ARBITRATION AWARD

Commissioner	Hilary Mofsowitz
Case Number	WECT 18795-18
Date of Award	22 March 2019

In the matter between:

GIWUSA obo Mgedezi and others
(Applicant)

and

Swissport SA (Pty) Ltd
(First Respondent)

The Workforce Group (Pty) Ltd
(Second Respondent)

Applicants' representative	Abeedah Adams
Applicants' address	GIWUSA 41 Salt River Road Community House, Salt River, 7925
Telephone	021 447 6375
Telefax / E-mail	086 664 5479 / giwusa.wc.@gmail.com

First respondent's representative	Ntando Jane
First respondent's address	Swissport SA (Pty) Ltd P O Box 98 Cape Town International Airport 7525,
Telephone	021 812 3822
Telefax / E-mail	021 914 0377 / Ntando.jane@swissport.com

Second respondent's representative	Donna Nieman
Second Respondent's address	The Workforce Group (Pty) Ltd Second floor, Rosenpark 1 High Street, Bellville, 7530
Telephone	031 714 2800
Telefax/ E-mail	086 543 0296 / dnieman@workforce.co.za

Details of hearing and representation

1. This is the award in the matter between General Industrial Workers Union of South Africa ("GIWUSA") on behalf of Xolani Mgedezi ("Mgedezi"), Zanemvula Mndawo ("Mndawo") and Tshzamile Nogenge ("Nogenqe") (to be referred to collectively as "the applicants") and Swissport SA (Pty) Ltd ("the first respondent) and the Workforce Group (Pty) Ltd ("the second respondent"). Abeedah Adams ("Adams") an official of GIWUSA represented the applicants. Two other officials of GIWUSA also represented the applicants. They were Phethani Madzivhandila and Timoti Klaas. Ntando Jane ("Jane") the national human resources business partner represented the first respondent. Donna Nieman ("Nieman") the legal officer represented the second respondent.

2. Arbitration was held at the offices of the CCMA in Cape Town on 22 February 2019 and 7 March 2019. Closing argument in the form of written submissions was received on 14 March 2019. The proceedings were digitally recorded. The documentary evidence forms part of the record.

The issue to be decided

3. The issue to be decided relates to section 198D of the Labour Relations Act 66 of 1995 as amended ("the LRA") with specific reference to the interpretation of section 198A (3) (b) (i) and (ii) and 198A (5) of the LRA. The applicants seek to be deemed indefinite employees of the first respondent and to be transferred "onto the books" of the first respondent. The applicants also seek to receive the same benefits as employees of the first respondent performing the same or similar work.

Background to the dispute

4. It is undisputed that the three applicants are currently employed by the second respondent, the Workforce Group. They were employed between 2014 and 2017. Mgedezi and Mndawo are employed as fork lift drivers. Nogenge is employed as an acceptance clerk. It is undisputed that Swissport, the first respondent, is a client of the Workforce Group and that the three applicants render services at the client's premises (from the time that they commenced employment). Swissport offers ground handling and cargo services at the airport.

5. Both respondents conceded that Swissport is the applicants' employer for purposes of the LRA and Swissport accepts liability for the applicants on all issues related to the LRA. The respondents' version is that the client is responsible for daily operations and supervision. The applicants did not dispute this. The respondents' version is that the human resources and industrial relations functions are performed by the Workforce Group. The applicants dispute this. It is common cause that there is a commercial relationship between the two respondents.

6. It is undisputed that all the applicants are "on the books" of the Workforce Group and receive the benefits that employees of the Workforce Group receive. The Workforce Group remunerates the applicants. It is undisputed that employees of Swissport receive additional benefits such as pension fund, medical insurance, end of year discretionary bonus and shift allowance if on rotational shifts. It is undisputed that employees of the Workforce Group do not receive these benefits. It was undisputed that all fork lift drivers are employed by the Workforce Group and that Swissport does not employ any forklift drivers. The applicants, however, are of the opinion, that the position of cargo controller is sufficiently similar to theirs and therefore the position of cargo controller ought to be regarded as the comparator. It is undisputed that Swissport does employ cargo controllers. It was undisputed that cargo controllers enjoy better benefits than the applicants. There was no evidence that Swissport employs any acceptance clerks and therefore no position of comparator was placed before me.

