Case No 474/94

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

THE NATIONAL UNION OF
METALWORKERS OF SOUTH AFRICA _____ Appellant

and

JUMBO PRODUCTS CC..... Respondent

CORAM: Corbett CJ, Vivier, Kumleben, Nienaber et Schutz JJA.

DATE OP HEARING: 22 August 1996

DATE OF JUDGMENT: 5 September 1996

J U D G M E N T

/ CORBETT CJ:...

CORBETT CJ:

The respondent, Jumbo Products CC ("Jumbo"), sued the applicant, the National Union of Metalworkers of South Africa ("NUMSA"), in the Witwatersrand Local Division for damages in the sum of Rl 729 761. The cause of action alleged in Jumbo's particulars of claim was, in brief, that NUMSA, a trade union, had unlawfully caused certain of its members in the employ of Jumbo to engage in an unlawful strike and that this had resulted in certain losses being sustained by Jumbo in the business (metal engineering) carried on by it. The damages claimed were to compensate for these losses. In its plea NUMSA, apart from denying Jumbo's cause of action and joining issue thereon, raised various alternative defences, including an unreasonable failure by Jumbo to mitigate its losses and contributory negligence on the part of Jumbo.

The matter came to trial before Plewman J in November

1993. Prior to the trial and on the application of the parties an order of Court was made directing the separation of issues and for the trial to proceed on all issues except those relating to the quantum of damages, the hearing on the latter being postponed sine die. By an amending direction Plewman J also excluded from consideration in the proceedings then before him the defences of mitigation and contributory negligence. At the end of the trial the learned Judge held in favour of Jumbo on its cause of action, made a declaration to that effect, postponed the matter to a date to be arranged for the hearing of the remaining issues and ordered NUMSA to pay the costs of the proceedings up to that stage. The judgment was delivered (orally it would seem) on 21 December 1993.

On 17 March 1994 NUMSA initiated motion proceedings in the Court a quo giving notice of an application for leave to appeal to this Court against the whole of the judgment of Plewman J. In

terms of Rule 49(l)(b) of the Uniform Rules of Court this application ought to have been made not later than 11 January 1994. On 18 March 1994 NUMSA gave notice of a further application, to be moved at the time of the hearing of the application for leave to appeal, for condonation of the late filing of the latter application. These applications, which were opposed by Jumbo, came before Plewman J on 3 June 1994. He delivered a short judgment dismissing the application for condonation with costs. As I shall later show, there is a suggestion on the part of NUMSA that this judgment comprehended a refusal of leave to appeal against the judgment of 21 December 1993 (to which I shall for convenience refer as "the judgment on the merits").

On 24 June 1994 NUMSA filed with this Court a petition in which it sought leave to appeal -

> "... both against the whole of the judgment of his Lordship Mr Justice Plewman [this refers to the judgment on the merits], together with his refusal to grant condonation."

On 18 July 1994 Jumbo filed an answering affidavit opposing the relief sought and asking that the petition be dismissed with costs. In accordance with the provisions of sec 21(3)(b) the petition was considered by two members of this Court who on 18 August 1994 made an order in the following terms:

> "(a) The application for leave to appeal is referred for argument before the Appellate Division in terms of sec 21(3)(c)(ii) of the Supreme Court Act 59 of 1959;
>
> (b) Full argument on the merits of the proposed appeal will be heard at the same time as the argument on
> the application for leave to appeal so as to enable the Court, if leave is granted, to determine the appeal;

> (c) For the purpose of paragraph (b) supra, the applicant is required to comply with all the rules relating to the prosecution of appeals, and the respondent if he wishes to oppose, with all rules relating to such opposition."

This matter is now before us in terms of this order.

Before dealing with the merits of the petition there is something I should like to say about its form and content. In terms of Appellate Division Rule 3(5) -

> "Every application for leave to appeal shall furnish succinctly and fairly all such, information as may be necessary to enable the court to decide whether such leave ought to be granted, and . . ."

In the present case the petition itself is succinct enough; in fact excessively so. It consists of a seven-page document, to which are annexed the pleadings in the action, the court order granting a separation of issues, the judgment on the merits, the applications for

leave to appeal and condonation in the Court a quo and certain heads of argument. In all the original petition, together with annexures, comprise 229 pages.

