REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 949/2021

In the matter between:

SOUTH AFRICAN COMMERCIAL CATERING

AND ALLIED WORKERS UNION obo

TSHOKODO AND 210 OTHERS **Plaintiff**

and

MASS DISCOUNTERS (PTY) LTD T/A

GAME AND DION WIRED STORES **Defendant**

Heard: **11 and 12 May 2026**
Final heads of argument filed on 26 May 2026

Delivered: 29 May 2026

This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email. The date for hand-down is deemed to be 29 May 2026.

JUDGMENT

PRINSLOO, J

Introduction

[1] It is common cause that following a retrenchment process, a number of employees were dismissed by the Defendant (Game) between June and July 2021.

[2] The Plaintiff (SACCAWU or the union), acting on behalf of its members, filed a statement of claim on behalf of 210 individual employees (the employees), challenging the fairness of their dismissal. The procedural fairness of the employees' dismissal has been challenged and disposed of by way of a section 189A(13) application. The only issue before this Court is the substantive fairness of the employees' retrenchment.

[3] At the commencement of the trial, the Defendant challenged the number of employees before Court as well as the number of claimants for severance pay. It was placed on record that certain employees ought to be excluded, for several reasons *inter alia* that some of them have settled their claims with the Defendant, some were pursuing their claims in other pending matters, and others were indeed paid their severance pay.

[4] The Defendant prepared a list of names to identify the employees who should be excluded from this matter and/or the severance pay claim, and to indicate which employees' claims remain before the Court. After consideration of the name list, the Plaintiff's attorneys confirmed that the name list was indeed accurate. The unfair dismissal claim is pursued in respect of 154 individuals, and the severance pay claim is pursued for only 19 individuals. They will be referred to as the employees.

[5] The claim for severance pay in respect of the other individual plaintiffs who are pursuing an unfair dismissal case under a different case number is to be decided by the Court adjudicating the other pending matter.

[6] The Defendant called two witnesses and at the closing of the Defendant's case, the Plaintiffs' case was closed without any evidence adduced.

<u>The pleadings and pre-trial minute</u>

[7] Before I deal with the merits of the case and the evidence adduced, it is necessary to say something about the pleadings filed. It is trite law that the court and the parties are bound by the pleadings, the pre-trial agreement[1],

[1] *Chemical, Energy, Paper, Printing, Wood & Allied Workers Union and Others v CTP Ltd and Another* [2013] 4 BLLR 378 (LC).

and the issues they agreed to in the pre-trial minute.[2] This Court cannot and should not go beyond the issues it is required to determine, with reference only to the pleadings and the pre-trial minute.

[8] Jacob and Goldrein[3] aptly capture the position as follows:

> 'As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings… For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial.
>
> The Court itself is as much bound by the pleadings of the parties as they are themselves. It is not part of the duty or function of the Court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties…
>
> The Court does not provide its own terms of reference or conduct its own enquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to.'

[9] In *SA Breweries (Pty) Ltd v Louw*[4] (*Louw*), the Labour Appeal Court (LAC) was required to, *inter alia*, determine a complaint by the appellant that the court *a quo* decided the case on factual issues not properly put before it on the pleadings, nor as refined in the pre-trial conference minute. The LAC held that:[5]

> '[4] 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

[2] *Professional Transport & Allied Workers Union on behalf of Khoza and Others v New Kleinfontein Gold Mine (Pty) Ltd* (2016) 37 ILJ 1728 (LC); *National Union of Metalworkers of SA and Others v Driveline Technologies (Pty) Ltd and Another* (2000) 21 ILJ 142 (LAC).
[3] JHI Jacob, IS Goldrein, '*Pleading: Principles and Practice',* Sweet & Maxwell, at pp 8 - 9.
[4] (2018) 39 ILJ 189 (LAC).
[5] Ibid at paras 4 – 5.

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.

[5] The critical complaint in this matter is that the court a quo decided the case on factual issues not properly put before it on the pleadings, nor as refined in the pretrial conference minute. The complaint had been raised during the hearing and in argument at the conclusion of the trial, considered by the court a quo and dismissed. In our view, the complaint is justified and the court a quo was in error.'

[10] The LAC further held that:[6]

'The relationship between the pleadings and the pretrial conference minute has been the subject of several judicial pronouncements[7]. 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 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.'

[11] In summary, a statement of claim must 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 claims. Those must be sufficiently detailed to enable the defendant to respond and to be informed of the nature or essence of the dispute. Each side must be given an unambiguous warning of the case they are to meet.

[12] The issues raised by the Plaintiff must be considered against the backdrop that the pleadings provide the architecture and the evidence at trial provides the detail and texture. However, it is not for this Court to decide a case on

[6] Ibid at para 8.
[7] See: *Price NO v Allied - JBS Building Society* 1980 (3) SA 874 (A) at 882D - E; *Zondo and others v St Martin's School* (2015) 36 ILJ 1386 (LC) at paras 10 – 11.

factual issues not properly pleaded or refined in the pre-trial minute. This principle was confirmed by the Supreme Court of Appeal (SCA) in *MEC for Health and Social Development of Gauteng Provincial Government v Slabbert*[8], where it was held that:

> 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.

