Bibo.

28/92

518/90

N v H

THE SOUTH AFRICAN ALLIED WORKERS UNION (IN LIQUIDATION) AND 99 OTHERS — Appellants

and

ADVOCATE P P DE KLERK N O — First Respondent

and

COLLONDALE CONSUMER PRODUCTS (PROPRIETARY) LIMITED

Incorporating HOOVER (FORMERLY KNOWN AS HOOVER SA (PROPRIETARY) LIMITED — Second Respondent

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE SOUTH AFRICAN ALLIED WORKERS UNION (IN LIQUIDATION) AND 99 OTHERS — Appellants

and

ADVOCATE P P DE KLERK N O — First Respondent

and

COLLONDALE CONSUMER PRODUCTS (PROPRIETARY) LIMITED

Incorporating HOOVER (FORMERLY KNOWN AS HOOVER SA (PROPRIETARY) LIMITED — Second Respondent

CORAM: BOTHA, VAN HEERDEN, SMALBERGER, F H GROSSKOPF, JJA, et NICHOLAS, AJA

HEARD: 20 FEBRUARY 1992

DELIVERED: 13 MARCH 1992

J U D G M E N T

SMALBERGER, JA:

The first appellant is the South African Allied Workers Union (in liquidation). The other

...../2

appellants are all former employees of the second respondent. They together with certain other employees were summarily dismissed from their employment on 31 August 1987. The vast majority of those dismissed were at the time members of the South African Allied Workers Union ("the SAAWU"). Consequent upon their dismissal they sought orders of reinstatement in the industrial court, alleging that their dismissal constituted an unfair labour practice in terms of the Labour Relations Act 28 of 1956 ("the Act"). The SAAWU was a co-applicant. During the course of the hearing in the industrial court, which was presided over by the first respondent, the second respondent agreed to reinstate eleven of the employees. The application for reinstatement by the remainder was eventually dismissed by the first respondent. Review proceedings were subsequently launched in the

...../3

Eastern Cape Division with a view to having the decision of the first respondent set aside. At the same time an order was sought declaring their dismissal by the second respondent an unfair labour practice and ordering the second respondent to reinstate them in their employment. The SAAWU was a party to the application. The second respondent opposed the application while the first respondent abided by the decision of the court. The matter came before JANSEN J. He dismissed the review application with costs, including the costs of a previous postponement. He subsequently granted leave to appeal to this Court against the whole of his judgment and order. The judgment of the learned judge a quo in respect of the review proceedings is reported at 1990(3) SA 425 (E) ("the judgment").

Subsequent to leave to appeal being granted the SAAWU was placed in liquidation. At the commencement of the proceedings in this Court an application to substitute for it the South African Allied Workers Union (in liquidation) as the first appellant was granted by consent. There was also considerable confusion as to the precise identity of the remaining appellants before us. It appeared that not all the applicants in the court a quo (about whom there was also some uncertainty) who had been granted leave to appeal had persisted in their appeal. The parties have now reached agreement as to who the remaining appellants before us are. They number 99 and their names appear from two lists filed with the registrar of this Court. For the sake of convenience the first appellant will be referred to as "the Union", the remaining appellants as "the appellants" and the

...../5

second respondent as "Hoover".

It is common cause that, after being granted leave to appeal, the Union and the appellants did not comply with the Rules of the Appellate Division relating to the prosecution of appeals in that they failed to lodge timeously (1) the notice of appeal with the registrar of this Court; (2) their powers of attorney to prosecute the appeal; and (3) the record of the appeal. They now seek condonation of their failure to do so. To this end they have filed a petition in which their attorney, Mr Matlala, seeks to explain why the time limits laid down by the Rules were not complied with.

Hoover opposed the application for condonation. Mr Gauntlett, who appeared for Hoover, contended that there was no satisfactory explanation for what he claimed amounted to a flagrant non-

compliance with the relevant Rules. He further contended that the petition failed to address adequately the question of prospects of success, as it was required to do. In this regard he relied on what was said in Rennie v Kamby Farms (Pty) Ltd 1989(2) SA 124 (A) at 131 D - E. He accordingly submitted that this was an appropriate case for refusal of condonation without an enquiry into the prospects of success on the merits of the appeal (Cf Rennie's case at 131 I-J; Ferreira v Ntshingila 1990(4) SA 271 (A) at 281 J - 282 A).

