IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 55/2019

In the matter between:

DAVID VICTOR & 200 OTHERS	**Appellants**
and	
CHEP SOUTH AFRICA (PTY) LTD	**First Respondent**
COMMISSIONER J SHARDLOW N.O.	**Second Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Third Respondent**
CONTRACTA-FORCE CORPORATE SOLUTIONS (PTY) LTD	**Fourth Respondent**

Heard: **3 September 2020**

Delivered: **16 September 2020**

Summary: *Temporary employment service--- Application of deeming provision in s 198A(3)(b) of LRA---Section 198 of LRA 1995---Whether service provider a TES depending on nature of the service agreement, the degree of control exercised over the service provider by the client and the degree that service provider's employees are integrated into client's workplace---determination both factual and legal---client exercising control over production and having an overriding oversight, supervisory and disciplinary authority----Such factors indicative that service provider a TES in terms of s198 of the LRA 1995.*

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Coram: Davis JA, Murphy AJA and Kathree-Setiloane AJA

JUDGMENT

MURPHY AJA

[1] The 201 appellants are employed by the fourth respondent, Contracta-Force Corporate Solutions (Pty) Ltd ("C-Force"), to repair wooden pallets for the first respondent, Chep South Africa (Pty) Ltd ("Chep"). They referred a dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") in which they sought a declaration deeming them to be employees of Chep in terms of section 198A(3)(*b*) of Labour Relations Act[1] ("the LRA") and to be entitled to equal treatment in terms of section 198A(5) of the LRA. The appeal raises important questions regarding the rights of employees procured by labour brokers to provide work to their clients.

[2] Our law regarding temporary employment services (known colloquially as "labour broking") is set out in Chapter IX of the LRA. The issue has been one of some controversy over several years and has resulted in recent legislative reform aimed at affording additional protection to vulnerable workers. Despite demands for prohibition, Parliament stopped short of banning labour broking but enacted several amendments to the LRA to provide greater employment security and to regulate the industry.

[3] A labour broker that hires out labour is considered to be a "temporary employment service" ("TES"), defined in section 198 of the LRA to mean:

> 'any person who, for reward, procures for or provides to a client other persons –
>
> (a) who perform work for the client and
>
> (b) who are remunerated by the temporary employment service.'

[4] In terms of section 198(2) of the LRA, a TES is deemed to be the employer of the persons whose services have been procured for or provided to the client by

[1] Act 66 of 1995.

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the TES. However, both the TES and its client are rendered jointly and severally liable if the TES contravenes a binding collective agreement, wage determination or arbitration award, or the provisions of the Basic Conditions of Employment Act[2] ("the BCEA").[3]

[5] In 2014, Chapter IX of the LRA was amended to insert section 198A introducing additional protections for employees in precarious employment.[4] Section 198A of the LRA regulates "temporary service" employment. It applies only to employees earning below a threshold prescribed by the Minister in terms of section 6(3) of the BCEA.[5] Section 198A(1) of the LRA defines "a temporary service" to mean work for a client for a period not exceeding three months; as a substitute for an employee of the client who is temporarily absent; or in a category of work and for a period of time determined to be a temporary service in a bargaining council collective agreement or sectoral determination.

[6] Section 198A(3)(*b*) of the LRA enacts another important deeming provision. It provides that an employee not performing a temporary service for a client is deemed to be an indefinitely employed employee of that client and the client is deemed to be the employer. Accordingly, while a TES is normally regarded as the employer of the workforce it procures and provides to perform work for the client, section 198A(3)(*b*) has introduced a different arrangement for employees falling below the specified earning threshold who work for more than three months. Such employees are deemed to be the client's employees.[6] The contractual relationship between the client and the placed employee does not come into existence through a negotiated agreement or through the normal recruitment processes used by the client. Employees paid less than the threshold amount, and who work for a TES for more than three months, automatically become employed by the client on the same terms and conditions

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[2] Act 75 of 1997.
[3] Section 198(4) of the LRA.
[4] Labour Relations Amendment Act 6 of 2014.
[5] Section 198A(2) of the LRA
[6] To prevent the client from attempting to avoid the operation of section 198A(3)(*b*) of the LRA, the legislature has added section 198A(4) of the LRA, which provides that if a TES or client terminates an employee's assignment to avoid the operation of section 198A(3)(*b*) of the LRA, that termination will be considered a dismissal and the usual remedies available through the LRA will apply.