The pleaded case

[13] The Plaintiff's pleaded case, as recorded in the statement of claim, is that the employees' dismissal was substantively unfair and not 'operationally justifiable on rational grounds.' It is evident from the statement of claim that the fairness of the employees' retrenchment is challenged on three main grounds – the commercial rationale, the failure to consider alternatives and selection criteria.

[14] The Plaintiff attacked the commercial rationale and pleaded that the implementation of a new store model, upon which the retrenchments were premised, was not an 'economic, technological, structural or similar need' of the Defendant and that the implementation thereof was not reasonable. In the alternative, it was pleaded that the retrenchment of the employees did not contribute in a meaningful way to the realisation of an economical, technological, structural or similar need of the Defendant.

[15] It is evident from the statement of claim and the pre-trial minute that the Plaintiff challenged the need to retrench. The Defendant's pleaded case is, *inter alia,* that it was challenged by a decline in financial performance, technological inefficiencies, and stronger competitors in the market, and, as a result, it had to undertake a complete business turnaround strategy. This required the implementation of a new store model that was driven by a genuine economic, technological, structural, or similar need, specifically that it would reduce operational costs, improve profitability, and ensure long-term sustainability.

[16] The Plaintiff further pleaded that the Defendant failed to consider alternatives to retrenchment, including natural attrition and making reasonable offers of

[8] [2010] 2 All SA 474 (SCA).

employment to the employees within the Massmart Group, as it had undertaken to do. This is confirmed as a disputed issue in the pre-trial minute. At the commencement of the trial, Mr Boda, for the Plaintiff, confirmed that they were not pursuing a case that natural attrition was an alternative to retrenchment, and that the issue was therefore limited to the alternative of a reasonable offer of alternative employment.

[17] The Defendant's pleaded case is that the employees were all mapped into available positions and they rejected the offers without a valid or justifiable reason.

[18] The last issue challenged is the selection criteria. The Plaintiff's pleaded case is that the Defendant presented new contracts of employment to the employees that contained an unreasonable reduction in working hours and/or salary, as well as amendments to terms and conditions of employment, including amendments to their dates of commencement as employees to dates much later than their actual commencement dates. The employees objected to the terms of the new contracts and the Defendant refused to amend the new contracts and to offer them reasonable offers of employment within the Massmart Group. Instead, the SACCAWU members were selected for retrenchment and the selection was purely based on their refusal to accept the new contracts and it was neither objective nor fair.

[19] In summary, the Plaintiff's pleaded case is that the employees' dismissal was substantively unfair and the challenge to substantive fairness is directed at the existence of a commercial rationale, the failure to consider alternatives, and the selection criteria. I will deal with these aspects in turn *infra.*

[20] During the course of the trial and in the propositions put to the Defendant's witnesses in cross-examination, the Plaintiff sought to introduce a case that was materially different from the case that was foreshadowed in the statement of claim. The Plaintiff adduced no evidence, but to the extent that the Plaintiff sought to introduce a case in conflict with the pleaded case, it cannot be considered for purposes of this judgment, as this Court cannot decide a case on factual issues that were not properly pleaded or refined in the pre-trial minute.

[21] In terms of section 192(2) of the Labour Relations Act[9] (LRA), the onus of proving that the employees' dismissals were substantively fair rests on the Defendant. *In casu* the Defendant has to prove, on a balance of probabilities, the existence of a valid commercial rationale, that it considered alternatives and that the selection criteria were fair, in order to establish the substantive fairness of the dismissal.

The commercial rationale

[22] In relation to the commercial rationale, the Plaintiff pleaded that:

> *10. The implementation of the new store model, upon which the retrenchments were premised, was not an economic, technological, structural or similar need of the respondent.*
>
> *11. The implementation of the new store model was furthermore not reasonable, regarding being had to (sic) the economic, technological, structural or similar needs of the respondent.*
>
> *12. Alternatively to 9 and 10 above, the dismissal of the SACCAWU members did not contribute in a meaningful way to the realisation of an economical, technological, structural or similar need of the respondent.*

[23] The test to be applied in evaluating substantive fairness was described by the Labour Appeal Court (LAC) in *National Union of Food Beverage Wine Spirits and Allied Workers v Coca Cola Beverages South Africa (Pty) Ltd*[10] *(Coca Cola)* as:

> [41] To the extent that the appellants pursue the submission that there was no general need to retrench and that the retrenchment was substantively unfair for that reason, this is not a submission that can be sustained by reference to the evidence. The economic case for restructuring and the consequent redundancies in particular occupational posts was made in the s 189(3) notice and elaborated on in detail in the evidence given by Leonhardt, Rajbally and Phetha. Although certain of the English authorities to which the Labour Court referred in its judgment may reflect an overly deferential approach, the Labour Court acknowledged that fairness, rather than correctness, was the applicable benchmark and that the Court was obliged to determine the rationality between the retrenchment and CCBSA's commercial objectives and in particular, whether the decision to retrench was a reasonable option in all the circumstances. This approach cannot be faulted.

