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# NUMSA v Assign Services & Others

## (2017) 38 ILJ 1978 (LAC)


**Neil Coetzer**

# Overview

- Debate over labour brokers has been raging for some time.
- ‘Labour broker’ inserted into LRA (1956) in 1983
  - any person who for reward procures and provides persons to work or provides services for a client and who remunerates those persons.
  - If these elements present, labour broker ‘deemed’ to be employer.

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# Overview

- Amendment to LRA (1995) in 1998
  - renaming of ‘labour broker’ to ‘TES’.
  - Section 198(2) – creates a statutory employment relationship (not a deeming clause).
  - Joint and several liability introduced.

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# Overview

- Use of TES increased dramatically
  - Employers sought to minimize employment costs and reduce risks associated with employment i.e. CCMA disputes
  - Led to abuse – East Rand Proprietary Mines in 2002
- DoL commissioned research project into the issue
  - Employees paid significantly less;
  - No security of employment.

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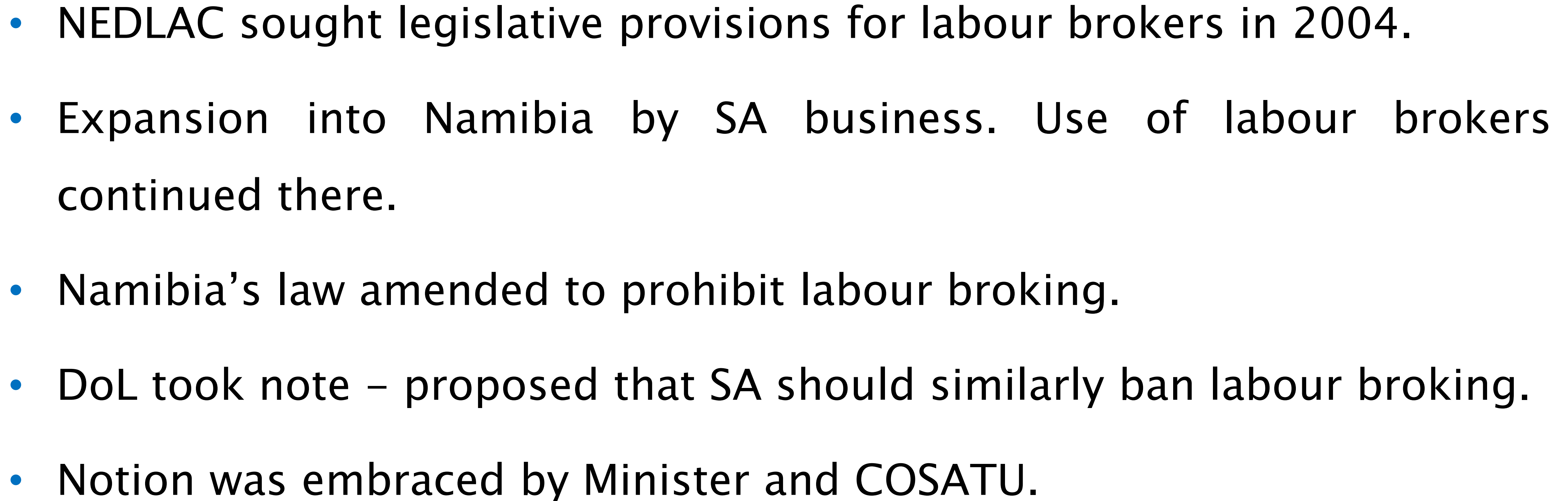
# Overview



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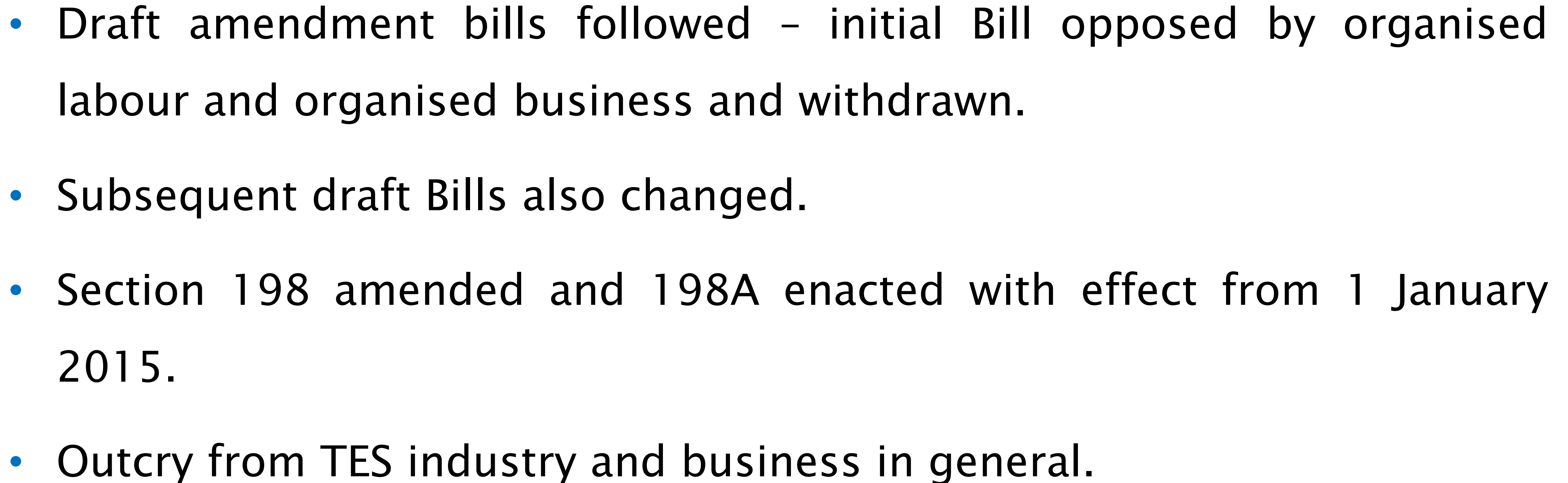
# Overview



- Draft amendment bills followed – initial Bill opposed by organised labour and organised business and withdrawn.
- Subsequent draft Bills also changed.
- Section 198 amended and 198A enacted with effect from 1 January 2015.
- Outcry from TES industry and business in general.

