



(1) Reportable: NO
(2) Of interest to other Judges: NO
(3) Revised

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JS279/20

In the matter between:

**NATIONAL UNION OF METALWORKERS
OF SOUTH AFRICA (NUMSA)**

First Plaintiff

VILAKAZI, AGRIPPA & 19 OTHERS

Second to Further Plaintiffs

and

CUBE ROUTE LOGISTICS (PTY) LTD

Defendant

Heard: 22 – 23 January 2026

Delivered: 28 January 2026

JUDGMENT

MAKHURA, J

Introduction

[1] The National Union of Metalworkers of South Africa (NUMSA), acting on behalf of the second and further plaintiffs (the individual plaintiffs), referred an unfair dismissal dispute to this Court, claiming that the dismissal of the individual plaintiffs for operational requirements by the defendant was substantively unfair.

Material facts and evidence

- [2] On 4 November 2019, the defendant issued a notice in terms of section 189(3) of the Labour Relations Act¹ (LRA). The notice was served on NUMSA on 6 November 2019. The defendant employed 166 employees and contemplated retrenching 36. The retrenchment fell under section 189A of the LRA, and the defendant opted for a facilitated retrenchment process.
- [3] The defendant stated that its distribution business had declined by 30% over the past 18 months, while its wage costs increased from R1 196 172.45 in May 2018 to R1 447 337.70 in October 2019. Further, its biggest client, Royal Canin (Pty) Ltd, had reduced its delivery volumes by 28% during the same period.
- [4] The defendant indicated in the section 189(3) notice that its business structure had become unsustainable and that previous cost-cutting measures had not yielded the desired results. It cited that during the 2018/19 financial year, it operated at significant cost and suffered a loss of over R22 million.
- [5] As alternatives, the defendant proposed removing assistant drivers, discontinuing the picking bonus for all employees, including drivers and general workers and replacing it with performance-based bonus with defined key performance indicators. Assistant drivers were classified as general workers. The defendant proposed Last-In-First-Out (LIFO) as the selection criterion and offered the employees who would be retrenched first preference for re-employment within six months should vacancies arise.
- [6] The first facilitation meeting occurred on 3 December 2019. Further meetings were held on 13 December 2019, 14 and 21 January 2020, and 12 March 2020.
- [7] On 25 March 2020, the defendant emailed NUMSA in response to its proposal. NUMSA had proposed short time by reducing the hours of work from 195 to 152 per month. The defendant instead proposed 130 hours per

¹ Act 66 of 1995, as amended.

month, with pro rata picking and offloading bonuses, subject to review after 30 days.

- [8] The defendant's only witness, Bruce Tiley (Tiley), testified that Mabasa did not respond to the counter proposal of 130 hours. Although Tiley was not challenged during cross-examination, Mabasa later testified that the proposal was rejected during a meeting with the defendant after he had obtained the members' mandate to that effect.
- [9] On 6 April 2020, the defendant sent another email to Mabasa repeating the same short-time proposal of 130 hours short-time and requesting a response by 14h00 on 8 April 2020. Mabasa testified that the proposal was rejected by the members for two reasons. First, the defendant had applied to the National Bargaining Council for the Road Freight and Logistics Industry (NBCRFLI) for exemption from the 2020 wage increase, and they had assumed that they were not going to receive the wage increase. Second, the defendant had not paid them the picking bonus.
- [10] On 9 April 2020, the defendant dismissed the individual plaintiffs for operational reasons. The plaintiffs then referred the current matter to conciliation and, later this Court.
- [11] In their statement of claim, the plaintiffs, under the statement of facts, pleaded that it received the notice in terms of section 189(3) on 6 November 2019 and that the individual plaintiffs were dismissed on 9 April 2020. They pleaded further that:

'The first consultation meeting took place on 3 December 2019, and at this meeting the respondent made a presentation and highlighted that the respondent was experiencing financial difficulties and it intended retrenching some of the employees.