[24] In *HeroTel (Pty) Ltd v Moses and Others*[11] the LAC confirmed the applicable test for substantive fairness in operational requirements dismissals - a

[9] Act 66 of 1995, as amended.
[10] (2024) 45 *ILJ* 1813 (LAC), [2024] 9 BLLR 948 (LAC).

[11] (CA05/2024) [2025] ZALAC 42; [2025] 10 BLLR 1026 (LAC); (2025) 46 ILJ 2850 (LAC).

decision to retrench will be substantively fair if it is a rational and reasonable response to the operational requirements predicament faced by an employer. The LAC affirmed that whilst employers have the prerogative to restructure their operations to maximise profits and operational efficiency, the courts do not accept the employer's proffered rationale at face value. Rather, adopting the test in *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers Union*[12], a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected employees, and to enquire as to whether a reasonable basis exists on which the decision to dismiss for operational requirements is predicated. Fairness, not correctness, is the mandated test. The LAC further endorsed the principle that there must be a rational connection between the employer's scheme and its commercial objective, and that through consideration of alternatives an attempt must be made to find the option which least harms the rights of the employees.

[25] In *Edge Line Engineering (Pty) Ltd v Association of Mineworkers and Construction Union and others*[13] the LAC confirmed that in scrutinising the grounds advanced for a retrenchment, a court does not second-guess the commercial or business efficacy of the employer's ultimate decision but rather determines whether the decision was genuine and not a sham. It is not the court's function to decide whether the decision was the best decision under the circumstances, but only whether it was a rational commercial or operational decision. The LAC further held, applying *BMD Knitting Mills*, that a higher standard of substantive review is required: a court is entitled to examine whether the particular decision is also fair to the affected employees and to enquire as to whether a reasonable basis exists for the decision. Retrenchment must be preceded by a genuine consultation process and must be properly and genuinely justifiable by operational requirements or business rationale. A retrenchment used as a ruse to rid the employer of certain employees for whatever reason will not survive scrutiny under this standard.

[26] In argument, Mr Boda accepted the formulation of the test, as formulated in *Coca Cola,* but he submitted that it does not assist the Defendant because the rationality inquiry is not a license to dispense with evidence – it presupposes a

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12 [2001] 7 BLLR 705 (LAC); (2001) 22 ILJ 2264 (LAC).
13 [2026] 4 BLLR 327 (LAC).

factual foundation against which the rationality of the decision could be measured. Mr Boda submitted that the Defendant led no evidence in support of its pleaded case that the new store model would reduce operational cost and improve profitability.

[27] The starting point when scrutinising the commercial rationale or the reason for retrenchment is to establish the presence of a *bona fide* operational requirement. An operational requirement is defined as 'requirements based on the economic, technological, structural or similar needs of an employer'. This is followed by an inquiry into whether the decision to retrench was, in fact, based on that operational requirement[14].

[28] Where an employer contends that there is operational justification for its decision to retrench, it must put forward evidence to show that the operational reason is real and that the dismissal was a fair consequence of its existence. This calls for a consideration of the evidence adduced.

[29] Mr Duval van Rhyn testified that during 2019 /2020 he was employed as the Defendant's Vice President for Game Operations. On 6 July 2020 the Defendant issued a notice in terms of section 189(3) of the LRA (the notice). It was recorded that Massdiscounters had performed poorly and, as of December 2019, had incurred a financial loss of R 675 million, of which R 572 million was attributable to Game, with the remainder attributable to Dion Wired. As a result of the loss and continued poor performance, the Defendant engaged in an assessment of how it could improve profitability and long-term sustainability to remain commercially viable and competitive in a very challenging market.

[30] Mr van Rhyn explained that a decision was taken to close down Dion Wired as Game had a better chance of recovery. In March 2020, operations under the Dion Wired brand ceased, but the intervention was insufficient to address the Defendant's decline in financial performance. The Game brand had been challenged by decreasing financial performance, technological inefficiencies and stronger competition in the market and it was unable to align its store operating model with the progressive technological innovations. The reality

[14] *Retrenchment Law in South Africa,* Rochelle le Roux, LexisNexis 2016 at p 187 - 191.

was that the Game model was outdated in a changed market and the Defendant could not compete in the new retail market with its old store model.

[31] The Covid-19 pandemic also negatively impacted the Defendant. In 2019, prior to COVID, Game was already battling financially, and in March 2020, when the hard lockdown was announced, the impact was significant. At the time, Game sold mainly appliances. The sale of non-essential items was prohibited, and as a result, Game could not sell its non-essential items due to the Covid-19 restrictions announced by the President of South Africa.

[32] The retail landscape changed drastically because customer access to stores was affected by the lockdown measures –customers were either not permitted to go to stores, or they were too scared to visit a store due to the pandemic. Suddenly, customers wanted to buy goods online, and Game was not geared to serve that market need. Mr van Rhyn explained that online buying had a lasting effect on retail and it changed the market and the face of retail significantly. More competitive e-commerce players entered the market and the Game store operating model was not geared to deal with the shift in the retail market. The Defendant needed to change how it operated to survive in the new market.