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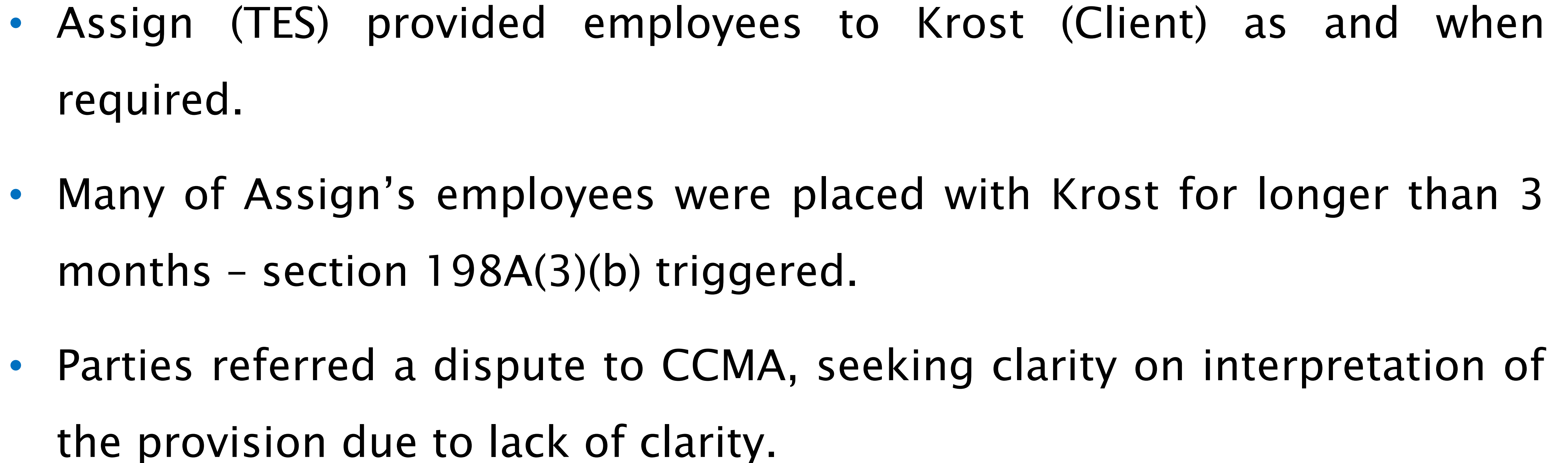
# Facts in brief



- Assign (TES) provided employees to Krost (Client) as and when required.
- Many of Assign's employees were placed with Krost for longer than 3 months – section 198A(3)(b) triggered.
- Parties referred a dispute to CCMA, seeking clarity on interpretation of the provision due to lack of clarity.

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# Facts in brief

- CCMA
  - Employees of Krost, since employed for longer than 3 months;
  - Sole employer construction.

- Assign approached Labour Court to review.

# Facts in brief

- Labour Court
  - Nothing in the deeming provision invalidated contracts of employment between Assign and employees;
  - No reason why Assign should be relieved of its statutory duties and obligations;
  - Section 198(3)(b) creates dual employment model operating in parallel

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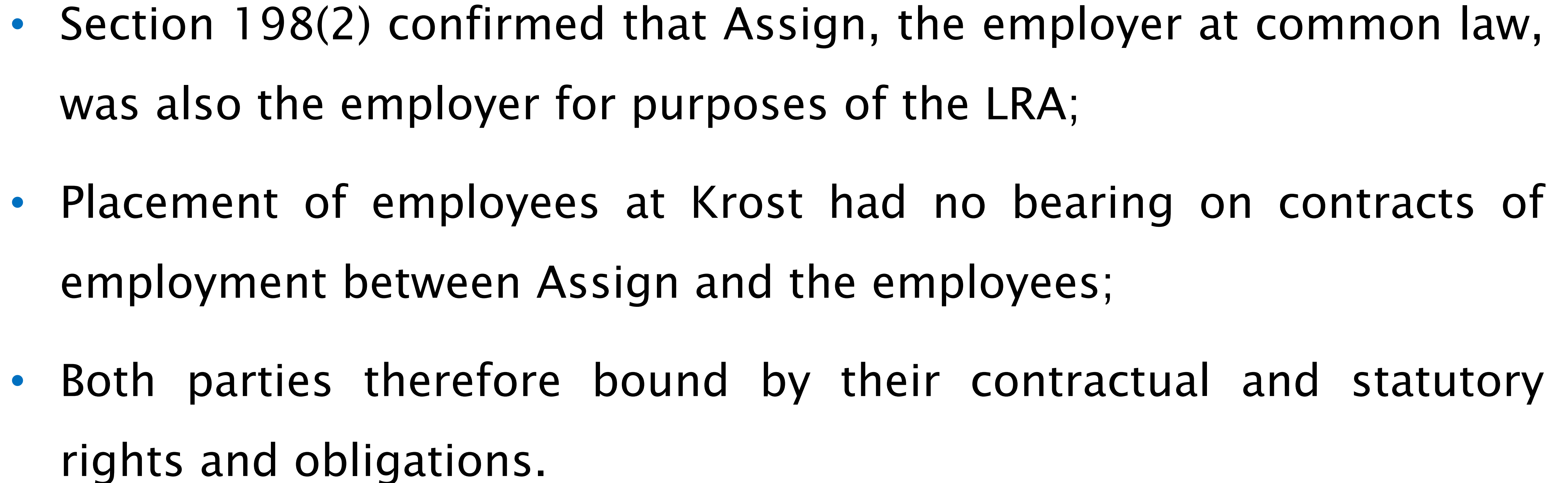
# Facts in brief



# Judgment of LAC

- Issue on appeal
  - Interpretation of s198A(3)(b) – deeming provision.
- ‘temporary service’ places emphasis on nature of the service, rather than who the person rendering the service is or the recipient of the service.
- This is useful in determining who the employer of the placed worker is.

