REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: JS929/02

In the matter between:

NATIONAL UNION OF MINEWORKERS — First Applicant

EPHRAIM CHULU & OTHERS — Second and Further Applicants

and

BILLARD CONTRACTORS CC — First Respondent

MIDWAY BRICKS (PTY) LTD — Second Respondent

JUDGMENT

Background and summary of material facts

1. Some time during 1999 a company known as Wenen Steenmakery went into liquidation. Its business was manufacturing bricks. Its operations were conducted in premises somewhere between Potgietersrus and what is now Polokwane. A certain Mr Van Rooyen, who had his own brickworks known as Terraclay, established the Second Respondent, Midway Bricks (Pty) Ltd. Midway Bricks bought the insolvent enterprise.

2. Mr Van Rooyen, with the advice of his attorney Mr Boltman, decided that the workforce necessary to operate the brickworks would not be employed by Midway Bricks. Instead, their services would be procured through a labour broker. This was the practice he had adopted in his Terraclay business.

3. Eager to assist his client, and considering himself to be knowledgeable in labour law, Mr Boltman established the First Respondent, Billard Contractors CC. The members of Billard Contractors were Mr Boltman himself, who held a 51% interest, and a Mr Phungu, who held

a 49% interest. The close corporation's sole business was to act as a labour broker and to provide labour to Midway Bricks. Mr Phungu was employed by Billard Contractors and in this capacity served as a manager of the workforce employed to provide services to Midway Bricks. More than 200 employees were employed to work at Midway Bricks in terms of this arrangement.

4. In the course of 2001 a significant number of the employees employed in this way became members of the First Applicant, the National Union of Mineworkers ("NUM"). A number of grievances were raised. During July 2001 a recognition agreement was concluded between NUM and Billard Contractors.

5. During April 2002 a list of grievances was again submitted to Billard Contractors. Regular meetings took place at the workplace between NUM shop stewards and Mr Phungu, representing Billard Contractors. During this period monthly meetings also took place between an NUM official, Mr Mogale, shop stewards and Messrs Boltman and Phungu.

6. On 16 May 2002 one of the NUM shop stewards, a Mr Kwetsi (the 158th individual applicant) was suspended by Billard Contractors on the grounds of an alleged disciplinary infraction, pending a disciplinary enquiry.

7. On the following day, 17 May 2002, a significant number of employees did not work between approximately 07:00 (the start of the first shift) and 12:00, when they returned to work. During this period the workers concerned gathered at the entrance gate to Midway Bricks and there was singing and dancing.

8. On 22 May 2002, following a meeting between Billard Contractors and the NUM shop stewards at which a number of the workers' grievances were discussed, Mr Boltman decided to uplift the suspension of Mr Kwetsi. Mr Van Rooyen, the managing director of Midway Bricks, was not happy with this decision and insisted that Mr Boltman should re-instate the suspension. Later that day, Mr Boltman again suspended Mr Kwetsi. On the same day, Midway Bricks gave written notice to Billard Contactors of termination of the labour broking agreement with effect from 30 June 2002.

9. On the following day, 23 May 2002, a further work stoppage took place at the start of the first shift at 07:00. Again, workers gathered at the entrance to Midway Bricks. There was singing and dancing. Mr Mogale, the NUM's regional organiser, was called to the premises. Workers eventually returned to work after 12:00.

10. On 27 May 2002 a further work stoppage took place at 07:00. Once again Mr Boltman was called to the premises. He issued an ultimatum that workers should return to work. Again, Mr Mogale was called to the premises. The workers returned to work. Mr Boltman held a meeting with shop stewards. The shop stewards mentioned a number of grievances to Mr Boltman and told him that the workers were angry.

11. On the following day, 28 May 2002, a further work stoppage took place at 07:00. As on previous days, workers gathered at the entrance gate and there was singing and dancing. Mr Boltman was again called to the premises and again issued an ultimatum to workers to return to work. Workers ultimately resumed their duties after lunch at approximately 14:00.

12. That afternoon a meeting took place between Mr Boltman, Mr Mogale and the NUM shop stewards. In the course of that meeting various grievances of the workers were discussed. The list of grievances was long. In the course of the meeting Mr Mogale indicated that the union did not regard the work stoppages as strike action. When asked to explain this contention Mr Mogale made two principal points: first, the action was not strike action because it had not been preceded by the declaration of a dispute and conciliation at the CCMA; second, the workers were frustrated because Mr Boltman had not adhered to undertakings that had been given and in particular had done an about turn after agreeing to lift the suspension of Mr Kwetsi. In the course of this discussion Mr Boltman indicated that there had been four strikes over a period of 12 days. He stated that the next unprotected strike would result in dismissals.

13. The following morning, 29 May 2002, workers commenced work in the usual way at the start of the first shift at 07:00. Not long thereafter, however, workers left their work stations and congregated once again at the entrance gate to Midway Bricks. Mr Boltman was called to the premises. He issued a notice which was referred to in the pre-trial minute and in the evidence as an "ultimatum". I set out its terms in full:

> "***TO THE NATIONAL UNION OF MINE WORKERS AND ALL EMPLOYEES OF BILLARD CONTRACTORS:***
>
> ***UNPROTECTED STRIKE***
>
> ***PLEASE TAKE NOTE OF THE FOLLOWING:***
>
> 1. *At plus minus 07:00 on Friday, 17 May 2002 members of our workforce embarked on an unprotected strike. The South African Police Services was requested to assist in*

maintaining law and order. Having been issued with an ultimatum, the workers resumed their duties at approximately 12:00 on Friday.