[33] In the notice, the employees were informed that the Defendant had secured additional facilities to pay salaries and to meet its payment obligations to suppliers. Mr van Rhyn explained that Game ran out of cash flow due to financial pressure and had to reach out to its US shareholder to assist with the payment of salaries and suppliers, which enabled them to keep the doors open. To ensure the future of the stores, Game needed a complete business turnaround strategy.

[34] The employees were notified of the proposed new store model, which envisaged sustainability and an enhanced customer experience. Attached to the notice was a list of the affected roles in the current store structure. The list indicated the number of current roles that would either become redundant, reduced, or repurposed into new roles in the proposed new store model.

[35] Mr van Rhyn presented the proposed restructuring of Game store operations to employees, explaining that a new operating model was intended to improve

operational efficiency and cost-effectiveness. The current store model (as applied at the time) and job roles required refinement to reflect new, more effective ways of working. There was a definite shift in customer behaviour, including, *inter alia,* online shopping, and as a result, Game had to change how its stores operated and find a way to address this shift in behaviour. In the new store model, the focus was on the customer, whereas in the old model it was more on administration. In the new store model, certain administrative functions were consolidated or reduced and new functions were introduced. The focus centered on driving sales and attracting customers in a changing retail landscape.

[36] Mr van Rhyn explained that the new store model was not taken lightly by the Defendant. It was thought through carefully, and it was aimed at redesigning a model that was 50 years old and which was crafted historically, at a time when shops closed on weekends, and online shopping did not exist. It no longer served the new retail market. The new model was aimed at changing customer behavior, and it created new opportunities for employees. The aim was to introduce new and effective ways to respond to the changing face of retail, and it was not designed to create job losses.

[37] In cross-examination, Mr van Rhyn's evidence about the business or commercial rationale for restructuring was not challenged.

[38] The Plaintiff did not dispute the substantial evidence proffered by the Defendant regarding the reasons or business rationale that it advanced for retrenchment. In my view, the Defendant's evidence established that its constrained financial circumstances and the changing retail landscape necessitated a transition to a more efficient and responsive operational structure and store model. Measured against the applicable standards, it cannot be said that the employees' retrenchment was irrational or disconnected from Game's commercial objectives and operational requirements, nor that it was an unreasonable option in the circumstances.

[39] The new store model was designed to incorporate e-commerce positions in order to meet evolving market demands. The onset of COVID-19 accelerated the need to adopt the new model, as the existing model could not adapt to the rapidly changing commercial environment. The existing store model was 50

years old - its store classifications had become unfit for purpose and operationally inefficient, as evidenced by the fact that the Defendant was operating at a loss. In order to remain competitive, it was important that Game modernise its operational practices to keep pace with the market and to remain relevant in the retail space.

[40] In fact, considering the evidence, it was rational and entirely reasonable in the context. SACCAWU's pleaded challenge relating to the commercial rationale is without merit. The Defendant indeed discharged its onus to establish an operational rationale, which was justifiable and reasonable.

The pleaded vs the argued case

[41] The Plaintiff filed lengthy heads of argument (103 pages) with the central thesis that Game failed to discharge the onus of proving that the retrenchment was substantively fair within the meaning of section 189 of the LRA and that the dismissals were not genuinely required by its operational requirements.

[42] I have dealt with the onus *supra* and will further do so *infra,* when considering the other aspects of the Plaintiff's challenge to the fairness of the employees' retrenchment.

[43] A material part of the Plaintiff's argument has been dedicated to advancing an argument that the employee's retrenchment was not genuinely required by Game's operational requirements. The argument is that the Defendant could achieve every operational objective it identified without requiring the employees to sign new contracts.

[44] The category of employees who were already employed on a 40-hour contract, were already on flexible contracts, and the scheduling and multi-skilling flexibility the Defendant claimed to require, was already conferred by their existing contracts. As there were no material changes to the terms, no new contract was necessary, and the employees' refusal to sign new contracts was not a refusal of anything of substance. They were already on 40-hour contracts before the new store model was introduced, and there was no need to sign new contracts to transition to a 40-hour contract.

[45] Mr Boda further submitted that the Defendant's case was that it needed the employees to move from 45 to 40-hour contracts, whilst the employees would not suffer financial prejudice as their remuneration would be maintained, shows that there was no operational purpose in compelling a new contract at all, because the financial outcome was identical and there was no labour cost saving generated for this category of employees. Furthermore, the changes the Defendant sought to implement in respect of the 45-hour permanent contracts were not fundamental; they fell squarely within the ambit of managerial prerogative and none of what the Defendant sought to achieve required a new contract, as everything could have been implemented under the existing contract as a matter of managerial prerogative.

[46] Mr Boda argued that the Defendant could lawfully and unilaterally schedule the employees for 40 hours, with no reduction in their contractual salary, as this would have been within managerial prerogative and would have required no consent or a new contract. As the employees' remuneration was maintained, there were no labour cost savings resulting from the contractual change; therefore, the purpose of re-signing was merely an administrative exercise and not a valid operational requirement.

[47] In short, the Plaintiff's argument is that retrenchment for declining to sign new contracts was not necessitated by a genuine operational requirement – at best it was a 're-papering exercise' and 'administrative convenience' which are not operational requirements within section 189 of the LRA.