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of its similar employees, with the same employment benefits and the same job security that follows.[7]

[7] The effect of these provisions, as relevant to the present case, is that if an employee of a TES, paid remuneration below the prescribed threshold, works for a client in excess of three months, he or she will be deemed an employee of the client employed on an indefinite basis. Then, in terms of section 198A(5) of the LRA, such employee 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. However, to be deemed an employee employed by the client on an indefinite basis, and to be treated not less favourably than the client's employees, the employee is first required to establish that the initial employer is indeed a "temporary employment service" as defined in section 198(1) of the LRA.

Factual background

[8] CHEP hires out pallets which are used for the storage and transportation of goods in the logistics industry. The pallets require conditioning, repairs and refurbishment. CHEP and C-Force concluded an agreement in 2009 in relation to the conditioning of these pallets which service was to be rendered by C-Force to CHEP. Subsequently, on 12 November 2014, CHEP and C-Force concluded a service level agreement ("the SLA"). The two agreements are substantially similar except that the 2014 SLA specifies that C-Force is appointed as an independent contractor, and that neither C-Force nor any of its personnel is deemed to be an agent, employee or partner of Chep. It is not disputed that C-Force operated as a TES under the 2009 agreement. The SLA of 2014 aimed at establishing different legal relationships.

[9] The most relevant provisions of the SLA oblige C-Force to: i) render pallet conditioning services to Chep at its premises in accordance with Chep's requirements; ii) attend to the staffing and management of the plant at which the pallets are conditioned; iii) ensure that it employs sufficient adequately

[7] *Assign Services (Pty) Ltd v National Union of Metalworkers of SA & others* (*Casual Workers Advice Office as Amicus Curiae*) (2018) 39 ILJ 1911 (CC) [2018] 9 BLLR 837 (CC).

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trained and inducted employees for C-Force to render the pallet conditioning services; iv) properly supervise and manage its employees; v) ensure compliance with Chep's health and safety policies; vi) condition a specified number of pallets in accordance with specified quality criteria; vii) supply and maintain small tools; viii) man and operate the plant during specified working hours; ix) meet certain production volumes; and x) conduct quality audits in conjunction with Chep which may result in a reduction of the fee payable with reference to conditioned pallets which do not meet the applicable quality criteria.

[10] The fee payable by Chep to C-Force is calculated based on the number of pallets conditioned by C-Force; and Chep is obliged to compensate C-Force for any loss in production which loss was caused by Chep.

[11] The SLA specifically records that C-Force is appointed as a service provider, and that the relationship between Chep and C-Force is one of client and independent contractor. C-Force further warrants that it is not a labour broker or personnel service provider.

[12] In terms of the SLA, Chep determines production levels and is entitled to conduct daily quality audits to measure C-Force's performance against agreed targets and deviation levels, and to impose penalties if targets are not met. Moreover, Chep is required to provide all raw materials, necessary plant, equipment and consumables required by C-Force to enable it to carry out the services, and must attend to the maintenance and repairs of plant equipment supplied by it.

[13] Chep also reserved to itself the right to request that any C-Force employee be removed from the site, if they do not comply with the SLA and C-Force must ensure that these persons cease providing services to Chep immediately.

[14] In accordance with the SLA, C-Force employed various persons, including the appellants, who continue to render services under the SLA in respect of the conditioning of the pallets, including supervisors who supervise the appellants in the performance of their pallet conditioning work. It is undisputed that the

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appellants have performed work at Chep for more than three months and earn below the threshold.