2. *At plus minus 07:00 on Thursday, 23 May 2002, you, along with other members of our workforce, embarked on an unprotected strike. You have refused to heed to a call to return to work. Having been issued with an ultimatum the workers resumed their duties at approximately 12h45.*

3. *At plus minus 7H00 on Monday 27 May 2002 you along with other members of our workforce once again embarked on an unprotected strike. You once again refused to heed to a call to return to work. Having been issued with an ultimatum the workers resumed their duties at approximately 9H15.*

4. *At plus minus 7H00 on Thursday 28 May 2002 you along with other members of our workforce once again embarked on an unprotected strike. You once again refused to heed to a call to return to work having been issued with an ultimatum the workers resumed their duties at approximately 14:00.*

5. *At plus minus 7H00 this morning you along with other members of our workforce once again embarked on a unprotected strike.*

6. *This action is in breach of your contract of employment and appropriate action will be taken.*

7. *This strike further does not comply with the requirements of Section 64 and Section 65 of the Labour Relations Act, 1995.*

8. *You are further invited to provide reasons for the following before 11:30 on 29 May 2002, you may do so individually are through your shop stewards.*

   a) *why the strikers should not be dismissed?*" (sic)

14. This notice appeared on a letterhead of Billard Contractors and was signed by Mr Boltman.

15. Before this notice was issued Mr Mogale, together with one Mr Ndaka, the regional chairperson of the NUM, attempted to speak to Mr Boltman and attempted to persuade him that he should not issue an ultimatum. Mr Boltman refused to meet them until he had issued the notice. Copies of the notice were then handed out to workers gathered at the entrance gate, and the content of the notice was read out over a loud haler. The notice was, in general, not read by workers and the copies that had been distributed were thrown to the ground.

16. At approximately 12:00 that day, Mr Boltman decided to dismiss all the employees of Billard Contractors, with the exception of Mr Phungu and those workers who had in fact continued to work inside the factory and who had not participated in the work stoppage on 29 May 2002.

17. Following the dismissals, a meeting took place between Mr Boltman and the NUM representatives. Mr Boltman refused to discuss the merits of the dismissals and insisted that the dismissals would stand.

18. In total approximately 240 workers were dismissed. Subsequently 39 of these were re-employed (by Midway Bricks). At the conclusion of the trial, a list of 200 individual applicants was provided who, it was common cause, had been dismissed on 29 May 2002 and who had not subsequently been re-instated or re-employed by Midway Bricks.

19. Among these were 14 individual applicants who, it was common cause, were not on duty at 07:00 on any of the five days on which work stoppages took place. Also among these were a further 25 individual applicants who were not on duty at 07:00 on 29 May 2002, the date of the dismissals, but who were on duty on one or more of the other four days on which work stoppages took place.

The parties' contentions

20. On the question of the substantive fairness of the dismissals, the principal contention of Mr van der Riet, who appeared for the Applicants, was that the work stoppages on each of the five days did not constitute strike action. On each of the first four occasions on which work stoppages took place, the Applicants contended, they had in fact been prevented from tendering their services by Midway Bricks, whose supervisors had seen to it that the clock cards were not available to workers when they attempted to clock in at around 07:00 in the morning on each of those days. On the fifth occasion, 29 May 2002, when the work stoppage took place some time after workers had clocked in, the work stoppage had taken place, the Applicants contended, because workers had been informed by representatives of Midway Bricks that there was "no more work for them" and had been told to leave the premises.

21. Quite apart from this, the Applicants contended, the dismissals of the respective groups of 14 individual applicants and 25 individual applicants to which I have referred above were unfair because those employees committed no misconduct on 29 May 2002, the date of the

dismissals. In the case of the group of 14, they committed no misconduct on any of the days in question.

22. As to procedural fairness, the Applicants contended that the procedure followed by Boltman prior to the dismissals failed to meet the requirements established in Modise & others v Steve's Spar Blackheath (2000) 21 ILJ 519 (LAC) and Karras t/a Floraline v SA Scooter & Transport Allied Workers Union & others (2000) 21 ILJ 2612 (LAC). The Applicants contended that in the circumstances prevailing, the employees had not been given sufficient time to reflect on the notice that was issued on that day and to respond to it.

23. Finally, the Applicants contended that the Labour Broking agreement concluded between Midway Bricks and Billard Contractors was a sham. They contended that Midway Bricks should be found to be the true employer or at least a co-employer of the dismissed workers, and asked that any relief granted should be granted against Midway Bricks solely or jointly with Billard Contractors.

24. The Respondents, on the other hand, contended that the series of work stoppages constituted a series of incidents of unprotected strike action. They contended that the procedure followed was fair in the circumstances.

25. As to the groups of 14 and 25, Mr Pretorius, who appeared for the Respondents together with Mr Venter, conceded that there had been no fair reason for the dismissals of the group of 14, and conceded further that they should be re-instated. The group of 25, however, had associated themselves with the conduct of the remaining dismissed workers on one or more of the previous four days of strike action. On that basis, it was submitted, their dismissals were for a fair reason despite the fact that they had not participated in strike action on 29 May 2002, the date of the dismissals.

