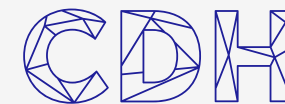


Employment Law

15 June 2026



SOUTH AFRICA

- The pleaded case shall prevail
- The witness you may not need:
When cell phone records speak for themselves

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The pleaded case shall prevail

In a significant judgment for employers managing large-scale restructurings, the Labour Court has confirmed that a retrenchment dispute will be determined on the case pleaded and the issues defined in the pre-trial minute, and not on new theories advanced for the first time in cross-examination or argument.

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 Stores (JS 949/2021) [2026] ZALCJHB 178*, the Labour Court held that Game had established a genuine operational rationale for its restructuring, had properly considered alternatives to dismissal and had acted fairly in retrenching employees who rejected reasonable alternative offers of employment.



Background facts

The dispute arose from Mass Discounters' large-scale restructuring of its Game business in 2020 and 2021, following sustained financial losses, increased market competition, technological inefficiencies and shifts in consumer behaviour, which were accelerated by the COVID-19 pandemic.

Game adopted a new store model aimed at improving operational efficiency, reducing administrative duplication and repositioning the business to remain commercially viable in a rapidly changing retail environment. The restructuring resulted in a number of existing roles becoming redundant, reduced or repurposed.

The South African Commercial, Catering and Allied Workers Union (SACCAWU), acting on behalf of affected employees, challenged the substantive fairness of the retrenchments. Although the litigation originally involved 210 employees, the dispute before the Labour Court was ultimately narrowed to 154 unfair dismissal claims and 19 severance pay claims.

The union's pleaded case was that the retrenchments lacked a valid commercial rationale, that Game had failed properly to consider alternatives to dismissal and that the employees had been selected for retrenchment unfairly because they refused to accept new contracts of employment.

The employees, however, led no evidence at trial. Game called two witnesses and closed its case on the basis of the pleaded issues.





The legal framework

The case required the Labour Court to consider the substantive fairness of retrenchments under sections 189 and 189A of the Labour Relations Act 66 of 1995, and the extent to which a party may expand or reformulate its case beyond the pleadings and the pre-trial minute.

The court reaffirmed the principle that the pleadings and pre-trial agreements define the parameters of the dispute to be adjudicated, and that neither the parties nor the court may stray beyond those issues.

In the retrenchment context, this was important because the union sought in argument to advance a materially different case from the one it initially pleaded.

On substantive fairness, the court applied the established principle that an employer must show a genuine operational requirement and that the decision to retrench was a rational and reasonable response to that operational need. The court also had to consider section 41(4) of the Basic Conditions of Employment Act 75 of 1997 (BCEA), which disentitles an employee to severance pay where the employee unreasonably refuses an offer of alternative employment.



The Labour Court's application of the law

The Labour Court dealt first with the pleaded case and the pre-trial minute. It stressed that the litigation had to be decided on the issues that had actually been pleaded, namely the commercial rationale for the retrenchments, the consideration of alternatives and the fairness of the selection criteria.

During cross-examination and argument, SACCAWU sought to introduce a different case: namely that the retrenchments were in truth a mere *"re-papering exercise"*, that existing contracts already gave Game sufficient flexibility and that no new contracts were operationally necessary.

The court held that this was not the case pleaded and could not be entertained. In doing so, it reaffirmed the established principle that litigants are bound by their pleadings and that a court may not decide a matter on factual issues not properly pleaded or defined in the pre-trial process.

On the commercial rationale, the court accepted Game's evidence that the restructuring was driven by genuine operational requirements. The evidence showed substantial financial losses, an outdated store model, changing customer behaviour, the impact of e-commerce and the

commercial disruption caused by the pandemic. The court was satisfied that the move to a new store model was neither irrational nor a farse, but rather a rational and reasonable response to a difficult commercial environment.

Importantly, the union did not meaningfully challenge this evidence, and the employees adduced no evidence to support the pleaded contention that the restructuring lacked a valid business rationale.