The referral to arbitration

[15] The appellants referred a dispute to the CCMA in terms of section 198A(3)(*b*) of the LRA read with section 198D of the LRA which provides *inter alia* that any dispute arising from the interpretation or application of section 198A of the LRA may be referred to the CCMA or relevant bargaining council for conciliation and, if not resolved, to arbitration.

[16] In their referral, the appellants alleged that C-Force was a TES which had placed them at Chep and sought confirmation that Chep was their deemed employer in terms of section 198A(3)(*b*) of the LRA. Both Chep and C-Force opposed the relief sought at arbitration and contended that C-Force was not a TES, but an independent contractor or service provider to Chep.

[17] A dispute of this kind requires the commissioner to determine if the deeming provision in section 198A(3)(*b*) of the LRA has become operative and whether there may be a justifiable reason for differential treatment of the employees, as contemplated in section 198A(5) of the LRA, with regard being had to seniority, experience, length of service, merit, the quality or quantity of work performed and other criteria of a similar nature.[8]

[18] The parties concluded a pre-arbitration minute which recorded as common cause that the appellants were employees of C-Force and the remuneration of all the appellants is less than the threshold referred to in section 198A(2) of the LRA. The pre-arbitration minute identified the issues in dispute as being whether: i) C-Force renders a temporary employment service as defined in section 198(1) of the LRA; and ii) C-Force for reward provides to Chep the appellants to perform work for Chep and at the premises of Chep. The dispute was set down for arbitration in October and November 2015. The commissioner separated the issues and confined himself to determining whether C-Force was

[8] Section 198D(2) of the LRA.

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a TES and, in the event that it was, to set the matter down for arbitration in terms of section 198D of the LRA to deal with the issues of equalisation.

[19] The appellants' case was that C-Force is a TES, as it provides labour to Chep who perform work for a client that determines the methods of work and monitors and controls the work performed by them. Chep denied that C-Force was TES on the basis that it provides a service to Chep as an independent contractor.

[20] After hearing the evidence of three witnesses, two of the appellants and a foreman employed by Chep on behalf of the respondents, the commissioner held that C-Force is a TES as defined in section 198(1) of the LRA and set the matter down for arbitration in terms of section 198D of the LRA.

[21] The commissioner placed little reliance on the evidence of the witnesses and focused instead upon the undisputed facts and the arrangement established by the SLA. As he saw it, there were three "critical issues" to be considered in deciding whether C-Force was a TES, namely (i) the nature of the SLA, (ii) the degree of control exercised over C-Force by Chep, and (iii) the degree that C-Force is integrated into Chep's workplace. He noted in particular that there was no evidence showing that C-Force owned a fully equipped service facility where it repaired pallets using its own raw materials, plant and equipment. Instead, on the face of it, C-Force merely provides employees to Chep to perform work for Chep, which is limited to the repair of pallets, in just the same way as a TES would do. Chep furnishes the timber used to repair the pallets and supplies and maintains the plant and equipment (with the exception of small hand tools, such as hammers), conveyors, fork-lift trucks and the nail guns necessary to recondition the pallets.

[22] The commissioner found that there was not an "arms-length" relationship between Chep and C-Force and that the repair of pallets is an integral part of Chep's operations. In his view, if C-Force was a service provider, the work it performed would not be integrated to the extent that it is but would only be an accessory to the client's business. C-Force does not enjoy discretion as to how the work is to be performed. The SLA prescribes not only the desired results, but the manner in which those results are to be achieved, with almost no latitude

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granted to C-Force to achieve what is required by Chep. He accordingly accepted the submission that Chep exercises overall control over the activities of the appellants.

[23] Moreover, Chep sets production targets, monitored by its staff, with negative deviations being brought to the attention of C-Force for redress. The SLA also provides rules to control the conduct and behaviour of the workers and makes provision for a worker who does not comply with Chep's rules to immediately cease to provide services. Although the workers are not directly supervised by Chep, it retained the right to instigate disciplinary proceedings against the workers albeit that the disciplinary action would be taken by C-Force's management.

