



- (1) Reportable: No
(2) Of interest to other Judges: Yes/No
(3) Revised: No

Signature

24 August 2026
Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No. JS488/22

In the matter between:

**SOUTH AFRICAN COMMERCIAL CATERING AND ALLIED
WORKERS UNION obo BIYELA, SICELO & 349 OTHERS**

Plaintiffs

and

MASSTORES (PTY) LTD t/a MASSMART LOGISTICS

Defendant

Heard: 17 & 19 August 2026

**Delivered: 24 August 2026 (By circulation to the parties' legal representatives
by email)**

**JUDGMENT
(APPLICATION FOR LEAVE TO AMEND)**

MAKHURA, J

Introduction

- [1] This matter concerns a claim of unfair dismissal arising from the retrenchment of the individual plaintiffs by the defendant for operational requirements. The dismissals occurred on 1 March 2022 following a facilitated retrenchment process undertaken in accordance with section 189A of the Labour Relations Act¹ (LRA). Pursuant thereto, the plaintiffs referred the dispute to this Court in terms of section 191(5)(b)(ii) of the LRA.
- [2] The trial commenced on 13 April 2026 and proceeded until 15 April 2026. During this period, the defendant led the evidence of one witness, who was subjected to cross-examination and subsequently re-examined, before he was excused. The matter remained part-heard at the conclusion of the proceedings and was re-enrolled, by agreement between the parties on 15 April 2026 and in consultation with the Registrar, for continuation from 17 to 21 August 2026.

The amendment application and opposition

- [3] On 7 July 2026, the plaintiffs served and filed a notice of amendment in terms of which they intended to introduce various amendments to their statement of claim. On 21 July 2026, the defendant objected to part of the proposed amendment. The objection was directed at the proposed inclusion of the following three paragraphs under the theme addressing the challenge to the commercial rationale, namely:

'9A Throughout the consultation process, and despite numerous requests by the SACCAWU members, the Defendant declined to consider and/or provide information that is directly relevant to the commercial rationale. This information includes the following: (1) the precise and reliable details of EXCO's decision to retrench; (ii) the conversion of labour brokers ... or temporary employment service workers; (iii) the high proportion of employees who rejected the 120-hour contract.

¹ Act 66 of 1995, as amended.

9B The Defendant's failure to consider and/or provide this information is indicative of the fact that the retrenchments were a fait accompli and thus had no commercial rationale.

10A The respondent's decision to require employees to accept the reduced minimum hours was pre-determined before the consultation process was complete, as evidenced by, inter alia, the respondent's conduct in approaching employees directly and offering them new contracts before the section 189 process was concluded, and converting labour broker employees to permanent employment during the consultation process. The consultation process was accordingly not conducted in good faith and was a sham.'

[4] On 6 August 2026, the plaintiffs launched this application for leave to amend their statement of claim. Mr Dockrat, the plaintiffs' attorney of record, deposed to the supporting affidavit and articulated the reason/s for the amendment as follows:

'... During the course of the trial, counsel for the Defendant indicated that the Defendant intended to object to certain propositions and submissions advanced by the Plaintiff's representative on the basis that those propositions had not been pleaded.

At that time, the Plaintiff's legal representatives were of the view, and so advised the Plaintiff, that there was no merit in the anticipated objection. This view was informed by the well-established principle that the overall onus to establish the substantive fairness of dismissal for operational requirements – including the existence of a genuine and bona fide commercial rationale – rests squarely on the employer in terms of section 192(2) of the Labour Relations Act ... On that basis, and at the conclusion of the trial proceedings in April 2026, the Plaintiff did not take any immediate steps to amend its pleadings.

Subsequently, on 29 May 2026, Prinsloo J handed down judgment in *South African Commercial Catering and Allied Workers Union obo Tshokodo and 210 Others v Mass Discounters (Pty) Ltd t/a Game and Dion Wired Store* Case No. JS949/2021 ("the Game judgment") ... That matter also involved the Plaintiff and a member of the Massmart group of companies and similarly concerned a challenge to the substantive fairness of a retrenchment.'

- [5] Mr Dockrat further submitted that, in *Game*, Prinsloo J held that the parties are confined to the issues defined in their pleadings and the pre-trial minute. The learned judge emphasised that a court is not entitled to determine a matter on the basis of factual issues or contentions raised for the first time during cross-examination or argument where such issues were neither pleaded nor recorded in the pre-trial minute. Mr Dockrat indicated that, although the plaintiffs do not agree with all the findings made in *Game*, they have, on legal advice, decided:

‘*ex abundanti cautela*, to amend [their] statement of claim...

It was for this reason, and no other, that the notice of amendment dated 6 July 2026 was served...’