The court also found that Game had properly considered alternatives to retrenchment. A detailed mapping process had been undertaken over an extended period to place affected employees into roles within the new Game structure or elsewhere within the wider Massmart Group. Vacancies were frozen and reserved for affected employees, and specific mechanisms were agreed to identify suitable roles within a defined geographical radius and, where necessary, across other Massmart businesses.

The evidence showed that the overwhelming majority of employees accepted alternative placements.

On the pleaded case, the contention that Game had failed to consider alternatives was therefore unsustainable.

As to selection criteria, the court rejected the contention that employees were selected unfairly merely because they refused to sign new contracts. On the evidence, the restructuring abolished or materially altered existing roles, and employees were identified through the agreed mapping exercise for placement into suitable alternative roles. Those who unreasonably rejected reasonable alternative offers were retrenched because their existing roles had become redundant and they had declined available alternatives.

The court held that conventional criteria such as last in, first out were not part of SACCAWU's pleaded case and, in any event, were not applicable to the restructuring model under consideration.

The severance pay claims of the remaining 19 employees also failed. The court held that section 41(4) of the BCEA applied because those employees had rejected reasonable offers of alternative employment without placing evidence before the court to justify their refusal. In the absence of any evidence from the employees themselves, there was no basis on which the court could find that the refusals were reasonable or that severance pay remained due.



The court's findings and order

The Labour Court held that Game had discharged the onus of proving that the retrenchments were substantively fair. It found that the business restructuring was supported by a genuine commercial rationale, that reasonable alternatives to dismissal had been considered and offered, and that the pleaded challenge to the selection criteria lacked merit. The court dismissed SACCAWU's unfair dismissal claims and the severance pay claims, and made no order as to costs.



Key takeaways

The judgment offers several practical lessons for employers.

First, it underscores the importance of ensuring that pleadings and pre-trial minutes accurately define the issues in dispute, particularly in complex retrenchment litigation.

Second, it confirms that an employer will be well placed to defend a restructuring where it can demonstrate a genuine operational rationale supported by evidence, rather than mere assertion.

Third, it highlights the evidential significance of a substantive "*alternative to retrenchment*" process, including documented efforts to redeploy affected employees into suitable alternative roles.

Finally, it serves as a reminder that employees who unreasonably refuse reasonable alternative employment may forfeit any entitlement to severance pay under section 41(4) of the BCEA.

Thabang Rapuleng, Thato Maruapula and Rashaad Yusuf Dadoo



The witness you may not need: When cell phone records speak for themselves

In the recent decision of *Mohapi Thabo and Another v The State* (A41/2024) [2026] ZAGPJHC (21 May 2026), the High Court considered whether cell phone records relied on by the state were admissible in circumstances where the state had failed to call a witness from Vodacom to authenticate the records formally. The judgment is significant for its treatment of electronically generated evidence and, in particular, for its confirmation that cell phone records may, depending on how they are created, constitute real rather than hearsay evidence. This decision would also impact arbitrations which deal with employment disputes.



Facts

The appeal arose from the convictions and sentences of the two appellants on charges linked to the commission of serious offences. In challenging their convictions, the appellants contended, among other things, that the state's case rested on circumstantial evidence in the form of video footage and cell phone records, and that the cell phone records were, in particular, inadmissible because they had not been authenticated by a witness from the service provider whom the state had initially indicated it intended to call.

During the trial, the state relied on Vodacom data and documentation related to the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 to place the appellants at OR Tambo International Airport when the deceased had been collected and also later in Edenvale, where the deceased had been allegedly held against his will, murdered and his body buried. The defence team objected to the admission of this material. Although the records were provisionally admitted on the basis that a Vodacom representative would later be called to authenticate them, that witness was not called to testify. The appellants argued that, absent such authentication, the records remained inadmissible hearsay and could not be relied upon.

