REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No. JA 25/11

In the matter between:

NUM obo SELEMELA **Appellant**

and

NORTHAM PLATINUM LIMITED **Respondent**

Summary: Appeal: Review of CCMA award. *Sidumo* test restated. Insubordination sufficiently serious and deliberate. In appropriate circumstances, a lapsed (final) written warning may be taken into account in determining the fairness of dismissal. Held: Dismissal substantively fair.

JUDGMENT

NDLOVU, JA

Introduction

[1] This is an appeal against the whole judgment and order of the Labour Court (per de Swart, AJ) handed down on 21 July 2009. The appeal came before us with the leave of the Court *a quo*.

Factual background

[2] The appellant, the National Union of Mineworkers (NUM), is a registered trade union and instituted this litigation on behalf of its member, Stephen Selemela.[1] The respondent company carries on the business of mining operations in the Northam district, Limpopo Province. On 21 May 2004, Selemela assumed employment with the respondent as an artisan assistant.

[3] However, on 15 August 2005, he was charged with two counts of misconduct, as follows:

> '1. Misconduct whereby you on the 09/07/2005 neglected your duty by refusing to carry out a lawful instruction given to you by your supervisor: J J Liebenberg to clean the workshop.
>
> 2. Misconduct whereby you on the 09/07/2005 left your workplace without the permission of your supervisor.'

On the same day a third count of misconduct was added, namely:

> 3. Misconduct whereby you on the 11/07/2005 threatened to kill Adriaan Willemse by stating that you will come to the workshop and kill him and the other people in the workshop.'

[4] On 20 August 2005, and at the conclusion of a disciplinary hearing, Selemela was found guilty as charged on all three counts. Two days later, he was dismissed from the respondent's employ and served with the duly completed 'dismissal form' accordingly. At the time of his dismissal he was earning R2483,03 per month.

[5] Selemela was aggrieved by his dismissal, hence he referred a dispute to the CCMA whereby he alleged that the dismissal was substantively unfair and sought reinstatement. He did not challenge its procedural fairness. Attempts at conciliation failed and the dispute was subsequently referred to arbitration. The matter came before commissioner Jowie Teffo (cited as the first

[1] Section 200 of the LRA. See also *National Union of Mineworkers v Hermic Exploration (Pty) Ltd* (2003) ILJ 787 (LAC) at paras 37-- 41; *Amalgamated Engineering Union v Minister of Labour* 1949 (4) SA 908 (A) at 910.

respondent in the Court *a quo*) who, on 16 November 2006, issued an arbitration award whereby she declared that Selemela's dismissal was substantively unfair and ordered that he be reinstated "to his former position as at (the) date of dismissal on the same terms and conditions"; and to resume his duties with effect from 1 December 2006. The respondent was further ordered to pay Selemela an amount of R29796,36 being his twelve months' remuneration on or before 1 December 2006.

[6] The respondent, being dissatisfied with the commissioner's decision, took the matter up on review with the Labour Court, in terms of section 145 of the Labour Relations Act (the LRA).[2] In its judgment, the Court *a quo* found that the dismissal of Selemela was "procedurally and substantively" fair and thus reviewed and set aside the commissioner's award accordingly. It is against this judgment that the appellant now appeals to this Court.

The arbitration proceedings

[7] During the arbitration hearing, two witnesses testified on behalf of the respondent, namely, Andries Johannes Liebenberg (also known as Johan) the workshop electrician, and Adriaan Willemse (also known as Attie), the electrical assistant. Selemela was the only witness for his case.

[8] Liebenberg testified that on 9 July 2005, at about 08h45, he instructed Selemela and his co-workers Attie and Vistos to strip a 35 millimetre cable at the workshop, which they duly did. Then Liebenberg and Chris de Beer, another electrician, left the workshop for the training centre to attend to another job there and returned to the workshop at 09h45. At about 10h00, Liebenberg issued another instruction to Selemela and his co-workers as aforementioned to clean up the workshop of all the pieces of cable that they had stripped. They had to perform the cleaning quickly because, as it was on Saturday, the company would close early at 11h00. However, Selemela and Vistos simply ignored Liebenberg's instruction. Instead, Vistos left the workshop and Selemela went to stand by the front door. De Beer also asked Selemela to comply with the instruction, but still in vain. At that stage,

[2] Act 66 of 1995.