- [6] The defendant’s primary objection is that the plaintiffs seek, through the proposed amendment, to introduce a challenge to the procedural fairness of the dismissal. According to the defendant, any such challenge ought to have been pursued by way of an application in terms of s 189A(13) of the LRA and cannot competently be raised in the present proceedings, where the dispute referred to the Court concerns only the substantive fairness of the dismissal. On that basis, the defendant contends that this Court lacks jurisdiction to entertain a procedural fairness dispute, particularly in the absence of a successful application for condonation.² The defendant has also questioned the bona fides of the application.

The legal principles

- [7] The Constitutional Court in *Affordable Medicines Trust and Others v Minister of Health and Others*³ held as follows:

² Section 189A(17)(a) provides that an application challenging a consultation process under section 189A(13) must be instituted within 30 days from the date on which the employer gives notice terminating the employee’s employment or, where no notice is given, within 30 days from the date of dismissal. In terms of section 189A(17)(b), a challenge may still be brought after the expiry of the 30-day period if the employees can demonstrate good cause for the delay.

³ 2006 (3) SA 247 (CC) at para 9.

'The principles governing the granting or refusal of an amendment have been set out in a number of cases. There is a useful collection of these cases and the governing principles in *Commercial Union Assurance Co Ltd v Waymark NO*. The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is *mala fide* (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or 'unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed'. These principles apply equally to a notice of motion. The question in each case, therefore, is, what do the interests of justice demand?'

- [8] In *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH*⁴, the Constitutional Court clarified the test as follows:

'[65] ... The legal principles that are restated in *Affordable Medicines* reflect the constitutional right to have a dispute resolved by the application of law before a court. This entails the right of a litigant to frame the dispute that requires resolution, and in the present matter, to formulate a defence. Hence, the importance of the permissive principle, to which I have referred.

[66] The Commissioner of Patents failed to adopt the permissive principle, but instead arrogated to herself a broad discretion to decide the application to amend under the capacious concept of the interests of justice. That is not our law. More particularly, as a general principle, courts do not decide for litigants what disputes the interests of justice permit them to pursue before the courts. Yet, that is what the Commissioner of Patents decided. The proposed special plea, she found, would give rise to a protracted enquiry that detracts from the real issue in dispute in the action. A court cannot exclude a cause of action or a defence because the enquiry entailed by it is protracted. That is for the litigant to decide. Nor should a court decide for a litigant, at the stage of pleadings, the real issue in dispute. That too is a choice which the courts should afford litigants considerable latitude to determine...

⁴ 2024 (1) SA 331 (CC).

[67] Plainly, the permissive principle is not without limits. Pleadings that are excipiable, or, as the holding in *Affordable Medicines* affirmed, are introduced in bad faith or cause an injustice that cannot be compensated by an order for costs, afford grounds for refusing a proposed amendment...'

[9] This Court in *Molefe & Others v SA Police Service*⁵ held that:

'Ultimately, the primary object of permitting an amendment is to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done ... In particular, the court must have regard to whether the text of the amendment is set out in clear and particular terms; an amendment that would render the pleading excipiable will ordinarily not be granted.'

Analysis

[10] The principles that emerge from the foregoing authorities and many others are that an amendment should generally be permitted where it serves to ventilate the real issues in dispute between the parties. The amendment must be sought bona fide and without undue delay. Because pleadings are directed not only to the parties but also to assist the Court in the proper ventilation of the dispute or issues, the Court retains discretion to grant or refuse an amendment. That discretion must be exercised judicially by balancing, on the one hand, the applicant's right to amend its pleadings where the proposed amendment is bona fide and timeous, and, on the other, the respondent's right to resist the amendment where allowing it would cause prejudice or injustice. Furthermore, an amendment that would render the pleading excipiable, or expose it to a special plea or an application to strike out, should ordinarily not be allowed.

[11] In his heads of argument, Mr. Omar, for the plaintiffs, argued that the proposed amendment "*seeks to align the language of the statement of claim with the evidence already led and propositions already put to the Defendant's witnesses during the course of the trial*". He further argued that, in this context, the

⁵ (2021) 42 ILJ 1240 (LC) at para 7.

proposed amendment is sought “*out of an abundance of caution*” to avoid any argument that the evidence was incongruent with the plaintiffs’ pleaded case, and that the amendment is intended to ensure the proper ventilation of the dispute.