26. As to procedural fairness, Mr Pretorius submitted that the *audi alteram partem* rule, which is at the core of the requirement of a fair procedure, was properly complied with in the circumstances.

27. As to the contention that the labour broking agreement was a sham, the Respondents jointly contended that the labour broking agreement was *bona fide* and that there was no basis to find that Midway Bricks was the employer of the dismissed employees.

Substantive fairness of the dismissals

28. As indicated above, Mr Pretorius, for the Respondents, conceded that there was no fair reason for the dismissal of the group of 14 individual applicants.

29. As to the group of 25, I do not accept the Respondents' submission that the participation by these workers in misconduct on one or more of the previous four days of work stoppages could constitute a fair reason for their dismissal in circumstances where none of them was required to report for duty on 29 May 2002. They have at no stage been called to account for misconduct committed by them on any of the previous days of work stoppages, and it is clear that they were dismissed because of the work stoppage that took place on 29 May 2002. There is no evidence that they committed misconduct on that day. The Respondents have failed to show that there was a fair reason for the dismissal of the individual applicants in this group.

30. As to the balance of the individual applicants, the central factual disputes that I must determine are these. Were the first four work stoppages caused by representatives of Midway Bricks removing workers' clock cards, thereby preventing workers, who wanted to work and were tendering their services, from clocking in? Or were they initiated by workers who were frustrated by their various grievances, including the suspension of their shopsteward? Was the fifth work stoppage caused by representatives of Midway Bricks instructing workers to leave the workplace because there was "no more work for them"? Or was it caused by workers deciding to "down tools" in further expression of their frustration and grievances?

31. To answer these questions an analysis of the evidence and an assessment of the probabilities on the strength of that evidence must be conducted in the manner contemplated by Nienaber JA in Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie & others 2003 (1) SA 11 (SCA).

32. In my view, the evidence and the probabilities that arise from the evidence overwhelmingly favour the Respondents' contentions in relation to these factual disputes. I am satisfied, on a proper consideration of the evidence before me, that the work stoppages on all five occasions were initiated by the workers and that these work stoppages constituted unprotected strike action. I set out in the paragraphs that follow my principal reasons for coming to this conclusion.

33. I accept Mr Boltman's evidence that the notes of the meeting that took place on 28 May 2002 reflect with a reasonable degree of accuracy what transpired in that meeting.

34. I also accept Mr Boltman's evidence that neither Mr Mogale nor any other representative of the Applicants or the union complained of the removal of clock cards at any stage during the period immediately prior to the meeting on 28 May 2002.

35. Mr Mogale did, at the meeting on 28 May 2002, dispute that the work stoppages constituted strike action. When, however, he was asked to explain why he said this, he made no allegation that clock cards had been removed. His statements in that meeting are consistent only with the proposition that the work stoppages were a spontaneous and angry reaction of workers to their grievances in the workplace, and that this was their response to unjustifiable conduct on the part of the Respondents.

36. The allegation that clock cards were removed, and that this was the reason why workers did not work during the first four work stoppages, is inconsistent with the fact that during the work stoppages workers carried various placards relating, for example, to the suspension of Mr Kwetsi. It is inconsistent, too, with the manner and style of protest conducted by the workers, gathering in a crowd at the gate on each occasion, singing and dancing. The work stoppages clearly took the form of protest action of one kind or another. The timing of the work stoppages bears a strong correlation to the decisions to suspend and re-suspend Mr Kwetsi. The probability that the work stoppages were unrelated to Mr Kwetsi's suspension is remote.

37. No rational explanation could be put forward as to how it was, if the clock cards had been removed on each of the first four occasions, it became possible for the workers to return to work following the intervention of Mr Boltman and Mr Mogale each time. Who gave the instruction to remove the clock cards and who gave the instruction to produce them again on each occasion when workers agreed to return to work?

38. Mr Mogale's version of the outcome of the meeting on 28th May 2002 was that an agreement was reached with Mr Boltman that those employees alleged to have gone on strike would face disciplinary action. Mr Mogale agreed that provided evidence could be produced that employees had in fact been on strike, disciplinary steps could be taken against them. After the meeting, Mr Mogale testified, employees told him that they had been dismissed, but Mr Boltman made it clear that they had not and that they should go back to work.

39. If clock cards had been removed on the prior occasions, there seems to be no rational explanation as to why the Respondents would have "changed tack" on 29 May 2002. The only direct evidence lead by the Applicants as to the reason for the work stoppage on 29 May 2002 was the testimony of Mr Masenamela. His evidence was that the reason he stopped working on that day was that his work supervisor, a Mr van Zyl, told him that the company was shutting down and that there was no more work. At first he took this "as a joke" because Mr van Zyl was a person "who always joked". However, when he wanted to pick up his tools to start working, van Zyl stopped him from doing so. He then realised, he said, that van Zyl was serious. Mr Masenalmela's version, as it appears from the typed transcript, continued as follows:

> *"I stopped then and asked him [Van Zyl] what the problem was. He said the company was shutting down and I was finished working with the company. What was required of me was just to go to the hostel. I asked him the reason why is the job finished. He said he did not want to talk to me. I must just go from that section, go to the hostel. When I looked at the other sections I realised the problem, there was all confusion happening there. When I asked the other employees as to what was happening they said that there is no more work for us and I found that to be the same problem I had, and what remained was that for us to go outside."*

40. That was the full extent of the evidence led by the Applicants both as to why Mr Masenamela himself stopped working on the 29th of May 2002 and why all of the other individual applicants who had clocked in on that morning also stopped work.