The respondent provided the applicants with its financial statements which were later considered by the applicants.

When the respondent retrenched the applicants there was no agreement that was reached between the parties and it must be noted that the respondent never considered any of the applicant's proposals.'

- [12] Under the statement of legal issues, the plaintiffs alleged that the dismissal of the individual plaintiffs was substantively unfair because the defendant sought to compel the individual plaintiffs to accept the changes to the terms and conditions of their employment by introducing a new shift system, removing the picking bonus and sending out the drivers for pickup and offloading without assistant drivers against the NBCRFLI Main Agreement. Further:

'The respondent failed to consider all proposals brought forward by the applicants, which then suggest that at the time of consultation the respondent had already taken a decision to retrench the applicants.

It must also be noted that after the applicants were retrenched the respondent employed new employees.

In terms of the respondent's notice to retrench, the respondent cited that one of the reasons for retrenchment is financial difficulties but when the books were audited there were no financial difficulties that were picked up.

It is clear that section 189 of the LRA the employer must consult with the employees or their representative at the time it is contemplating dismissals or retrenchments, not when respondent has already taken a decision to retrench and want to impose its decision on the applicants.

This was not a meaningful consulting seeking process or attempt to reach consensus on appropriate measures to avoid dismissals, minimise the number of dismissals, change the timing for dismissals or mitigate the adverse effect of the dismissals as per section 189. No consensus was reached by the parties but a decision to retrench/dismiss and selection criteria were imposed on the applicants (sic).'

- [13] The pre-trial minute recorded that the plaintiffs disputed the rationale for the retrenchment. The plaintiffs contended that there was no reason for the defendant to retrench and disputed that the defendant had suffered losses and/or experienced any financial difficulties. They submitted that the

defendant wanted to change the terms and conditions of the employees. The defendant cited the significant decline in its business, which led to a loss of R22 million.

[14] Regarding alternatives, the plaintiffs recorded that:

‘The union proposed short time for a period of three months as an alternative to retrenchment. The employer agreed to the proposal and indicated that we must ask employees to vote in order to determine the number of people who support it. It was further agreed that should majority vote in favour of short time can (sic) be implemented. Majority of applicants voted in favour of short time however the respondent dismissed the applicants instead of implementing the short time.’

[15] The plaintiffs’ answer to the specific question of whether the fairness of the selection criteria was that the parties agreed that LIFO would be applied but the defendant did not apply it, and that the defendant failed to consider the individual plaintiffs’ history with Tailormade Solutions after they were transferred to the defendant in terms of section 197 of the LRA on 1 October 2019.

[16] Tailormade Solution is a labour broker that placed some of its employees with the defendant. These employees were transferred to the defendant in terms of section 197 of the LRA.

[17] On which alternative employees could have been retrenched instead of the individual plaintiffs, the plaintiffs stated that the defendant should have released all the labour broker employees. The plaintiffs also contended that the defendant employed new employees after their dismissal, which was in contravention of the agreement to re-employ the dismissed employees should new vacancies become available after their dismissal.

[18] Mr Mogare, for the plaintiffs, submitted that the dismissal was substantively unfair on the grounds that there was no need for retrenchment, the defendant failed to consider the alternatives proposed by the plaintiffs and that the selection criteria were imposed.