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# Judgment of LAC

- Service by a placed worker which does not fall within the defined category and which is in excess of 3 months is not a ‘temporary service’ for purposes of the LRA.
- Section 198A(3)(b) – client is deemed to be employer, subject to s198B, on an indefinite basis.
- Sole employer interpretation in line with objects of amendments – Explanatory Memorandum to LRA Amendment Bill, 2012.

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# Judgment of LAC

- Purpose of amendments – ‘to restrict the employment of more vulnerable, lower-paid workers by a TES to situations of genuine and relevant “temporary work”’.
- Sections 198A(4) and (5) introduced to provide protection for vulnerable workers.
- Purpose is to ensure that deemed employees are fully integrated into client’s business.

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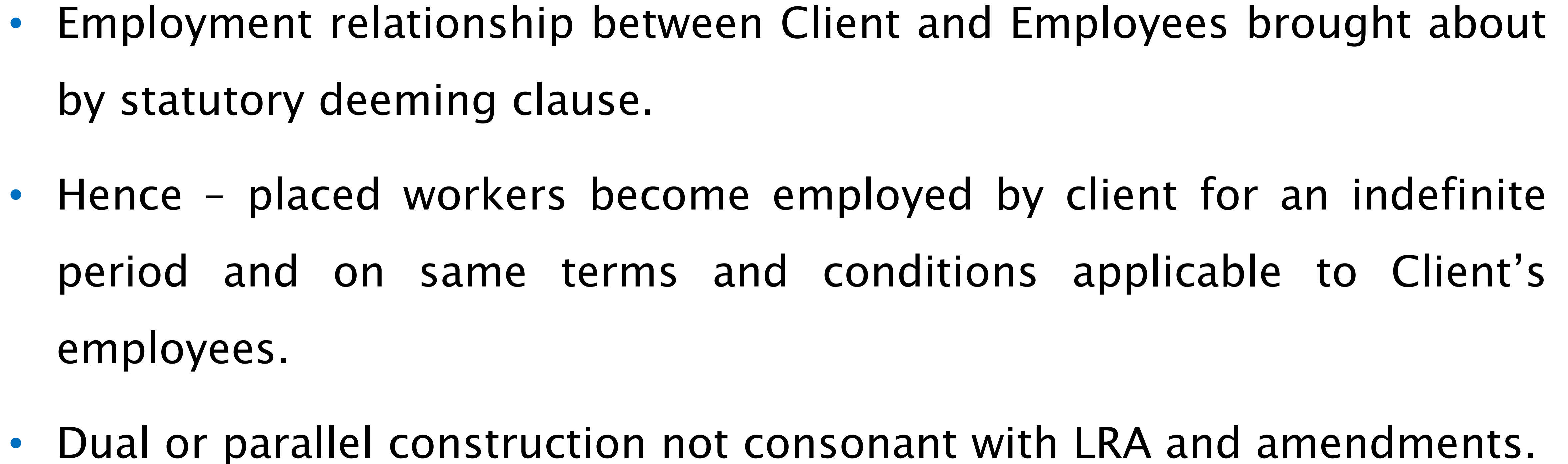
# Judgment of LAC



- Employment relationship between Client and Employees brought about by statutory deeming clause.
- Hence – placed workers become employed by client for an indefinite period and on same terms and conditions applicable to Client's employees.
- Dual or parallel construction not consonant with LRA and amendments.

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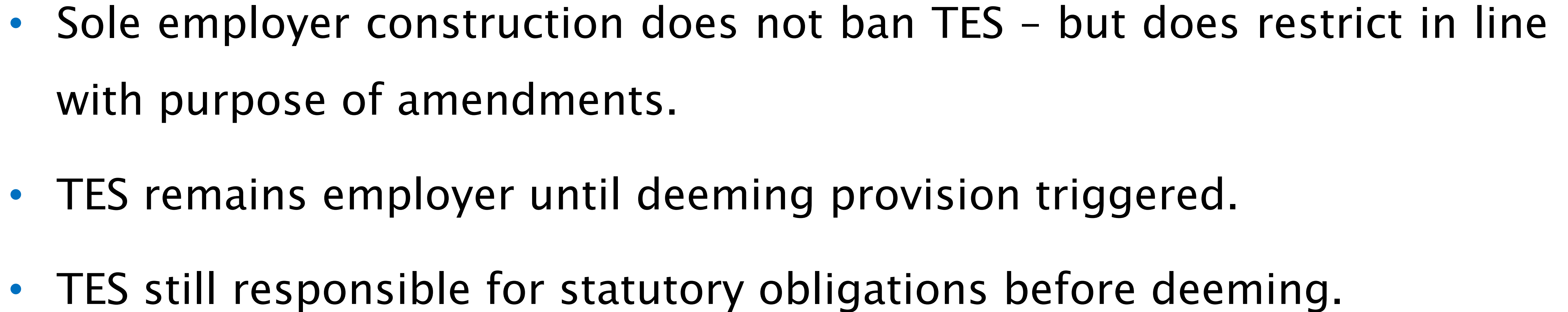
# Judgment of LAC