41. Mr Masenamela's assertion that he was stopped from working by Mr van Zyl was strongly denied by Mr van Zyl. In weighing up the evidence of Mr Masenamela and Mr van Zyl in this regard I accept Mr van Zyl's evidence as being more consistent with the probabilities. It is consistent with the evidence of Mr Tshibambu (who testified that he had heard workers on 29 May 2002 saying "down tools" before the majority of the workers left the premises). Mr Masenamela's version is inconsistent with the fact that a significant number of employees did not stop work that morning, did not leave the premises, and continued to work in the usual way. In the circumstances I do not accept Mr Masenamela's evidence as to the reason for him leaving the workplace on 29 May 2002 and I find that on 29 May 2002 the work stoppage was once again initiated by workers wishing to draw further attention to their grievances, including the suspension of Mr Kwetsi. Their conduct on each occasion constituted strike action.

42. The Applicants chose not to conduct their case on the basis of a contention that the Respondents' conduct (in relation to their various grievances, or in relation to the suspension of Mr Kwetsi in particular) was provocative and that strike action was a response to unjustified conduct on the part of the Respondents. Mr van der Riet fairly conceded that this case could not be reconciled with the Applicants' central contention that in fact there was no strike action because on each occasion the workers had genuinely wished to tender their services and were prevented from doing so by representatives of Midway Bricks.

43. I have found against the Applicants on the central factual disputes, and I have found that the work stoppage on 29 May 2002 was the fifth in a series of unprotected strikes. Having regard to the seriousness of the contravention of the provisions of the Labour Relations Act, and having regard to the fact that no attempt was made whatsoever to comply with the provisions of the Labour Relations Act before commencing strike action, there was, in my view, a fair reason for the dismissals of those of the individual applicants who participated in strike action on 29 May 2002.

44. In those circumstances I find that there was a fair reason for the dismissal of all of the individual applicants other than the 39 individual applicants (comprising the respective groups of 14 and 25) to whom I referred earlier.

Procedural fairness of the dismissals

45. In Modise v Steve's Spar Blackheath (*supra*) the Acting Judge President, as he then was, in the majority judgment at paragraph [73], had the following to say:

> *"A hearing and an ultimatum are two different things. They serve separate and distinct purposes. They occur, or, at least ought to occur, at different times in the course of a dispute. The purpose of a hearing is to hear what explanation the other side has for its conduct and to hear such representations as it may make about what action, if any, can or should be taken against it. The purpose of an ultimatum is not to elicit any information of explanations from the workers but to give the workers an opportunity to reflect on their conduct, digest issues and, if need be, seek advice before making the decision whether to heed the ultimatum or not."*

46. The Labour Appeal Court made it clear that the form which the observance of the *audi* rule must take will depend on the circumstances of each case (at paragraph [96] of the judgment; see also Karras t/a Floraline v SA Scooter & Transport Allied Workers Union

(*supra*) at paragraphs [23] – [30]; Mzeku & others v Volkswagen SA (Pty) Ltd (2001) 22 ILJ 1575 (LAC) at paragraph [35]).

47. The Labour Appeal Court did not, in Modise v Steve's Spar Blackheath, determine the question whether an employer was first required to observe the *audi* rule and only later issue an ultimatum, or whether it must first issue an ultimatum and then observe the *audi* rule. The majority inclined towards the view that the observance of the *audi* rule must come before an ultimatum can be issued. The Court went on to suggest, without deciding, that the way this might work in the context of a strike was as follows (at paragraph [75] of the judgment):

> *"...the employer would invite the strikers or their union or their representatives to make representations by a given time why they cannot be said to be participating in an illegal or illegitimate strike and, if that is so, why they should not be issued with an ultimatum calling upon them to resume work by a certain time or be dismissed. The dismissal would only result from a failure to comply with such ultimatum. If, after hearing or reading their representations, the employer is satisfied that the strike is illegal or illegitimate and that it would not be unfair to issue an ultimatum at that stage, he could then issue an ultimatum calling upon them to resume work by a certain time or face dismissal. If they complied with the ultimatum, he would not dismiss them. If they failed to comply with the ultimatum, he would then be entitled to dismiss."*

48. The judgment in Modise v Steve's Spar Blackheath makes it clear, it seems to me, that the hearing contemplated by the Court is a matter of pre-dismissal procedure. By contrast, a pre-dismissal ultimatum appears to have more in common with a final warning to striking employees of the consequences of continuing with their misconduct. By this I do not mean to equate an ultimatum with a formal disciplinary warning. It seems to me that a disciplinary warning for misconduct may subsequently be issued even where an ultimatum has been complied with. An ultimatum is, rather, a special kind of warning issued in the context, usually, of collective industrial action. Its purpose, it seems to me, is to provide a cooling off period for striking workers before any final decision is taken to dismiss. This may explain why the requirement of a pre-dismissal ultimatum finds itself among the procedural steps described in item 6 of Schedule 8 to the LRA, the Code of Good Practice: Dismissal.

