

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case Number:

JA14/98

In the matter between

Nampak Corrugated Wadeville

Appellant

and

Khoza

Respondent

JUDGMENT

NGCOBO JA

1]This Appeal concerns the fairness or otherwise of the dismissal of Mr. Khoza, the respondent herein, by Nampak Corrugated Wadeville

(' Nampak'), appellant herein, for gross negligence arising from damage to a boiler operated by Khoza.

2]In view of the fact that the respondent' s heads of argument were filed late, a preliminary matter to decide is whether the late filing should be condoned.

3]On 9 April 1998 the registrar of this court advised the respondent' s attorney, Mr Magunda, that the respondent' s heads of argument had to be served and filed on or before 14 September 1998. When the respondent' s heads of argument had not been filed by 5 October 1998, this court enquired from Mr Magunda whether the respondent intended to oppose the appeal, and indicated that if the respondent intended to oppose the appeal heads of argument had to be filed. On the same day, Mr Magunda confirmed that the respondent intended to oppose the appeal and indicated that heads of argument, together with an application for condonation, would ' follow shortly' .

4]The respondent' s heads of argument were only filed on 4 November 1998, that is, the day before the appeal was due to be argued. Attached to the heads of argument was an ' affidavit in support of an application for condonation' . There was no notice of application for condonation, as required by the rules of the court.

5]In an attempt to explain the delay in filing the heads of argument, Mr Magunda said that he does not have telefax transmission facilities. He has to rely on a colleague whose offices are close to his. Normally, a member of his staff would go to pick up the fax from his colleague' s office. He says that this is probably what happened to the notice of 9 April 1998. However, that member of staff did not bring the notice to his attention. The result was that he never became aware of the contents of that notice until he

received the further enquiry from this court dated 5 October 1998. I should mention here that, on their face, the appellant's heads of argument were served upon Magunda's office by telefax on 18 August 1998. Whether he received them and whether he made enquiries about the date when the respondent's heads of argument had to be filed, does not appear from his affidavit. In all probability, he made no enquiries. He then says counsel was instructed immediately thereafter to prepare heads of argument. Mr Mpama, who appeared on behalf of the respondent, informed us that he did not prepare the heads of argument, having been briefed only on 2 November 1998.

6]The heads of argument themselves do not comply with the rules of this court. An amount is in blank. They contain a 'list of authorities' which is not referred to in the heads of argument. Some of the authorities are not properly cited; nor does one know what proposition the authorities are being cited in support of.

7]In this country of ours, it is not unlikely that a firm of attorneys could, even in this day and age, not have telefax transmission facilities. No blame attaches to Mr Magunda in this regard. While it is understandable that a member of his staff may have failed to bring the notice to his attention, as an attorney he must take full responsibility for the conduct of his member of staff. However, Mr Magunda offers no explanation, nothing at all, for the delay from 5 October 1998 to 4 November 1998 when respondent's heads of argument were filed.

8]Failure by practitioners to file their heads of argument timeously is becoming a problem in this court. In this term alone, out of 15 appeals heads of argument in 5

appeals were not filed on time. This is so notwithstanding that the parties were given between four and five months within which to file their heads of argument. This court has in the past made it clear that in the absence of an acceptable explanation for the failure to file heads of argument in time, condonation will not be granted (See *Allround Tooling (Pty) Ltd v NUMSA* [1998] 8 BLLR 847 (LAC) at 850 C-E (and the cases cited therein)). Here, no acceptable explanation for not timeously filing the heads of argument has been provided. In the result, the application for condonation is refused.

9]Then to the merits of the appeal.

10]Khoza had been employed by Nampak as a boiler attendant for some 15 years. He had received proper training as a boiler attendant. He was described in evidence as 'a very experienced boiler attendant.'

11]On the night of 12/13 May 1996 he was on duty. He was responsible for the operation of a coal burning steam boiler. The boiler had to be fully operational to supply steam by 07h00 on Monday 13 May 1996. It takes about 4 hours for the boiler to reach the operational pressure of 1500 kPa. Once the required pressure was reached, Khoza had to regulate the fire to ensure that the fire did not get too hot nor the heat too intensive.

12]This is how the boiler operates.

13]The coal for the fire is fed from a bunker on to a stoker consisting of a chaingrate (' the grate '). The grate acts as a conveyor belt. It moves horizontally from the rear, that is, where coal is fed into the boiler, to the front, where burnt-out ash is tipped onto an ash pit. From the rear to the front, the grate moves over and around a roller shaft (' the front roller ') and back to the rear, where it comes up and around a rear roller. It takes approximately one hour to move from the rear to the front. The coal fed in burns to ash by the time the grate reaches the front. As the grate moves over the front roller, ash is tipped onto the ash pit.