[24] The commissioner concluded as follows:

> 'The applicants contend that notwithstanding the wording of the SLA which describes the relationship as one between a service provider/independent contractor and a client, the client exercises almost complete control on how the work is to be performed, therefore the true relationship is between a TES and a client. Independent contractors generally have significant scope and freedom to perform the services it has been contracted to perform in any manner it sees fit. ....The SLA allows no independent action on the part of Contra-Force (sic).
>
> A TES which is intent on being considered a service provider may describe itself as a service provider but still hire out employees to a client to perform work. The fact that the SLA states that Contracta-Force will provide a service conditioning pallets and will receive an agreed activity fee in return does not in my view mean that it is not a TES. After all a TES also provides services to its client."

The Labour Court proceedings

[25] CHEP challenged the commissioner's ruling on review before the Labour Court alleging that the commissioner had committed gross irregularities; made decisions that were unreasonable and irrational; committed material errors of law resulting in him misconstruing the true nature of the dispute and asking the wrong question, thus depriving the parties of a fair trial of the issues.

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[26] Chep argued that the definition in section 198(1) of the LRA prescribes only three cumulative requisites for a person to constitute a TES, namely: i) the procurement or provision of personnel to a client for reward; ii) such personnel must render services or perform work for the client; and iii) such personnel must be remunerated by the person or company that provides them to the client.

[27] This, according to Chep, means that before a service provider will be a TES, personnel (and their labour and productive capacity) must be placed at the behest of the client as opposed to the provision of a specific output, product and/or result. Likewise, the services are to be rendered to the client and not the TES, with the TES playing a passive role in relation to the services within the tripartite relationship, and with the client being the direct recipient of the services.

[28] Chep contended that the commissioner misdirected himself by having regard to the degree of control exercised over C-Force by Chep and the degree to which C-Force is integrated into Chep's workplace. These considerations, it argued, do not form part of "the definitional elements" of a TES set out in section 198(1) of the LRA. The commissioner, therefore, asked and answered the wrong questions which resulted in an irregularity amounting to a material error in law as he misconstrued the nature of the dispute and thus deprived the parties of a fair trial. The Labour Court (van der Merwe AJ) agreed with that contention.

[29] The learned acting judge reasoned as follows:

> 'The SLA specifically provides for the delivery of a specified product, namely repaired wooden pallets and it can thus not be said that C-Force is providing Chep with "other employees" or that it places the workers with Chep. C-Force provides a product and not individual labour to Chep…C-Force is not receiving a reward or a fee for providing employees to Chep. C-Force, as a service provider, is receiving an agreed price for a specified product, which is markedly different form a TES or labour broker, receiving a fee or reward for every employee that it places with its client. The arrangement for receiving an agreed price for a specified product falls outside the statutory definition of a TES.

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> The C-Force employees in the matter at hand also were not made available to Chep in pursuing Chep's own business purposes. Being remunerated at an agreed price for a specified product, reflects an arrangement whereby C-Force is pursuing its own business purposes, being the delivery of repaired wooden pallets, that meet the minimum standard set by Chep and, in this sense, the C-Force employees are not provided to Chep to perform work for Chep.'

[30] With regard to the commissioner's taking account of the considerations of control and integration to determine if the appellants had been procured or provided to "perform work for the client" as contemplated in section 198(1) of the LRA, the Labour Court held:

> 'These so-called "critical" issues are materially misaligned with the requirements identified by s 198(1). Section 198(1) is silent regarding an enquiry into the degree of control by the client over the TES and certainly does not suggest that an evaluation should be performed to determine the level of integration into the client's business. The Commissioner's ruling was therefore based on an incorrect interpretation of the law and as such constituted a material error of law.'

[31] On this basis, the Labour Court set aside the award and substituted it with orders declaring that: i) C-Force is not a TES as defined in section 198(1); and ii) the deeming provision in section 198A(3)(*b*) of the LRA does not apply to C-Force's workforce engaged at Chep.