49. A hearing is required, then, to deal with at least the question whether it is fair to issue a final warning in the form of an ultimatum. Material to this question is whether or not employees are in fact engaged in unprotected strike action, since it would not be fair to issue a final

warning in the form of an ultimatum to employees who are not in fact committing misconduct. A further question that is inherently relevant to this enquiry is whether it would be fair to impose the sanction of dismissal on striking workers who fail to comply with the ultimatum. Again, it would not be fair to issue a final warning to employees in the form of an ultimatum if it would not be fair to act on the ultimatum and to dismiss those who fail to comply with it.

50. This much is, perhaps, relatively straightforward. The code of good practice on dismissal specifically requires an employer to engage with the relevant trade union "to discuss the course of action it intends to adopt". It is clear that this engagement is required before a final warning in the form of an ultimatum is issued. It also seems clear that this engagement will, if properly conducted, satisfy the requirement of a hearing described by the Labour Appeal Court in Modise v Steve's Spar Blackheath.

51. A hearing of this kind that takes place before an ultimatum is issued cannot, however, deal with the question whether or not, as a matter of fact, workers subsequently complied with or attempted to comply with the ultimatum, or whether individuals amongst the strikers complied with it or attempted to do so. Those questions can only be resolved after the expiry of the ultimatum. It may, for this reason, be inevitable that the *audi* rule must be observed both before issuing a final warning in the form of an ultimatum, and after the ultimatum has expired, whether before or after workers have been dismissed.

52. Giving a further opportunity to be heard to workers or their union after expiry of a fair ultimatum but before dismissal, while possible, may prove complicated in the context of a strike dismissal, and may create uncertainty about the status of workers and their obligations in the interim. In Karras t/a Floraline v SASTAWU (*supra*) the Court contemplated the possibility that on the facts of that case it may have been appropriate for the employer to have suspended employees from duty and to have given them an opportunity, on the following day, to make representations why they should not be dismissed (at paragraph [30] of the judgment). Whether or not that is reasonably practicable is likely to depend on the circumstances of each case. It seems to me that there may also be circumstances in which it would be fair for an employer to dismiss workers who it believes have rejected an ultimatum without hearing them further, provided that the workers or their union are given some kind of hearing after the dismissals. That hearing would take the form of giving them an opportunity, after the dismissals, to persuade the employer that the workers did in fact comply with the ultimatum, or that they were prevented from doing so, or that dismissal was inappropriate for some other reason. A hearing of this kind may be equated to an internal appeal, and it is difficult to see why this

procedure would be unfair if the workers were also given a hearing prior to the ultimatum being issued: compare Semenya & others v CCMA & others, JA26/03, as yet unreported judgment dated 24 March 2006 (LAC).

53. As in the case of the hearing given before an ultimatum is issued, it seems to me that this further hearing will ordinarily be collective in nature, and need not be formal. An invitation to make written representations on the relevant issues may suffice: see Modise v Steve's Spar Blackheath at paragraph [96]. As to the degree of formality required, I respectfully agree with the decision of Van Niekerk AJ in Avril Elizabeth Home for the Mentally Handicapped v CCMA & others, JR782/05, as yet unreported judgment dated 14 March 2006 (LC). There the Labour Court held that the conception of procedural fairness incorporated in the LRA represents a significant and fundamental departure from the 'criminal justice' model developed under the unfair labour practice jurisdiction under the 1956 Labour Relations Act. The Court carefully considered the provisions of the Code of Good Practice (Schedule 8 to the LRA), which must be construed in the context of the constitutional right to fair labour practices. That right must, in turn, be given content *inter alia* by international labour standards (NEHAWU v University of Cape Town & others (2003) 24 ILJ 94 (CC) at paragraph [34]).

54. In the Avril Elizabeth Home case the Labour Court concluded as follows:

> "*This conception of the right to a hearing prior to dismissal... is reflected in the Code [Schedule 8 to the LRA]. When the Code refers to an opportunity that must be given by the employer to the employee to state a case in response to any allegations made against that employee, which need not be a formal enquiry, it means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss.*"

55. The Court was concerned in that case with the dismissal of an individual employee for misconduct. In my view, this conception of the right to a hearing prior to dismissal applies equally to a situation of collective misconduct, save only that in the case of collective misconduct the opportunity to state a case will ordinarily be given to the collective, usually the trade union where one is involved.

56. Turning to the present matter, it is clear that no hearing was given after the dismissals. Mr Boltman took the view, once the dismissals had been effected, that the opportunity for making representations had passed and that the union and the Applicants must now exercise such external remedies as they had available. Had the First Respondent granted a hearing of some kind after the dismissals, whether in the form of an appeal or otherwise,

it would certainly have avoided the situation in which it presently finds itself, having to reinstate a significant number of workers who were not even on strike when the dismissals took place.

57. It also appears from the evidence that Mr Boltman did not readily appreciate the distinction between a hearing of the kind contemplated in Modise v Steve's Spar Blackheath, and an ultimatum. Mr Boltman's attitude to unprotected strike action was that on each occasion it occurred, an ultimatum should be issued calling upon the workers to return to work or face disciplinary consequences. Although there was a dispute about whether in fact an ultimatum was issued during the first two work stoppages, it is clear that that was the approach Mr Boltman took. On the first four separate occasions on which strike action took place this approach succeeded in securing a return to work.

58. After the fourth work stoppage, however, on 28 May 2002, a lengthy meeting did take place between Mr Boltman, shopstewards and Mr Mogale.

