



ilera **AFRICA**  
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# **“DEVELOPMENTS IN IDENTIFYING THE TRUE EMPLOYER OF THE EMPLOYEE IN THE CONTEXT OF LABOUR BROKERS”**

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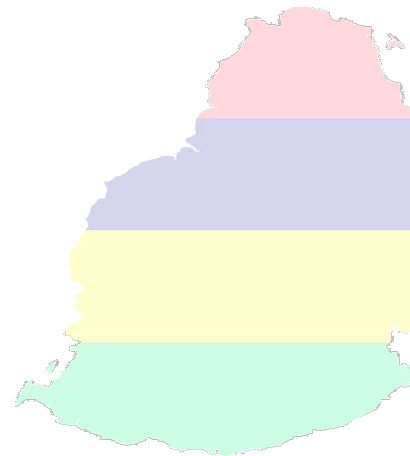
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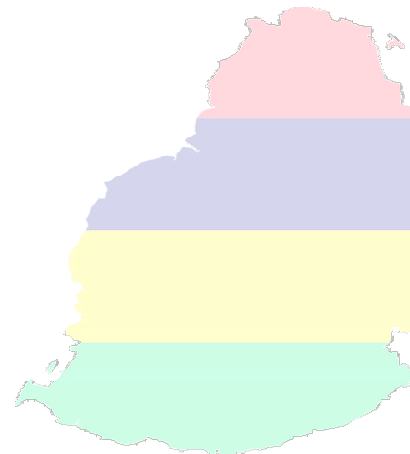
# ORDER OF PRESENTATION

1. INTRODUCTION
2. BACKGROUND TO S198A
3. POSITION IN NAMIBIA
4. SECTION 198A THROUGH THE CASES
5. CONCLUSION



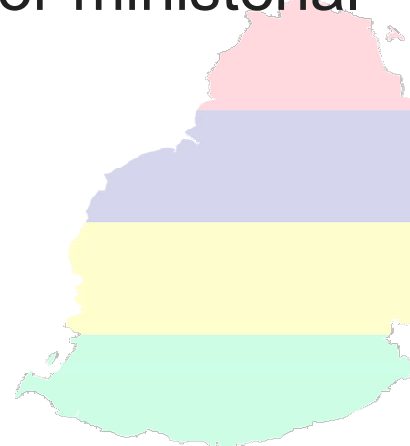
# INTRODUCTION

- a. The practice of Labour Brokering – Brief Description
- b. Crux of argument - 'Sole employer' interpretation preferred



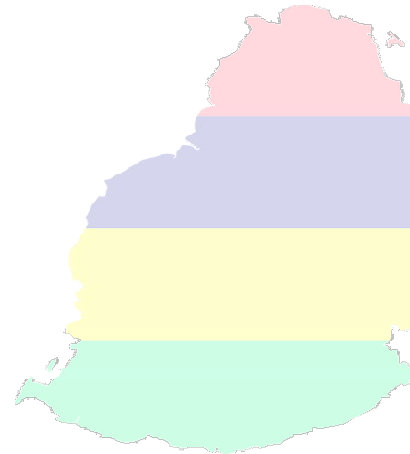
# MEANING OF 'TEMPORARY SERVICE'

- a. For a period not exceeding three months;
- b. As a substitute for an employee of a client who is temporarily absent;  
or
- c. In a category of work: collective agreement (BC level), or ministerial  
determination



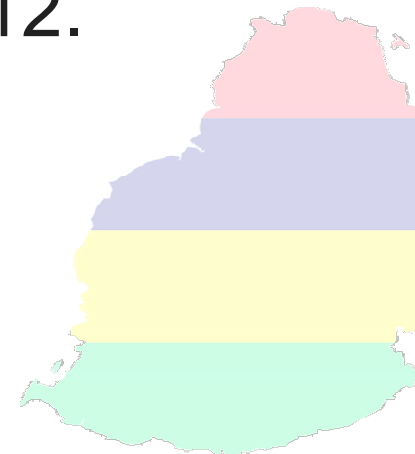
# SECTION 198A OF THE LRA

- Introduced by 2015 amendments to the LRA
- Purpose was to bring about improved regulation of the TES industry and enhanced protection for workers it engages.
- Consider definition of 198A and its 3 pre-requisites



# POSITION IN NAMIBIA

- The concept of “labour hire”
- The practice was banned in 2007
- Re-instated in 2009 without concomitant legislation
- Regulation brought about by amendments in 2012.