[32] The appellants contend that the Labour Court erred in interpreting the relevant provisions of the LRA with insufficient regard to their protective and social purpose. The LRA, they argue, was amended in 2014 in order to address more effectively the abusive practices associated with labour broking. The amendments are aimed at balancing important constitutional rights and to protect more vulnerable, lower-paid workers. Section 198A exists to fill a gap in accountability between client companies and employees who are placed with them.[9] The purpose of section 198A must be contextualised within the right to fair labour practices in section 23 of the Constitution of the Republic of SA 1996

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[9] *Assign Services (Pty) Ltd v National Union of Metalworkers of SA & others (Casual Workers Advice Office as Amicus Curiae)* (2018) 39 ILJ 1911 (CC) [2018] 9 BLLR 837 (CC) at para 70.

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and the purpose of the Act as a whole. The respondents, on the other hand, align with the reasoning of the Labour Court.

Evaluation

[33] Objective proof that a person is a TES is a condition precedent to the operation of the deeming provision in section 198A(3)(*b*) of the LRA, akin to a jurisdictional fact, and is a mixed question of law and fact. Thus, the Labour Court, as it correctly held, was required to decide if the commissioner's finding was correct, as opposed merely to being reasonable.

[34] As explained earlier, section 198(1) of the LRA defines a TES as any person who for reward, procures for or provides to a client other persons who perform work for the client and who are remunerated by the TES. It is common cause that C-Force remunerated the appellants. The question to be decided therefore, is whether C-Force for reward procured or provided the appellants to perform work for Chep. This involves consideration of various relevant factors. Ultimately, no single factor is decisive. A purposive interpretation giving effect to the objects of the legislative policy and the protective provisions is required.

[35] The Labour Court's finding that C-Force does not provide Chep with "other employees" because the SLA specifically provides for "the delivery of repaired wooden pallets" takes insufficient account of the fact that Chep is essentially responsible for the appellants' working conditions, through their placement at its premises, its control over the manner of work and its residual power to discontinue their services.[10] C-Force did not "deliver" repaired wooden pallets; its employees, under Chep's supervision, refurbished the pallets at Chep's premises using raw materials and equipment supplied by Chep.

[36] Similarly, its reasoning that a TES relationship cannot exist where workers are involved in the provision of a service on behalf of a business to a client, beyond being merely supplied as labour, is too restrictive an interpretation which would allow contractual manipulation of triangular employment arrangements to avoid

[10] Clause 5.3 of the SLA reads: "On request by Chep, the Service Provider must procure that of the Employees who do not comply with the provisions of this Agreement, immediately ceases to provide the Services" (sic).

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the provisions of section 198A of the LRA too easily, thereby undermining the protective purpose of section 198A of the LRA.

[37] The first question in deciding if a company is a TES in terms of section 198(1) of the LRA is whether it has provided other persons to a client for reward. Where workers are brought to the client by a third party to perform work at its premises, such normally will be at least an indication that the workers were procured to work for the client, especially if the client retains overarching control over the work process and can determine whether a worker continues to perform his or her work at all.

[38] The next question is whether the provider procured the workers for reward. The Labour Court found that C-Force is not receiving a reward or a fee for providing employees to Chep but was receiving an agreed price for producing a specified product or outcome. It is paid for the number of pallets conditioned, less any penalties in the event of targets or quality not being met.

[39] There is no reason in principle why the reward payment to a TES cannot be calculated by reference to tasks or product. All that section 198(1) of the LRA requires is that workers be provided to a client for reward and that the worker be remunerated by the provider. The method for computing the reward payable by the client to the provider is not alone sufficient basis to exclude the provider from the TES category. Moreover, the substance of the arrangement is more definitive than the form. And what is clear in this instance is that the reward paid by Chep to C-Force was in substance driven primarily by the labour costs of refurbishing the pallets. Clause 11.1 and 11.2 of the SLA provide that Chep will pay C-Force a base price for every pallet conditioned, set out in Annexure 2 to the SLA, which may be re-negotiated on an annual basis, having regard to increased labour costs and any increased input by C-Force. Although the invoices purport to price per pallet, the expected production and pricing set out in Annexure 2 to the SLA is at a rate per "man-hour" set by ordinary and overtime wages payable at different rates, making it clear that the labour component is the essential cost driver. Other costs of the reconditioning process (raw materials, equipment, electricity, consumables and premises) are met by Chep.