The purpose of pleadings

- [19] It is important to deal with the purpose of the pleadings in litigation because as it shall become clear, the underlying theme in this judgment is the disconnect between the plaintiffs' pleaded case and the case they sought to introduce and argue during the trial, particularly insofar as the issues of alternatives and selection criteria are concerned.
- [20] Litigation does not start on the day of the trial or hearing. It starts with proper consultation and diagnosis of the issues and drafting clear and unambiguous pleadings to enable the other party and importantly the court to know and understand the issues to be determined. After the pleadings, the parties conclude a pre-trial minute in terms of which they, based on the pleadings already filed, carefully and thoroughly (at least that is what is expected of the litigants) agree on the issues that common cause and those that are in dispute. The parties also set out the issues for determination by the Court and the relief sought. Once the parties conclude and sign the pre-trial minute, they are bound by the terms of the minute, and their respective cases must be presented within the four corners of the minute.
- [21] There are many judgments on this issue. In *Harmse v City of Cape Town*², this Court said that the statement of claim serves to bring the defendant before the court to defend a claim made against it and to inform the defendant of the material facts and the legal issues arising from those facts upon which the plaintiff will rely to succeed in its claim. Whilst the rules of the Court do not require an elaborate exposition of all facts, the Court held that the material facts and legal issues must be sufficiently detailed to enable the defendant to respond thereto.³
- [22] The Supreme Court of Appeal in *Minister of Safety and Security v Slabbert*⁴ held that:

² [2003] ZALC 53; (2003) 24 ILJ 1130 (LC).

³ Ibid at paras 6 – 8; see also this Court's decisions in *Candy & others v Coca Cola Fortune (Pty) Ltd* (2015) 36 ILJ 677 (LC) at para 38; *De Weijer v Babcock Africa Services (Pty) Ltd* [2025] ZALCJHB 193 at para 8.

⁴ [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) at para 11.

‘The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.’

[23] In *SA Breweries (Pty) Ltd v Louw*⁵, the LAC, in addition to reiterating the principle, emphasised the importance of diligence and clarity in the presentation of the case by practitioners. It held as follows:

‘To state the obvious, litigation is complex. Among the duties of legal practitioners is to conduct cases in a manner that is coherent, free from ambiguity and free from prolixity. True enough, the holy grail of translating what is complex into simplicity is not always attainable, but the ground rules are irrefrangible: say what you mean, mean what you say and never hide a part of the case by a resort to linguistic obscurities. The norm of a fair trial means each side being given unambiguous warning of the case they are to meet. Moreover, these requirements are not mere civilities as between adversaries; the court too, is dependent upon the fruits of clarity and certainty to know what question is to be decided and to be presented only with admissible evidence that is relevant to that question. Making up one’s case as you go along is an anathema to orderly litigation and cannot be tolerated by a court. Counsel’s duty of diligence demands an approach to litigation which best assists a court to decide questions and no compromise is appropriate.’⁶

[24] The LAC went on to consider the purpose and significance of the pre-trial minute, its relationship with the pleadings and the amendment of pleadings. It held:

‘The relationship between the pleadings and the pretrial conference minute has been the subject of several judicial pronouncements. In short, a minute of this sort is an agreement from which one cannot unilaterally resile. Also, a pleading binds the pleader, subject only to the allowing of an amendment, either by agreement with the adversary, or with the leave of the court. The case pleaded cannot be changed or expanded by the terms of a minute; if it

⁵ (2018) 39 ILJ 189 (LAC).

⁶ Ibid at para 4.

does, it is necessary that that change go hand in hand with a necessary amendment. The chief objective of the pretrial conference is to agree on limiting the issues that go to trial. Properly applied, a typical minute-cum-agreement will shrink the scope of the issues to be advanced by the litigants. This means, axiomatically, that a litigant cannot fall back on the broader terms of the pleadings to evade the narrowing effect of the terms of a minute. A minute, quite properly, may contradict the pleadings, by, for example, the giving of an admission which replaces an earlier denial. When, such as in the typical retrenchment case, there are a potential plethora of facts, issues and sub-issues, by the time the pretrial conference is convened, counsel for the respective litigants have to make choices about the ground upon which they want to contest the case. There is no room for any sleight of hand, or clever nuanced or contorted interpretations of the terms of the minute or of the pleadings to sneak back in what has been excluded by the terms of a minute. The trimmed down issues alone may be legitimately advanced. Necessarily, therefore, the strategic choices made in a pretrial conference need to be carefully thought through, seriously made, and scrupulously adhered to. It is not open to a court to undo the laces of the straitjacket into which the litigants have confined themselves.⁷

[25] It follows from the above principles that the court must decide issues that are germane to the matter per the pleadings. The court cannot create new factual issues and formulate new legal issues for the parties. This Court, even as a court of equity, is bound by these principles and cannot therefore consider or decide novel points not raised in the pleadings or introduced for the first time during the trial without a successful application for amendment of the pleadings. The parties have drawn the battlefield through their pleadings; any fight outside the lines does not concern the Court.

