application to be granted".

Directions and submissions

The directions

[18] The Chief Justice's directions required the parties, in addition to any other matters they wished to canvass, to address the following questions:

> "(a) On the assumption that the notice of withdrawal filed by [MDA] on 25 October 2017 was filed without the applicant's actual authority, did the filing of that notice have any legal effect or bring about the withdrawal of her application?
>
> (b) If the answer to question (a) is that the filing of the notice did not have the effect of bringing about the withdrawal of her application, did the applicant

> need an order reviving her application or setting aside the notice of withdrawal?"

The applicant's submissions

[19] The applicant submits that, on the uncontested evidence, the notice of withdrawal was indeed filed without her actual authority. The mandate initially given to MDA was to prosecute her claim. Withdrawing the claim was the total opposite of the mandate. The applicant was thus not bound by the purported notice of withdrawal. An implied authority to withdraw a case does not fall within the scope of the implied authority recognised in *Kruizenga*.[4]

[20] There was also, the applicant submits, no apparent or ostensible authority. Although MDA's email of 25 October 2017 spoke of the withdrawal of the claim, the same email recorded that the applicant was going to appoint new attorneys to handle the matter. Withdrawing the case was inconsistent with her intention as thus recorded.

[21] The purported notice of withdrawal, the applicant thus contends, did not bring about the withdrawal of her claim in the Labour Court and there was no need for an order reviving her claim. However, the order of 3 November 2017 required the applicant to take steps for the revival of her claim. Unless she took steps (which she did by bringing the interlocutory application), the order would have had the effect of treating her case as at an end.

The respondent's submissions

[22] The respondent does not argue that MDA had the applicant's actual authority to withdraw the case, although the respondent does not explicitly concede the point. The respondent submits that, if this Court accepts the applicant's allegation of an absence of actual authority, we should find that the applicant by conduct ratified the withdrawal.

[4] *MEC for Economic Affairs, Environment & Tourism: Eastern Cape v Kruizenga* [2010] ZASCA 58; 2010 (4) SA 122 (SCA); [2010] 4 All SA 23 (SCA).

The respondent bases this argument on the fact that the applicant did not voice disagreement in response to MDA's email of 25 October 2017 and did nothing for about three months until the interlocutory application was served on 24 January 2018.

[23] In the alternative, the respondent submits that the applicant should be estopped from denying MDA's authority to withdraw the case. With reference to *Kruizenga*, the respondent argues that the applicant represented to the respondent, which reasonably believed, that MDA had "the usual and customary powers" associated with appointment as an attorney. The respondent had no reasonable basis to question MDA's authority to file the notice of withdrawal. Although, according to *Kruizenga*, a court may on grounds of equity reject reliance on estoppel, it would not be equitable to do so in the present case, since there is obvious prejudice to the respondent. But for the withdrawal notice, the respondent would have proceeded with its opposition to the condonation application on 3 November 2017 and with its exception on 17 November 2017. In that event, the matter might have reached finality six years ago.

Jurisdiction and leave to appeal

[24] The effect of the Labour Court's judgment is to preclude the applicant from pursuing her claim for unfair dismissal. This prejudicially affects her right to fair labour practices, which is guaranteed by section 23(1) of the Constitution. It also impacts on her right, guaranteed by section 34 of the Constitution, to have her labour dispute resolved by the application of law in a fair public hearing before a court. This Court thus has jurisdiction.

[25] Whether leave to appeal should be granted depends on the interests of justice. A relevant consideration is prospects of success. As I shall presently explain, the applicant enjoys good prospects of success. Prospects of success will not necessarily be decisive. Where a case does not involve any important issue of principle and turns on the particular circumstances of a case, it might not be in the interests of justice for this Court's resources to be expended on resolving it. In the present case, however, we are able to do justice without having to convene an oral hearing. A judgment from this

Court may provide guidance in how matters of this kind should be approached. It is thus in the interests of justice to grant leave to appeal.

