
Welcome
Q & A
Q & A
Closing
Session 1
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Session 3
Juta's Annual
Labour Law Seminar
#JALL18
John Grogan ▪ Puke Maserumule ▪ Avinash Govindjee


Welcome to Juta's Annual
Labour Law Seminar
2018

Presented by

Avinash Govindjee
and
John Grogan

in proud partnership with


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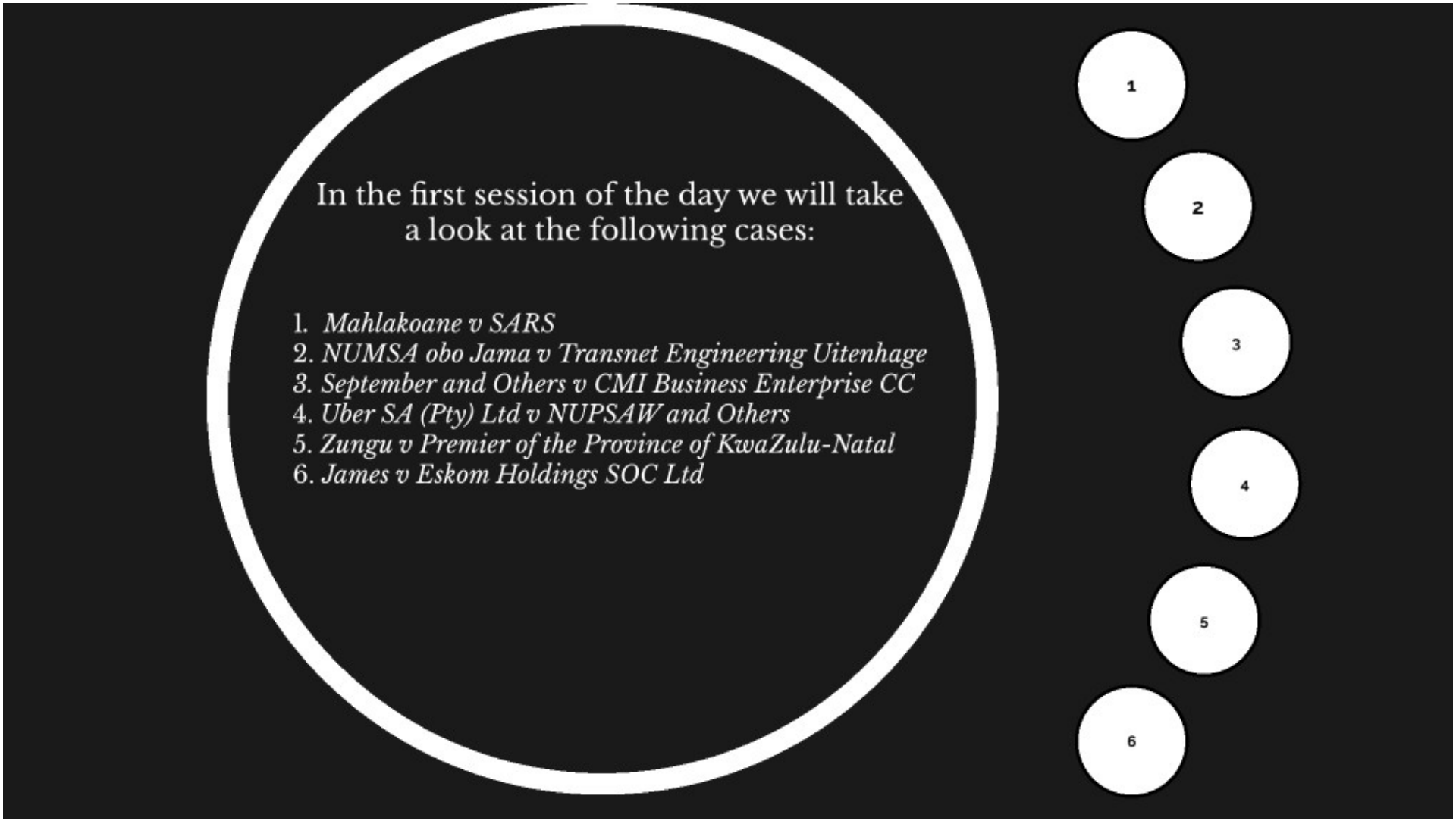

In the first session of the day we will take a look at the following cases:
1. Mahlakoane v SARS
2. NUMSA obo Jama v Transnet Engineering Uitenhage
3. September and Others v CMI Business Enterprise CC
4. Uber SA (Pty) Ltd v NUPSAW and Others
5. Zungu v Premier of the Province of KwaZulu-Natal
6. James v Eskom Holdings SOC Ltd
1
2
3
4
5
6