[26] The only exception I can think of is where the issue affects the jurisdiction and competence of the Court. In that case, the court can, and must, *mero motu* raise the issue with the parties and determine it. This exception finds no application in this case.

Was the dismissal substantively unfair?

⁷ Ibid at para 8.

The rationale

[27] The question is whether there was a commercial rationale for the defendant's decision to embark on the retrenchment process and ultimately dismiss the individual plaintiffs. In considering whether there is a commercial rationale, the LAC in *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers Union*⁸ held that:

'the court is required to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements is predicated. Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, *albeit* that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test.'⁹

[28] The defendant led evidence about its decline in its distribution business and the rising wage costs. Tiley also testified that before embarking on the retrenchment process, the defendant's directors had implemented cost cutting measures such as changing the timing of the deliveries from same day delivery service, which was more costly, to next-day delivery, which was less costly. Further, Tiley testified that the directors were not paid their salaries. Despite these measures, the defendant could not curb the losses, which ultimately led to a loss of over R22 million before taxation, as reflected in its July 2018 to the end of June 2019 audited financial statements.

[29] Tiley's evidence was largely uncontested. In fact, he was not cross examined about the decline in the business, which was the underlying reason also expressly set out in the section 189(3) notice. The statement of claim and pre-trial minute did not challenge the rationale as set out in the section 189(3) notice. The only issue that the plaintiffs sought to challenge was that the defendant was not in financial distress. The financial statements were shared with the plaintiffs during the consultation process which took place between December 2019 and March 2020. The plaintiffs did not, in their statement of

⁸ (2001) 22 ILJ 2264 (LAC); [2001] 7 BLLR 705 (LAC).

⁹ *Ibid* at para 19.

claim, set out the grounds upon which they submit that the defendant was not in financial distress, despite the financial statements showing significant losses for the 2018/19 financial year. Mabasa, in his testimony, sought to interpret the financial statements based on the advice he received from the union's accountant, which the Court intervened and indicated that he was not competent to give evidence on the financials. The accountant was not called to testify.

- [30] For the reasons set out above, the Court accepts Tiley's unchallenged evidence as set out above and finds that the defendant had a reasonable basis for its decision to contemplate dismissal for operational requirements. The defendant had therefore discharged its onus in this regard.

Alternatives

- [31] It is trite that the employer's failure to properly consider the alternatives to retrenchment could lead to the dismissal being declared substantively unfair.¹⁰
- [32] The plaintiffs' pleaded case is that the defendant "*never considered any of the [their] proposals*" and/or that the defendant "*failed to consider all proposals*" they put forward. In the pre-trial minute, the plaintiffs referred to the proposed short time for a period of three months, which it alleged that despite the agreement with the defendant, the defendant made a volte-face and dismissed the individual plaintiffs. The latter case was not raised or pursued during the cross-examination. Instead, the plaintiffs' case was that they did not agree to the defendant's proposed short time.
- [33] The evidence of Tiley and that of Mabasa for the plaintiffs materially contradicted the plaintiffs' case that the defendant did not consider any alternatives or the alternatives proposed by NUMSA. This, in my view, should be the end of the enquiry because the plaintiffs' case was limited to the defendant failing to consider the alternatives.

¹⁰ See: *SA Commercial Catering & Allied Workers Union & others v Woolworths (Pty) Ltd* (2019) 40 ILJ 87 (CC); [2019] 4 BLLR 323 (CC) at para 34.