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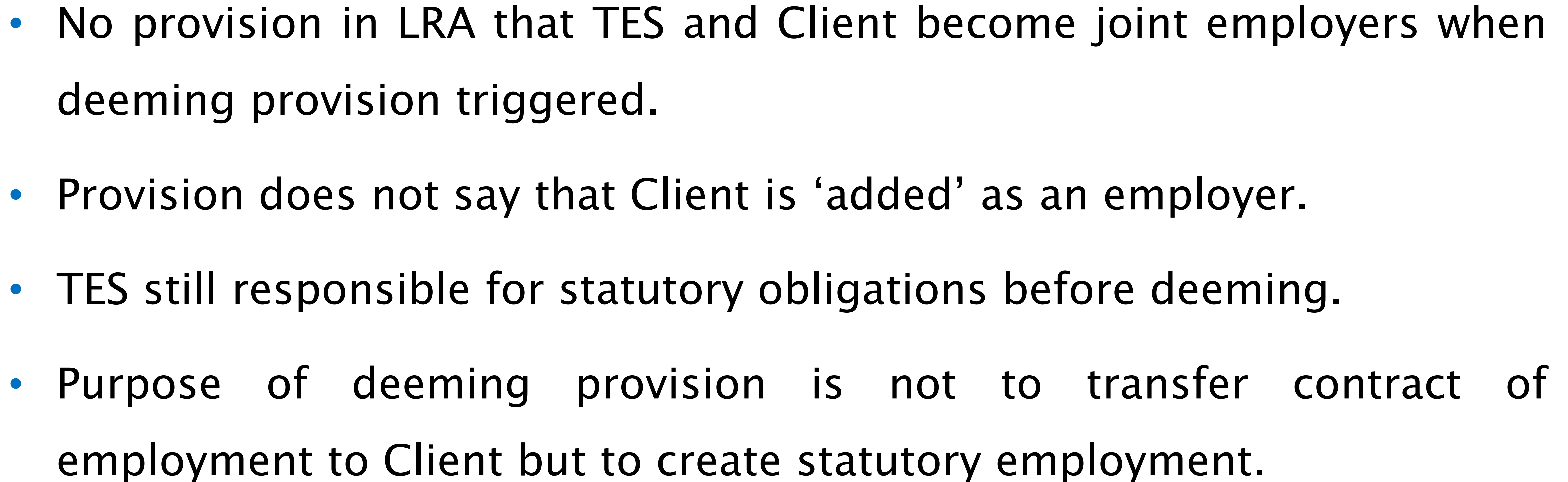
# Judgment of LAC



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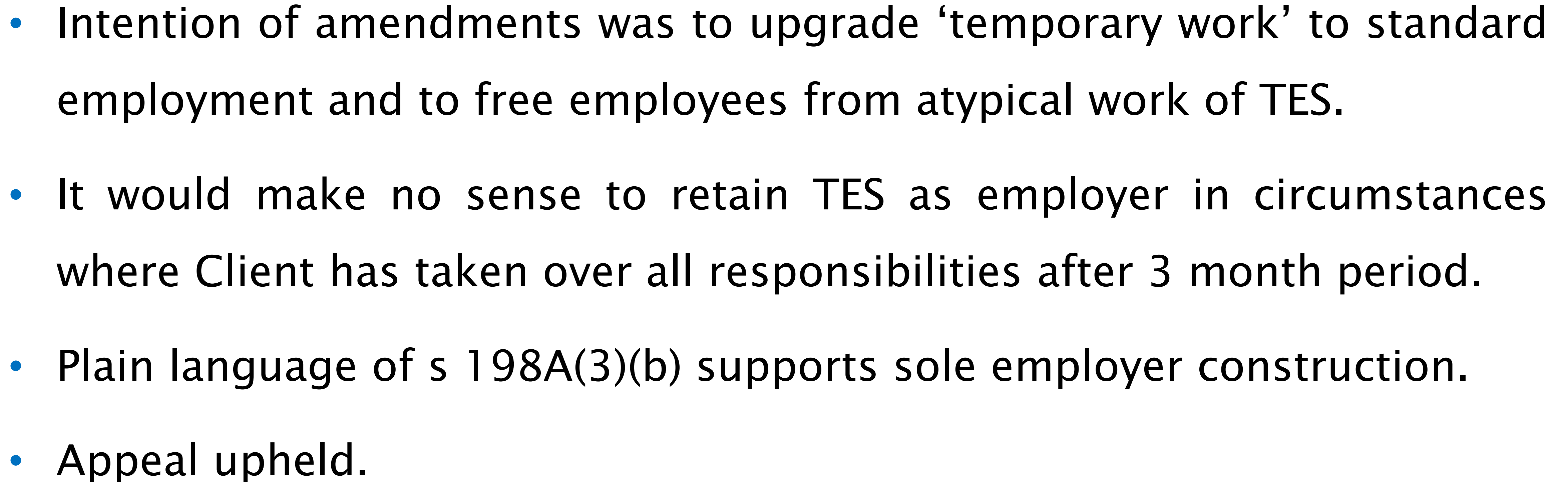
# Judgment of LAC



- Intention of amendments was to upgrade ‘temporary work’ to standard employment and to free employees from atypical work of TES.
- It would make no sense to retain TES as employer in circumstances where Client has taken over all responsibilities after 3 month period.
- Plain language of s 198A(3)(b) supports sole employer construction.
- Appeal upheld.

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# Practical Implications

- Pending appeal – judgment of LAC suspended.
- Client finds itself with new permanent employees (subject to FTC).
- TES falls out of the equation for purposes of LRA.
  - Partial ban of TES? Is this constitutional?
- Equal treatment for new employees

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# Practical Implications

- Responses from employers
  - Take on employees?
  - Retrenchments & restructuring?
  - Contracting to an independent Service Provider?
  - Automation and mechanization?
  - Employer organizations to lobby for amendments?