# SECTION 198A THROUGH THE CASES

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*



# ***ASSIGN SERVICES CCMA, 2015***

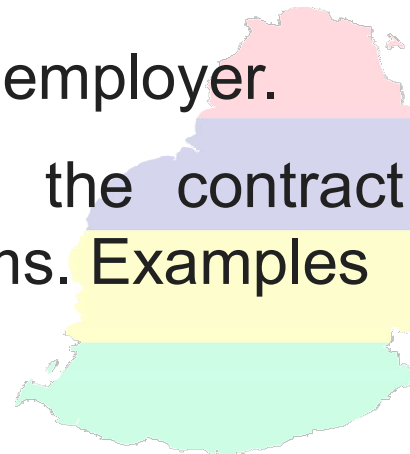
- **Applicant** (*Assign*)- Dual employment position.
- **Respondent** (*NUMSA*)- Sole employment position
- **Commissioner:** “In my opinion the deeming provision in Sec 198A(3)(b) should be interpreted akin to how the law deals with the concept of “adoption”
- **Commissioner:** mindful of the challenges - discipline and re-instatement





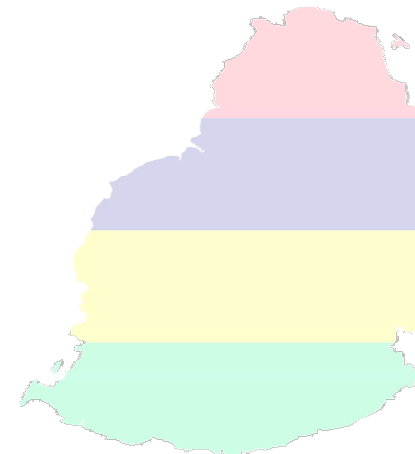
# ***ASSIGN SERVICES LABOUR COURT, 2015***

- On review : Commissioner erred in law
- **Firstly:** section has the effect of the client becoming the employer of the placed employee after three months has lapsed for purposes of the LRA (and no other purpose) and is independent of the contract between the TES and the worker.
- **Secondly:** section does not serve to make the client the employer.
- Nothing in 198A(3)(b)(i) has the effect of invalidating the contract between the TES and the worker or detracts from its terms. Examples



# CONT...

- **Only issue for determination:** whether the TES continues to be the employer of the worker and is concurrently vested with rights and duties
- Worker protected automatically-: no public policy considerations resulting in the placed worker having to sacrifice these rights on the basis that the TES found placement at the client.
- Found that a dual employment relationship exists.



# ***NUMSA V ASSIGN SERVICES***

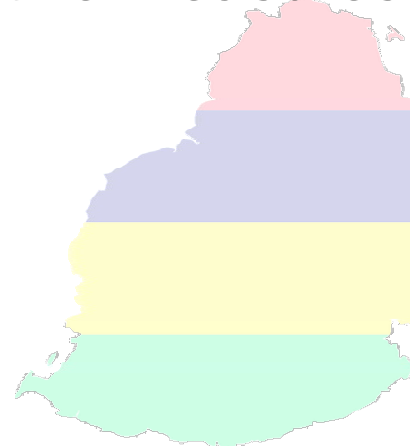
## **LABOUR APPEAL COURT, 2017**

- LAC overturned the judgment of the LC.
- **Considered:** relevant constitutional and statutory interpretive injunctions in the light of the ***purpose*** of the LRA and the provisions of section 198 as well as the Explanatory Memorandum accompanying the LRA Amendment Bill
- **Found that:** The sole employer interpretation is consonant with the main thrust of the amendments to s198 and 198A outlined in the Explanatory Memorandum



# CONT...

- In addition to the deeming provision, further measures were introduced into section 198A to protect vulnerable employees.
- **198A(4)**- protects against dismissal
- **198A(5)** protects against unfair discrimination
- **Does not mean:** worker is employed by both, but protective measures in place: worker integrated into the enterprise of client.



# CONT...

- **Joint and several liability:** employee may institute action against either the TES or client or both – is a measure to protect lower-earning workers- to confine the TES and have the potential to discourage further involvement.
- **Relationship between workers and the client in court's view relating to amendments:**
  - no provision that the contract is transferred from the TES to the client.
  - no provision to the effect that after the lapse of the three month period , the client replaces the TES.
  - no provision that the TES and the client become joint employers upon expiration of the three month period.
  - amendments do not stipulate that the client is added to the equation as an employer.
- Purpose not to transfer the contract, but to create a statutory employment relationship

# CONT...

- **Purpose of amendments** - to upgrade worker to the standard employment and free worker from atypical employment
- **No sense:** to retain TES. “would be the employer only in theory and an unwarranted “middle-man” adding no value to the employment relationship.”
- **TES may remain** for various reasons.
- **The court asserted:** the employment relationship is created by operation of law and is independent of the relationship between the TES and the worker.

# CONCLUSION

- The challenges elicited above *seem to favour* the view that the sole-employer interpretation would be the preferred approach by the Constitutional Court
- However, it also remains to be seen whether the Court will refer the mischief created by the amendments, back to the legislature.