[48] The thesis introduced in argument depends on this Court accepting that nothing of substance changed between the old and the new store model, and that the existing contracts were sufficient to achieve everything Game needed when the new store model was introduced.

[49] The difficulty with the aforesaid argument advanced on behalf of the Plaintiff is that it was never part of the Plaintiff's pleaded case. Furthermore, the Defendant was not afforded a fair opportunity to answer to the unpleaded case being pursued in argument, and no evidence was led on the specific issues raised in argument. The Defendant has to prove on a balance of probabilities that the employees' dismissal was fair, and the content of what must be proved is delineated by the issues raised by the pleadings and in the pre-trial

minute – it cannot be determined by whatever propositions are advanced for the first time in cross-examination or in argument. The very purpose of pleadings is to define the issues for the other party and for the Court. The Court is called upon to adjudicate the disputes that arise from the pleadings and the pre-trial minute, and those disputes alone.

[50] The proposition or argument that the employees' existing contracts of employment already conferred on Game sufficient scheduling and multi-skilling flexibility, rendering the new contracts legally unnecessary, that the retrenchment was a mere 're-papering exercise' or for 'administrative convenience', that the existing contracts already conferred sufficient flexibility, and that no new contracts were necessary, was not pleaded. If SACCAWU intended to pursue the case it now argues, it was obliged to plead the factual basis on which it contends that the Defendant's operational objectives were achievable without retrenchment and that the existing contracts were sufficient to achieve the operational needs. Instead, the pleaded case was that the new store model was not an economic, technological, structural or similar need of the Defendant.

[51] The argument presented regarding the contracts is also misconceived, given the evidence adduced. The evidence establishes that the retrenchment process was not intended to facilitate wage bill savings. It had a far broader purpose, including creating efficiencies by transitioning to a new store model, creating and modifying positions to drive growth, and aligning the workforce with changes in consumer behaviour. Game created new roles with different job descriptions, operating hours, and overtime arrangements, and these changes constituted a fundamental alteration to the nature of the job and would amount to a unilateral change to the terms and conditions of employment – it was not merely a 're-papering' exercise or the routine exercise of managerial prerogative.

[52] The issues argued, which were not pleaded by the Plaintiff, fall outside the scope of the issues this Court has to decide.

Alternatives to retrenchment

[53] In relation to alternatives, the Plaintiff's pleaded case is as follows:

The respondent failed to consider alternatives to retrenchment including, but not limited to natural attrition, and offering to the SACCAWU members, reasonable offers of employment within the Massmart Group, as it had undertaken to do.

[54] The issue of natural attrition is not pursued, and the only remaining contention is that the employees were not made reasonable employment offers within the Massmart Group.

[55] In the section 189 notice the employees were informed that in the event that they were deployed to other or similar positions within the Massmart Group, the principle to be applied was that *'if the affected employees' current salary is lower than the receiving company minimum for the vacant role – we propose to maintain the affected employee's current salary in the new role and increase salary over time in terms of the applicable bargaining unit wage agreement.'* Mr van Rhyn emphasized that the Defendant would not, in the process, change an employee's salary and the focus was to make Game 'future fit', not to change working hours or salaries.

[56] Ms Vague, who was the Defendant's management representative and senior people partner at the time of the retrenchment, testified that a facilitation process was followed at the CCMA. However, SACCAWU requested to engage with Game's management directly and differently, and as a result, a steering committee (Steerco) was formed. Steerco consisted of employer and employee representatives, and SACCAWU, as the majority union, represented employees. Steerco dealt with the mapping and placement of employees and the parties reached an agreement as to the manner in which the affected employees would be either mapped into the new Game store model or deployed to comparable vacancies within the Massmart Group (the mapping agreement).

[57] Ms Vague explained that during November and December 2020, Game would conduct a desktop mapping exercise to map as many of the affected employees into the new Game store model. 'Mapping' is an exercise where they had the information of the affected employees relating to *inter alia* position occupied, years of service, functions performed, skills, qualifications and experience, which was compared with the list of available vacancies and individuals were matched with positions. The Defendant completed the aforesaid exercise and presented it to the union in January 2021. It was

agreed that the actual placement of affected employees into roles within the new Game structure would take effect in January 2021, after the Steerco had signed off on the mapping process. Any affected employee who was not mapped into Game, would be considered for deployment into similar or comparable vacancies within the Massmart Group. It was agreed that the Defendant and the union would re-engage on potential retrenchment and/or accommodation of any employee not mapped and placed and/or who rejected an alternate offer of employment.

[58] A 'mapping guideline' was developed to provide the employees, the union and management with clear guidelines on how to conduct the mapping exercise. Ms Vague testified that prior to the commencement of the mapping exercise, it was explained to store managers and shop stewards, and no objection was raised. It became a daily exercise as they had to check daily for new vacancies into which suitable employees could be mapped.

[59] The first step in the mapping exercise was conducted on a 'store-by-store' basis, meaning they considered the current store and the new roles, mapping employees into those roles to avoid an employee having to relocate to a different store or region. Employees were requested to complete a career profile form, which would indicate their preferred location, experience, and qualifications for purposes of the mapping exercise.