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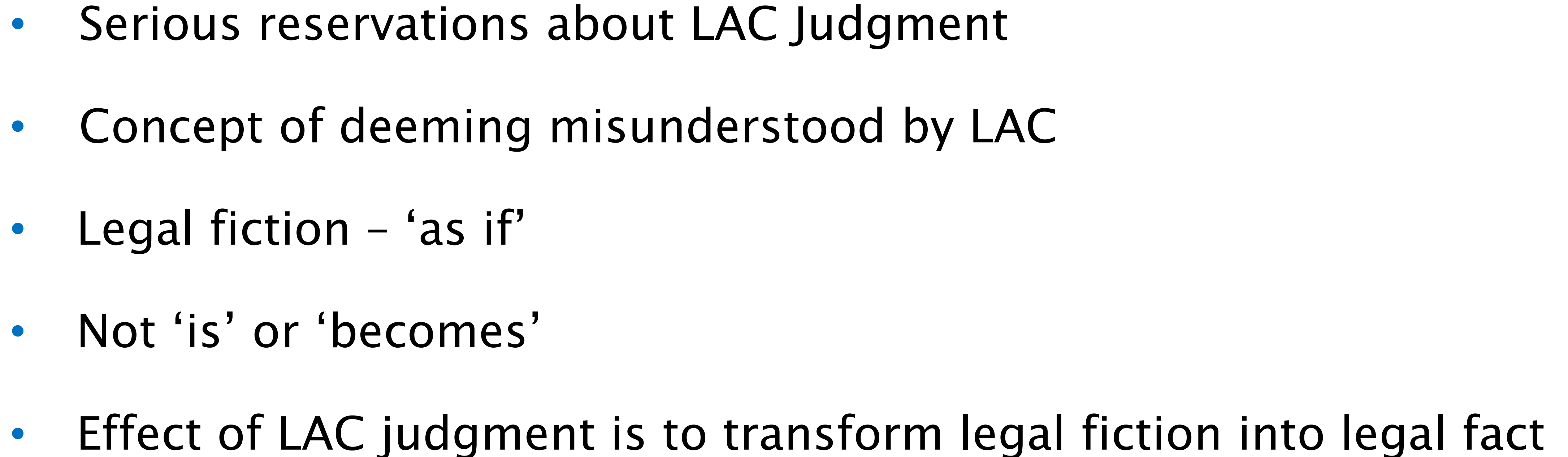
# Is the LAC Judgment correct?



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# Is the LAC Judgment correct?

- Section 198(2)

  "*For purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer.*"

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# Is the LAC Judgment correct?

- Not a deeming provision
- Creates a statutory form of employment – TES is employer
- BCEA creates obligations for 'employer'
  - Provide written particulars of employment;
  - Pay severance pay;
  - Grant leave and monitor working time arrangements

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# Is the LAC Judgment correct?

- TES may also terminate contract of employment in terms of BCEA
- BCEA's provisions not amended to accommodate section198(3)(b) i.e. the deeming clause
- Cannot hold TES liable under BCEA to do certain things as employer, while LRA excludes TES as employer for purposes of the LRA
- LRA must be read with BCEA

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# Is the LAC Judgment correct?

- *Ekurhuleni Metropolitan Municipality v SAMWU* [2015] 1 BLLR 34 (LAC):-

  "*In terms of the basic tenets of our law on the interpretation of statutes, the BCEA cannot be interpreted in a manner which conflicts with the LRA. They must be interpreted as being in harmony with each other.*"

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# Is the LAC Judgment correct?

- **Memorandum of Objects, 2012**:-

"*Section 198 of the Act continues to apply to all employees. It retains the general provisions that a [TES] is the employer of persons whom it employs and pays to work for a client, and that a [TES] and its client are jointly and severally liable for specified contraventions of employment laws.*"

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# Is the LAC Judgment correct?

*"The proposed amendment seeks to clarify provisions relating to [TESs] by providing the following:-*

- *An employee bringing a claim for which a TES and client are jointly and severally liable may institute proceedings against either the TES or the client or both and may enforce any order or award made against the TES or client against either of them."*

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# Is the LAC Judgment correct?

- *"A labour inspector acting in terms of the BCEA may secure and enforce compliance against the TES or the client, as if it were the employer, or both."*

- Legal fiction intended.

# Is the LAC Judgment correct?

- **Section 198(3)(b) – the deeming provision**

*"(3) For the purposes of this Act, an employee –*

*(b) Not performing such temporary service for the client is –*

*(i) <u>deemed to be the employee of that client</u> 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."*

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# Is the LAC Judgment correct?

- Deeming provision to 'augment' or 'supplement' provision in section198(2) to include the client as an employer
- Section 198(2) not amended to cross-refer to deeming provision i.e. 'subject to section198(3)(b)' or to say that section198(2) no longer applies when section 198(3)(b) is triggered
- Parallel employment construction seems obvious – 2 distinct employment relationships

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# Is the LAC Judgment correct?

- **Memorandum of Objects, 2012**:-

*"The proposed section 198A seeks to introduce additional protection for employees who earn below the threshold… For the purposes of the [LRA], employees are treated as the employees of the client if they work for a period in excess of three months."*

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# Is the LAC Judgment correct?

- Purpose of amendment – Protection of vulnerable workers
  - Permanent employment;
  - Pay equality

- LAC believes that sole employer construction provides greater protection. Matter of opinion.