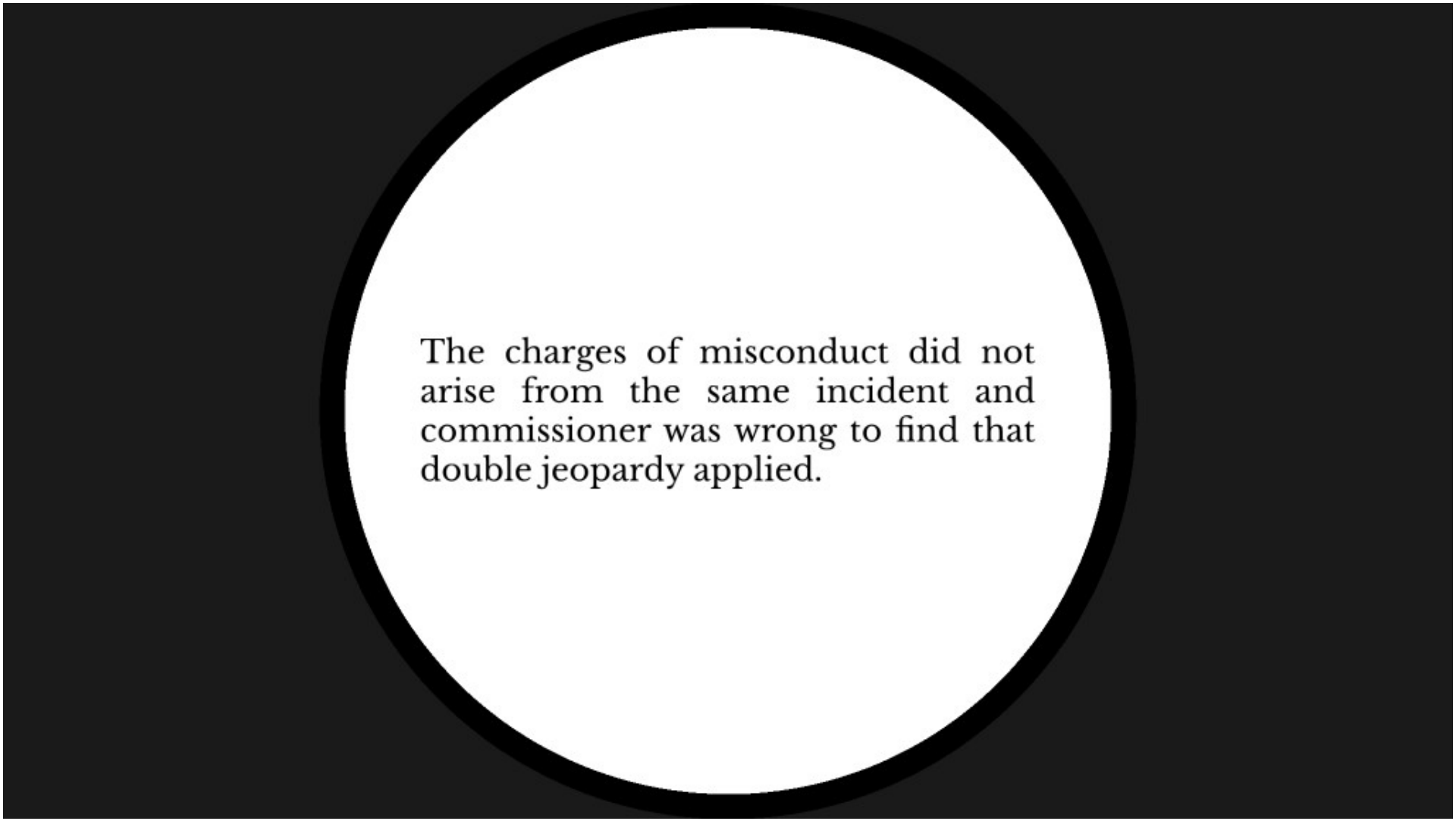
DOUBLE JEOPARDY

Mahlakoane v SARS
[2018] 3 BLLR (LAC)

"The principle of "double jeopardy" has, as its heart, fairness and this rule or principle simply entails that an employee cannot, generally, be charged again with the same misconduct that he or she was either found guilty or not guilty of. However, there are instances where breaches of this rule or principle can be condoned. The paramount consideration, however, is fairness to both sides."

Mrs M's dismissal was found to be unfair because she had been subjected to a second hearing on the basis of charges relating to the same offence, and had been reinstated

Held


The charges of misconduct did not arise from the same incident and commissioner was wrong to find that double jeopardy applied.

JURISDICTION

Automatically unfair - or just unfair?

NUMSA obo Jama v Transnet Engineering Uitenhage
[2018] 3 BLLR (LC)

- J dismissed for twice disobeying an instruction not to wear his union T-shirt
- Union characterised the dispute as "alleged gross insubordination"
- After evidence, arbitrator decided the real reason was union affiliation
- Council accordingly lacked jurisdiction

Held

Proper test was whether the commissioner's jurisdictional ruling was right or wrong

By stating that he believed he was discriminated against, J had merely expressed an opinion

Arbitrator not bound by this

Commissioner had erred in finding that the CCMA lacked jurisdiction

The award was set aside

JURISDICTION

September and Others v CMI Business Enterprise CC
[2018] ZACC 4

Questions

FURTHER INSTRUCTIONS

A copy of this form must be served on the other party.

Proof that a copy of this form has been served on the other party must be supplied by attaching any of the following:

- A copy of a registered slip from the Post Office; or
- A copy of a signed receipt if hand delivered; or
- A signed statement confirming service by the person delivering the form; or
- A copy of a fax confirmation slip; or
- A copy of an email confirmation slip; or
- Any other satisfactory proof of service.

Attach relevant documents such as collective agreements, etc.

The CCMA may be requested to assist with service.

UNFAIR LABOUR PRACTICE

If the dispute(s) concerns an unfair labour practice the dispute must be referred (i.e. received by the CCMA) within 90 days of the act or omission which gave rise to the unfair labour practice. If more than 90 days has lapsed you are required to apply for condonation.

2. DETAILS OF THE OTHER PARTY (PARTY WITH WHOM YOU ARE IN DISPUTE)

The other party is:

☐ An employer ☐ An employer's organisation

☐ An employee ☐ A trade union

Name:.....

(If company or close corporation, the name of the company or close corporation)

Surname (if applicable):.....

Postal Address:.....

.....Code:.....

Physical Address:.....

.....Code:.....

Tel:.....Cell:.....

Fax:.....Email:.....

Company or close corporation registration number:.....

If it is an organisational rights dispute, the name of the owner of and/or the person who controls access to the premises where the employees work.

.....

If a Temporary Employment Service (TES) is involved, the name of the TES:

.....

Number of employees employed by the employer:.....

3. NATURE OF THE DISPUTE

What is the dispute about (tick only one box)?

☐	Refusal to Bargain	☐	Mutual Interest
☐	Severance Pay	☐	Organisational Rights
☐	Unfair Labour Practice	☐	Disclosure of Information
☐	Freedom of Association	☐	S80 BCEA
☒	Unfair Discrimination - S10 EEA	☐	S19 SDA
☐	Interpretation/Application of Collective Agreement		
☐	Unilateral Changes to Terms and Conditions of Employment		
☐	***Dismissal***	☐	S198 LRA
☐	S198A LRA (Labour Broker)	☐	S198B (Fixed Term Contract)
☐	S198C (Part-time Employment)		
☐	***Other***.....		