- [34] The common cause facts established during the trial are that NUMSA proposed a short time of 152 of the 195 hours they were working. Although not explored, the 195 hours presumably included overtime. The defendant considered the proposal and despite its initial stance that it could only manage 117 hours, proposed 130 hours with pro rata picking and offloading bonuses, to be reviewed after 30 days. The defendant's proposal was made on 25 March 2020. On 6 April 2020, this proposal was repeated and this time NUMSA was given until 8 April 2020 to respond.
- [35] Mabasa's evidence was inconsistent with the pre-trial minute. He testified that the defendant's proposal was rejected because of the pending wage increase exemption application before the NBCRFLI and because the employees had not received their picking bonus. This evidence regrettably came to light for the time during Mabasa's evidence-in-chief. Tiley had no opportunity to respond to it. It should therefore be rejected for this reason alone. However, even if accepted, the two reasons for rejecting the 130 hours short time proposal were unreasonable. If NUMSA and its members were concerned about the exemption application, they would have had the opportunity to oppose the exemption application. To the extent that the employees were owed picking bonuses, they had the right to refer a dispute to the bargaining council for unfair labour practice or contractual claim before this Court, depending on the cause of action for their claim.
- [36] The plaintiffs raised three further alternatives during the trial – the Voluntary Severance Package (VSP), the temporary relief scheme (TERS) and the placement of employees at ePETstore. These were never raised in their pleadings nor in the pre-trial minute, and the evidence should be disregarded. Regardless, the plaintiffs could not articulate how these three alternatives could have assisted the defendant. Further, the evidence established that the proposals were considered. The defendant considered and offered the employees VSP. At least six employees took the VSP before the dismissal. The TERS was proposed by the facilitator. No further details were raised. Tiley's evidence was that, to the best of his knowledge, this was not considered by the defendant. He said that he had no independent recollection

of the issue. Had the plaintiffs pleaded their case in this regard, the defendant would have had the opportunity to respond to it. The plaintiffs also raised that they proposed to the defendant that some of the employees be placed at ePETstore. Tiley's response was that he did not recall the discussion about this alternative. Regardless, so Tiley testified, ePETstore was a separate legal entity and not a division of the defendant and therefore that option was not viable.

- [37] Accordingly, the defendant had considered and discussed the alternatives to retrenchment and had discharged its onus in this regard. It had demonstrated that it approached the consultation process with a mind that was open to persuasion and had demonstrated a genuine consideration of the alternative proposals from NUMSA. The plaintiffs' claim that the defendant did not consider the proposals is unsubstantiated and baseless. The defendant had discharged its onus and established that it had properly considered the alternatives.

Selection criteria

- [38] In *Umicore Catalyst SA (Pty) Ltd v National Union of Metalworkers of SA on behalf of Members*¹¹, the LAC said the following regarding the selection criteria:

'Absent agreement to the contrary, the selection criteria for operational requirements dismissals must be fair and objective. The intrinsic value of 'fair and objective' criteria has been explained as follows:

"The purpose of having, so far as possible, objective criteria, is to ensure that redundancy is not used as a pretext for getting rid of employees whom some managers wished to get rid of for other reasons. Excepting cases where the criteria can be applied automatically (eg last in, first out) in any selection for redundancy, elements of personal judgment are bound to be required, thereby involving the risk of judgment being clouded by personal animosity. Unless some objective criteria are included, it is extremely difficult to demonstrate that the choice was not determined by personal likes and dislikes alone."

¹¹ [2024] ZALAC 37; (2024) 45 ILJ 2545 (LAC).