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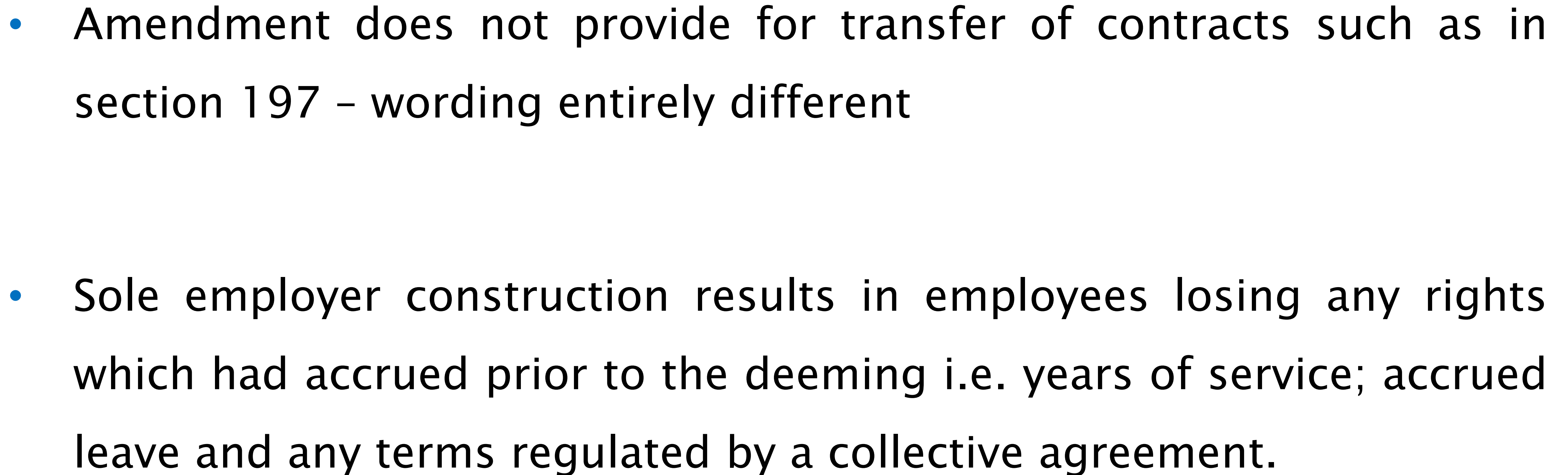
# Is the LAC Judgment correct?



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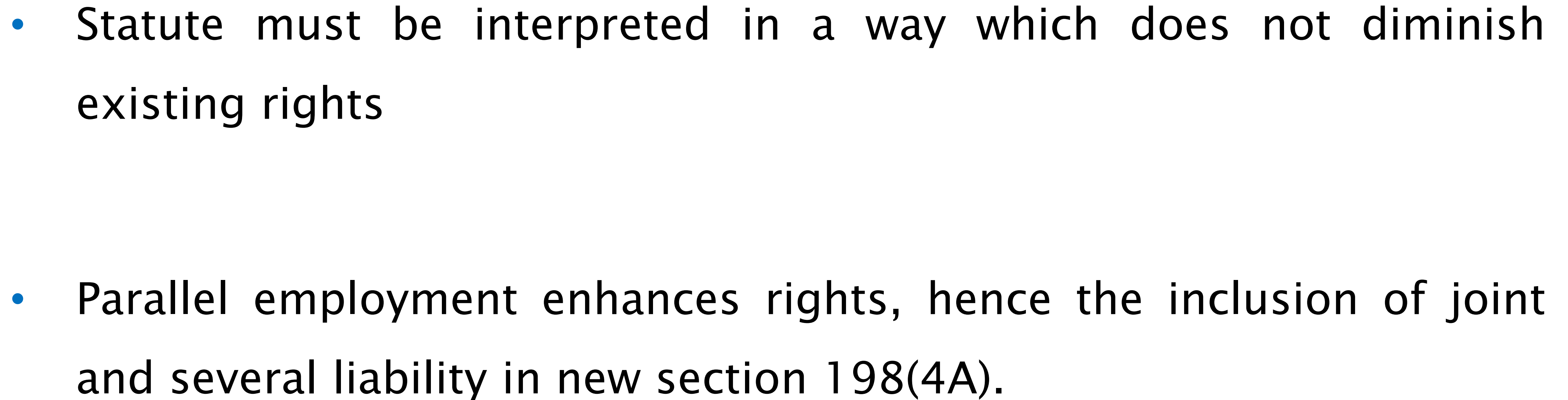
# Is the LAC Judgment correct?



- Statute must be interpreted in a way which does not diminish existing rights
- Parallel employment enhances rights, hence the inclusion of joint and several liability in new section 198(4A).

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# Is the LAC Judgment correct?

- LAC's sole employer construction seems contrary to express provisions of the LRA:-
  - Ignores plain wording of section 198(2) & provisions of BCEA; and
  - Does not explain on what basis contractual and/or statutory obligations simply evaporate.

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# Rule of Law

- Rule of law is central to the integrity of our Constitutional democracy .

- South Africa is a state founded on, *inter alia*, the Rule of law (s1(c) of the Constitution).

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# Rule of Law

**Section 1** of the Constitution states as follows:-

*The Republic of South Africa is one, sovereign, democratic state founded on the following values:-*

a) *Human dignity, the achievement of equality and the advancement of human rights and freedoms.*
b) *Non-racialism and non-sexism.*
c) *Supremacy of the constitution and the rule of law.*
d) *Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness"*

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# Rule of Law

- What is the Rule of law?
- The law must, as far as possible, be:-
    - Accessible;
    - Intelligible;
    - Clear; and
    - Predictable.

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# Rule of Law

- Section 198A(3) is unclear.
- No clarity on various consequences of deeming:-
  - What happens to contracts of employment?
  - Is only client required to consult in s189 process?
  - Does client or TES take disciplinary action?
  - Are both client and TES required to give notice of termination in terms of BCEA?