The heads of argument annexed to the original petition purported to be heads submitted to Plewman J at the conclusion of the evidence at the trial by counsel for NUMSA (armexure "NUMSA 6") and by counsel for Jumbo (annexure "NUMSA 7"). I say "purport" for in fact NUMSA 7 consisted of another set of heads of argument prepared on behalf of NUMSA. This was pointed out by Jumbo in its affidavit opposing the relief sought in the petition and the error has been set right in the record before us. Annexure NUMSA 7 now consists of heads of argument presented to the trial Judge on behalf of Jumbo at the conclusion of the evidence.

In its petition to this Court NUMSA makes no attempt to point out or contend in what way the trial Judge erred in coming to

the conclusion reached by him in his judgment on the merits. In fact that judgment is not subjected to any critical analysis, either as to its findings of fact or as to its exposition and application of the law. All that the petition states is that the aforementioned heads of argument (which as I have emphasized were prepared and submitted prior to the judgment) show how complex the matter is and how important it is to NUMSA. As regards the prospects of success, which is of course what an application for leave to appeal is all about, the petitioner merely says:

> "I am advised, and respectfully submit that the issues of fact and law set out in detail in the heads of argument annexed hereto marked "NUMSA6" and "NUMSA7" are such that there is a reasonable prospect that this Honourable Court might uphold an appeal."

This is not good enough. As I have said, it does not indicate in what way and why it is contended that the Court a quo erred, either in its

findings of fact or its conclusions of law or its application of the law to the facts; and the mere reference in this regard to NUMSA 6 and NUMSA 7 is unacceptable for two reasons. Firstly, those heads of argument do not deal with the judgment as such, but merely advance pre-judgment submissions. Secondly, the petition itself should set forth succinctly and fairly the petitioner's case. It should not place the onus on the Court to glean this case from heads of argument and other supporting documents. It may well be that contentions advanced in heads of argument prior to judgment become irrelevant, or redundant or unfounded by reason of the judgment; and equally the judgment may raise new issues which have to be dealt with.

I have dwelt on these matters at some length because there is a current tendency for petitions to be prepared in this "lazy" way and I wish my remarks to be taken as a general direction as to the proper drafting of a petition for leave to appeal.

I return to the merits of the petition. Sec 20(4) of the Supreme Court Act 59 of 1959 provides as follows:

> "(4) No appeal shall lie against a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of that court given on appeal to it except -
>
> (1) in the case of a judgment or order given in any civil proceedings by the full court of such a division on appeal to it in terms of subsection (3), with the special leave of the appellate division;
>
> (2) in any other case, with the leave of the court against whose judgment or order the appeal is to be made or, where such leave has been refused, with the leave of the appellate division."

The present case falls under para (b). Accordingly, no appeal lies to this Court against the judgment on the merits or the judgment refusing condonation of the late filing of the application to the Court a quo for leave to appeal except either where the Court

a quo has itself granted leave to appeal or where, the Court a quo having refused such leave, such leave has been granted by this Court. Thus, as is clear from the sub-section, this Court's jurisdiction to grant leave itself is dependent on the Court a quo having refused such leave. The proper procedure, as imperatively laid down by sec 20(4)(b), is for the would-be appellant to apply for leave first to the court against whose judgment the appeal is to be made. If that court grants leave, then this Court may entertain the appeal. If that court refuses leave, then (but only then) may this Court consider an application for leave to appeal. Thus sec 20(4)(b) not only prescribes the proper procedure, but it also defines the jurisdiction of this Court to entertain an application for leave to appeal. (Cf S v Cassidy 1978 (1) SA 687 (A), at 690 H; Windhoek Munisipaliteit v Ministersraad van SWA / Namibia en 'n ander 1985 (1) SA 287 (A), at 293 H - 294 B.)

The application of these provisions to the facts of the

present case raises two difficulties in the path of NUMSA. In the first place, NUMSA seeks from this Court leave to appeal against the order of the Court a quo refusing the application for condonation without the Court a quo having refused to grant such leave, indeed without even an application for such leave having been made to the Court a quo. And in the second place, NUMSA seeks from this Court leave to appeal against the judgment on the merits without the Court a quo having refused such leave. These difficulties have been raised in the heads of argument filed in this Court on behalf of Jumbo and it is contended by counsel for Jumbo that the applications for leave in respect of the condonation order and the judgment on the merits are thus fatally defective and cannot be entertained by this Court.

I have no doubt that Jumbo's contentions are correct. It was argued by counsel appearing on behalf of NUMSA that the judgment of Plewman J dated 3 June 1994 should be interpreted as

having dealt with both the application for condonation and the application for leave to appeal; and that consequently there has been a refusal by the Court a quo to give leave to appeal against the judgment on the merits. It must immediately be pointed out that this argument, if correct, only assists NUMSA in regard to the application for leave to appeal against the judgment on the merits. It does not assist on the condonation issue. But in any event, I cannot accept counsel's interpretation of the judgment of 3 June 1994. Plewman J begins the judgment by saying:

> "This is an application for condonation of the late filing of an application for leave to appeal."