59. In the course of that meeting Mr Boltman set out a number of issues for discussion. These points appear from notes that were subsequently prepared of the meeting. As stated earlier, I accept Mr Boltman's evidence that the notes reflect in substance what was discussed at the meeting. Mr Boltman's "points of discussion for agenda" appear at the outset. They were:

> *"Are strikers back at work?*
> *Why the collective action should not be interpreted as an unprotected strike?*
> *Why the decrease in production on 27 May 2002 must not be interpreted as a slow strike?*
> *Why should strikers not be dismissed?*
> *Are strikers returning to work*
> *If they are not returning are they attending hearing at 14h00?*
> *Intimidation and inciting thereof if there are any other grievances?*
> *Company's action if there is a recurrence of such action?"*

60. Mr Mogale appears, from the notes of the meeting, to have responded in turn by setting up a series of issues which the workers wanted to place on the agenda. All of the issues concerned grievances of the workers, with the exception of one. The exception was Mr Mogale's response to the employer's allegation that what had occurred constituted strike action.

61. The notes show that after some preliminary discussions Mr Boltman asked why the collective action should not be interpreted as an unprotected strike? Mr Mogale's response, as it appears from the notes, was as follows:

> *"Mr Mogale replied if it was a strike we would declaring dispute and if it was pushing us to call a strike we would need a certificate from the CCMA but the cause of this "thing" is because of you (Boltman) and we have the doubt that do you know you can not exploit the workers but you have a problem you say you own Billard Contractors. Why then when certain issues were agreed upon to you, you consulted Midway Bricks further and then changed everything that we agreed upon. Last we negotiated to you about Ephraim [Kwetsi]. Ephraim was suspended unfair – Mr Boltman said he would arrange for Ephraim to be re-employed. You phoned me and said he must go after you consulted with the Midway directors. You must stick to your [words] if you do not have a say do not make promises that you know you cannot implement. We do not know if you are here for business or only to show that you know the law. You frustrate the workers. We tell workers that if they are frustrated not to stop the work. We do not know whether you are reliable. We try to talk to persons but they are frustrated. That is why they react like this."* (sic)

62. A little later in the meeting, the notes record that Mr Boltman asked why strikers should not be dismissed. Mr Mogale's response is recorded as follows:

> *"Mr Mogale said how you can dismiss people if you do not want to listen to their problems and do not know why you dismiss them. Their electricity has been removed that is how you treat your workers. How can you expect them to work, you are less concerned about the problems of your employees, you are playing tricks. See that you attend to workers' problems otherwise it will affect your production. How can people work when they do not have warm water to bath in? They get sick. Give us the right people to talk to, so that we can solve the problems."* (sic)

63. On the question of the company's action if there was a recurrence, the notes record Mr Boltman as having stated that this was the fourth strike in 12 days. He is then recorded as stating that "we are addressing the Labour Court and on the next unprotected strike people will be dismissed".

64. Mr Mogale's response to this is recorded as follows:

"We did not call a strike. Workers have grievances they have problems now you come with legal tricks a fruitless exercise make sure to address them. If you want good relationship listen to problems make sure to address certain problems if you are failing talk to them to solve the problem." (sic)

65. The meeting then went on to consider a number of the grievances that had been raised by Mr Mogale. Ultimately the meeting adjourned on the basis that a further meeting would be convened on 4 June 2002 to discuss grievances.

66. I have found that on each of the five occasions on which work stoppages took place, the conduct of the workers' constituted unprotected strike action. I am satisfied that at the meeting on 28 May 2002 Mr Boltman gave the union an opportunity to make representations as to why their conduct should not be viewed as unprotected strike action. Mr Mogale clearly understood, and agreed, that the company was entitled to take disciplinary action, and he expected that disciplinary proceedings would follow in due course in relation to the work stoppages of the past few days. He clearly also intended to raise, in those proceedings, the contention that the work stoppages did not constitute strike action. Since the workers had by then either returned to work or agreed to do so, there was no need to discuss the issue of a further ultimatum. Neither he nor Mr Boltman contemplated that the next recurrence of strike action would be the very next day. Mr Boltman did, however, make it clear that any recurrence would result in the dismissal of workers.

67. When workers went on strike once again the following morning, Mr Boltman may reasonably have assumed that they had simply disregarded his clear statement the previous day that dismissal would follow further unprotected strike action, and may reasonably have assumed that the strike was simply a continuation of worker action in support of their grievances. While these assumptions might have been reasonable, it seems to me that Mr Boltman should nevertheless have been willing to hear from the union whether this was in fact the case, or whether something new had occurred of which he was not aware. Workers might have been told to leave the premises (a suggestion that, on the facts, I have rejected). Or there might have been a misunderstanding or miscommunication about the outcome of the meeting the previous day.

68. What Mr Boltman did was to issue the notice whose content I have set out in full above. He refused to engage with the trade union representatives present before issuing the notice. Although the notice was referred to at various times during the evidence as an ultimatum, it was not, properly construed, an ultimatum. The notice gave the workers or their

representatives an opportunity to provide reasons by 11:30 that morning why strikers should not be dismissed. It was not a notice stating that unless workers returned to work by that time they would be dismissed. What was communicated to workers and the union was "unless you tell me why I should not do so, I intend to dismiss all of the workers who are on strike".

69. Although representatives of the union were present at the premises, there was no attempt by them to make representations after the notice was given. The exchange between the union representatives and Mr Boltman on that morning was limited to an argument about whether Mr Boltman should issue an ultimatum without first discussing the matter with the union representatives.