Selemela left the workshop as well. He and Vistos only returned at 10h45, which was 15 minutes before the closing time. There was some indication in evidence that Vistos, as a result of this incident, was no longer employed by the respondent. As to how his employment contract got terminated, of course, is an issue of no relevance to this case.

[9] On Monday, 11 July 2005, Selemela was called to the office of Andre van der Veen, the respondent's foreman, where he was confronted about his alleged misconduct on the previous Saturday. When Selemela came out of the office, he went straight to Willemse and, speaking in English, accused Willemse of being a spy and threatened that he would come back to the workshop and shoot him (Willemse) and Liebenberg and also that he would 'get' the other artisans.

[10] Liebenberg further testified that Selemela had previously received a final written warning involving the misconduct of disobeying a lawful instruction and leaving the workstation without permission, committed on 27 January 2005. The said warning was valid for 182 days.

[11] Willemse substantially corroborated the evidence of Liebenberg in relation to Selemela's alleged acts of misconduct both on 9 and 11 July 2005. Concerning the Saturday instruction to clean up the workshop, Willemse, in summation, stated:[3]

> 'Ek het die instruksie uitgevoer. Stephen (Selemela) het die instruksie geignoreer en Vistos het die werksplek verlaat. Terwyl ek besig was het Johan Liebenberg na Stephen toegekom en vir die tweede keer gevra om my te help skoonmaak. Hy het weer die instruksie geignoreer en hy het die werksplek verlaat. Ek het die werksplek klaar skoon en veilig gemaak. Hulle het so 10:50 teruggekom…'

On the Monday incident, Willemse stated:[4]

> 'Dit was net na die meeting wat hy (Selemela) na my toegekom het, wat hy vir my gese het, am I a spy or what… Ek het hom gevra hoekom sal hy so iets

[3] Transcript of arbitration proceedings at p134 of the indexed papers.
[4] Transcript of arbitration proceedings at p138 of the indexed papers.

> se. Hy het gese moenie worry nie, hy sal net inkom, in die workshop inkom en vir my en Johan skiet… Dit was nog voor 10:00, teetyd.'

Willemse further stated that Selemela was speaking English at the time he threatened him.

[12] Selemela denied that he failed to carry out Liebenberg's instruction on 9 July 2005. He said when Liebenberg and de Beer returned from the training centre, Liebenberg instructed them (i.e. Selemela, Willemse and Vistos) to stop stripping the cables but to collect the pieces that they had already stripped and throw them in the rubbish bin. The reason for stopping them was presumably because it was then nearing the closing time. He said he then collected the pieces (which he referred to as the armour) and went to throw them in the rubbish bin. Before going back to the workshop he went to the toilet. When he returned, he found that there was a lot of dust in the workshop. He then decided to stay outside. After the dust had subsided, he then went inside the workshop. It was already closing time.

[13] On Monday, 11 July 2005, during tea time, he was called to the foreman's office where he was asked to answer about his alleged misconduct on Saturday. When he denied the allegation, Willemse was called in and asked to explain what happened on Saturday. Once he confirmed that Selemela had indeed ignored Liebenberg's instruction, he was then excused and told to leave the office.

[14] Selemela further testified that, when he came out of the office, he went to Willemse and asked him why he had said that he (Selemela) refused to carry out the instruction when in fact they had performed the job together. He said, at that stage, he asked Willemse (in English): *'*Are you a spy or what?*'* From there he went to speak to Black co-workers (about three of them) in the tea room. During the conversation, he had remarked (in SeSotho) to his Black colleagues that he knew that "these people, they are inclined to eat during working hours… and fall asleep… all the White men we work with there… I said that whilst they were busy, when they will be busy eating or sleeping I will

shoot them a photo."[5] It was in that context that he used the word 'shoot' and it was not intended thereby to threaten anyone. He said at the time he made that statement Liebenberg and de Beer were present in the tea room and seated at a table right at the back about ten metres away.