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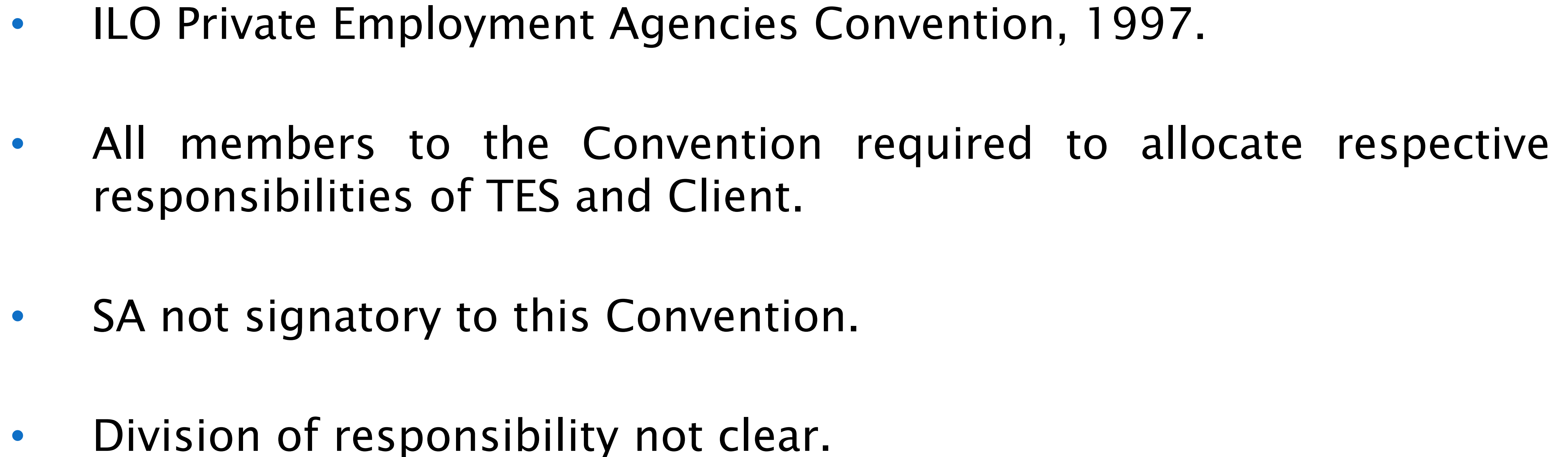
# International Law



- ILO Private Employment Agencies Convention, 1997.
- All members to the Convention required to allocate respective responsibilities of TES and Client.
- SA not signatory to this Convention.
- Division of responsibility not clear.

# International Law

**Article 12** of the Convention states as follows:-

- "*A member shall determine and allocate, in accordance with national law and practice, the respective responsibilities of private employment agencies providing the services referred to in paragraph 1(b) of Article 1 and of user enterprises in relation to:-*
  - *collective bargaining;*
  - *minimum wages;*
  - *working time and other working conditions;*
  - *statutory social security benefits;*
  - *access to training;*
  - *protection in the field of occupational safety and health;*
  - *compensation in case of occupational accidents or diseases;*
  - *compensation in cases of insolvency and protection of workers claims;*
  - *maternity protection and benefits, and parental protection and benefits*".

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# Rule of Law

- LAC's interpretation means that these issues are irrelevant since TES falls away after 3 months. Easy way out.
- Section could be interpreted either way – sole or dual employer construction theoretically possible.
- Why use 'deemed' if the intention is to 'become'?
- Drafting not clear – offends the Rule of Law.
- Constitutional Court will need to clarify the issue.

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# Rule of Law

In *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC):-

- *"It is vague because, on its own terms, its meaning is so broad that it borders the absurd, and yet its context provides no definitive limited meaning. In the light of this conclusion, it seems to me impermissible, as the majority judgment does, to attach an interpretation to the section which is not suggested by its context. <u>To do so is an exercise in drafting, not interpretation. Drafting should be left to the Legislature</u>".*

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# Rule of Law

- Is it unconstitutional? No challenge at present.

- Section 172(1) of the Constitution states as follows:-

*"When deciding a constitutional matter within its power, a court-*

*(a) must <u>declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency</u>; and*

*(b) may make any order that is just and equitable, including-*

- *an order limiting the retrospective effect of the declaration of invalidity; and*
- *an order suspending the declaration of invalidity for any period and on any conditions, <u>to allow the competent authority to correct the defect</u>".*

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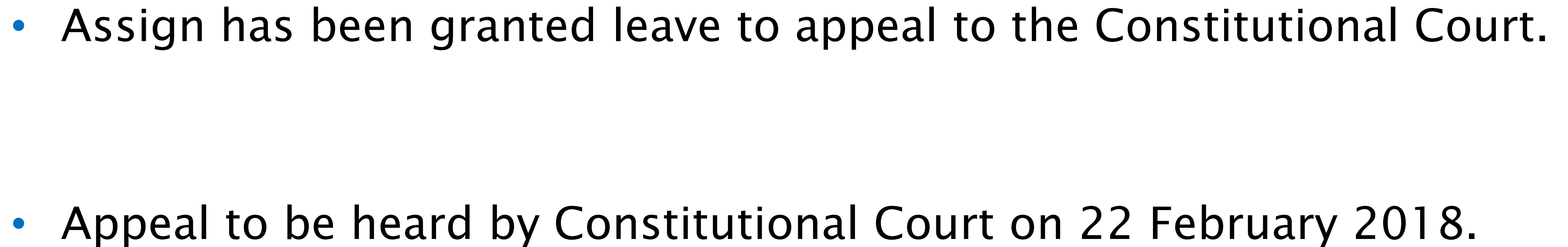
# Constitutional Court



- Assign has been granted leave to appeal to the Constitutional Court.

- Appeal to be heard by Constitutional Court on 22 February 2018.

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# Where are we now?