In the passage in Rennie's case referred to by Mr Gauntlett HOEXTER JA, with reference to Meintjies v H D Combrinck (Edms) Bpk 1961(1) SA 262 (A) at 265 C, said the following:

> 'Where application is made for condonation of an appellant's failure to lodge the record timeously it is advisable (more particularly where, as in the present case, the

> explanation is palpably wanting) that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success.'

(See too Moraliswani v Mamili 1989(4) SA 1 (A) at 10 D - E.) In construing this passage it must be borne in mind that when Meintjies's case was decided a different procedure applied from that which pertains at present. The general rule was for applications for condonation to be heard separately without the full appeal record being either required or available. Now the practice is to set down an application for condonation of the kind under consideration at the same time as the hearing of the appeal. This Court will therefore always have available to it, and will have studied, the judgment of the court below, the heads of argument and indeed the full appeal record. From these documents the prospects of success or otherwise

will be reasonably apparent. While, as stated in Rennie's case, it is "advisable" that the prospects of success should be dealt with in the petition for the instruction and assistance of the court generally, a failure to do so will not necessarily be fatal. Each case will depend on its own facts. The emphasis is on the need to set forth essential information "briefly and succinctly" i e without verbosity or argument. This could include, in appropriate cases, a reference to documentation available to the court. It is not required to deal at length in a petition with the prospects of success; the overloading of petitions with unnecessary discursiveness should be discouraged.

The present petition alleges that there are reasonable prospects of success on appeal, and refers to an annexed copy of the notice of application for

...../9

leave to appeal which sets out in reasonable detail the points in issue in respect of which it is claimed that reasonable prospects of success exist. This coupled with ready access to the judgment a quo and the heads of argument in the appeal is sufficient in the present matter to satisfy the requirements relating to an allegation of reasonable prospects of success.

Notwithstanding the failure to comply with the Rules in the respects mentioned, and the generally unsatisfactory nature of the explanation for such failure, this is not the type of case where the non-observance of the Rules has been so flagrant, or the application for condonation is so unworthy of consideration, that we would be justified in dismissing the application irrespective of the prospects of success. It therefore becomes necessary to consider whether reasonable prospects of success exist.

If they do, the application should be granted; if not, it should be refused.

The judge a quo held, for reasons which appear from the judgment (1990(3) SA at 429 H - 437 C), that only one of the appellants, Mr Elliot Dikimolo, (being the person who attested the affidavit in support of the review proceedings) had locus standi (in the sense of being properly before the court). He further held, on the merits of the application, that it had not been shown that the first respondent's determination was grossly unreasonable (at 440 H). In view of the conclusion to which I have come on the merits it is not necessary to consider the judge a quo's findings in respect of the locus standi issue. That being so, no view is expressed in regard to them. The failure to do so must not in any way be construed as approval of such findings or the reasons for them.

The facts that led to the dismissal of the appellants, as found by the first respondent, are set out succinctly in the judgment at 439 B - G. These facts may be briefly summarised as follows. The workers at Hoover's factory (including the appellants) refused to work on 24 and 25 August 1987 in order to compel compliance with certain wage demands. It is common cause that their conduct in this regard amounted to an illegal strike. They agreed to return to work on 26 August while negotiations between their representatives and Hoover's management continued. However, they resorted to a "go slow" and an overtime ban. On 27 August, when Hoover refused to continue negotiations under those conditions, they again went on strike. The strike continued the next day. On that day the striking workers each received in their pay packets a letter written in both Xhosa and English

informing them that if they failed to resume normal work on Monday 31 August, they would be summarily dismissed. They nevertheless persisted with their illegal strike on the Monday. In the course of the day two meetings were held between the workers' representatives and Hoover's management. At the second of these it was agreed that the workers would resume work at 14:00, as insisted upon by their representatives. This meeting concluded at 13:55. Despite the agreement the workers failed to return to work. Instead they gathered outside the factory premises. Eighteen workers who wanted to resume work, and actually returned to their work stations, were intimidated or persuaded to return to the gathering. (Amongst these were the eleven who were later reinstated.) When by 15:00 the workers had not yet resumed work the factory gates were closed and

...../13

the workers dismissed. Shortly afterwards the workers arrived at the gates saying they wanted to return to work. They were refused entry. Mr Unterhalter, who appeared for the Union and the appellants, did not challenge these factual findings.