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❒	S198C (Part-time Employment)		
❒	***Other***		

If it is an unfair labour practice, state whether it relates to probation.

This section must be completed!

If necessary write the details on a separate page and attach to this form.

If it is an unfair dismissal dispute, tick the relevant box

- ☐ Misconduct
- ☐ Incapacity
- ☐ Unknown Reasons
- ☐ Constructive Dismissal
- ☐ Poor Work Performance
- ☐ Dismissal relates to Probation
- ☐ Operational Requirements (Retrenchments)
- ☐ where I was the only employee dismissed
- ☐ where the employer employs less than ten (10) employees
- ☐ Other .....

4. **SUMMARISE THE FACTS OF THE DISPUTE** (Use additional paper if necessary)

Racial discrimination, verbal abuse

5. **DATE AND WHERE DISPUTE AROSE:**

The dispute arose on: _____
(give the date, day, month and year)

The dispute arose where: _____
(give the city/town in which the dispute arose)

6. **DATE OF DISMISSAL (if applicable)** _____

7. **FAIRNESS/UNFAIRNESS OF DISMISSAL (if applicable)**

(a) **Procedural Issues**
Was the dismissal procedurally unfair? Yes ☐ No ☐
If yes, why?

.....

.....

(b) **Substantive Issues**
Was the reason for the dismissal unfair? Yes ☐ No ☐
If yes, why

.....

.....

8. **RESULT REQUIRED**

Employer to stop discriminating us

9. **SECTOR**

Indicate the sector or service in which the dispute arose.

- ☐ Retail
- ☐ Mining
- ☐ Building & Construction
- ☐ Business/Professional Services
- ☐ Agriculture/Farming
- ☐ Other .....
- ☐ Safety/Security (Private)
- ☐ Domestic
- ☐ Food & Beverage
- ☐ Transport (Private)

Please turn over →

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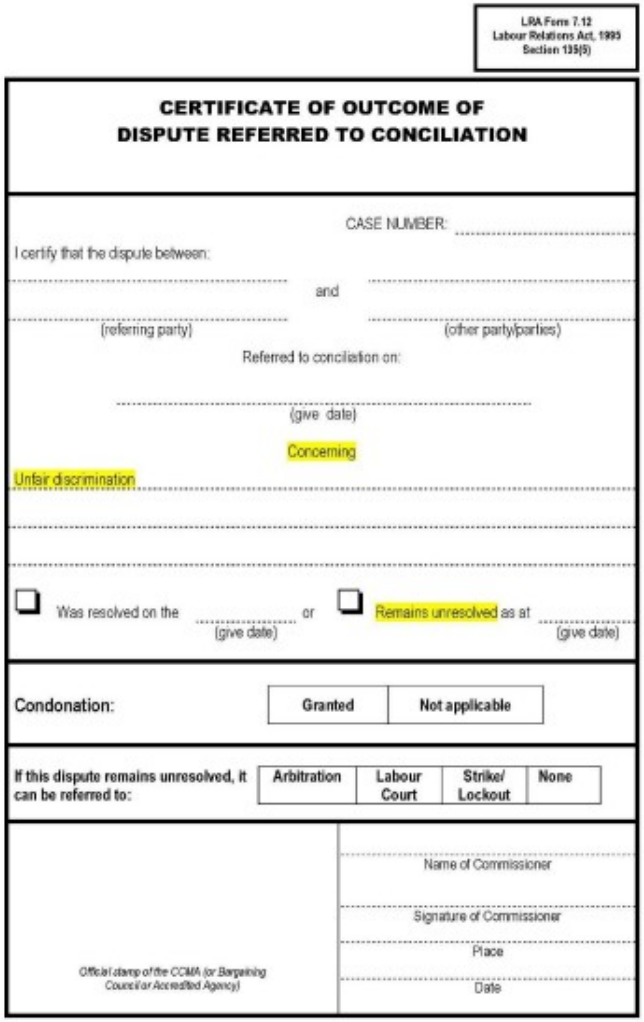


LRA Form 7.12
Labour Relations Act, 1995
Section 135(5)

CERTIFICATE OF OUTCOME OF DISPUTE REFERRED TO CONCILIATION

CASE NUMBER: .....

I certify that the dispute between:

..... and .....

(referring party) (other party/parties)

Referred to conciliation on:

..... (give date)

Concerning

Unfair discrimination .....

.....

.....

☐ Was resolved on the ..... (give date) or ☐ Remains unresolved as at ..... (give date)

Condonation:	Granted	Not applicable

If this dispute remains unresolved, it can be referred to:	Arbitration	Labour Court	Strike/ Lockout	None

