



**REPUBLIC OF NAMIBIA**

**CASE NO. LCA 97/2010**

**IN THE LABOUR COURT OF NAMIBIA  
HELD AT WINDHOEK**

In the matter between:

<b>MAUREEN BROWN</b> applicant	<b>First</b>
<b>MAGDALENA WALTERS</b> applicant	<b>Second</b>
<b>HAMUKWAYA SHANINGWA</b> applicant	<b>Third</b>

and

<b>PEP</b> Respondent	<b>STORES</b>	<b>NAMIBIA</b>	<b>(PTY)</b>	<b>LTD</b>
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**CORAM: VAN NIEKERK, J**

Heard: 20, 22 March 2012

Delivered: 30 March 2012

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## **JUDGMENT**

**VAN NIEKERK, J:** [1] Although the original heading of this application indicated that there are five applicants, it is clear from the papers before me that there are in fact only three applicants. I therefore amend the heading to reflect reality.

[2] The history of the matter is shortly as follows: The applicants and two of their colleagues were dismissed from the respondent's employ on 3 July 2007. On 28 August 2007 they filed a complaint in the District Labour Court of Windhoek. On 18 June 2010 the District Labour Court dismissed the complaint of unfair dismissal. The chairperson, after the trial, found that there was no reason to doubt that the dismissal of all the complainants was procedurally and substantively fair.

[3] On 5 July 2010 the applicants and their two colleagues filed a notice of appeal through one Mr S F Machenje, who described himself at the end of the notice of appeal as the their legal representative. The appeal was set down for hearing on 11 March 2011.

[4] On 25 February 2011 the respondent filed its heads of argument, in which three points *in limine* were raised, namely:

1. That the applicants did not file heads of argument in terms of Rule 18(5) of the Labour Court Rules, despite being legally represented;

2. That the applicants' legal representative had not complied with Rule 18(3)(a); and
3. That the notice of appeal did not comply with Rule 19(2) of the Rules of the District Labour Court.

[5] On 8 March 2011 before the hearing of the appeal the first applicant, acting for all the applicants, signed a notice of withdrawal of the appeal. Thereafter on 18 October 2011 and on 2 November 2011 the third applicant "and others" served a notice on the respondent's regional office, calling on the respondent, it would seem, to meet at the Registrar's office to arrange a suitable date for the hearing of the appeal. What the outcome of these notices was is not known, but it is common cause that the appeal was not set down.

[6] On 7 December 2011 (and it appears again on 9 December 2011) the respondent received an application for review by the three applicants in terms of "Rule 15(b)". As there is no rule 15(b), it appears that the applicants act in terms of rule 15(1) of the District Labour Court as the matter was previously dealt with under the old Labour Act (Act 6 of 1992). This is the application presently before this Court for adjudication.

[7] The relief claimed is for the setting aside of "the notice of withdrawal under disguise put by the applicant" and for the appeal to be put on the roll for hearing. Attached to the notice are affidavits by each of the applicants in which they state that the reason why the first applicant

signed the notice of withdrawal of the appeal is that at the time they were told by their representative, the African Labour and Human Rights Centre, that this was the correct action to take while they were awaiting legal aid, the reason being that if they proceeded without an attorney to represent them, the case will be dismissed. They state that they took this legal advice because their aim was to “not to quit but to fight to the end of our case and our appeal to be heard.” They state that they are lay persons when it comes to legal knowledge and that they did not understand the gravity of the withdrawal notice and that it would “implicate the future proceedings of the appeal.”

[8] The relevant parts of Rule 15 of the Rules of the District Labour Court read as follows:

“15. (1) This rule applies to any application -

- (a) to review the proceedings of any district labour court;
  - (b) to review and set aside or correct any decision taken by the Minister, the Permanent Secretary, the Commissioner, a labour inspector or any other officer involved in the administration of the provisions of the Act;
  - (c) to review the decision or proceedings of any tribunal, board or other body performing judicial, quasi-judicial or administrative functions with regard to any labour matter.
- (2) An application to which this rule applies shall be made promptly and in any event within three months from the date when grounds for the application first arose.

- (3) An application to which this rule applies shall be brought on notice of motion in the form of form 11 setting out the proceedings or decision sought to be reviewed and supported by an affidavit setting out the grounds and the facts and the circumstances upon which the applicant relies to have the proceedings or decision reviewed and corrected or set aside.”

[9] Mr *Dicks* on behalf of the respondent filed heads of argument which the Court found very useful in preparing this judgment. He is thanked for his efforts in this regard. Counsel correctly points out in paragraph 15 of the heads of argument that the application is defective for several reasons, *inter alia* (i) Form 11 is not used; (ii) rule 15 only provides for a review of district labour court proceedings and the decisions of the Minister of Labour, the Permanent Secretary, the Labour Commissioner, a labour inspector or any other officer involved in the administration of the Act or a review of the decision or proceedings of any tribunal, board or other body performing judicial, quasi-judicial or administrative functions with regard to any labour matter; (iii) the rule does not permit a party to review and set aside his or her own deliberate act, such as the withdrawal of an appeal.

[10] Counsel further submitted that, in any event, the purported review falls foul of rule 15(2) and that there is no application for condonation for the inordinate delay. The submission continued that there is no properly motivated application for the re-instatement of the appeal, that the application is frivolous and vexatious and that it should be dismissed with costs.