[15] He said that on the same day (i.e. 11 July 2005) he was called to the IR (presumably, the industrial relations) office where he was asked to sign a suspension form and, at the same time, informed about misconduct charges that had been preferred against him. He was never asked to explain the context in which he had used the word 'shoot' but was merely told to sign the suspension form.

[16] It was put to Selemela, under cross-examination by the respondent's representative, that both in his statement that he submitted to the disciplinary enquiry and during his evidence at the enquiry he had never mentioned that he went to the toilet and that when he returned to the workshop he found that it was full of dust. To that, he said it was because during the enquiry he was sometimes stopped and told that what he was saying was irrelevant. He conceded that he was speaking loudly to his colleagues when he used the word 'shoot', meaning 'to take a photo'. He was at that time also looking at Willemse who was still in the tea room but starting to turn around and going away.

[17] The commissioner rejected Selemela's version with respect to the incident of the Saturday on the basis that she found it improbable, and accepted the respondent's account. However, in relation to the Monday's incident the commissioner rejected the respondent's version and accepted Selemela's defence. In this regard, she reasoned that if Liebenberg had indeed heard Selemela telling Willemse that he would shoot both Willemse and him, then he (Liebenberg) would have intervened and asked Selemela why he had made such threat. On this basis, the commissioner found that Selemela's conviction in relation to the Monday's incident could not be sustained. However, she appeared to have accepted that Selemela was guilty of

[5] Transcript of arbitration proceedings at 183-4.

insubordination, although she hastily questioned whether the misconduct was so serious as to have warranted a sanction of dismissal.

[18] Upon her finding that Selemela's final written warning had already lapsed and that the insubordination that he had committed was not so serious and deliberate, the commissioner concluded that the sanction of dismissal was too severe. As indicated earlier, she ordered that Selemela be reinstated to his job on the same terms and conditions. In addition, the respondent was ordered to pay Selemela the amount of R29 796,36 which was described by the commissioner as being Selemela's twelve months' remuneration.

Proceedings in the Labour Court

[19] In its review application, the respondent put forth the following submissions as its grounds of review:

1. Since the LRA did not countenance an order for both reinstatement and compensation, the commissioner exceeded her powers when she made such order in her award.

2. The evidence clearly established that Selemela was instructed twice to clean up the workshop and he did not only fail to carry out the instruction but he absented himself from the place concerned without informing anyone as to where he was going. This was clear evidence of wilful conduct on the part of Selemela and therefore a deliberate act of insubordination.

3. The threat of shooting made by Selemela was clear, express and not implied. There was corroborative evidence in this regard. If the commissioner properly assessed the evidence, she would have found that the threat was indeed made, recognised the seriousness of the threat and appreciated that, as a result, the relationship necessary for continued employment had been destroyed.

4. The commissioner was wrong in holding that the final written warning which was issued on 22 February 2005 and valid for 182 days had

lapsed when Selemela committed the misconduct of insubordination on 9 July 2005. Even, assuming in Selemela's favour, that the period of 182 days be calculated from 27 January 2005 (being the date of the previous misconduct), it would have expired on 29 July 2005. In other words, considered from either way, the final written warning had not yet expired as at 7 July 2005 when Selemela committed insubordination.

5. In any event, even if the final written warning had lapsed, the commissioner was obliged to take it into account and by not doing so she committed an irregularity.