He then proceeds to recount the facts advanced in the application in order to explain and extenuate the failure by NUMSA's attorneys to file timeously the application for leave to appeal against the judgment on the merits. Having briefly reviewed these facts the learned Judge

states:

> "I am not persuaded that in all these circumstances it is appropriate to condone the failure of the present applicant to comply with the rules."

The judgment then proceeds:

> "There is I think something that I should add because I think it does have a bearing on the matter. I do not base my refusal on my views on the merits of the application. I have had from counsel an outline of where it is suggested I erred and I have considered this only for the purposes of ascertaining whether there is such an error in my judgment that some grave injustice would follow from a refusal to condone non-compliance with the rules. The fact of the matter is that the applicant called no evidence at the trial and the whole question turns on inferences from undisputed facts. The prospects of success are therefore not so overwhelming that procedural failures should for that reason alone be ignored. Condonation is refused and [the] application is dismissed with costs."

It was argued by counsel for NUMSA that this last-quoted passage from the judgment of Plewman J, in which reference is made to "the merits of the application", shows that the learned Judge dealt with both the application for condonation and the application for leave to appeal, and dismissed both. I cannot agree with this interpretation. The whole tone of the judgment, particularly as it appears from the first and last sentences thereof, indicates that the learned Judge was dealing only with the application for condonation. And, having refused condonation, he presumably took the view that the application for leave to appeal fell away and did not require separate consideration. The reference in the judgment to "the merits of the application" occurs in the context of a consideration of the question of condonation. In adjudicating such applications the Court normally has regard not only to the facts and circumstances relating to the failure to comply with the procedural rules in question and the

applicant's explanation therefor, but also to other relevant factors, such as the degree of non-compliance, the importance of the case, the respondent's interest in the finality of the judgment, the convenience of the court, the avoidance of unneccessary delay in the administration of justice and the applicant's prospects of success in the main proceedings (see Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie 1969 (3) SA 360 (A), at 362 G). In a particular case the Court may be inclined to weigh the degree of noncompliance and the explanation therefor against the prospects of success. As it was put by Holmes JA in Melane v SANTAM Insurance Co Ltd 1962 (4) SA 531 (A), at 532 E —

> "What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long

delay."

Exceptionally, the degree of non-compliance may be so gross and the explanation therefor so inadequate, that the court may be moved to refuse condonation, regardless of the prospects of success in the main proceeding (see e g Ferreira v Ntshinpila 1990 (4) SA 271 (A), at 281 J - 282 A and the cases there cited).

In the present case all that the learned Judge said was that his decision was based on factors other than the merits of the main proceeding, viz the application for leave to appeal against the judgment on the merits; and that he gave thought to such merits only in order to determine whether they were so strong that grave injustice would follow from a refusal to grant condonation. This is very different from the enquiry which the court has to make when deciding to grant leave to appeal. In such a case the enquiry is whether there are reasonable prospects of success, i e whether there is a reasonable

prospect that the court of appeal may take a different view and hold the trial Judge to have been wrong (see S v Ackerman en 'n ander 1973 (1) SA 765 (A); Botes and Another v Nedbank Ltd 1983 (3) SA 27 (A), at 28 D). The learned Judge a quo did not purport to apply this test.

Counsel for NUMSA also argued that an application for condonation is accessory to the main proceeding - in this case the application for leave to appeal against the judgment on the merits -and that it is not the practice to require an order granting leave to appeal, given either by the trial Judge or the court of appeal, as a prelude to an appeal against a refusal of condonation. In this connection reference was made to the case of Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein. and Others 1985 (4) SA 773 (A).

In Finbro's case an application to a single Judge in a

provincial division failed. An application to the court of first instance for leave to appeal to this Court was filed, but out of time; and in consequence thereof the applicant lodged at the same time an application for condonation. The learned Judge refused both the application for condonation and the application for leave to appeal on the merits. (The refusal of the application for leave to appeal on the merits appears from the original record, which I have consulted.) On application to this Court on petition an order was made, in terms of sec 21(3)(b) of Act 59 of 1959, granting leave to appeal to the Appellate Division against the refusal of condonation by the Court a quo; ordering that, provided that this appeal succeeds, leave be further granted to appeal to the Appellate Division against the whole of the judgment of the Court a quo on the merits; and giving certain other directions for the further hearing of the matter. In due course this Court did hear the matter, granted condonation and entertained the

appeal on the merits. The only remarkable feature of this procedure is the fact that leave to appeal against the refusal of condonation was not sought or obtained in the Court a quo. It was for this reason that counsel for NUMSA cited Finbro's case, supra, in support of the practice contended for.