- Attempts to circumvent or defeat purposes of s198A(3) prohibited by LRA.
- Drafters of section 198A anticipated this.
    - Section 198A(4)
    - Section 200B
- Will result in test cases / legal proceedings.

# Where are we now?

- Section 198A(4).

*"The termination by the temporary employment service of an employee's service with a client, whether at the instance of the temporary employment service or the client, for the purpose of avoiding the operation of subsection (3) (b) or because the employee exercised a right in terms of this Act, is a dismissal."*

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# Where are we now?

- Section 200B – simulated transactions to circumvent

*"(2) If more than one person is held to be the employer of an employee in terms of subsection (1), those persons are jointly and severally liable for any failure to comply with the obligations of an employer in terms of this Act or any other employment law."*

- Incidentally, also envisages a dual-employment relationship.

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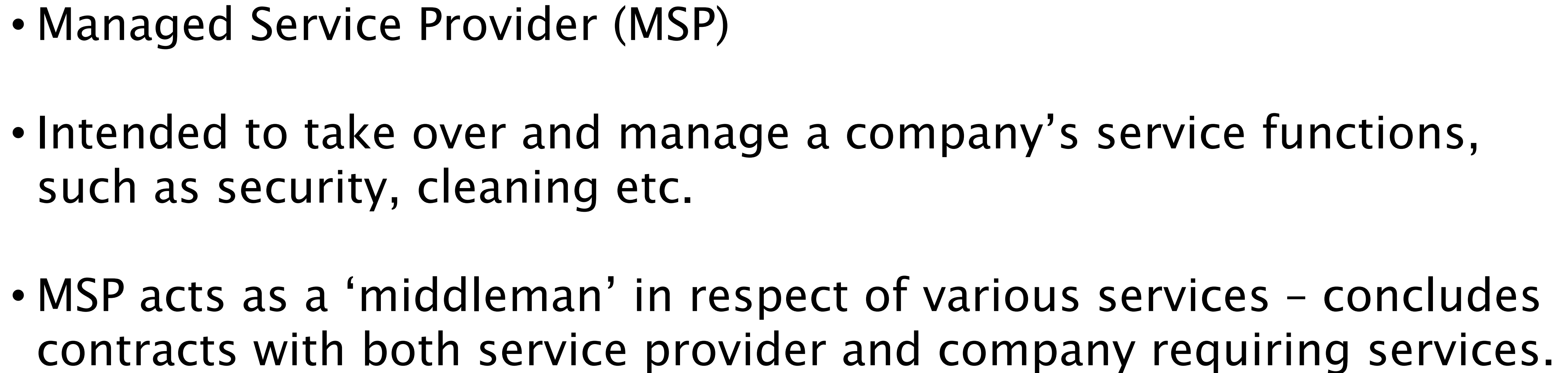
# Possible option



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# Possible option

- **Thabiso & 914 others and Shoprite Checkers (Pty) Ltd & Others**
- Shoprite entered into contractual arrangement with MSP. MSP took control of Shoprite's logistics and the management of its distribution warehouse.
- MSP then contracted various of those services out to various TES and MSP managed the delivery of various services.
- Employees claimed that they were employees of Shoprite and that relationship between Shoprite and MSP was a sham.

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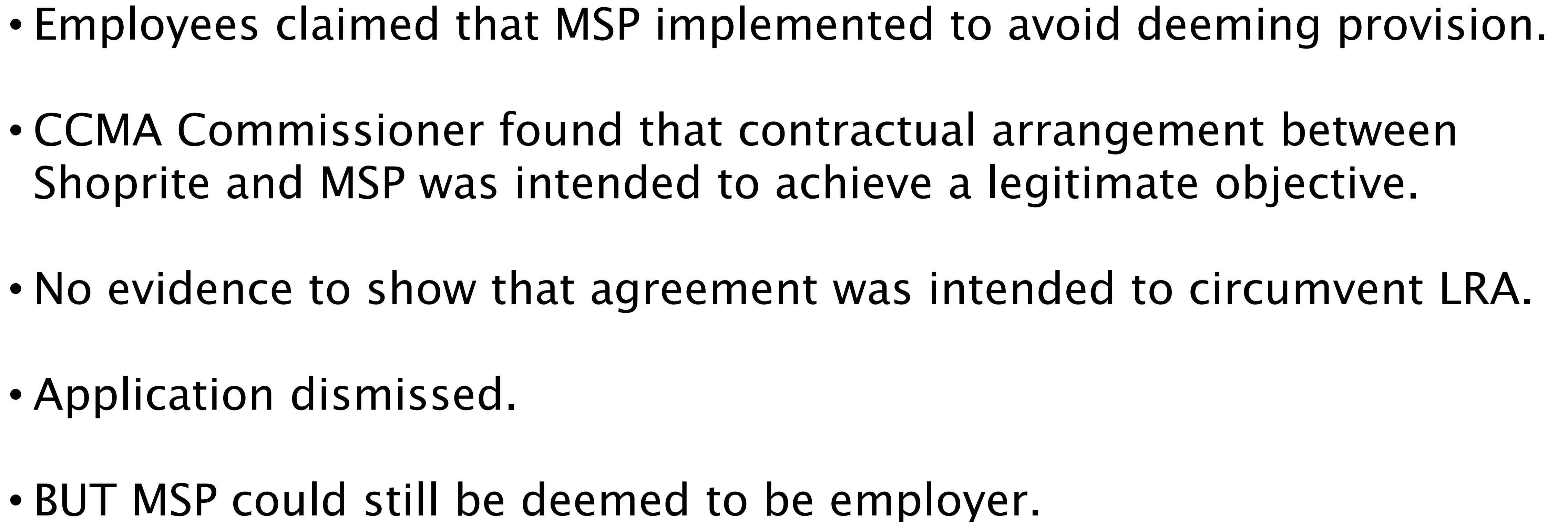
# Possible option



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