[20] The probability findings and conclusions of law reached by the Court *a quo* included the following:

> 'The Commissioner rejected Selemela's version regarding the events in the workshop on the Saturday as being improbable. The inescapable conclusion is accordingly that she accepted the evidence of Liebenberg and Willemse to the effect that Selemela failed to obey the instruction given to him to clean up the workshop. Indeed, she finds that Selemela was guilty of insubordination…
>
> Having accepted the evidence of Willemse and Liebenberg in regard to the events on the Saturday, the Commissioner, however, appears to reject their evidence in regard to the evidence on the Monday. Liebenberg and Willemse were either credible and reliable witnesses whose evidence was acceptable, or they were not. There appears to be no justification for accepting their evidence in regard to the insubordination, but rejecting it in regard to the subsequent threat by Selemela on the Monday…
>
> When regard is had to the award as a whole, the Commissioner clearly attempted to save Selemela's job. In pursuit of this objective, she made credibility findings which were inherently inconsistent and substituted her own views as regards the suitable sanction for insubordination, for that of the employer. Whilst the commissioner was not bound to defer to the employer, she was required to evaluate whether the sanction of dismissal was fair in the light of all the circumstances of the case…'

[21] Accordingly, the Court *a quo* held that the decision made by the commissioner was not one which a reasonable decision-maker could have reached. Hence, the arbitration award was reviewed and set aside.

The appeal

[22] There were three preliminary applications lodged by the appellant, namely, (1) for the reinstatement of the appeal which had lapsed; (2) for condonation of the late filing of the appeal record; and (3) for the late filing of the power of attorney. The applications were not opposed by the respondent. In fact, according to Mr Beaton, for the respondent, that issue was the subject of agreement between attorneys for both parties. The Court, accordingly, granted the applications and proceeded with the merits of the appeal.

[23] The following were listed as the appellant's grounds of appeal:

23.1 The Court *a quo* erred in finding that the commissioner committed a reviewable irregularity and exceeded his powers in awarding both reinstatement and compensation equivalent to 12 months' remuneration.

23.2 The Court *a quo* erred in finding that the commissioner had rejected as improbable Selemela's version regarding the events in the workshop on 9 July 2005.

23.3 The Court *a quo* erred in finding that the "inescapable conclusion" was that the commissioner accepted the evidence of Liebenberg and Willemse that Selemela had failed to obey an instruction given to him to clean up the workshop.

23.4 The Court *a quo* ought to have found that the mere fact that the commissioner rejected Selemela's version was not an indication, either in logic or in fact that she necessarily accepted the version of Liebenberg and Willemse and she was not bound to do so.

23.5 The Court *a quo* erred in finding that because the commissioner held that "it does not seem that the refusal to carry out the instruction was

serious and deliberate", the commissioner had (impliedly or expressly) found that Selemela was guilty of insubordination.

23.6 The Court *a quo* erred in finding that there was no justification for accepting the evidence of Liebenberg and Willemse in regard to insubordination but rejecting it in regard to the subsequent threat by the appellant on the following Monday.

23.7 The Court *a quo* ought to have found that the mere fact that the evidence of a witness was accepted on one issue does not provide support for the proposition that such witness' evidence ought also to be accepted on a different issue.

23.8 The Court *a quo* erred in finding that the written warning which Selemela had previously received 'had clearly not lapsed'.

23.9 The Court *a quo* ought to have found that the appellant had testified and produced documentary evidence which was not challenged that he had received a written warning which had expired on 16 May 2005.

23.10 The Court *a quo* erred in finding that the decision of the commissioner was not one which a reasonable decision-maker could have reached on the evidence.

[24] Mr Hulley, for the appellant, apparently believing that the amount of R29 796,36 was actually intended by the commissioner as compensation, as the Court *a quo* also construed it to be the position, conceded that the commissioner was then wrong to have ordered compensation in addition to reinstatement. He submitted, however, that with regard to the other issues raised against the award, the commissioner was correct in her assessment of the evidence before her and the conclusion that she reached. He submitted that even on the part where the commissioner rejected Selemela's version as improbable, it related not to the alleged insubordination (i.e. failing to obey an instruction) but rather to the misconduct of Selemela for having left the workplace without permission and having failed to re-enter the dust-filled

workshop through the back door. He submitted that this was not a serious misconduct to have warranted the sanction of dismissal.