- [12] Mr Omar repeated during argument that the amendment had been sought out of an abundance of caution. He correctly conceded that the principle articulated in *Game*, namely that parties are bound by their pleadings and the pre-trial minute, is well established and not novel. While he maintained that the proposed amendment was not prompted solely by the *Game* judgment, he was unable to identify any other compelling basis necessitating the amendment, particularly in light of the plaintiffs’ stated position and that of their legal representatives that such an amendment was not required. In these circumstances, the inference is inescapable that the amendment, notwithstanding the explanation that it was sought out of an abundance of caution, was prompted by the *Game* judgment. This is so despite the parties’ common acceptance that the judgment did not introduce a new legal principle but merely reaffirmed an existing one.
- [13] On the proposed amendment, the plaintiffs seek to add a complaint that the defendant failed to disclose relevant information requested by the individual plaintiffs or their union during the consultation process, that it failed to engage in a meaningful consultation process, approached employees with new contracts before consultations had been concluded, and had allegedly predetermined the outcome of the process. Properly construed, this proposed amendment seeks to challenge whether the consultations were conducted in good faith and whether employees were afforded a genuine opportunity to meaningfully participate in the decision-making process. These proposed additions therefore relate to the procedural fairness of the retrenchment process, and do not challenge the commercial rationale or the substantive fairness of the dismissals.
- [14] Mr Omar submitted that the proposed amendment is competent on the basis that, in disputes concerning dismissals for operational requirements, the

distinction between procedural and substantive fairness may at times become blurred.⁶ While that principle is correct, it remains trite that each matter must be determined on its own facts.

- [15] In the present case, the plaintiffs made it unequivocally clear in the pre-trial minute that they do not challenge the procedural fairness of their dismissal. In any event, had they intended to do so, they were required to pursue the appropriate relief through application proceedings in terms of section 189A(13) of the LRA. They did not follow that course and, as confirmed by their legal representatives in both the supporting affidavit and Mr Omar's submissions, they do not seek any remedy based on alleged procedural unfairness.
- [16] There seem to be inherent contradictions in the plaintiffs' case. On the one hand, they expressly renounce any challenge to procedural fairness; on the other, they seek to introduce allegations concerning an unfair consultation process and the defendant's failure to disclose information, matters that are typically procedural in nature. Although they contend that they do not ask the Court to determine whether this conduct on the part of the defendant constituted procedural unfairness, they simultaneously rely on the legal principle recognising that procedural unfairness may be inextricably intertwined with substantive unfairness.
- [17] It is difficult to conceive how this Court could conclude that procedural irregularities or defects affected the substantive fairness of the dismissals without first considering and determining whether the impugned conduct amounted to procedural unfairness. Put differently, before it can be said that the line between procedural and substantive fairness has been blurred, there must be a finding made by this trial Court regarding the existence of the alleged procedural defect. In the absence of a properly instituted section 189A(13) application, this Court does not have jurisdiction to adjudicate procedural fairness disputes or to make findings on those issues through the present trial proceedings. The contention

⁶ *HeroTel (Pty) Ltd v Moses & Others* (2025) 46 ILJ 2850 (LAC); *Universal Product Network (Pty) Ltd (UPN) v Mbatsana N.O.* [2026] 7 BLLR 698 (LAC).

that the plaintiffs do not seek relief on the basis of procedural unfairness does not render the proposed amendment permissible as the Court would still inevitably be required to decide whether there was a procedural defect. The proposed amendment consequently seeks to introduce matters that fall within the realm of procedural fairness, which are not permissible in these proceedings.

[18] While the plaintiffs are entitled to define the dispute they wish the Court to determine, the Legislature has created specific mechanisms to address what they now seek the Court to determine. Employees or trade unions who contend that insufficient information has been disclosed during the facilitated consultation process under section 189A have sufficient remedies. They may seek disclosure through the facilitator, invoke the rights contained in section 16 of the LRA, or approach this Court on application for appropriate relief in terms of section 189A(13) ⁷. The plaintiffs elected not to avail themselves of any of these remedies during the consultation and facilitation process. Nor did they institute proceedings in this Court challenging the procedural fairness of the retrenchment. Instead, they elected to pursue a claim confined to the substantive fairness of the dismissals. The present proceedings, instituted in terms of section 191(5)(b)(ii), are not for the determination of procedural fairness disputes.

[19] For all of these reasons, granting the amendment would, in effect, permit the plaintiffs to introduce a procedural fairness challenge through the back door, notwithstanding the statutory framework which requires such challenges to be pursued by different means. To allow the amendment would therefore be to sanction the introduction of a claim that is not properly justiciable in these proceedings. As the defendant correctly submitted, the consequence would likely be the raising of a special plea or an exception. I must add that the allegations would be susceptible to an application to strike out, all of which would serve only to prolong the litigation, increase costs, and cause unnecessary prejudice to the

⁷ See also *Regenesys Management (Pty) Ltd t/a Regenesys v Ilunga and Others* (2024) 45 ILJ 1723 (CC).

parties. In the circumstances, the amendment cannot be permitted, and the application must be dismissed.