It appears from the evidence of Mr Ashdown, Hoover's general manager, that he appreciated the need for some report-back meeting, which would have made it virtually impossible for the workers to return to work punctually at 14:00. He therefore determined in his own mind to stay his hand and allow the workers until 15:00 to return to work, failing which they would be dismissed. He did not, however, inform them to that effect. The eighteen workers to whom I have referred returned to their work stations at approximately 14:20. There seems to be no reason why the remaining workers could not have done likewise had they so wished.

...../14

The only ground on which it was sought to review the decision of the first respondent in the court a quo was that of gross unreasonableness. It is common cause that for the appellants to have succeeded on that ground it would have been necessary for them to show that the first respondent had failed to apply his mind to the matter before him in the sense outlined in Schoch NO & Others v Bhettay & Others 1974(4) SA 860 (A) at 865 G - 866 G. The nub of Mr Unterhalter's contention in this regard was that the appellants were unfairly affected by Ashdown's decision to close the factory gates at 15:00 and dismiss the workers without prior warning to them that 15:00 was the deadline by which they had to return to work. He submitted that the first respondent had disregarded this fact and that his failure to do so was grossly unreasonable to so striking a degree as to warrant the

inference that he had not applied his mind to the question of whether their dismissal constituted an unfair labour practice in terms of the Act. Interference with his decision on review was accordingly justified.

There is in my view no merit in Mr Unterhalter's contentions. It is true that the first respondent did not in his written reasons specificially address Ashdown's failure to communicate with the workers and warn them that they would be dismissed if they did not return to work by 15:00. But the matter did exercise his mind and he was alive to the significance and possible consequence of Ashdown's failure in this regard. This is apparent from one of the exchanges which took place between the first respondent and the appellant's counsel during the course of argument at the conclusion of the hearing

(which was recorded and forms part of the appeal record). The reason why the first respondent did not later allude thereto would appear to be that he concluded that the workers (including the appellants) reneged on the agreement and refused to return to work - a conclusion he was entitled to come to on the facts he found proved and one we cannot interfere with on review. They therefore persisted with their illegal strike action right up to the time of their dismissal. In the circumstances no significant weight can be attached to Ashdown's failure to inform the workers that he would dismiss them if they failed to resume work by 15:00. His failure to do so in the prevailing circumstances could not, and did not, render his dismissal of them an unfair labour practice.

On the first respondent's factual findings, by which we are bound, Hoover was, both in law and

fairness, entitled to dismiss the appellants when it did. Mr Unterhalter conceded that Hoover would have been entitled to dismiss the appellants summarily on the Monday morning for continuing with their illegal strike. The concession was correctly made. The workers had persistently breached their obligation to work. They had been warned of the consequences of their continuing to do so. The illegality of their conduct, as the facts indicate, was material and not merely technical. Dismissal in the circumstances would not have amounted to an unfair labour practice in terms of the Act. The agreement reached between workers and management at 13:55 that the workers would resume work at 14:00 amounted to an election by management not to dismiss them provided they returned to work (cf Administrator, Orange Free State, and Others v Mokopanele and Another 1990(3) SA 780 (A) at

787 E -F). Had the appellants returned to work as agreed Hoover would not have been entitled to dismiss them. However, when they failed to return to work the position reverted to what it had been before the agreement was reached. By refusing to return to work the appellants deliberately chose not to honour the agreement and to continue with their illegal strike. If, as was conceded, Hoover was entitled to dismiss them in the morning, it was equally entitled to do so then. By the time the appellants presented themselves at the factory gates they had been lawfully and fairly dismissed. There was no legal obligation on the part of Hoover to reinstate them.

The judge a quo held that the first respondent had failed properly to apply his mind to the case of four of the applicants before him (of whom three are appellants, one not having appealed) and that

...../19

but for his finding of absence of locus standi he would have come to their assistance (at 441 D - E). His reasons for coming to this conclusion appear from the judgment at 440 I - 441 D. The three appellants in question were part of the group of eighteen workers who attempted to resume their employment at 14:20. As I have mentioned, the evidence was that the eighteen persons concerned were intimidated or persuaded to return to the gathering of workers outside the factory gates. Eleven of these workers were subsequently re-employed by Hoover presumably on the basis that they had throughout been unwilling participants in the continued strike action.