[25] Mr Beaton submitted that in relation to the misconduct charges based on the events of Saturday (9 July 2005) the commissioner had properly analysed the evidence on both sides before making the finding that "[Selemela's] version cannot stand because it is improbable". Counsel argued that it was not correct that the commissioner had rejected Selemela's version as improbable only in relation to him having left the workstation without permission and failing to re-enter the workshop through the other door because of the dust, as Mr Hulley had suggested was the case. Mr Beaton further submitted that the commissioner ought to have taken into account that within the same year Selemela had wilfully disobeyed his superiors. Accordingly, he contended, the decision reached by the commissioner was not one which a reasonable decision-maker could reach.

[26] However, Mr Beaton conceded that the Court *a quo* was wrong in holding that because the commissioner had accepted the evidence of Liebenberg and Willemse about the events of the Saturday she necessarily had to accept the evidence of these witnesses about the Monday events.

Analysis and evaluation

[27] The commissioner issued the award on 16 November 2006 and the legal position at that time in relation to reinstatement was as interpreted by this Court in *Kroukam v SA Airlink (Pty) Ltd,*[6] namely, that an order on arrear remuneration must be commensurate with the limit on compensation,[7] namely, in the amount equivalent to 12 months' salary, until this position was again changed (removing the limit) in terms of the Supreme Court of Appeal decision in *Republican Press (Pty) Ltd v CEPPWAWU and Others.*[8] There was therefore, in my view, no misdirection on the part of the commissioner in awarding 12 months' remuneration, as it seems that is what she intended, subject to a sustainable finding that the dismissal was substantively unfair.

[6] (2005) 26 ILJ 2153 (LAC).
[7] In terms of section 194(1) of the LRA.
[8] (2007) 28 ILJ 2503 (SCA).

That being the case, it follows that Mr Hulley's concession on this point was, therefore, not warranted.

[28] It is trite that the test applicable in determining whether or not an arbitration award should pass muster of judicial review under section 145 of the LRA is that of the constitutional standard of reasonableness found in the question: 'Is the decision made by the commissioner one which a reasonable decision-maker could not reach?'[9] In other words, the decision reached by a CCMA commissioner must fall within the range of decisions that a reasonable decision-maker could make. As to what will constitute a reasonable decision, will depend on the circumstances of each case.[10] A commissioner is not given the power to consider afresh what he or she would have done, but simply whether or not the dismissal was fair. Further, that in arriving at the appropriate decision the commissioner is required to consider all relevant circumstances and not necessarily to defer to the decision reached by the employer.[11]

[29] In *Fidelity Cash Management Service v CCMA and Others*,[12] this Court (per Zondo JP, as he then was) amplified the *Sidumo* test as follows:

> 'It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the court feels that it would have arrived at a different decision or finding to that reached by the commissioner. When that happens, the court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in terms of the Act primarily given to the commissioner and that the system would never work if the court would interfere with every decision or arbitration award of the CCMA simply because it, that is the court, would have dealt with the matter differently…
>
> ….

[9] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) at para 110.
[10] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC).
[11] Ibid at para 76.
[12] [2008] 3 BLLR 197 (LAC) at paras 98 and 100.

> The test enunciated by the Constitutional Court in *Sidumo* for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision-maker could not have made in the circumstances of the case. It will not be often that an arbitration award is found to be one which a reasonable decision-maker could not have made but I also do not think that it will be rare that an arbitration award of the CCMA is found to be one that a reasonable decision-maker could not, in all the circumstances, have reached.'

[30] The remarks by the Court *a quo* to the effect that since the commissioner had accepted the evidence of Liebenberg and Willemse in relation to the events of the Saturday there was then no justification for the commissioner to have rejected their evidence in relation to the Monday events, were, with respect to the learned Acting Judge, obviously a misdirection on her part. Mr Beaton correctly conceded this point. It did not follow that a court or tribunal is obliged to accept everything that an otherwise credible and reliable witness has to say, especially where the witness testifies about separate and different issues. However, I am satisfied that the Court *a quo* was otherwise correct in its general assessment of the review application and, in particular, the conclusion which it reached.