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[40] The requisite element that the persons procured for reward and provided to a client "perform work for the client" entails an examination of the substance of the relationship between the client and the workers. The commissioner understood this to oblige him to consider (i) the nature of the SLA; (ii) the degree of control exercised over C-Force and the workers by Chep; and (iii) the degree that the workforce is integrated into Chep's workplace and organisation. These are legitimate and relevant factors, the consideration of which is essential to determining the substance of the relationship and whether (in fact and in law) work is performed for the client rather than the TES. They relate directly to the preconditions of section 198(1) of the LRA and the Labour Court erred in holding otherwise.

[41] Questions of control and integration, including the manner in which the workers work; the authority to which they are subjected; the degree they are integrated into the functioning of the organisation; and the provision of the tools of the trade and work equipment are relevant (possibly the only) factors in deciding if procured persons "perform work for the client". Where a client contractually controls the overall work process of persons who work at its premises, as well as their conduct and behaviour, such persons ordinarily will be deemed to work for the client. While the SLA requires C-Force to attend to the staffing and management of the plant and the workforce, as mentioned earlier, other provisions of the SLA give Chep an overriding oversight, supervisory and disciplinary authority.

[42] In its information sheet advertising its services, Chep describes itself as a leading provider of pallets and equipment-pooling services. It describes equipment pooling as "the shared use of high-quality standard pallets and containers by multiple customers who collectively benefit from the network scale of the pool, versus trying to manage reusable equipment individually". After pallets are used by customers, they are returned to Chep for refurbishing. Hence, pallet repair is an integral part of Chep's business performed by the workers procured for Chep by C-Force.

[43] In finding that C-Force was a TES and not a service provider the commissioner therefore relied appropriately on the following key considerations: i) the

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refurbishing. Hence, pallet repair is an integral part of Chep's business performed by the workers procured for Chep by C-Force.

[43] In finding that C-Force was a TES and not a service provider the commissioner therefore relied appropriately on the following key considerations: i) the requisite raw materials, plant and equipment are supplied and maintained by Chep; ii) pallet conditioning forms an integral part of Chep's business; iii) C-Force does not enjoy a discretion as to how the work is to be performed; iv) the SLA prescribes the desired results and the manner in which these results are to be achieved, during the hours prescribed by Chep and in accordance with Chep's policies and instructions; v) Chep exercises overall control over the workers' activities, sets production targets and provides detailed rules of conduct; vi) Chep may require a worker to immediately cease to provide services due to non-compliance with its rules; and vi) Chep has the right to instigate disciplinary proceedings against the workers.

[44] The commissioner did not err in taking these factors into account. Indeed, he would have erred had he not done so. He rightly found on consideration of these factors and on the construction of the SLA that the workers perform work for Chep. The appellants were accordingly provided to Chep by C-Force for reward to perform work for Chep. Hence, C-Force was a TES. The commissioner's decision was correct and there was no basis to review it. The Labour Court thus erred in setting aside the award.

[45] Neither party seeks costs of the appeal.

[46] In the result, the orders of the Labour Court are set aside and substituted with an order dismissing the application.

JR Murphy

Acting Judge of Appeal

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I agree

DM Davis

Judge of Appeal

I agree

F Kathree-Setiloane

Acting Judge of Appeal

APPEARANCES:

FOR THE APPELLANTS: Adv K Hardy

Instructed by Casual Workers Advice Office (Law Centre)

FOR THE RESPONDENTS: Adv L Erasmus

Instructed by: Kirchmanns Inc

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