Name of Commissioner

Signature of Commissioner

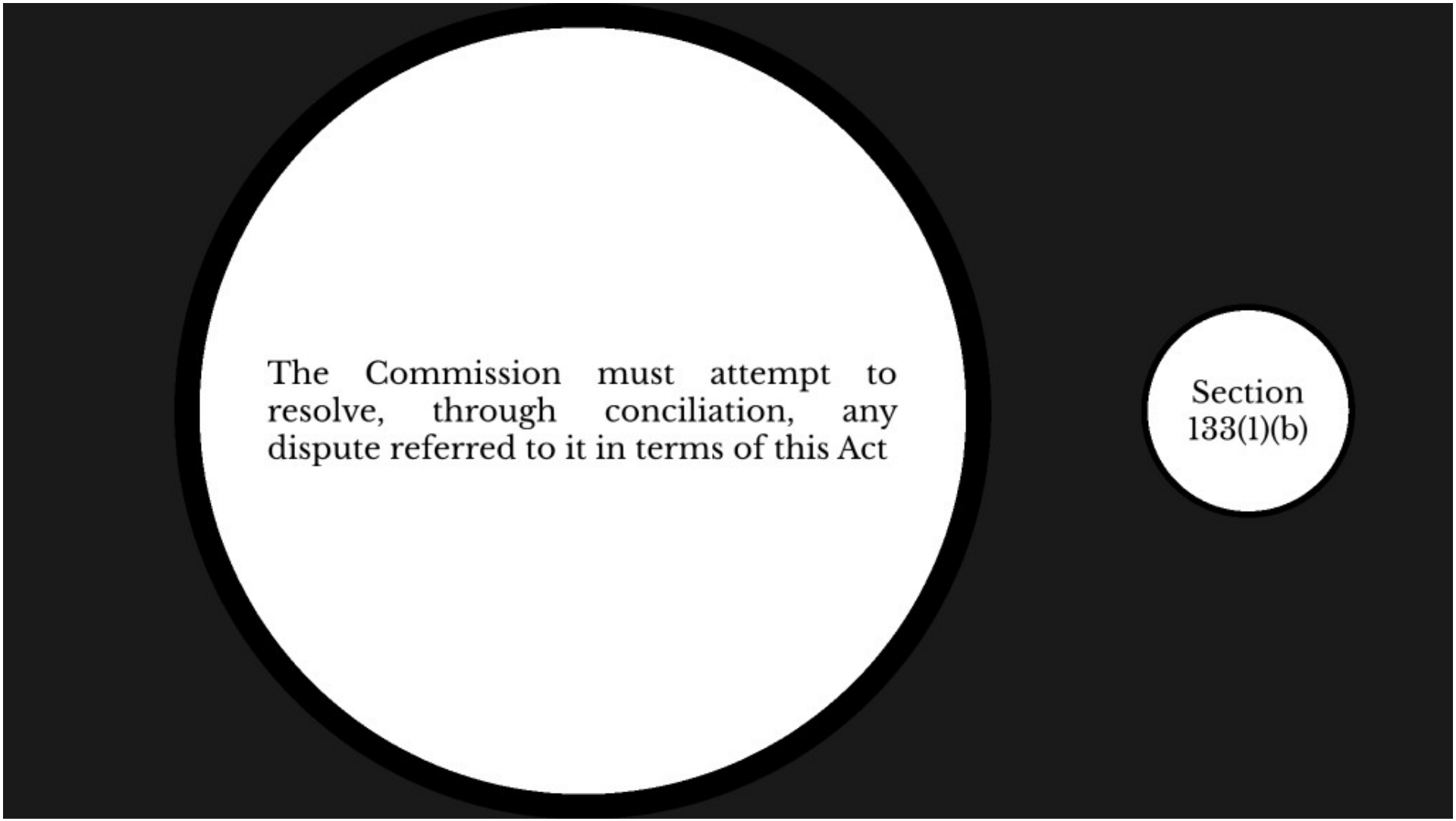
Place

Date

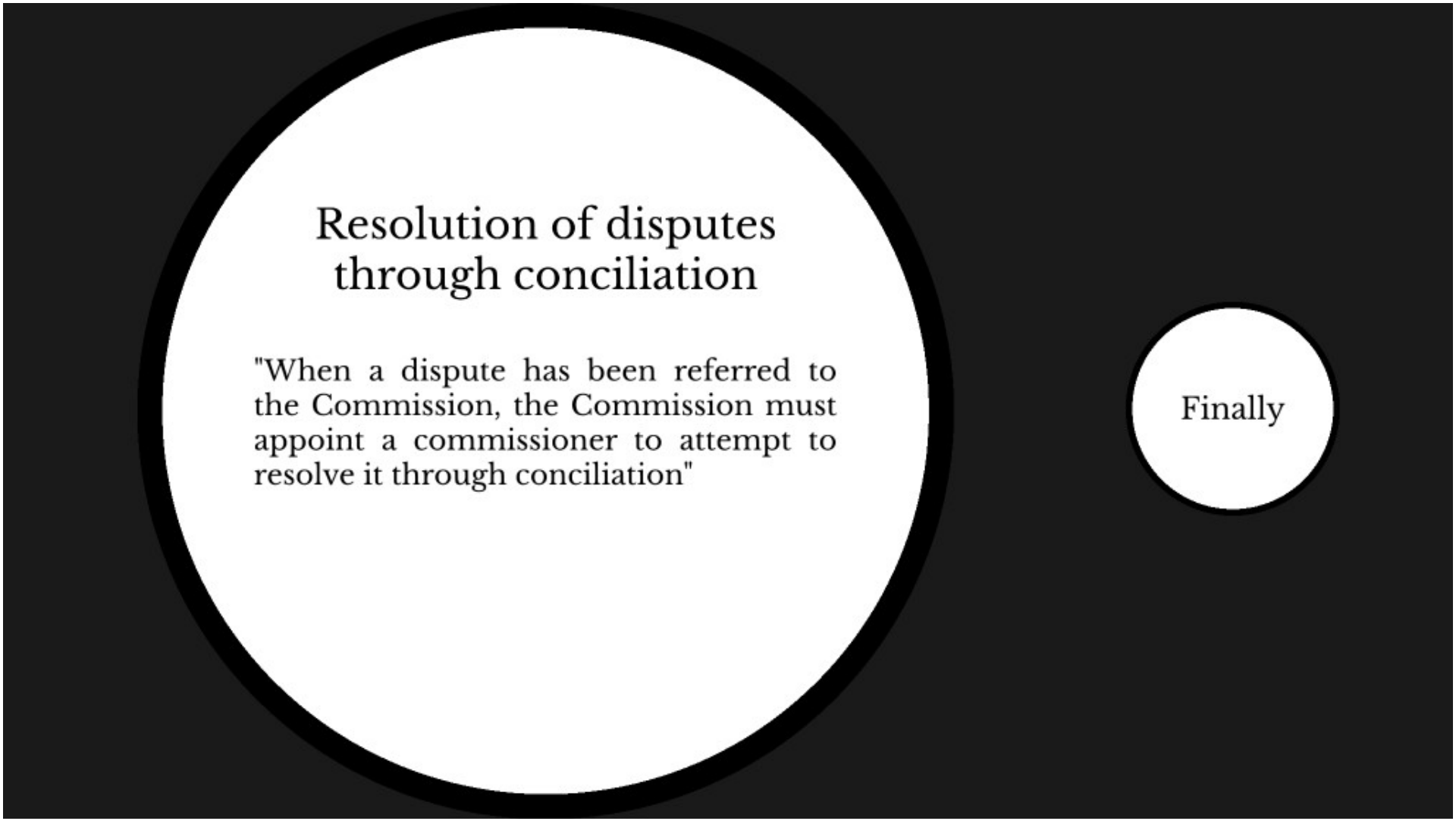
Official stamp of the CCMA (or Bargaining Council or Accredited Agency)

Did the Labour Court have jurisdiction to adjudicate a constructive dismissal dispute or a dispute concerning an AUD if the dispute was not referred for conciliation?