7. It was common cause that the applicants earn below the threshold of earnings determined in terms of section 6(3) of the Basic Conditions of Employment Act 75 of 1997 as amended ("the BCEA").

8. All parties agreed that the Constitutional Court judgment in *Assign Services (Pty) Ltd v NUMSA and others (2018) 9 BLLR 837 (CC)* is binding on the parties and that I must have regard to this decision. The applicants conceded this.

Summary of evidence and argument

Applicants' submissions

9. Xolani Mgedezi ("Mgedezi") (one of the applicants), testified in support of all the applicants. It was agreed that his testimony would represent the testimony of all the applicants. Mgedezi confirmed his duties as a forklift driver and testified that he performs additional duties such as packing, cleaning, preparing and collecting pallets and cargo handling. He (and other forklift drivers) are required to stand in for the controllers when the controllers are not available. Forklift drivers are required to show and train new controllers how to perform their tasks, as well as familiarize them with their duties until such time as they became more competent. It was the evidence of Mgedezi that forklift drivers performed the same tasks as controllers with the exception of the scanning function. These additional tasks were performed from "time to time".

The Respondents' submissions:

10. Marco Russel ("Russel") testified. He is the operations controller for the second respondent, the Workforce Group. The essence of his testimony is that he has responsibility for issuing warnings to employees at various client sites, including Swissport. At most times, the client advises him, he investigates and institutes the necessary procedures. The client keeps records of their employees' and then the Workforce Group processes the payroll system. Leave requests are authorized by him and the client.

11. Basil Hanekom ("Hanekom") testified. He is employed by Swissport as a cargo manager. It was his evidence that Colin Jacobs ("Jacobs") the training and compliance duty manager, is responsible for training and induction of new staff. Tests and assessments are administered. Classroom induction is also carried out. The applicants were not responsible for this function. Hanekom also confirmed the difference between the job functions of forklift drivers and cargo controllers. He referred to the job description of cargo controllers (which is part of the record). In terms of the job description of a controller, there are only three functions which forklift drivers also perform, but these are under the instruction of controllers. On this basis, it was his conclusion that the two positions are not sufficiently similar to be direct comparators. Forklift drivers operate under supervision of cargo controllers and the warehouse controller. Forklift drivers can fulfill the role of cargo controllers on an ad hoc basis if the need requires it. Forklift drivers can assist in the orientation of new cargo controllers (specifically on practical aspects), but only up to a specific point. Controllers are trained on certain technical aspects according to a program and the related assessments. The forklift drivers do not possess the necessary skills and knowledge to perform all of the functions of controllers.

Analysis of evidence and argument

12. Section 198A (3) of the LRA provides as follows:

"For the purposes of this Act, an employee –

(a) Performing a temporary service as contemplated in subsection (1) for the client is the employee of the temporary employment service 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."

13. In section 198A(1), "temporary service" is defined as work for a client by an employee for a period not exceeding three months, or as a substitute for an employee who is temporarily absent, or in a category of

work specifically determined to be a temporary service. It was common cause that the applicants did not perform a "temporary service" as envisioned by the LRA.

14. It is common cause that the applicants have been employed in the service of the client, Swissport, for a number of years (certainly in excess of three months) (approximately between two to five years). There was no evidence that the applicants performed a temporary service. It is therefore evident that the deeming provision in terms of section 198A(3)(b) is applicable. All parties conceded this. The client is deemed to be the employer. The applicants are therefore deemed to be the employees of Swissport, and in terms of the Constitutional Court judgement in the *Assign Services* matter, Swissport is deemed to be the employer for the purposes of the LRA. In terms of section 198A (5) of the LRA the applicants 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.