[60] If an employee could not be mapped to their existing store, they could be mapped to another Game store within a 50 km radius of their place of residence. If that was not possible, the employee could be mapped across the Massmart Group into any other banner (eg Makro or Builders Warehouse) within a 50 km radius.

[61] Ms Vague explained that a new Builders Warehouse store was opening in Midrand in March 2021. The Defendant needed employees to open the store and it was agreed that they would consider the affected employees first to be employed at the new store before the vacancies would be advertised externally. The employees who could not be mapped within the 50 km radius, alluded to *supra*, became first in line to be considered at the new Builders Warehouse store.

[62] On 15 February 2021 the Steerco met and the Defendant presented the outcome of the mapping exercise. The union failed to get a mandate and undertook to provide a substantive response by 22 February 2021, which would also afford an opportunity to consult with employees regarding the Builders Warehouse in Midrand.

[63] A Steerco meeting was held on 22 February 2021, and it was made clear that consensus was needed on mapping employees in 'like-for-like' roles. The next Steerco meeting was scheduled for 3 March 2021. On 24 February 2021 the Defendant addressed an email to SACCAWU wherein it was recorded that *'we should aim to finalise a process where we can start placing employees from Game in to the Game new structure – it has been 9 months since they have received section 189 letter and it will be welcomed to give some sense of comfort that we are working together as the Union and Company to ensure deployment and minimal job losses. Additionally we considered your two requests: (1) to maintain the salary of transferring employees into like for like / comparable roles and (2) to consider transport allowances and confirm as follows:*

1. *With regard to into like for like / comparable positions across the Group (inclusive of Builders Midrand and all other group deployment placements) – we agree that we will maintain employees' current pay – no employee will be prejudiced from a salary perspective…*

2. *We will consider any additional transport costs to employees on an individual basis who have been placed outside of the 50 km radius.'*

[64] Ms Vague explained that there were three types of contracts offered to employees – a 45-hour supervisory roll contract, a 40-hour permanent, non-flexible contract, and a 40-hour flexible contract. On 15 April 2021 the union addressed a letter to the Defendant, recording *inter alia* that *"While we do not dispute the draft employment contract copies have been provided to the Union Steerco members before, and this should not be construed to mean that the contents thereof have been agreed to and accepted by the parties. Accordingly, the only body that has powers to ratify the employment contract as agreed and acceptable, is the broader National Forum that established the Steerco as its sub-committee to deal with the modalities of implementation of the mapping process."* Ms Vague testified that the union influenced employees not to sign the contracts. She sat with 13 regional people partners on a daily

basis, and they looked at the offers accepted and refused, the number of employees who were placed and could still be placed. Offers in the regions were rejected because the employees stated that the union instructed them not to sign or that they were waiting for the union. She authorised travel to the stores to discuss the offers with employees in person because Game wanted to save jobs.

[65] Ms Vague testified that for a period of 12 months, positions across the Massmart Group were frozen for the mapping process and no position was filled externally, as vacancies were reserved for the affected employees.

[66] On 3 June 2021 Game addressed a letter to Steerco members regarding a final opportunity for employees to be mapped to positions in terms of the new Game store model. The section 189 consultation process has been ongoing since 6 July 2020, and by June 2021, 6 177 employees have been mapped into Game in accordance with the agreed mapping principles. As of 3 June 2021, 5 533 employees had successfully secured positions in Game through the mapping process. The employees (335 employees, including the individuals before the Court) who were offered positions but refused to accept the positions or sign the contracts were requested to provide reasons for their refusal or rejection of the alternative offers. Where valid and justifiable reasons were provided, the employees were placed back into the pool of 'unmapped' employees or they were further engaged.

[67] Game made it clear that the section 189 process was extensive and that it had to be finalised. The 335 employees who refused alternative offers were given a final opportunity to either accept the reasonable offer of alternate employment or to elect for a VSP package and they had to do so by 9 June 2021. If an employee rejected a reasonable offer of alternate employment without a valid reason or elected not to accept a VSP, Game would have exhausted all avenues and they would be retrenched with effect from 11 June 2021, without severance pay. The mapping process and alternative offers would continue in respect of the employees who remained in the pool of unmapped employees. If an employee rejected an alternative offer for a valid reason, they were retrenched with severance pay. This was communicated directly to the 335 employees who refused to accept alternative offers in a

letter dated 4 June 2021. It was recorded that many employees indicated that they would not accept the positions offered to them 'on advice of the union.'

[68] Ms Vague testified that the aforesaid process was followed to save jobs. The Defendant considered not only mapping into positions at Game but also comparable vacancies at other banners within the Massmart Group. The intention was to limit job losses. The overwhelming majority of employees (approximately 95%) accepted their placement offers, and only a small percentage (5%) refused the new contracts and the positions they were mapped into under the new store model.