The merits

MDA's authority to withdraw the case

[26] The uncontested evidence is that the applicant asked MDA to withdraw as her attorneys and that MDA misunderstood her instruction. In the condonation application argued in January 2022, the responsible attorney at MDA filed a confirmatory affidavit to this effect. The filing of the notice of withdrawal of the case thus occurred without the applicant's actual authority.

[27] The respondent's contention that the applicant ratified MDA's withdrawal of the case is untenable. The evidence is clear that the applicant wanted MDA to withdraw as her attorneys so that NVI could continue with the claim on her behalf. There is nothing to show that the applicant, as a layperson, must have understood, from MDA's email of 25 October 2017, that MDA was intent on withdrawing the whole case. This is particularly so since the same email spoke of her intention to use new attorneys. The very next day, NVI sent an email to CDH attaching a notice of substitution and making proposals from which it was clear that the applicant intended to carry on with the case. The delay from 3 November 2017 to 18 January 2018 is explained by the fact that the applicant was unaware until 18 January 2018 that she had been put to terms to take action in order to prevent her case from being deemed to be permanently abandoned.

[28] In *Kruizenga*,[5] which concerned High Court litigation, Cachalia JA was careful to emphasise that the issue in that case was whether a party may resile from agreements made by his attorney, without his knowledge, at a rule 37 conference. He emphasised that his judgment did "not deal with agreements reached outside of the context of conducting a trial in the normal course of events".[6]

[5] Id.

[6] Id at para 6.

[29] After a survey of various authorities, Cachalia JA summarised the position of an attorney's implied authority thus:

> "To summarise it would appear that our courts have dealt with questions relating to the actual authority of an attorney to transact on the client's behalf in the following manner: Attorneys generally do not have implied authority to settle or comprise a claim without the consent of the client. However, the instruction to an attorney to sue or defend the claim may include the implied authority to do so provided the attorney acts in good faith. And the courts have said that they will set aside a settlement or compromise that does not have the client's authority where, objectively viewed, it appears that the agreement is unjust and not in the client's best interests."[7]

[30] Implied authority is a form of actual authority. If an attorney does something that is contrary to the express instructions of the client, it is contrary to the attorney's actual authority. The fact that the attorney's act would, but for the client's express contrary instruction, have been within the attorney's implied authority does not convert the act from an unauthorised one into an authorised one. However, the fact that the act would, but for the contrary instruction, have been within the attorney's implied authority may be relevant in deciding whether the client is estopped from denying the attorney's actual authority.

[31] In *Kruizenga*, Cachalia JA said that the appointment of an attorney may constitute a representation by the client that the attorney has "the usual and customary powers associated with the appointment". In the context of that particular case, the usual and customary powers were said to include "instructing counsel to defend the claim, to draft the plea and to attend all pre-trial procedures, including rule 37 conferences".[8] The Court's conclusion was that the defendant was estopped from denying the authority of his attorney to reach certain agreements during pre-trial

[7] Id at para 11.

[8] Id at para 17.

procedures, namely conceding the merits and admitting certain heads of damages, even though these agreements were contrary to the client's express instructions.

[32] In response to an argument that permitting estoppel to operate in this way could lead to grave injustice, Cachalia JA said that, "because estoppel is a rule of justice and equity, it is open to a court to disallow the defence on this ground".[9] In that particular case, however, the Court did not consider that justice and equity required reliance on estoppel to be disallowed.

[33] On the facts of the present case, there is no merit in the respondent's invocation of apparent or ostensible authority. The applicant herself did nothing to convey to the respondent or CDH that MDA had authority to withdraw her claim. We have not been referred to any authority in support of the proposition that, when an attorney is mandated to pursue a claim, it is part of the attorney's "usual and customary powers" to withdraw the case out of the blue. By "out of the blue", I mean a notice of withdrawal which the other side was not expecting to receive pursuant, for example, to settlement discussions at a pre-trial conference. And I emphasise, in fairness to MDA, that they did not deliver the notice of withdrawal in the purported exercise of a discretion conferred on them by a general mandate. MDA only acted as they did because they mistakenly believed that this was the applicant's specific instruction.