15. It was undisputed that the client does not employ forklift drivers. Forklift drivers are supplied by the Workforce Group (undisputed). However, the applicants have compared themselves with cargo controllers (who do have better benefits than forklift drivers). While some of the duties do seem to overlap, the evidence supports the conclusion that the two jobs are different in many respects. The job of cargo controller carries more responsibilities and additional tasks which the forklift drivers do not perform. The job description of cargo controllers was not placed in dispute. The applicants conceded that they perform some of the responsibilities of the controllers and only from "time to time" and on an ad hoc basis. Even when forklift drivers perform the same function as cargo controllers, this is done under the supervision of controllers. This is indicative that controllers carry more responsibility and hold a more senior position. Forklift drivers do not operate in the same full capacity of cargo controllers. For example, cargo controllers perform functions such as flight planning and organizing of equipment, workforce, flight arrivals and departures. Forklift drivers do not perform these functions. Cargo controllers are responsible for completion of all required messaging and relevant flight documentation. Forklift drivers do not perform these functions. Cargo controllers are responsible for certain legal documentation. Forklift drivers are not. While forklift drivers may assist in the orientation of new controllers, this does not mean that the two positions carry the same weight or responsibility. New controllers are still required to undergo formal classroom assessments which is undertaken by the training manager. New controllers are still required to participate in formal inductions which is undertaken by the training manager. The applicants conceded that they are not accredited trainers. On an assessment of the evidence, I find that the two positions are not the same or sufficiently similar to warrant a conclusion that the applicants must be treated on the whole not less favorably than cargo controllers employed by the client. The work of cargo controllers is not sufficiently similar to invoke the provisions of section 198 A (5) of the LRA. In respect to Nogenge, an acceptance clerk, no comparator was placed before me. It was established as common cause that

Swissport does not employ any other acceptance clerks. A deemed employee must be treated on the whole no less favourably than an employee of the client performing the same or similar work. In the circumstances, as there were no comparators employed by the client, the applicants cannot succeed in this claim.

16. Section 75 of the Constitutional Court judgment provides the following: "Section 198 (2) gives rise to a statutory employment contract between the TES and the placed worker, which is altered in the event 198A (3) (b) is triggered. This is not a transfer to a new employment relationship but rather a change in the statutory attribution of responsibility as employer within the same triangular employment relationship. The triangular relationship then continues for as long as the commercial contract between the TES and the client remains in force and requires the TES to remunerate the workers". Based on this, I have accepted the existence of the triangular employment relationship. I have accepted that the client Swissport is the applicants' employer for the purposes of the LRA. This kicks in by operation of law. This finding is supported by the constitutional court decision. The court decision is clear that there is no requirement for the client to step into the shoes of the TES. The employment relationship between the placed worker and the client arises by operation of law. This is independent of the terms of any contract between the placed worker and the TES.

17. This does not imply that the applicants must be "on the books" of Swissport. The constitutional court decision makes it clear that it is not required to transfer the applicants to the new employment relationship. Swissport is required to take responsibility for the applicants in terms of the "deeming" provision of the LRA. This means that the applicants are deemed to be indefinitely employed by Swissport for the purposes of the LRA. Swissport (and the Workforce Group) have conceded this and understand the implications. This award will also confirm this requirement.

18. The constitutional court accepted that post deeming, where the placed employee is deemed to be employed by the client for the purposes of the LRA, the TES (1) may retain a role in the practicalities of the relationship (including to remunerate employees); (2) may maintain a contractual relationship with the employee; (3) may maintain a contractual relationship with the client; and (4) may participate in litigation where the employee seeks to pursue a claim founded on the TES's joint and several liability. Based on this, I have concluded that it is not material who regulates administration and remuneration (be it the TES or the client or both) as it has no bearing on the outcome of this case. Based on the decision of the constitutional court, it is not required that the applicants' contracts of employment be transferred from the Workforce Group to the client, Swissport. In view of the special relationship and commercial relationship between the two entities and the nature of the relationship, the fact that human resources and industrial relations are performed by the Workforce Group and/or Swissport, does not detract from the liability that Swissport has towards the applicants.

Award

19. The applicants are deemed to be employed on an indefinite basis in terms of section 198A(3)(b)(i) and (ii) of the LRA by Swissport SA (Pty) Ltd (the client) which is their employer for the purposes of the LRA.

20. The relief the applicants seek in terms of permanent employment contracts with Swissport cannot be granted.

Hilary Mofsowitz
CCMA Senior Commissioner