The state nevertheless led evidence from Lt. Col. Schnelle, Lt. Col. Neethling and Mr Budhia. Their evidence dealt with the obtaining, analysis and interpretation of the cell phone data; the operation of the relevant base stations; and the location of the relevant devices at the material times. The question before the court was whether that evidence was sufficient to establish the admissibility and evidential weight of the records despite the absence of a dedicated Vodacom authentication witness.





Legal question

The principal issue was whether the failure to call the Vodacom witness rendered the cell phone records inadmissible. This, in turn, required the court to consider a broader evidentiary question: whether cell phone records generated automatically by a telecommunications system should properly be treated as documentary evidence, which may attract hearsay concerns, or as real evidence, the admissibility of which depends on proof of the reliability and integrity of the system that produced it.



Applicable law

The court considered the general principles of the law of evidence relating to the admissibility of electronic material, with a particular focus on the distinction between documentary and real evidence. In *Kapa v The State* ZACC 1 [2023] (4) BCLR 370 (CC), the Constitutional Court reaffirmed that not every evidentiary irregularity renders a trial unfair, and that the admissibility of evidence ultimately turns on whether its reception is consistent with the interests of justice and the right to a fair trial.

In *Ex parte Rosch* [1998] 1 All 8A 319 (W) and *S v Ndiki and Others* [2008] (2) SACR 252 CK, the High Court recognised that information generated automatically by a computer system, without human intervention, may constitute real evidence rather than hearsay. In such cases, admissibility depends on the reliability and accuracy of the system and process that produced the information, rather than on the credibility of a human declarant. By contrast, *S v Brown* (1) SACR [2016] (WCC) illustrates that where electronic material reflects human creation or intervention, it may be more appropriately treated as documentary evidence.



Application of the law to the facts in *Mohapi Thabo*

The court held that the absence of the Vodacom employee as a witness was not fatal to the admissibility of the cell phone records. It accepted that admissibility is governed by the ordinary principles of evidence and that a court is not automatically required to hear from a Vodacom, MTN or Cell C employee, provided that a competent witness can explain how the data was obtained and why it can be regarded as reliable. On the facts, the court was satisfied that such evidence had in fact been led.

In reaching that conclusion, the court placed considerable weight on the experience and expertise of the state witnesses. Schnelle had extensive experience in telecommunications investigations within the South African Police Service. Neethling had long-standing experience in cell phone data tracking and mapping, and Budhia, a Vodacom radio engineer, gave evidence concerning the relevant base station coverage at OR Tambo International Airport. The court found that their evidence sufficiently explained how the records were generated, obtained and interpreted. Importantly, it was never put to any of these witnesses that the records had been altered or tampered with. Their evidence therefore stood uncontested.

The court then turned to the classification of the records themselves. It found that the Vodacom printouts had been generated by a computer and were not dependent on human intervention. For that reason, they were properly to be treated as real evidence. The court distinguished this from *S v Brown*, where the images in question had involved human creation and manipulation, making them more appropriately treated as documentary evidence. By contrast, in this matter, the cell phone data had been generated automatically by the telecommunications system and obtained pursuant to lawful process.

The court held that, once regard was had to the manner in which the records were produced and the competent explanatory evidence led by the state, the trial court had not misdirected itself in admitting and relying on the cell phone records. It also found that the admission of the records did not infringe the appellants' right to a fair trial and did not render the trial unfair. On that basis, the appeal against conviction and sentence was dismissed.



Key takeaways

The judgment confirms that cell phone records are not inadmissible merely because the party tendering them does not call a representative from the telecommunications provider. What matters is whether the court is presented with competent evidence explaining how the data was generated, obtained and analysed, and why it can be regarded as reliable.

The decision is also significant for its endorsement of a functional approach to electronic evidence. Courts will look beyond labels and assess whether the evidence was generated through human input or by an automated electronic process. Where the latter applies, such material may constitute real evidence rather than hearsay.

For litigants and practitioners, the judgment provides useful guidance on the evidential foundation required for the admission of electronic records. Although a service provider witness may in some cases remain desirable, the absence of such a witness will not necessarily be decisive if the reliability and integrity of the data can be established through other competent evidence.

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