Section 115 of the LRA:


The Commission must attempt to resolve, through conciliation, any dispute referred to it in terms of this Act
Section 133(1)(b)


Resolution of disputes under auspices of Commission
The Commission must appoint a commissioner to attempt to resolve through conciliation...any other dispute that has been referred to it in terms of this Act
S 135


Resolution of disputes through conciliation
"When a dispute has been referred to the Commission, the Commission must appoint a commissioner to attempt to resolve it through conciliation"
Finally

16 Conciliation proceedings may not be disclosed

(1) Conciliation proceedings are private and confidential and are conducted on a without prejudice basis. No person may refer to anything said at conciliation proceedings during any subsequent proceedings, unless the parties agree in writing [or as ordered otherwise by a court of law].

(2) No person, including a commissioner, may be called as a witness during any subsequent proceedings in the Commission or in any court to give evidence about what transpired during conciliation [unless as ordered by a court of law].

Zondo's Critique

The majority judgment makes new law:

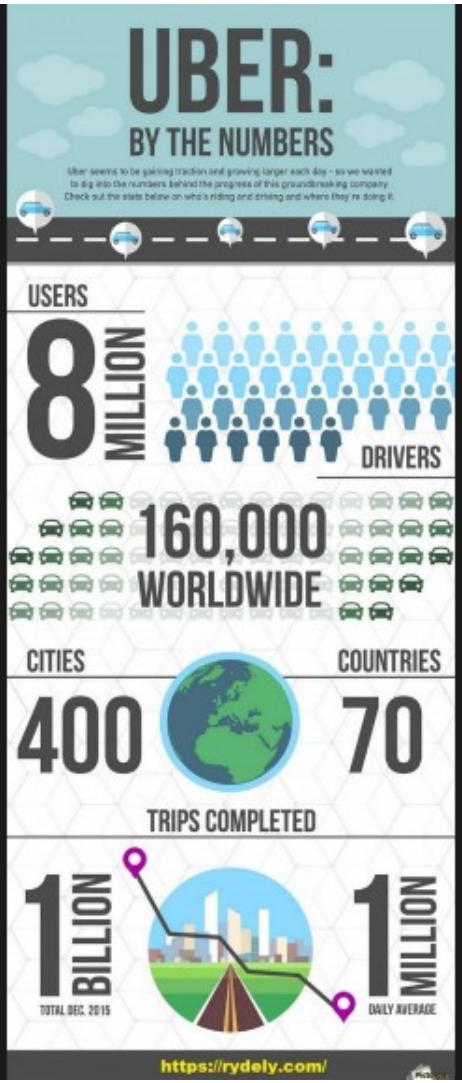
"There is an exception to the principle that a dispute about the fairness of a dismissal is required to be referred to conciliation before it can be the subject of arbitration or adjudication"

Uber SA (Pty) Ltd v NUPSAW and Others
[2018] ZALCCT 1

Were the drivers employees of Uber SA at the time they were refused access to the App / deactivated?

Was the commissioner's decision correct?

Let's look at the numbers...



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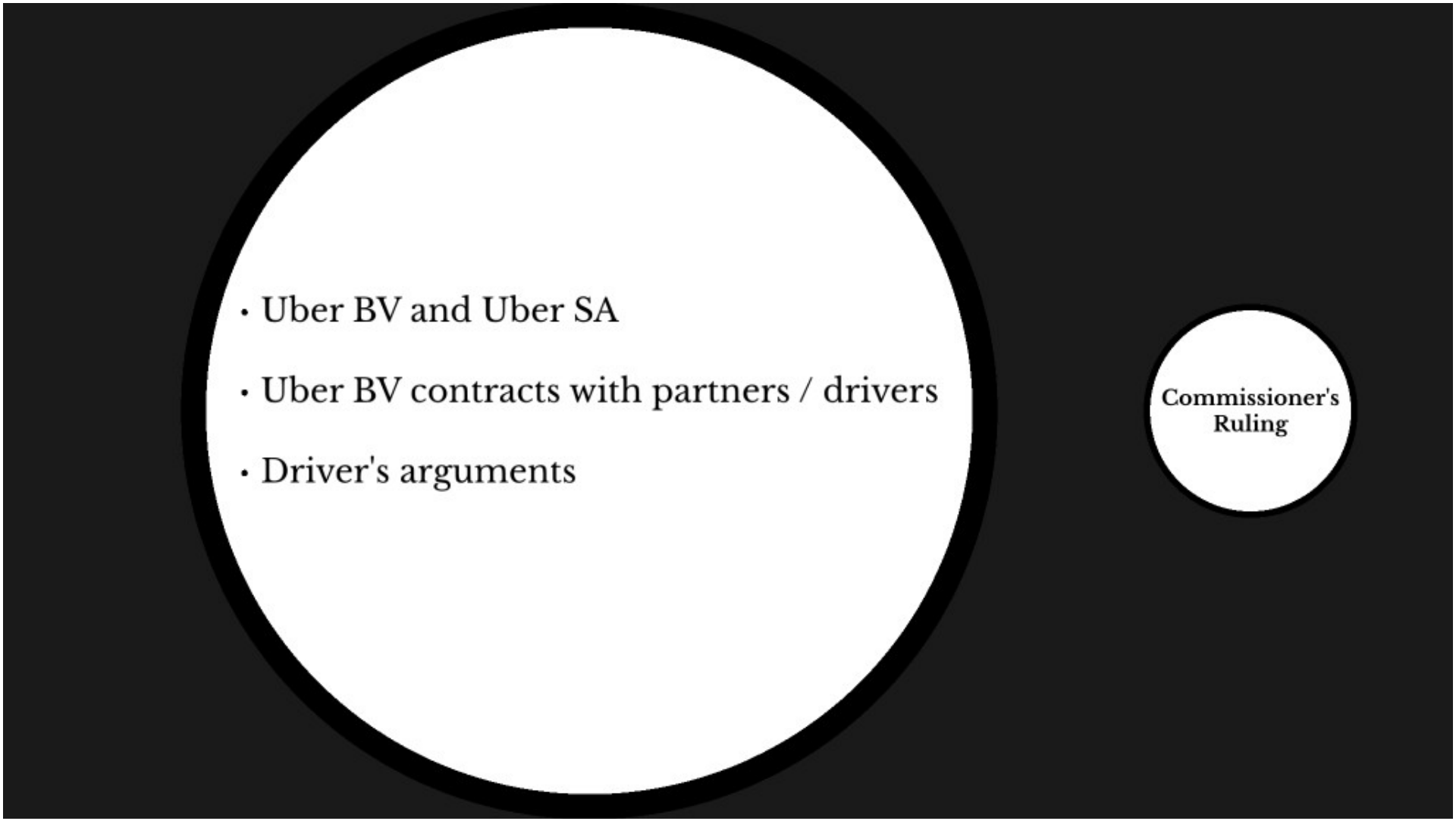
Relationships