14]If the burning coal remains in contact with the grate for too long a period the grate will be damaged. To prevent this, the burning coal must be raked onto cold coal which is fed in. This process is called banking. If the grate is obstructed in its movement the shear pin will break off and the grate will stop moving. To get the grate moving again, the shear pin must be replaced. If the shear pins keep on breaking, this may be indicative of a major problem. In that event, the motor must be switched off. The burning coal must be pushed off the grate into the ash pit to prevent damage to the grate.

15]In the early hours of the morning of 13 May 1996, the boiler stopped moving. Khoza reported the matter to Mr van Heerden. The latter sent Mr Combrinck, an electrician, to attend to the problem. He found that a shear pin had broken. The shear pin was replaced. The grate moved for approximately 20 minutes before jamming again. Khoza called Combrinck back. Once again the shear pin had broken. It was replaced.

The grate moved for approximately 35 minutes before jamming once again. The shear pin had broken once again. It was replaced once more. This was the last shear pin that Khoza had, as each attendant is issued with three pins. The grate ran for approximately 20 - 30 minutes before jamming again. Khoza went to the workshop to call Combrinck. As the pins had been finished, Combrinck contacted van Heerden and explained the problem. Khoza was instructed to start another boiler. Khoza then switched off the motor of the first boiler. The grate was stationary at the time. There was burning coal on the grate. He did not push the burning coal into the ash pit nor did he remove it from the boiler. He proceeded to start the second boiler as instructed. He left work at approximately 07h30 that morning. He did not return to the first boiler to remove the burning coal that had been left on the grate.

16]A subsequent inspection of the boiler revealed that a hole measuring 900 mm by 200 mm had been burnt into the grate and that the links around it had been melted into a solid plate. The damage was found at the end of the grate where ash should have been discharged. It cost R12 392.94 to repair the damage.

17]Dultro Engineering CC, a firm which inspected the damage and prepared a report, found that the damage had been caused by overheating. As to what caused the overheating, the firm gave four possible explanations: either the banking procedures

were not followed; or banking was done incorrectly; or back ash was not removed, causing a build-up on the back-roller; or the boiler was left unattended.

18]Khoza was subsequently charged with gross negligence and appeared at a disciplinary hearing. At the enquiry, Khoza testified, *inter alia*, that he had followed the correct procedures. He essentially told the enquiry what had happened and how he was instructed to start a second boiler.

19]At the conclusion of the enquiry, the chairperson found that the damage had been caused by the exposure of the grate to too high temperature for a prolonged period. He further found that had the correct procedure been followed, the damage would not have been caused. Khoza was accordingly found guilty of ' gross negligence of the highest degree' . Having found ' no mitigating circumstances' , the chairperson recommended a dismissal.

20]His internal appeal to the managing director was unsuccessful. His dismissal was upheld.

21]Khoza challenged his dismissal, and referred the dispute to the industrial court for a determination in terms of section 46(9) of the Labour Relations Act, No. 28 of 1956, as amended. Before that court, Khoza put in issue the substantive fairness of his dismissal. The industrial court found that Khoza had failed to remove the burning coal from the grate as required by the emergency drill instructions. As a consequence, burning coal remained in contact with the grate for a substantial period and caused a hole in the grate.

It concluded that Khoza was, therefore, negligent. However, it could not find that he was grossly negligent ' [d]ue to the circumstantial nature of the evidence ' as to the cause of Khoza ' s negligence.

22]The court found that, having regard to the facts and circumstances of the case, the sanction of dismissal was too harsh and constituted an unfair labour practice. It ordered that Khoza be reinstated in his employment with effect from 28 February 1998. The court, however, refused to order compensation in addition.

23]The present appeal is against the determination and order made by the industrial court.

24]The essential facts which are either common cause or not in dispute are that: the grate jammed three times during the course of the morning; the shear pin was replaced three times; the grate moved for a short time each time the shear pin was replaced; the damage to the boiler was caused by a hole having been burnt into the grate; the hole was caused by burning coal having been left on the grate for a long period; when Khoza went to start the second boiler, he left burning coal on the grate which was then stationary; Khoza never returned to the first boiler before he finished work at 07h30 on the morning of Monday 13 May 1996.

25]On appeal, as in the court below, Nampak contended that the damage to the grate had been caused prior to the grate jamming. They argued that the hole caused the grate to jam, as the grate became unable to travel around the sprocket. If Nampak ' s

contention is upheld, it would mean that at some point prior to the grate jamming, Khoza had abandoned the boiler and failed to carry out banking procedures.