[34] In *Ras*,[10] an attorney had, without authority, withdrawn his client's licensing application at the hearing of a liquor board. A Full Court of the Cape Provincial Division of the Supreme Court said that it was clear from the authorities that a client is not bound by the actions of his legal representative where the latter "has exceeded the mandate given him and he has achieved an object that had not been intended by his principal".[11] The Court referred to a statement by one of the old authorities that "for

[9] Id at para 21.

[10] *Ras v Liquor Licensing Board, Area No 11, Kimberley* 1966 (2) SA 232 (C).

[11] Id at 237E-F.

acts of great prejudice the attorney needs a special mandate".[12] This applied to "any material alteration in the object of the suit".[13] The Court also referred[14] to *De Vos v Calitz,*[15] where a distinction was drawn between an act performed by an attorney in the course of his authority and discretion as an attorney and an act performed by an attorney in the mistaken belief as to his client's instructions.[16]

[35] Although apparent or ostensible authority cannot be based on the unauthorised agent's own conduct, MDA's email of 25 October 2017 was in any event contradictory or equivocal, since it referred not only to withdrawal but to the applicant's intention to appoint new attorneys. The very next day, the respondent's attorneys received a notice of substitution from NVI together with proposals which showed that the applicant was intent on pursuing the pending case. At best for the respondent, it received mixed and conflicting signals.

[36] I cannot accept the respondent's contention that it acted to its prejudice in reliance on MDA's supposed authority. By the time the order was made on 3 November 2017, the respondent and its attorneys clearly knew that the applicant was intending to pursue her claim and had not intended for it to be withdrawn. The respondent complains that, but for the notice of withdrawal, it might have achieved finality pursuant to the proceedings scheduled for hearing on 3 and 17 November 2017. But the respondent did not give up those hearings in the belief that the case had been withdrawn. The respondent knew that the applicant was contesting the supposed

---

[12] Id at 237G-H.

[13] Id at 238A.

[14] Id at 238B-C. The statements from *Ras* to which I have referred in footnotes 10 to 13 were approved by a Full Court of the Transvaal Provincial Division of the Supreme Court in *Transvaal Canoe Union v Butgereit* 1990 (3) SA 398 (T) at 409E-410G. See also paras 21-2 of the judgment of a Full Court of the Eastern Cape Division of the High Court in *Minister of Justice and Constitutional Development v Rozani* [2007] ZAECHC 113.

[15] *De Vos v Calitz & De Villiers* 1916 CPD 465.

[16] See also *Forget v Knott* 1921 EDL 164 at 172:

> "It seems to me on the authorities quoted by Mr Van der Riet that an attorney, being a special agent as far as this particular case is concerned, has no authority to do more than prosecute it to its final determination in the interests of his client, and as soon as he proceeds to do something which on the face of it is not for the benefit of his client, the opposite party is put upon enquiry, and the attorney's client can repudiate it."

withdrawal. The respondent was seeking to take advantage of an error by insisting that the enrolled matters be postponed and that the applicant motivate why her case should be revived. If the respondent had simply acknowledged that MDA's filing of the notice of withdrawal was an error, the applicant would, in the absence of agreement by the respondent, have had to apply for a postponement of the hearings on 3 and 17 November 2017.

[37] Since MDA had neither actual nor apparent or ostensible authority to withdraw the applicant's case, she was not bound by the notice of withdrawal. Although the Judge who dealt with the matter on 3 November 2017 may not have known that the notice of withdrawal was unauthorised, this was clearly established in the interlocutory application. Accordingly, the Labour Court should have found that, since the case was never withdrawn, there was no need to revive it. The applicant should not have been treated as a supplicant for an indulgence.