[31] Mr Hulley contended that when the commissioner rejected Selemela's version as being improbable she was referring only to the evidence of Liebenberg and Willemse pertaining to the issue of dust in the workshop, Selemela's failure to use the back door in that situation and his leaving the workstation without permission. Counsel submitted that the commissioner's finding in that regard did not extend to her evaluation of the two witnesses' evidence pertaining to the insubordination charge. I do not agree. If that was the case it would, in my view, amount to interpreting the award too narrowly and, indeed, selectively and in a self-serving manner. The award may not have been elegantly or articulately phrased, but this is not uncommon with arbitration awards. They

are not ordinarily expected to reflect a high standard of legal skill and meticulousness as in court judgments[13].

[32] In my view, the commissioner's analysis of the issues makes it clear that she first dealt with the Saturday incidents and then passed on to those that occurred on the Monday. When she was assessing the evidence in relation to the Saturday events, (on the basis of the evidence of Liebenberg and Willemse on the one hand, and Selemela, on the other), she was dealing with the evidence in its entirely as presented to her, including the evidence pertaining to the allegation of insubordination on the part of Selemela. It was after her evaluation of all this evidence that she reached the conclusion that Selemela's version could not stand as she found it improbable. To my understanding, this probability finding was not restricted to the narrow issues as Mr Hulley suggested.

[33] I am satisfied that the commissioner did accept that Selemela was guilty of insubordination. After she concluded her findings on probabilities, she said this: "The question is whether the above misconduct of insubordination was so serious to warrant a sanction of dismissal." I do not see what other insubordination the commissioner could have meant if it was not about Selemela's failure to carry out Liebenberg's instruction to clean up the workshop. Absence from a workstation without permission may be an act of misconduct but it does not *per se* constitute insubordination, at least certainly not on the facts of this case. Strangely also, whilst the commissioner acknowledged that Selemela was guilty of insubordination she did not propose what the suitable and appropriate sanction should have been, or be, imposed on him, in lieu of dismissal.

[34] It was common cause, on the papers, that Selemela had two relevant previous convictions involving the following acts of misconduct, both of which were committed on the same day:[14]

[13] Compare: Section 138(1) of the LRA which provides:
'(1) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the *dispute* fairly and quickly, but must deal with the substantial merits of the *dispute* with the minimum of legal formalities.'

[14] See written warnings, at pages 249 and 287 of the indexed papers.

'1. Disobeying of a lawful instruction (whereby he didn't commence with the task between 10H30 – 11H30 on 27/1/05).

2. Leaving the workplace without permission on 27/1/05.'

[35] The two documents appearing at pages 249 (the first document) and 287 (the second document) were admittedly handed in at the arbitration hearing by Selemela and the respondent, respectively. Both documents relate to the same two previous convictions as referred to above. However, their characterisations vary in some significant respects, as shown hereunder:

First document	Second document
1. Written warning	1. Final written warning
2. Issued on 16/2/2005	2. Issued on 22/2/2005
3. To expire 16/5/2005	3. Valid for 182 days
(Therefore, valid for 3 months)	

[36] Whilst the commissioner appeared to have accepted the respondent's version that Selemela was, on 22 February 2005, issued with a final written warning valid for 182 days, she nevertheless found that the warning had expired when Selemela committed the current transgressions on 9 July 2005. However, a simple arithmetical calculation shows that the commissioner was clearly wrong. The Court *a quo* accepted the commissioner's finding that the final written warning was valid for 182 days but held, correctly so, that the warning "had clearly not lapsed". In the circumstances, there is no reason, in my view, why it should not be accepted that, indeed, the appellant had a final written warning issued against him on 22 February 2005 and which was valid for 182 days.

[37] Remarkably though, it was Selemela who seemed to have raised the issue of it being the second time that he was involved in a similar misdemeanour. He said the following:[15]

[15] Transcript of arbitration proceedings, at p182 lines 9-10 of the indexed papers.

> 'And they said to me, you heard what the witness (Willemse) said. And I said to them, this thing is now happening for the second time.'