Costs

- [20] The defendant sought an award of costs. In support of this contention, Mr Itzkin relied on rule 20(8) of this Court's Rules, which provides that, unless the Court directs otherwise, an applicant for an amendment is responsible for the costs occasioned to the opposing party. However, the issue of costs in this Court is governed by section 162 of the LRA. The established principle is that costs do not automatically follow the result, and any order as to costs must be determined in accordance with the requirements of law and fairness.⁸
- [21] Mr Itzkin submitted that the general principle embodied in section 162, as affirmed by the Constitutional Court, does not apply to applications for amendment. He contended that, in light of rule 20(8), the default position is that a party seeking to amend its pleadings should bear the costs of the amendment application, unless exceptional circumstances justify a departure from that position. I am unable to agree with this contention. The matter before this Court remains a dispute governed by the LRA and, accordingly, the established principle that costs do not automatically follow the result continues to apply. The mere fact that a party seeks an amendment does not, without more, justify a departure from that principle.
- [22] Section 162(2) of the LRA requires the Court, when determining costs in accordance with the requirements of law and fairness, to take into account the conduct of the parties both in prosecuting or defending the dispute and during the course of the proceedings. In the present matter, the defendant consented to certain of the proposed amendments that related directly to the central issue

⁸ *Zungu v Premier of the Province of KwaZulu-Natal and Others* [2018] ZACC 1; (2018) 39 ILJ 523 (CC); *National Union of Mineworkers on behalf of Masha & others v Samancor Ltd (Eastern Chrome Mines) & others* (2021) 42 ILJ 1881 (CC); *Motor Industry Staff Association v Great South Autobody CC t/a Great South Panelbeaters*; *Solidarity on behalf of Strydom v State Information Technology Agency SOC Ltd* (2025) 46 ILJ 481 (CC).

before the Court, namely the substantive fairness of the dismissal. Its opposition was confined to the proposed amendment which sought to introduce a challenge to the procedural fairness of the dismissal, an issue not for determination before this Court.

[23] The plaintiffs were aware that the matter had been enrolled for the continuation of the trial from 17 to 21 August 2026. This allocation was arranged and agreed upon more than four months earlier, on 15 April 2026. Despite anticipating the defendant's objection, which was placed on record by Mr Itzkin during the trial, the plaintiffs' legal representatives did not consider it necessary at that stage to seek an amendment to the statement of claim because they considered the anticipated objection to have no merit. It was only following the judgment in *Game* that they elected to pursue the amendment, ostensibly "*out of an abundance of caution*". However, Mr Omar correctly conceded that the *Game* judgment did no more than reaffirm a well-established and trite legal principle. In those circumstances, it cannot be said that the *Game* judgment was the precipitating cause of the amendment. Rather, the necessity for this proposed amendment, if any existed, was apparent well before that judgment was delivered.⁹

[24] The plaintiffs filed a notice of amendment on 7 July 2026, 12 weeks after the trial was adjourned part-heard, six weeks before the continuation of the trial, more than five weeks after the *Game* judgment, which was purportedly one of the trigger factors for the proposed amendment. After the objection was entered on 21 July 2026, the plaintiffs only filed the application for leave to amend on 6 August 2026, six court days before the trial was set to continue. The plaintiffs have, in my view, failed to provide any cogent justification for seeking the amendment at such a late juncture, namely after the trial had been adjourned

⁹ This should not be understood as an endorsement of the anticipated objection, nor does it imply that an amendment to the statement of claim (as proposed and objected to) is necessary. The merits of the anticipated objection remain to be determined (should it be raised), and nothing in this ruling should be construed as expressing a view that the plaintiffs must amend their statement of claim to address the anticipated objection. I have already decided and provided reasons why the current proposed amendment cannot be allowed.

part-heard and in close proximity to the date on which the hearing was due to resume.

[25] The proposed amendment is misconceived and should not have been pursued. It disrupted the continuation and possible finalisation of the trial, resulting in a waste of the court's resources. The conduct of the plaintiffs and their legal representatives warrants censure. The defendant should not be burdened with the costs occasioned by this ill-founded application. The plaintiffs must therefore pay the costs of the application, including the wasted costs of the trial.

[26] In the premises, the following order is made:

Order

1. The application for leave to amend is dismissed with costs, including the wasted costs of the 5-day trial.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Plaintiffs: Mr A.B. Omar

Instructed by: Dockrat Incorporated

For the Defendant: Mr R. Itzkin

Instructed by: Edward Nathan Sonnenbergs Inc.