The Labour Court's refusal to "revive" the claim

[38] Even if one assumes against the applicant that she needed the indulgence of a revival, the Labour Court plainly misdirected itself in refusing to revive her case.[17] A very important consideration was that the applicant never intended to withdraw her case, something which the Judge evidently accepted.

[39] Where the Judge went astray was in his cursory discussion of delay. He said he had to take into account "the long period of delay since the notice was filed". The Judge was presumably referring to the unauthorised notice of withdrawal, which was filed on 25 October 2017. There was a delay of five years from that date until the Labour Court heard the interlocutory application in October 2022. The Judge regarded the whole of that delay as attributable to the applicant. That is manifestly wrong:

[17] The Labour Appeal Court has held that an applicant may be permitted to withdraw a notice of withdrawal, thereby reinstating the case: *Ellies Electronics (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* [2020] ZALAC 33; 2020 JDR 2897 (LAC) at para 12.

(a) The first period of delay, about three months, was from 25 October 2017 to 24 January 2018, when the applicant served her interlocutory application. An intervening event was the order of 3 November 2017. The applicant was unaware of that order, and in particular the requirement that she file a revival application, until 18 January 2018. When she became aware of it, she promptly delivered her interlocutory application, well within the new 10-day period to which the respondent had agreed. The applicant was not at fault in this regard. To the extent that her failure to comply with the initial 10-day period required condonation, the Labour Court later granted condonation.

(b) The second period of delay, about four years, was from 24 January 2018 to 28 January 2022, when the interlocutory application was initially scheduled to be heard. It is uncontested that this period of delay was entirely attributable to the Labour Court's congested rolls. An additional reason was, of course, that the respondent chose to oppose the revival of the applicant's case, despite not being able to contest that the withdrawal had occurred without her authority.

(c) The third period of delay, about nine months, was from 28 January 2022 to 20 October 2022, when the interlocutory application was finally heard on its merits. The reason why the interlocutory application could not be argued on 28 January 2022 is that the applicant was put to the unnecessary burden of bringing an application to condone non-compliance with the 10-day period mentioned in the order of 3 November 2017 – unnecessary, because CDH had agreed that the 10 days would only run from 19 January 2018 and the applicant brought her application within the new 10-day period. In the event, condonation was granted unopposed.

[40] The Labour Court's misdirection on delay so tainted its assessment of the matter that we are entitled to consider the matter afresh. Given that the withdrawal of the case was unintended and unauthorised and that the applicant was not responsible for the

ensuing delay, it would be most unjust to bar her from proceeding with her case. Insofar as prospects of success are concerned, on the applicant's version there was virtually no consultation prior to her retrenchment. She also attacks the retrenchment decision on its merits. The respondent has not sought to persuade us that revival should be refused because of poor prospects. The respondent has also not sought to establish trial prejudice.

[41] In the result, the appeal must succeed. Although I question the respondent's conduct in resisting the applicant's attempts to get her case back on track, I do not think that this is sufficient to mark our displeasure with a costs order. I will thus follow the lead of the Labour Court and the Labour Appeal Court in making no order as to costs.

Order

[42] The following order is made:

1. Leave to appeal is granted.
2. The appeal succeeds.
3. The Labour Court's order of 24 October 2022 is set aside and replaced with an order in the following terms:

   "(a) The notice of withdrawal served by Mulima Denga Attorneys on 25 October 2017 is set aside as unauthorised.

   (b) Insofar as needs be, the applicant's statement of case is revived.

   (c) There is no order as to costs."

4. The parties are to bear their own costs in this Court and in the Labour Appeal Court.

For the Applicant:	Ndumiso Voyi Incorporated.
For the Respondent:	M Edwards Instructed by Cliffe Dekker Hofmeyr Incorporated.