Uber SA or Uber BV?

What about joinder?

The contracts and arguments


• Uber BV and Uber SA
• Uber BV contracts with partners / drivers
• Driver's arguments
Commissioner's Ruling

"Reality test"

Judgment

Whether drivers are employees of BV (either alone or in co-employment with another) or whether independent contractors of BV, remains open

UNLAWFUL DISMISSALS

Zungu v Premier of the Province of KwaZulu-Natal
[2018] 39 *ILJ* 523 (CC)

Ms Zungu claimed that Premier's decision not to renew her fixed-term contract was unlawful and that decision accordingly void

Decision: Zungu's claim in essence one of unfair dismissal under LRA - dispute should have been referred under the Act and LC lacked jurisdiction

Held

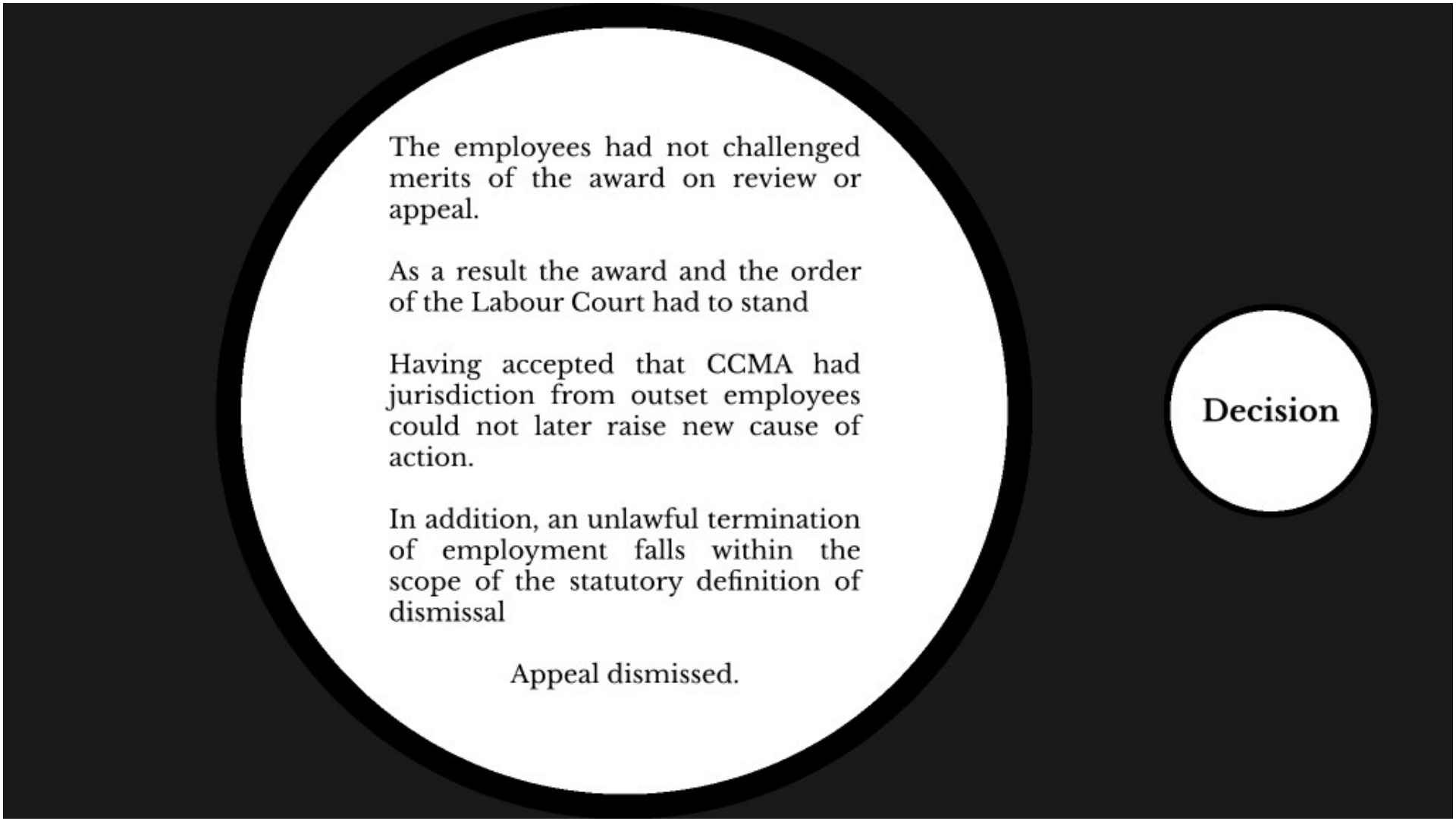
"The Labour Appeal Court was correct in upholding the Labour Court's decision that it did not have jurisdiction in the matter. This is because the claim by the applicant relating to the Premier's decision not to appoint her, and the contention that this was unlawful, falls squarely within the definition of dismissal in section 186(1)(b) of the LRA. Therefore the applicant cannot bypass the dispute resolution process envisioned in the LRA. The applicant was obliged to follow the dispute resolution process in Chapter VIII of the LRA but did not do so."