Put differently, an employer who does not use agreed selection criteria to select the employees to be dismissed may not depart from 'fair and objective' selection criteria. To do so would render the dismissals substantively unfair.¹²

- [39] The defendant argued that the plaintiffs did not plead that the dismissal was unfair based on the selection criteria. The plaintiffs, in response, argued that they had pleaded this case and referred the Court to paragraph 11.8 of their statement of claim, which reads:

'This was not a meaningful consulting seeking process or attempt to reach consensus on appropriate measures to avoid dismissals, minimise the number of dismissals, change the timing for dismissals or mitigate the adverse effect of the dismissals as per section 189. No consensus was reached by the parties but a decision to retrench/dismiss and selection criteria were imposed on the applicants (sic).' (Own emphasis)

- [40] The plaintiffs' complaint appears to be that the defendant applied the selection criteria that were not agreed. The plaintiffs developed this point in the pre-trial minute and stated that the parties had agreed on LIFO as the criterion to be used in selecting the employees to be dismissed but the defendant did not implement it.
- [41] During the trial, the plaintiffs sought to lead evidence that the defendant had retained employees with fewer years of service and dismissed the individual plaintiffs with longer years of service. The latter case, introduced during the trial, was in essence a complaint that the selection criteria were unfair or that, to the extent that the defendant applied LIFO, its application of this criterion was unfair. This is not the case borne out of the pleadings and the pre-trial minute.
- [42] The plaintiffs' claim was limited to the fact that the defendant imposed its own selection criteria or failed to apply LIFO which was the agreed selection criterion. The mere mention of the concept "*selection criteria*" in the pleadings without more is of no assistance to the plaintiffs and cannot be interpreted to

¹² Ibid at paras 17 – 18; see also *Chemical Workers Industrial Union & others v Latex Surgical Products (Pty) Ltd* [2006] 2 BLLR 142 (LAC); (2006) 27 ILJ 292 (LAC) at para 84; *Super Group Supply Chain Partners v Dlamini and Another* [2012] ZALAC 25; (2013) 34 ILJ 108 (LAC) at para 26.

mean that the plaintiffs complained about the adoption of the selection criteria or the application thereof.

- [43] Regarding the plaintiffs' statement in the pre-trial minute that the defendant failed to consider the service history of the individual plaintiffs with Tailormade Solution, the defendant testified that it had taken their years of service into account. Ultimately, this relates to whether a case was pleaded insofar as the plaintiffs sought to argue that LIFO was not applied fairly or that the defendant did not apply LIFO.
- [44] The defendant's case is that it applied LIFO. The plaintiffs have not pleaded in their statement of claim, nor have they set out in the pre-trial minute the names of employees that should have been retrenched before them. The pre-trial minute asked this specific question, but the plaintiffs elected not to provide a single name of those employees that they now seek to contend that they should have been dismissed before them.
- [45] The plaintiffs did not plead their years of service in comparison with those who should have been dismissed before them. The plaintiffs elected to answer the specific question by stating that the defendant employed new employees after their dismissal despite an agreement or undertaking to re-employ them if vacancies became available. The plaintiffs did not mention the names of the new employees, nor did they cross examine the defendant's witness or lead evidence on this issue any further during the trial. It is common cause that the defendant had re-employed six of the 20 retrenched employees.
- [46] Accordingly, the parties did not have to reach an agreement on the selection criteria. The complaint that the defendant imposed its own selection criteria takes the matter no further. Tiley testified that the defendant considered the employment history of the employees when applying LIFO. He was not challenged on this. The case of alleged unfair selection criteria or unfair application of the selection criteria of LIFO was not pleaded. There is therefore no challenge on the application of LIFO as a selection criterion and the Court need not determine an issue that is outside the pleaded case.

Conclusion

[47] Having considered the above, I find that the defendant had discharged its onus of proving that the dismissal of the individual plaintiffs was substantively fair. The parties did not pursue costs.

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

Order

1. The plaintiffs' claim is dismissed.
2. There is no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Plaintiffs: Mr S. Mogare (NUMSA)

For the Defendant: Mr A.J. Posthuma of Snyman Attorneys

LABOUR COURT