In my view no grounds exist which would have entitled the judge a quo to interfere on review with the first respondent's findings in respect of the three appellants in question. Those findings are fully

supported by the evidence and other events. The three appellants testified at the industrial court proceedings. They did not attempt to place themselves in a different category from the other appellants. They denied that they had been intimidated. They associated themselves fully with the other appellants and gave what was held to have been false evidence on their behalf. From this it may be inferred that prior to their dismissal they had aligned themselves with the workers who refused to return to work. For this reason alone there was no ground for differentiating between them and the remaining appellants. But in addition, (and this the judge a quo clearly overlooked), the first respondent was specifically requested during argument by the legal representative of the appellants concerned not to treat them differently from the remaining

appellants. That being so the first respondent can hardly now be faulted for having treated them on an equal footing.

In the result there were no valid grounds on which the decision of the first respondent could have been reviewed, and consequently no reasonable prospects of success on appeal. It follows that the application for condonation falls to be dismissed, with costs. The costs to be borne by the Union and the appellants will include Hoover's costs of appeal, as counsel for Hoover came to court to argue not only the application, but also the appeal (Cf Rennie's case (supra) at 132 C - D).

There are two further matters that require mention. In terms of the order of the court a quo the Union and the appellants were ordered to pay the costs occasioned by the postponement on 1 February

1990. This was done on the basis of an alleged concession by Mr Unterhalter. Mr Gauntlett very properly accepted Mr Unterhalter's assurance that no such concession had been made by him, and that the judge a quo was mistaken in this regard. The application for postponement came before MULLINS J. It is not necessary to traverse the facts that gave rise to the application - quite clearly the conduct of both sides contributed to the need for a postponement. Suffice it to say that after hearing argument and considering the matter MULLINS J expressed the prima facie view that in the proper exercise of his discretion he should make no order as to costs. He was, however, concerned about the question whether, in view of the amendment of the Act by Act 83 of 1988, the court had jurisdiction to entertain review proceedings. This caused him to

...../23

reserve the question of costs for the decision of the court determining such proceedings. In the circumstances the parties were agreed in argument before us that whatever the outcome of the condonation application (and, if necessary the appeal) the order of the court a quo should be altered to reflect no order as to costs in respect of the postponement of 1 February 1990. Mr Unterhalter quite rightly did not contend that any such alteration entitled the Union and the appellants to any costs in this Court.

In the court a quo the parties were ad idem that the court's review jurisdiction had not been ousted by the amendments brought about by Act 83 of 1988 which, inter alia, established a Labour Appeal Court with circumscribed review jurisdiction (see the judgment at 428 D). They apparently accepted as correct the views expressed by FRIEDMAN J in

Photocircuit SA (Pty) Ltd v De Klerk NO and De Swardt NO and Others 1989(4) SA 209 (C) at 214 E to 216 I. (The decision in the Photocircuit case has since been partly reversed by this Court - see 1991(2) SA 11 (A), but not on the issue of jurisdiction, which is not touched upon in the judgment). The parties persisted in this approach before us notwithstanding the contrary decision arrived at by HARMS J in Paper, Printing, Wood and Allied Workers Union v Pienaar NO and Others 1991(2) SA 46 (T). In that case HARMS J held that the Supreme Court no longer has jurisdiction to review the proceedings of industrial courts. The judgment, however, contains no reference to FRIEDMAN J's earlier reported judgment in the Photocircuit case. In view of our decision to refuse condonation we are not called upon to consider the appeal in this matter. It is therefore unnecessary

to decide whether the court a quo had jurisdiction to entertain the review proceedings before it.

In the result the following order is made:

1. The application for condonation is dismissed, with costs, such costs to include the second respondent's costs of appeal and the costs of two counsel;

2. The order of the court a quo directing the appellants (applicants) to pay the costs caused by the postponement of 1 February 1990 is set aside and the following order is substituted

"No order is made as to the costs of the postponement of 1 February 1990".

J W SMALBERGER
JUDGE OF APPEAL

BOTHA, JA)
VAN HEERDEN, JA)
FH GROSSKOPF, JA) CONCUR
NICHOLAS, AJA)