James v Eskom Holdings SOC Ltd
(2017) 38 *ILJ* 2269 (LAC)

Mr J and a colleague claimed in the Labour Court that their dismissals for stealing watermelons were unlawful and invalid because they had been subjected to "double jeopardy".

They had received compensation from the CCMA for a procedurally unfair dismissal, but wanted reinstatement

Held


The employees had not challenged merits of the award on review or appeal.
As a result the award and the order of the Labour Court had to stand
Having accepted that CCMA had jurisdiction from outset employees could not later raise new cause of action.
In addition, an unlawful termination of employment falls within the scope of the statutory definition of dismissal
Appeal dismissed.
Decision

"Section 186 of the LRA defines dismissal to mean, *inter alia*, that an employer has terminated a contract of employment with or without notice. The ordinary meaning of "termination" is to bring to an end. In this case, the respondent has through the action of the General Manager brought the contracts of employment of the appellants to an end. It does not matter what the General Manager did so contrary to the collective agreement. The appellants were in the circumstances entitled to approach the CCMA to challenge the fairness of the conduct of the respondent as they did. Having done so, it is not open to them to abandon their arbitrated referred dispute, and claim that they had not been dismissed."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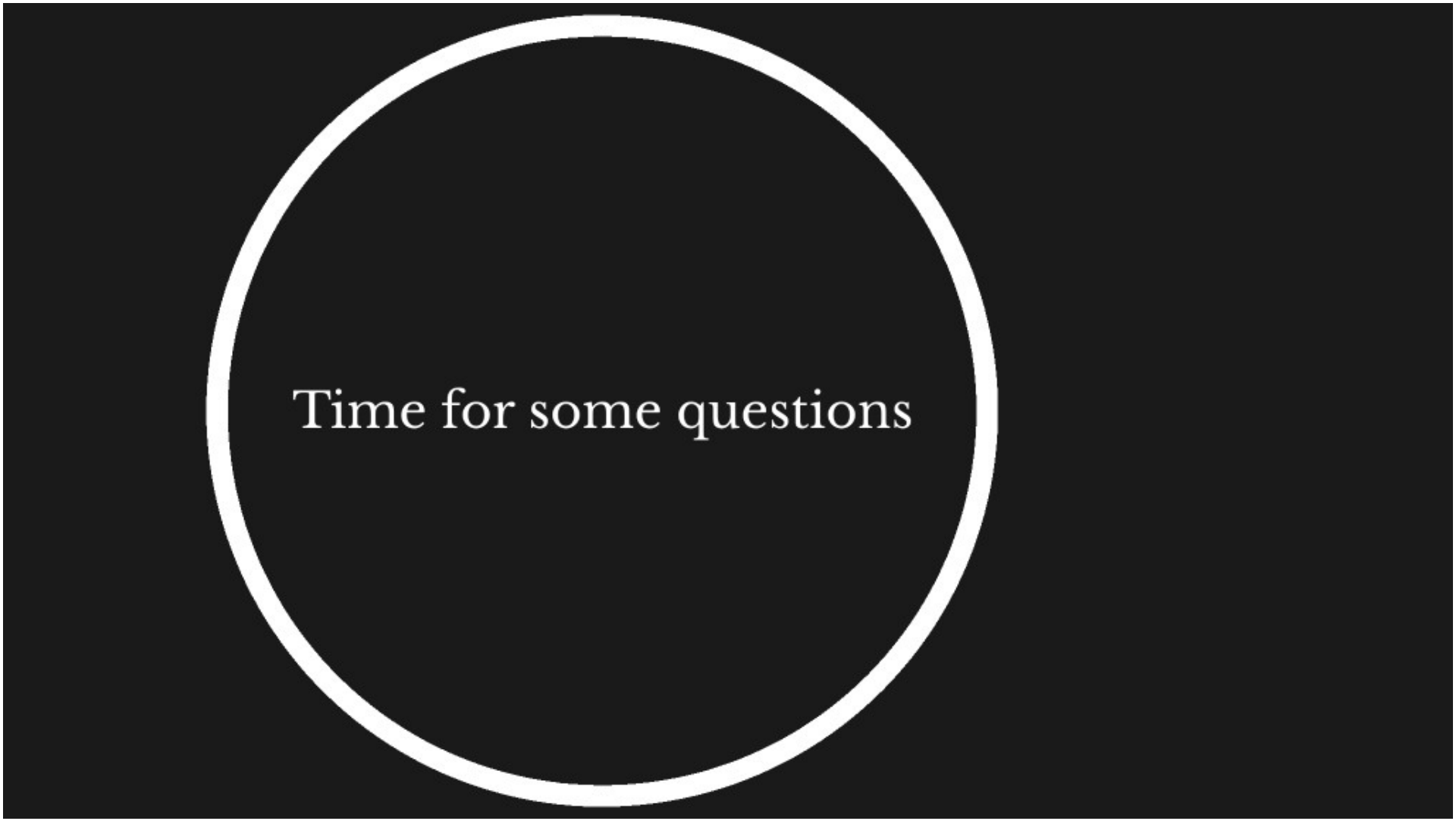
Time for some questions


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Let's now look at the following cases:
1. Rustenburg Platinum Mine v SAEWA obo Bester
2. Ndudula and Others v Metrorail PRASA
3. National Transport Movement v Passenger Rail Agency of SA
4. National Union of Metalworkers of SA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd
5. Simmadari v Absa Bank Limited
6. Pretorius and another v Transport Pension Fund and Others
7. Edcon Ltd v Steenkamp
8. Mashishi v Mdladla
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Rustenburg Platinum Mine v SAEWA obo Bester
[2018] ZACC 13

Is referring to a fellow employee as a "swart man" racist and derogatory? Sanction?