70. Mr Boltman was faced with the fifth incident of unprotected strike action in less than two weeks, and in particular was faced with a fresh strike only the day after the meeting of the 28th May, which I have described in some detail above. The course of action he took was to call for representations, which had to be given within more or less an hour of the notice being distributed, as to why striking workers should not be dismissed. The notice he issued was not an ultimatum as contemplated by the code of practice (Item 6(2) of Schedule 8 to the LRA). The notice was not one that gave workers an opportunity to reflect on an ultimatum, and to respond to it either by complying with it or rejecting it.

71. The code of practice does recognise that there may be circumstances in which an employer may dispense with giving an ultimatum. (See also Performing Arts Council of the Transvaal v Paper Printing Wood & Allied Workers Union 1994 (2) SA 204 (A) at 216 E – F.) In the circumstances of this case, since this was the fifth occasion in a matter of two weeks on which workers had embarked on unprotected strike action, and in the light of what had been said and agreed in the meeting of the previous day, Mr Boltman could, in my view, fairly dispense with giving a further ultimatum on the morning of 29th May 2002: compare SA Allied Workers Union (in liquidation) & others v De Klerk NO & another (1992) 13 ILJ 1123 (A).

72. But, for reasons I have already mentioned, Mr Boltman could not fairly dismiss striking workers on that day without giving them or their union an opportunity to give reasons why he should not dismiss them. He could, in my view, for reasons I have expressed earlier, have done this after dismissing, provided he made it clear that the workers or their union would still be given the opportunity to be heard. Or he could have given the opportunity to be heard before dismissing. This is what Mr Boltman sought to do in the notice he issued that morning. But the notice he issued gave too little time for meaningful engagement. The

notice failed to give the union representatives a proper opportunity to meet with him and to discuss, in a calm and reasonable environment, their contentions as to whether or not the workers' actions constituted further strike action, and whether there was any reason why their actions should not be met with dismissal. On Mr Boltman's own evidence, he was not prepared to meet with the regional chairperson of the union, Mr Ndaka, because he did not know who he was.

73. In my view, Mr Boltman's conduct was overhasty in the circumstances, and he failed to give an adequate opportunity to all concerned to calm down and have a sensible discussion about what should take place next. If he had been willing to sit down and listen to what the union representatives had to say that morning, I might have been satisfied that he had done everything he reasonably could have to follow a fair procedure in the circumstances. Or, as I have indicated, he could have dismissed (as he did) but given the union an opportunity to be heard in one form or another after the dismissals. He chose not to do that.

74. In the circumstances, I find that the dismissals of the remaining Applicants were procedurally unfair. The degree of unfairness was not, however, significant in the context of the repeated acts of unprotected strike action that I have described. That is something which will weigh in my assessment of what compensation should be awarded to these Applicants, if any.

The claim against Midway Bricks

75. The essence of the Applicants' contentions in submitting that Midway Brick should be held liable as at least a co-employer were the following:

75.1 There was no evidence of any valid operational reason why the hiring of the services of employees though a labour broker made "business sense" for Midway Bricks. The Respondents' assertion that this arrangement enabled Midway Bricks management to focus on things other than managing a workforce "does not ring true".

75.2 The labour broking agreement provided for a payment of commission that only just covered the salary of Mr Phungu, one of Billard Contractors' members, who rendered his services on a full-time basis for the benefit of Midway Bricks.

75.3 Mr Bolton was not genuinely a labour broker, and secured no direct financial benefit in consequence of the labour broking agreement. Instead, he sought to secure continued legal work as the attorney for Midway Bricks.

75.4 When the present dispute arose, Mr van Rooyen readily released both Mr Boltman and Mr Phungu from any potential liability that might arise, and he took over the members' interest in Billard Contractors. Midway Bricks no longer used the services of a labour broker and now employs its workforce directly.

75.5 All of these considerations, taken together, suggest that the labour broking arrangement was entered into primarily to circumvent the provisions of the Labour Relations Act, particularly those regarding unfair dismissals.

76. Against this, it was submitted on behalf of the Respondents that the parties had acted on the basis that Billard Contractors was the employer for some two years and seven months before the dismissals; that the workers and union had been properly apprised of the relationship between Midway Bricks and Billard; that at all material times prior to the dismissals neither Midway Bricks not any of its directors had held any interest in Billard Contractors and *vice versa*; and that it could not reasonably be said that Midway Bricks was the real decision maker behind Billard, in particular in respect of the dismissal of the workers who were on strike.

77. I have considered this question carefully. The issue was important enough for me to have decided to grant the application to join Midway Bricks as a party to these proceedings after a significant amount of evidence had been lead.

78. There is no doubt that the labour broking arrangement meant that Midway Bricks was able, as the only client of Billard Contractors, to influence significant employment decisions of Billard Contractors. The most pertinent example of this was the suspension of Mr Kwetsi. This was clearly a significant contributing factor to tension and labour unrest at the Midway Bricks premises. Many of the difficulties that a labour broking arrangement give rise to are described in the article to which I was referred by Mr Pretorius: Theron J, "Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship" (2005) 26 ILJ 618.