26]By contrast, Khoza contended that the grate was only damaged after he had gone to start the second boiler.

27]In my view, on any contention, Khoza was negligent. It is, therefore, not necessary to decide which of the two contentions is more plausible. The appeal can be disposed of on Khoza's version.

28]On his own version, after he was instructed to start the second boiler, Khoza left the burning coal on the grate. The grate was stationary at the time. He did not remove the burning coal from the grate into the ash pit as required by the emergency drill instructions. As a result, burning coal remained in contact with the grate for a prolonged period. This caused the damage to the grate. Mr Koetsier, the maintenance manager, admitted when questioned by the court below that the only way that a hole would have been burnt into the grate was for the grate to be stationary with burning coal on it for 'quite a long period'. Indeed, the report by Dultro Engineering is consistent with burning coal having been left on the grate for a prolonged period.

29]Khoza knew that leaving burning coal on the grate for a prolonged period could damage the grate. A reasonable boiler attendant would, in the light of this knowledge, have removed burning coal from the grate into the ash pit. Apart from this, the emergency drill instructions required Khoza to push the burning coal from the grate into

the ash pit once the motor was switched off. He did not do this.

30]When Khoza was asked by the court below why he had not removed the burning coals from the grate knowing what the consequences might be, his response was that he had been 'instructed to leave this boiler to start the other boiler and the time was already gone that time in the morning (sic)". He added that in the past burning coal had been left on the grate without any damage to the grate. This occurred during the period February to March when there were production problems and two boilers were used.

31]His explanation suggests that he was anxious to get the second boiler going in time for production. However, to remove the burning coal from the grate and push it into the ash pit would not have taken too long. He had ample time to do this and still get the second boiler started. Khoza, therefore, had no justifiable reason for not removing the burning coal from the grate. The most revealing fact about his attitude towards his duties is the fact that once he had started the second boiler, he did not bother to return to the first boiler to clear the grate of the burning coal. He simply abandoned the first boiler. This, in my view, was a gross dereliction of duty.

32]The next question that arises is whether, having regard to the facts and the circumstances of the case, dismissal was a fair sanction.

33]The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless

the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable. In judging the reasonableness of the sanction imposed, courts must remember that:

There is a band of reasonableness within which one employer may reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him.

(*British Leyland UK Limited v Swift* [1981] IRLR 91 at 93, para 11)

34]It seems to me that the correct test to apply in determining whether a dismissal was fair is that enunciated by Lord Denning MR in *British UK Limited v Swift*, **supra**, at p.93 para 11, which is:

Was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him, then the dismissal was fair.

35]Applying the above test, I cannot hold that it was not reasonable for Nampak to dismiss Khoza. He was engaged as a boiler attendant. He had to make sure not only that the boiler was functioning properly but also that no damage was caused to it. He was a very experienced boiler attendant. He knew he had to remove burning coal from the grate once the motor was switched off. He knew that failure to do this might cause not only damage to the boiler but endanger lives as well. The fact that he had to start the second boiler was no excuse for him not to remove burning coal from the grate. He had ample time to carry out the emergency instructions and then get the second boiler started. If the reason for his failure to carry out those instructions had been his anxiety to get the second boiler started immediately, one would have expected him at least to return to the first boiler once he had started the second one in order to check on the status of the coal on the grate. His failure to do so suggests that the reason advanced by him for not carrying out those instructions was a mere pretext. The probable explanation for his conduct, in these circumstances, is simply that he deliberately neglected to perform his duties. Consequently, I do not share the view of the industrial court that the evidence against Khoza was so circumstantial that it could not be used to explain his conduct. It was Khoza who had to furnish that explanation. In the absence of any credible explanation, the inference that he deliberately neglected to perform his duty is irresistible. This finding by the employer cannot be faulted.

36]In these circumstances, could Nampak still trust that in future Khoza would perform his duties as a boiler attendant diligently? I think not. The trust which is fundamental in an employer/employee relationship was broken.

37]I am not prepared to say that no reasonable employer would have dismissed Khoza in the circumstances. On the contrary, it seems to me that many a reasonable employer in the circumstances would have thought that it was right to dismiss him.

38]In the event, the appeal is upheld with costs. The determination and order made by the industrial court is altered to read:

'(a) The dismissal of the applicant did not constitute an unfair labour practice.

(b) The application is dismissed.'

NGCOBO JA

I agree,

MYBURGH JP

I agree,

FRONEMAN DJP

DATE OF HEARING: 5 November 1998

DATE OF JUDGMENT: 12 November 1998

For the appellants: Adv PR Jammy
Instructed by: Edward Nathan & Friedland Inc.

For the respondents: Adv G Mpama
Instructed by: Magunda Attorneys