[11] When the Court initially called on the applicants to move their application, they seemed to think that it is the appeal that should be heard and were unable to state anything meaningful in support of the application. They denied having received the opposing papers and the heads of argument in which they were forewarned about the allegation that the application is frivolous and vexatious and that costs will be claimed at the hearing. They were utterly unprepared to deal with these matters. It transpired that the respondent's documents were served by fax at the fax number of Mr Felix Muchenje, whose fax number the applicants had previously provided for service and who they acknowledged is assisting them with this application and who drew it up. Yet, they claimed, they were never informed about the respondent's papers or the heads of argument. Respondent then provided copies to them during the proceedings. The Court explained the implications of respondent's stance to them.

[12] As the Court was perturbed about these implications, as well as the ineptness of the application and that it was drafted by a person who claims to be their legal representative, the applicants were requested to provide certain information under oath, which they willingly did. It is not necessary to deal with all the information at this stage. Suffice it to say that first applicant denied ever signing the notice of withdrawal of the appeal. The third applicant also denied that he ever consented to the withdrawal or that he had any advance knowledge that it would be withdrawn. Both the first and third applicants denied knowledge of the contents of the affidavit they

signed in support of the review application and stated that they were just told to sign documents at the office of Mr Muchenje. The second applicant seemed to have some knowledge of the contents of the affidavit although she was very unsure. All three applicants denied ever taking the oath as is alleged at the foot of the affidavits or having signed the document in the presence of one Rector Machenje, who appears to be a police officer who allegedly commissioned the affidavit under the stamp of the Station Commander at the Katutura charge office of the Namibian Police. They denied visiting the charge office for this purpose. All three applicants stated that they made certain payments to Felix Muchenje for various legal documents to be drawn and for advice given in regard thereto. They handed in receipts reflecting payment for such services. The third applicant also provided two receipts issued by Felix Muchenje reflecting payment of advocate's fees. The first applicant stated that at a certain stage they were supposed to obtain the services of one Advocate Maletzky of the African Labour and Human Rights Centre and that their documents in regard to the appeal were held at the latter's office. As far as this Court is aware, Mr Maletzky is not an advocate or admitted legal practitioner. First applicant stated that Felix Muchenje at a later stage advised them to proceed without Maletzky's services, but that she was not yet able to retrieve her documents from the latter's office. The applicants were afforded the opportunity to collect the documents and to peruse and prepare themselves on the documents handed to them by the respondents.

[13] When the proceedings continued two days later, the applicants were

not really able to say much more in support of their application, except to voice their disappointment at the fact that they had not been properly advised and informed by Muchenje. They provided further information and documents under oath.

[14] While preparing this judgment I considered whether the applicants have not provided sufficient information under oath for me to consider the substance of their application as being an application for re-instatement of the appeal and to disregard the fact that it has been cast in the form of a review application. However, I think this would be stretching the leniency afforded to lay litigants in labour matters too far. Firstly, the respondents were not called to Court on this basis and were not prepared to deal with all the facts presented by the applicants. Furthermore, the applicants should have dealt with the prospects of success on appeal, which they did not do and appeared to be unable to do in any meaningful way. In my view there can only be one result to the application for review and that is its dismissal.

[15] The applicants should rather have brought an application for the re-instatement of the appeal, setting out in their supporting affidavits the full reasons for the appeal's withdrawal and attaching any relevant documents, e.g. their applications for legal aid. They should also have attached any confirmatory affidavits that may be necessary to bolster their application. They should also have explained in full why they have



delayed in bringing the application, why the appeal is important to them and have set out what the probabilities of success are on appeal.

[16] Counsel for respondent undertook to obtain instructions from his client regarding its stance on the issue of costs in the light of the information provided by the applicants during the hearing. On 29 March 2012 respondent's legal practitioners filed a letter indicating that respondent no longer seeks a cost order against the applicants. This is a generous gesture on their part and I trust that the applicants will take due note of this. It is so that the applicants appear to have been given poor advice and perhaps even misled. However, the Court wishes to warn litigants to be circumspect in whom they approach for assistance in litigation, which often requires a high degree of professional skill and experience. They should take steps to establish the credentials of such persons. A lay litigant in labour matters will not always be able to fend off cost orders because his or her representative or advisor gives them poor advice and causes unnecessary costs to the other parties to the litigation.

[17] I have directed that the record of these proceedings be transcribed and further order that a copy of this judgment and a copy of the proceedings and exhibits be forwarded to the Director of the Law Society, the Prosecutor-General and the Inspector-General of the Namibian Police for consideration and the taking of any further steps that would appear to be necessary. It appears from the available evidence that possibly certain offences, including fraud, forgery, defeating or obstructing the ends of

justice and contraventions of section 21(1)(a) and (b) of the Legal Practitioners Act, 1995 (Act 15 of 1995), may have been committed.

[18] I further direct the Registrar to pay the fees of the two interpreters used for one hour each on the first day. The interpreters are Ms Namundjebo and Mr Sethie.

[19] The result is that the application is dismissed.

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**VAN NIEKERK, J**

Appearance for the parties

For the applicants:

In person

For the respondent:

Mr G Dicks,  
Instr. by G F Köpplinger Legal Practitioners