79. However, express recognition is given by the provisions of section 198 of the Labour Relations Act to arrangements of this kind. Parties are entitled to choose to structure their relationships in this way, and they may do so even if the principal purpose is to make the

labour broker (and not its client) the person who is responsible for managing employees and ensuring compliance with the various statutes that regulate employment rights. The provisions of section 198(4) make the client jointly and severally liable in respect of contraventions of specifically identified employment rights. Unfair dismissal rights are not among these. Whether or not this is desirable as a matter of policy is not for me to decide in these proceedings, and I express no view on that question here.

80. I am not satisfied that the considerations raised by the Applicants justify a conclusion that the labour broking arrangement had an illegal purpose, or was simulated in a manner that would justify ignoring it and finding that Midway Bricks was the "true employer".

Relief

81. As far as the group of 14 individual applicants is concerned, Mr Pretorius conceded that those individuals should be reinstated. Mr van der Riet accepted that I am bound by the decision of the Labour Appeal Court in the matter of Chemical Workers Industrial Union and others v Latex Surgical Products (Pty) Ltd [2006] 2 BLLR 142 (LAC). On the strength of that decision, if I order reinstatement in terms of the provisions of Section 193(1)(a) of the Labour Relations Act, I may not order the reinstatement to be effective from any date earlier than a period of 12 months from the date of the order. I intend to order reinstatement from a date 12 months prior to the date of this order.

82. As to the group of 25 individual applicants, there is no reason, on the facts before me, why I should not order their reinstatement, in common with the group of 14. Although it is so that individuals in this group did participate in misconduct on one or more of the days preceding 29 May 2002, no evidence was lead as to the extent of their misconduct on those days, no separate disciplinary steps were taken in relation to their conduct on those days, and in those circumstances it is not reasonably possible, nor do I think it appropriate, for me to take this into account in determining the relief to which they are entitled in these proceedings. In my view, their reinstatement should also be made retrospective for a period of 12 months.

83. The effect of the order that I intend to make will be that the individual applicants that are reinstated will be entitled, in addition to the other consequences of reinstatement, to payment of the remuneration they would have earned during the 12 month period preceding this order, calculated at the rate applicable at the time of their dismissal.

84. As for the remaining Applicants, I have reached the conclusion that their dismissals were for a fair reason, but that a fair procedure was not followed in dismissing them. In relation to these employees, I have reached the conclusion, on a careful consideration of the relevant factors, that they should each be paid compensation in an amount equivalent to two weeks' remuneration, calculated at the rate applicable at the time of their dismissal. If the weekly amount of their remuneration fluctuated, the provisions of section 35 of the Basic Conditions of Employment Act, 1997 should be used to determine the applicable rate of remuneration. My reasons for concluding that this is compensation that is just and equitable in the circumstances are as follows.

85. The employees concerned committed a very serious breach of their employment obligations. The employees and their union approached this court on the basis of allegations (that their clock cards were removed on the first four instances of strike action and that on the fifth occasion they were told to leave the premises) that I have rejected. The misconduct on 29 May 2002 followed a series of similar instances of misconduct by employees in the two weeks preceding their dismissal.

86. The First Respondent went to considerable lengths to warn employees of the consequences of their conduct and to engage their shopstewards and trade union in this regard. It cannot be criticised as having shown no consideration to its obligations to engage the employees and their trade union and to warn them of the consequences of a further recurrence of unprotected strike action. I have found that the First Respondent was ultimately overhasty in the final stages that lead to the dismissals, on the morning of 29 May 2002. If the First Respondent had acted in a more measured way on that morning, and had heard in a proper way all of the submissions that have been made in these proceedings, it would in my view have been entitled, fairly, to have dismissed the employees who had embarked on strike action on the morning of 29 May 2002.

87. In those circumstances, I consider that compensation in an amount of two weeks' remuneration would be just and equitable. This is probably more than the remuneration the employees concerned would have received if a full and fair procedure had been followed on 29 May 2002 or in the days that followed, and may serve as a salutary reminder to employers of the importance of following fair procedures and not acting overhastily. For those reasons I consider compensation in that amount to be just and equitable in the circumstances.

88. The Applicants have been substantially successful. On the other hand, I have found against them on the central factual issues concerning the substantive fairness of the

dismissals of the large majority of Applicants. And I have found that no remedy should be granted against the Second Respondent. In those circumstances it seems to me to be appropriate that an order of costs be made in the Applicants' favour, but that they should be entitled to recover a portion of their costs only.

Order

The order that I make is as follows:

1. The First Respondent is ordered to reinstate, from a date 12 months prior to the date of this order, those Applicants whose names appear on Annexure "X" to the Applicants' heads of argument.

2. The First Respondent is ordered to pay compensation to the remaining Applicants (that is all of the individual Applicants other than those referred to in 1 above) in an amount equal to two weeks' remuneration calculated at the rate of remuneration applicable at the date of dismissal.

3. The First Respondent is ordered to pay 25% of the Applicants' costs on the party and party scale, but excluding costs incurred in relation to the application to join the Second Respondent to the proceedings, in respect of which there is no order as to costs.

C F N TODD
Acting Judge of the Labour Court

Dates of hearing:	29 November – 3 December 2004; 27 September 2005; 6 and 10 February 2006.
Date of judgment:	25 April 2006
Applicant's Representative:	Adv. J G van der Riet SC, instructed by Cheadle Thompson & Haysom
Respondent's Representative:	Adv. G Pretorius SC and Adv R Venter, instructed by Francis Barnard Attorney