I am not aware of any such practice. On the contrary, it seems to me that an application for condonation, though related to the main proceeding, is a discrete procedure falling under the general mantle of "any civil proceedings", as these words appear in sec 20(4) of Act 59 of 1959. That being so, there is, in my opinion, no escape from the provisions of sec 20(4)(b) relating to leave to appeal. So far as it is possible to judge from the records before me, the Judges who made the order under sec 21(3)(b) in Finbro's case, granting leave to appeal against the order of the Court below refusing condonation, acted per incuriam. The case cannot be regarded as a precedent on

this point. (Cf Blaauwbosch Diamonds Ltd v Union Government (Minister of Finance) 1915 AD 599, at 603.) It is true that in the case of a criminal appeal an unsuccessful applicant for condonation may appeal to this Court against the refusal of condonation without prior leave (see S v Gopal 1993 (2) SACK 584 (A), at 585 b-e), but this is due to an undesirable inconsistency between the Criminal Procedure Act 51 of 1977 and the Supreme Court Act 59 of 1959. (See also sec 316 (1) and (6) of Act 51 of 1977.)

For these reasons I am of the view that since the trial Court has not refused leave to appeal both against its order refusing condonation and its judgment on the merits, this Court is not empowered to entertain the application presently before it. The application must accordingly be struck off the roll. This is an unfortunate result in that for procedural and jurisdictional reasons NUMSA is denied, in these proceedings, a decision on the merits of

Jumbo's cause of action. But for this NUMSA has only itself to blame. These difficulties were highlighted in Jumbo's opposing affidavit to the petition (filed on 12 July 1994); and again in the heads of argument filed on Jumbo's behalf on 10 November 1995. Despite having been alerted in this way to the difficulties, NUMSA made no attempt to regularize the position.

Counsel for NUMSA contended that these findings by this Court give rise to considerable procedural inconvenience in a case such as this. Thus, in order to comply with the Act, so it was argued, NUMSA would have had to first apply to the trial Judge for leave to appeal against the refusal of condonation; in the event of leave being refused, an application for leave would then have to be directed to this Court; and in the event of leave being granted (either by the trial Judge or this Court) then the merits of the appeal against the refusal of condonation, could be considered by this Court. (As matters stand

at present, there would of course also have to be an application for the condonation of NUMSA's late application for leave to appeal against the refusal of condonation.) Only after the appeal against the refusal of condonation has been decided (in the applicant's/appellant's favour), would the applicant/appellant be in a position to approach the trial Judge for leave to appeal against the judgment on the merits. Such a procedure is the inevitable consequence of the events which have occurred in this case, though the procedure might be shortened by the application to this Court for leave to appeal against the refusal of condonation (such leave having been refused below) being combined with the appeal on condonation itself. Similarly, the trial Court might and ordinarily should (as in the Finbro case) make an order refusing both the application for condonation and the application for leave to appeal on the merits, in which event this Court could grant leave both in respect of the appeal against the refusal of condonation and the

appeal on the merits and both appeals could be heard at the same time. There remains the question of costs. Counsel for NUMSA asked that in the event of the petition being struck from the roll, the party and party costs of the petition and the wasted costs occasioned by the petition be awarded to Jumbo; and that the party and party costs occasioned by the preparation of the heads of argument and preparation of the appeal in respect of the merits be determined as follows:

(3) in the event that an appeal on the merits is heard by this Court, costs are reserved;

(4) while in the event that no appeal on the merits is or can be pursued, such costs are awarded to Jumbo.

Counsel for Jumbo, on the other hand, asked that their client be awarded all the costs of the present application.

Having carefully considered the matter, I am of the view

that the order suggested by Jumbo is to be preferred. The order put forward on behalf of NUMS A is somewhat complex and might present difficulties to the taxing master. The object of an order in this form is to prevent the possible duplication of costs should the appeal proceed on the merits. It seems to me that this can be avoided by the court which hears the merits of the appeal being alerted to this factor. It is accordingly ordered that NUMSA's petition be struck from the roll and that NUMSA be ordered to pay the costs of the application, such costs to include the costs of two counsel.

M M Corbett

VIVIER JA) KUMLEBEN JA)
NIENABER JA) CONCUR

SCHUTZ JA)