[38] Indeed, an employee's written warnings, even after they have lapsed, may be taken into account, in determining the fairness of his or her dismissal where the employee concerned is found to have a propensity to commit acts of misconduct at convenient intervals falling outside the period of applicability of the written warnings. In *Gcwensha v CCMA and Others,*[16] this Court stated as follows:[17]

> 'An employer is always entitled to take into account the cumulative effect of these acts of negligence, inefficiency and/or misconduct. To hold otherwise would be to open an employer to the duty to continue employing a worker who regularly commits a series of transgressions at suitable intervals, falling outside the periods of applicability of final written warnings. An employee's duties include the careful execution of his work. An employee who continuously and repeatedly breaches such a duty is not carrying out his obligations in terms of his employment contract and can be dismissed in appropriate circumstances.'

[39] In other words, even if it were to be accepted that Selemela's previous written warning, final or not, had lapsed that fact should not have relieved the commissioner from taking the written warning into account in determining whether or not the dismissal was fair, particularly bearing in mind that the previous transgressions were only five months old and, more importantly, startlingly similar to the present misconducts, namely, failing to obey a lawful instruction and leaving the workplace without permission. Such persistent insubordinate behavioural conduct could justifiably not be tolerated by any employer. In my view, the commissioner's finding that the insubordination committed by Selemela (on 9 July 2005) was not deliberate and not serious, is simply unreasonable and unsustainable. It is not a decision which a reasonable decision-maker could reach on the evidence presented. Selemela's insubordination of Liebenberg was sufficiently serious and deliberate and it, therefore, constituted a gross misconduct, justifying his

[16] [2006] 3 BLLR 234 (LAC).
[17] Id at paras 24 read with para 32.

dismissal. In other words, even if he was not guilty of the Monday misconduct it would, in the circumstances, not make any difference on the question of an appropriate sanction.

[40] However, since the issue of the Monday events was argued, I propose to deal briefly with it as well. Selemela admits that he confronted Willemse and asked him '[a]re you a spy or not?' but denies saying he would come back to the workshop and shoot him. According to Selemela, he only used the word 'shoot' when he was talking to his Black colleagues in SeSotho and in a completely different context, namely, meaning that he was going to take a photo of the white colleagues eating or sleeping during working hours and show it to the foreman.

[41] In my view, it is highly improbable that Selemela used the word 'shoot' in the context that he alleges. Indeed, it is unclear how, whilst speaking SeSotho, he would have used the word 'shoot', which is an English word, to refer to taking a photo. What is clear though is that when he confronted Willemse with the spy accusation, he was angry, if not very angry, and it was most probably during that heat of the moment that he threatened Willemse as alleged. The inherent probabilities appear to favour that conclusion. However, as stated already, a finding on the alleged Monday misconduct is really not necessary, given the overwhelming evidence countenancing the insubordination conviction, which alone is sufficient to justify the fairness of Selemela's dismissal.

[42] In my judgment, the commissioner's award, to the extent that it declared Selemela's dismissal substantively unfair, does not constitute a decision which a reasonable decision-maker could reach. The order of the Court *a quo* should therefore stand, save that in paragraph 3 thereof the words 'procedurally and' should be deleted, on the basis that the procedural fairness of the dismissal was not in issue.

[43] Both counsel submitted that, whatever the outcome, neither party would ask for costs of the appeal. That, to my mind, is a fair and equitable proposition.

The Order

[44] In the result, the following order is made:

1. The appeal is dismissed.

2. The order of the Court *a quo* is upheld, save that the words 'procedurally and' appearing in paragraph 3 of the order, are deleted.

3. There is no order as to costs of the appeal.

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NDLOVU, JA

Judge of the Labour Appeal Court

WAGLAY, DJP and MUSI, AJA concur in the judgment of NDLOVU, JA

Appearances:

For the appellant: Adv GI Hulley

Instructed by: KD Maimane Inc Attorneys, Johannesburg

For the respondent: Adv RG Beaton SC

Instructed by: Van Zyl Le Roux Inc, Pretoria

Application heard: 24 August 2012

Judgment delivered: 31 May 2013