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# SECTION 198A(3)(B) DEEMING PROVISION: LIABILITY FOR THE CLIENT EMPLOYER REGARDLESS OF THE ROLE THAT THE EMPLOYER STILL RETAINS

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## ISSUE

In the case of *General Industries Workers Union of South Africa obo Mgedezi and Others v Swissport SA (Pty) Ltd and Another* [2019] 9 BALR 954 (CCMA) the three issues, all hinging on section 198A(3)(b) of the Labour Relations Act 66 of 1995 ("**LRA**"), which arose before the Commission for Conciliation, Mediation and Arbitration ("**CCMA**") were:

1. Whether the Applicants were permanent employees of the client;
2. If so, whether they were entitled to be "on the books" of the client; and
3. Whether they were entitled to equal benefits as compared to certain employees of the client?

## SUMMARY

The Applicants were deemed to be permanent employees of the client as they had been employed for longer than three months without a justifiable reason. However, this does not require the Applicants to be placed "on the books" of the client. Employees are only entitled to equal benefits if the TES employee performs the same or similar work as an employee for the client.

## FACTS

The three Applicants are employed by the second respondent, the Workforce Group ("**Workforce**"). The first respondent, Swissport SA (Pty) Ltd ("**Swissport / client**") is a client of Workforce. Two of the Applicants are employed as fork lift drivers and the third as an acceptance clerk. The Applicants render their services at the client's premises.

The Applicants referred a dispute to the CCMA relating to section 198D of the LRA with specific reference to the interpretation of section 198A(3)(b) and section 198A(5). Section 198A(3) provides that an employee:

*(a) performing a temporary service as contemplated in subsection (1) for the client is the employee of the temporary employment services in terms of section 198 (2); or*

*(b) not performing such temporary service for the client is*:

- *(i) deemed to be the employee of that client and the client is deemed to be the employer; and*
- *(ii) subject to the provisions of section 198B, employed on an indefinite basis by the client.*

Section 198A(3)(b)(i) therefore provides a deeming provision. Once it is established that the employees are deemed to be that of the client, section 198A(5) becomes applicable. Section 198A(5) provides that "an employee deemed to be an employee of the client in terms of subsection (3)(b) must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment."

The Applicants sought to be deemed indefinite employees of Swissport and to be transferred "onto the books" of Swissport. They also sought to receive the same benefits as employees of Swissport performing the same or similar work.

The facts indicated that the Applicants earned below the threshold of earnings as determined in the Basic Conditions of Employment Act 75 of 1997 and that Swissport was responsible for daily operations and supervision of the Applicants. There was a commercial relationship between Swissport and Workforce and the Applicants are "on the books" of Workforce and received the benefits that Workforce employees receive. Swissport employees received additional benefits such as pension fund, medical insurance, end of year discretionary bonuses and shift allowances if employees were on rotational shifts. Workforce employees did not receive these additional benefits. All fork lift drivers were employed by Workforce and Swissport did not employ any forklift drivers or acceptance clerks.

The Applicants contended that their positions were sufficiently similar to that of a cargo controller and therefore that position should be regarded as a comparator. No evidence was presented with regard to whether Swissport employed any acceptance clerks and therefore there was no comparator position for this position.

The Applicants' submissions before the CCMA were that forklift drivers were often required to stand in for cargo controllers and that they were required to train new controllers how to perform tasks. It was submitted that forklift drivers performed the same tasks as controllers with the exception of certain functions.

Workforce submitted that it conducted all disciplinary procedures after being notified of issued by Swissport. Swissport kept records of the employees but Workforce processed the payroll. Leave requests were authorised by both respondents.

Swissport provided testimony that the training and induction of new staff was done by Swissport. Tests, assessments and classroom induction were done and accordingly the Applicants were not responsible for this function. The distinction between the job functions of forklift drivers and cargo controllers was made – only three functions of a cargo controller could also be performed by a forklift driver. Forklift drivers could assist and perform the position of cargo controllers but only up to a specific point as forklift drivers did not possess the necessary skills and knowledge to perform all the functions of controllers. Swissport concluded that on this basis, the two positions were not sufficiently similar to be direct comparators.

## CCMA'S EVALUATION

The commissioner looked at section 198A(1) of the LRA which defines "temporary service" as "work for a client by an employee for a period not exceeding three months, or a substitute for an employee who is temporarily absent, or in a category of work specifically determined to be a temporary service". The commissioner held that it was common cause that the Applicants had been employed with Swissport for a period in excess of three months and no evidence was led that this employment was a temporary service. The deeming provision in section 198A(3)(b) therefore applied.

As such, the Applicants had to be treated on the whole not less favourably than an employee of the client performing the same or similar work, *unless* there was a justifiable reason for different treatment.

The commissioner held that the evidence supported the conclusion that the job functions of a forklift driver and a cargo controller differed. The two positions were not sufficiently similar to invoke the provisions of section 198A(5) of the LRA.

Further, the commissioner held that since there was no comparator for the acceptance clerk, the Applicants could not succeed in this claim.

It was held that Swissport was the Applicants' employer for the purposes of the LRA, however this did not imply that they should be placed "on the books" of Swissport.

In conclusion the commissioner held that the fact that the administration and remuneration of the Applicants were performed by Workforce and/or Swissport did not detract from the liability that Swissport had towards the Applicants. It was held that the

Applicants were deemed to be employed on an indefinite basis in terms of section 198A(3)(b) of the LRA. However the commissioner could not grant the relief sought that the Applicants obtain permanent employment contracts with Swissport.

## IMPORTANCE OF THE CASE

The key principles to extract from this case are:

1. that TES employees who are placed at a client in excess of three months and earn under the threshold are deemed permanent employees of the client for purposes of the LRA;
2. such employees nonetheless remain “on the books” of the TES provided that a contractual relationship remains between the TES and the client, maintaining a tripartite relationship; and
3. an employee can only claim equal benefits if their employment is of an indefinite nature and there is an identifiable comparator who does the same or similar work to that of the employee.




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