[69] SACCAWU responded to Game on 9 June 2021 regarding the final opportunity extended to employees, stating that the issue of 'the 40-hour contract' was never agreed upon and was a key area of dispute. Ms Vague testified that the 40-hour contract was presented to the union and it was not disputed and that it was not something new, as it was already part of the previous store model. Game indicated from the onset which roles would be 40-hour contract positions. It was unreasonable of the union to raise this as a dispute almost one year after the section 189 process had commenced.

[70] By 11 June 2021, the Defendant knew which employees had accepted alternative positions, who still refused, and which employees remained in the mapping pool. On 11 June 2021, it was communicated to store managers that retrenchment letters should be issued to the individuals who still refused to accept alternative offers, but they could still sign new contracts or take a VSP. If not, the retrenchment would take effect on 11 June 2021.

[71] Ms Vague explained that the mapping process was finalised without the sign-off from Steerco because SACCAWU disengaged from the process. The Defendant had to continue the mapping process because the union became uncooperative and failed to fulfill its responsibilities, and the process could not continue indefinitely.

[72] After the section 189 process came to an end and in December 2021, Game engaged in a section 150 agreement relating to the 'reinstatement of retrenched employees'. Game had a number of vacancies and retrenched employees were reinstated on a like -for- like basis, in terms of the applicable

mapping principles and if an employee accepted a position, such an employee would be reinstated. If the employee was not paid severance pay during the section 189 process, he or she would be reinstated with retention of service; if they were paid severance pay, they would be reinstated without retention of prior service. If an employee could not be mapped, they would move to phase 2 and receive severance pay if they had not previously received it. If an employee refused a reasonable alternative offer, they were removed from the section 150 reinstatement process and placed on a reemployment list for 12 months. These employees were not paid severance pay as they declined a reasonable offer without a valid reason. There are 19 of them, all of them plaintiffs in this matter, claiming severance pay. Ms Vague testified that the said process was another attempt to save jobs.

[73] In cross-examination, it was put to Ms Vague that the real reason for retrenchment was the fact that the employees refused to sign the new contracts and that the 40-hour contracts were at the heart of Game's business rationale. Ms Vague disputed this and explained that the 40-hour contract was nothing new, it existed in the old store model. The Defendant needed a new store model and more flexibility in working hours, not fewer hours or salary cost savings.

[74] Mr Boda argued that the Defendant, in the mapping agreement, bound itself to a three-stage protocol – mapping, group-wide search, and a final re-engagement on accommodation – before it could lawfully dismiss any employee, and that it proceeded to retrench without completing the final stage. The Steerco never signed off on the placements, and without that sign-off, the process was frozen, the dedicated re-engagement on accommodation never took place, and the dismissals were accordingly effected in breach of a binding agreement that Game never canceled. On that basis alone, the retrenchments were substantively unfair.

[75] The difficulty with the argument advanced is that SACCAWU's statement of claim does not plead any breach of the mapping agreement as a basis for a finding of substantive unfairness. The pleaded case is confined to the content of paragraphs 9 - 18 of the statement of claim. The contention that Game breached a binding three-stage mapping agreement by failing to complete

stage three was advanced for the first time in the cross-examination of Ms Vague.

[76] In my view, it is impermissible for SACCAWU to advance in argument a case that was never pleaded, never foreshadowed, not defined in the pre-trial minute, and which Game was never called upon to answer. It therefore does not constitute an issue for determination by this Court.

[77] The contention that the Defendant failed to consider alternatives to retrenchment and to make reasonable offers of employment within Massmart has no merit. The evidence shows that the Defendant embarked on a lengthy process to identify affected employees, their skills, positions etcetera and to map them into existing or newly created roles within Game or the broader Massmart Group.

[78] The evidence is that the employees who were retrenched rejected reasonable offers of employment, as all employees were mapped into alternative positions or roles. The pleaded contention that Game failed to consider alternatives in the form of making reasonable offers of alternative employment in the Massmart Group, is unsustainable and not supported by any evidence.

Selection criteria

[79] In relation to selection criteria, the Plaintiff pleaded that:

> *14. The respondent presented new contracts of employment to the SACCAWU members that contained an unreasonable reduction in working hours and/or in salary, as well as amendments to their to their terms and conditions of employment, including amendments to their dates of commencement as employees of the respondent to dates much later then (sic) their actual commencement dates ("the new contracts").*
>
> *15. One or more, or all of the SACCAWU members objected to the terms of the new contracts, and did not sign the new contracts on the basis that they were unfair, alternatively were not reasonable, further alternatively contained terms and conditions that were different to what the respondent had advised the applicant and employees that it would offer."*

[80] In the pre-trial minute the Plaintiff recorded that the selection of the employees was based on their refusal to accept the new contracts and that their selection was neither objective nor fair. In argument, Mr Boda submitted that the Defendant was obliged to apply LIFO – this was not the pleaded case.

[81] Ms Vague testified that no selection criteria (such as LIFO or bumping) was proposed by the union during the retrenchment process. Instead, they agreed to the mapping process by which employees were identified and placed in suitable positions. Ms Vague testified that the application of LIFO or other conventional selection criteria in circumstances where employees remain on operationally deficient contracts would perpetuate the very problem the restructuring was designed to address.

[82] The factual averments, as pleaded, are not consistent with the evidence before this Court and are not supported by evidence - none of the employees testified to substantiate the allegations.

[83] In cross-examination, Mr van Rhyn confirmed that Game was prepared to retain the employees at their same salaries but in different roles. He confirmed that the type of contracts the employees had under the old model was not the reason for termination, but that the Defendant had to change the store model and intended to map employees into different roles.

[84] Ms Vague testified that the Defendant used the agreed upon mapping principles to map the affected employees and to offer them employment in alternative roles or suitable vacant positions. She emphasized that the employees were not retrenched because they refused to sign 40-hour contracts, but because they refused to accept reasonable alternative offers of employment, and in some instances, they were rejected for no valid reason. She testified that even employees who were employed on a 40-hour contract refused to accept a new 40-hour contract because they believed that the 'union was still 'negotiating' and they ultimately refused offers of alternative employment, which resulted in their retrenchment.

[85] There was no evidence to support the Plaintiff's case that the employees were presented with new contracts of employment that contained an unreasonable reduction in working hours and/or in salary, or that they contained amendments to their terms and conditions of employment, including amendments to their dates of commencement as employees. No evidence was adduced to the effect that one or more or all of the SACCAWU members objected to the terms of the new contracts and that they did not sign the new contracts on the basis that they were unfair, unreasonable or because they

contained terms and conditions that were different from what the Defendant had advised the union and employees that it would offer.

[86] On the contrary, the evidence showed that Game was prepared to retain the employees at their same salaries. Mr van Rhyn explained that the employees' basic salaries would remain the same and that they would not be in a worse position for accepting a new contract. He further explained that an employee's length of service would be retained for the entire period of employment. However, the contract included a commencement date that referenced only the employee's start date in the new role, while the length-of-service period remained for the entire period of employment.

[87] Conventional criteria are designed for situations where the employer must choose between employees performing the same or similar work. That was not the position here. The restructuring process and the introduction of the new store model eliminated old contract types and created new roles requiring different terms of employment. It displaced the employees from their erstwhile positions. The identification of employees occupying abolished positions who declined the alternative positions offered to them for retrenchment does not constitute selection based on refusal. Rather, it is a selection based on the redundancy of existing roles in their current form and is in line with what was agreed between the parties in the mapping agreement.

[88] The Plaintiff's case relating to the selection criteria is without merit.

[89] In conclusion, the Defendant has discharged the onus to prove that the retrenchment of the employees was substantively fair.

The Severance Pay Claim

[90] The pleaded case seeks an order that the Plaintiff's dismissal was unfair and that they be reinstated retrospectively, alternatively and only in the event that the Court finds that their dismissal was fair and reinstatement not appropriate, they seek an order that the Defendant must pay severance pay to the SACCAWU members in terms of section 41(2) of the BCEA.

[91] As this Court found no merit in the claim for substantive unfairness, it follows that the employees' retrenchment was fair, and the claim for severance pay is to be considered.

[92] After the Defendant's list was accepted as correct, the only remaining issue for consideration is the severance pay claim pursued on behalf of 19 employees who were not paid severance pay.

[93] Section 41(4) of the BCEA provides as follows: *"An employee who unreasonably refuses to accept the employer's offer of alternative employment with that employer or any other employer, is not entitled to severance pay in terms of subsection (2)."*

[94] With reference to the 19 employees who are pursuing a claim for severance pay, Ms Vague's evidence was that they were 'mapped' to available vacancies and had rejected the alternative positions offered to them prior to retrenchment, without advancing any good reasons. She testified that other employees with valid reasons were paid severance pay, and that only those who refused without a proper reason were not paid severance pay. Ms Vague testified that the 19 employees had also rejected additional offers of employment in the section 150 process and that they had once again failed to provide good reasons for their refusal.

[95] The 19 employees elected not to attend Court and testify, and no evidence was adduced as to the reasons for their refusal to accept alternative offers. There is no evidentiary basis for finding that their refusal was reasonable or that the alternative offers made to them were unreasonable.

[96] The claim for severance pay cannot succeed, considering the applicable legislative provisions and the evidence adduced.

Costs

[97] Costs should be considered against the provisions of section 162 of the LRA and according to the requirements of the law and fairness. This Court has a wide discretion in awarding costs.

[98] Mr Itzkin, for the Defendant, submitted that the referral ought to be dismissed with costs. He did not submit any reasons as to why a cost order should be made. Mr Boda made no submissions on the issue of costs.

[99] In *Zungu v Premier of Kwa Zulu-Natal and Others*[15] the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand allowing those parties to bring to this Court (or oppose) cases that should not have been brought to Court (or opposed) in the first place.

[100] In my view this is a case where the interest of justice will be best served by making no cost order.

[101] In the premises, I make the following order:

Order

1. The Plaintiff's case is dismissed;

2. There is no order as to costs.

_____

Connie Prinsloo

Judge of the Labour Court of South Africa

[15] (2018) 39 ILJ 523 (CC) at para 24.

Appearances:

For the Plaintiff: Advocate F A Boda SC

Instructed by: Dockrat Attorneys

For the Defendant: Advocate Riaz Itzkin

Instructed by: ENS Attorneys