Can an apparently neutral racial descriptor be regarded as racially abusive?

Was it unreasonable for commissioner to find the term "racially innocuous"?

Let's find out

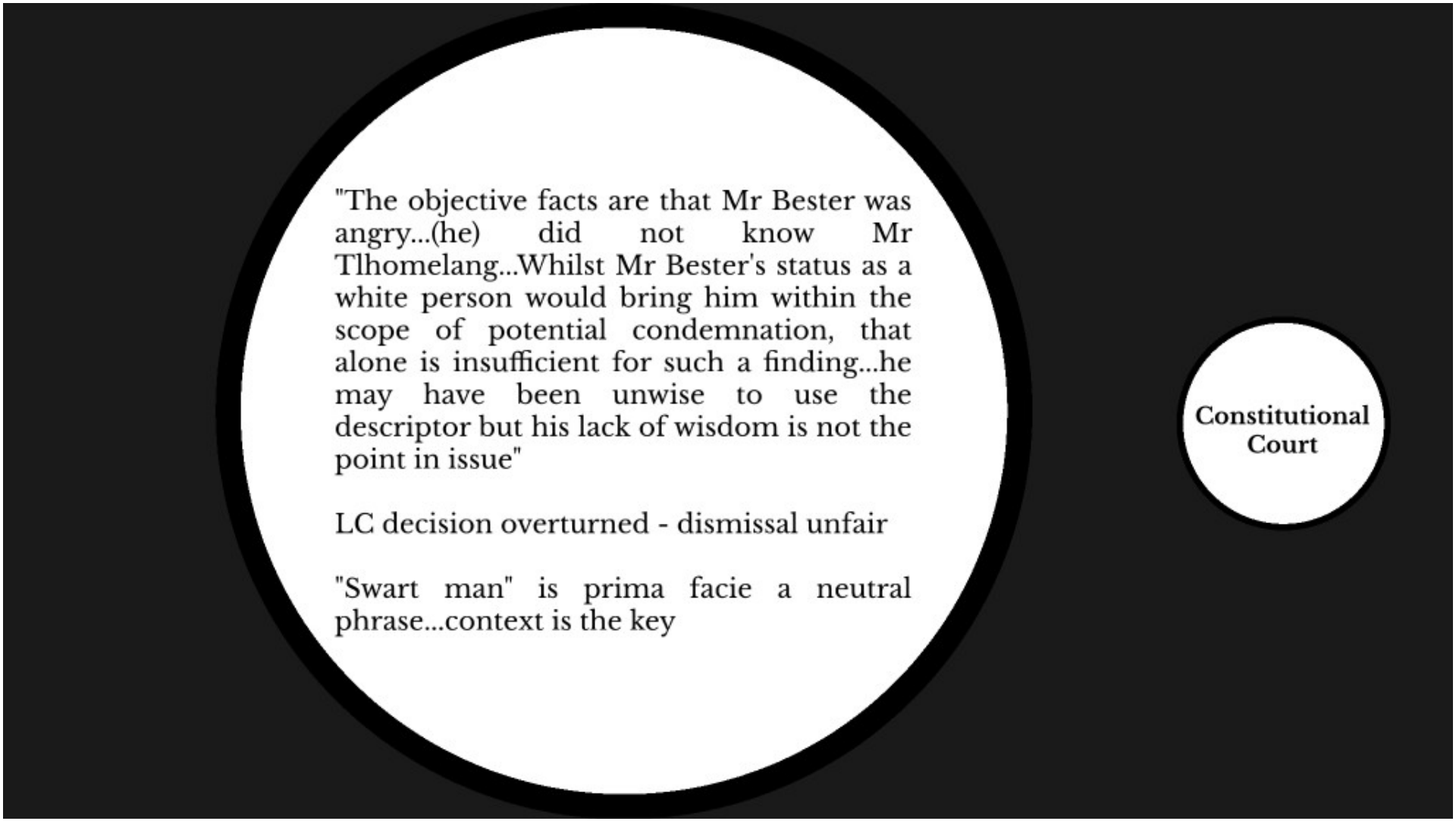
"I have not shouted at anybody in Mr Sedumedi's office, neither had I pointed fingers at anyone or in any direction. I did not make any comments using the words "swart man"

CCMA: retrospective reinstatement

LC: Commissioner's finding that the words uttered supported by evidence - the reference to "swart man" was derogatory and racist

Award set aside

LAC


"The objective facts are that Mr Bester was angry...(he) did not know Mr Tlhomelang...Whilst Mr Bester's status as a white person would bring him within the scope of potential condemnation, that alone is insufficient for such a finding...he may have been unwise to use the descriptor but his lack of wisdom is not the point in issue"
LC decision overturned - dismissal unfair
"Swart man" is prima facie a neutral phrase...context is the key
Constitutional Court

Objective test

Four people heard the words and considered the remarks to be inappropriate

LAC misdirected itself - unarticulated defence

"Presumptively neutral" vs impact of apartheid?

"Derogatorily subordinating" vs "racially innocuous"

Dismissal - lack of remorse / does not embrace new democratic order

Ndudula and Others v Metrorail PRASA
[2017] ZALCCT 12

S 6(1)

"No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex etc...or any other arbitrary ground"

S 6(4)

"A difference in terms and conditions of employment between employees performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1) is unfair discrimination"

S11

If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination -
a) did not take place as alleged; or
b) is rational and not unfair, or is otherwise justifiable

If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that
a) the conduct complained of is not rational;
b) the conduct complained of amounts to discrimination; and
c) the discrimination is unfair

Quick Question

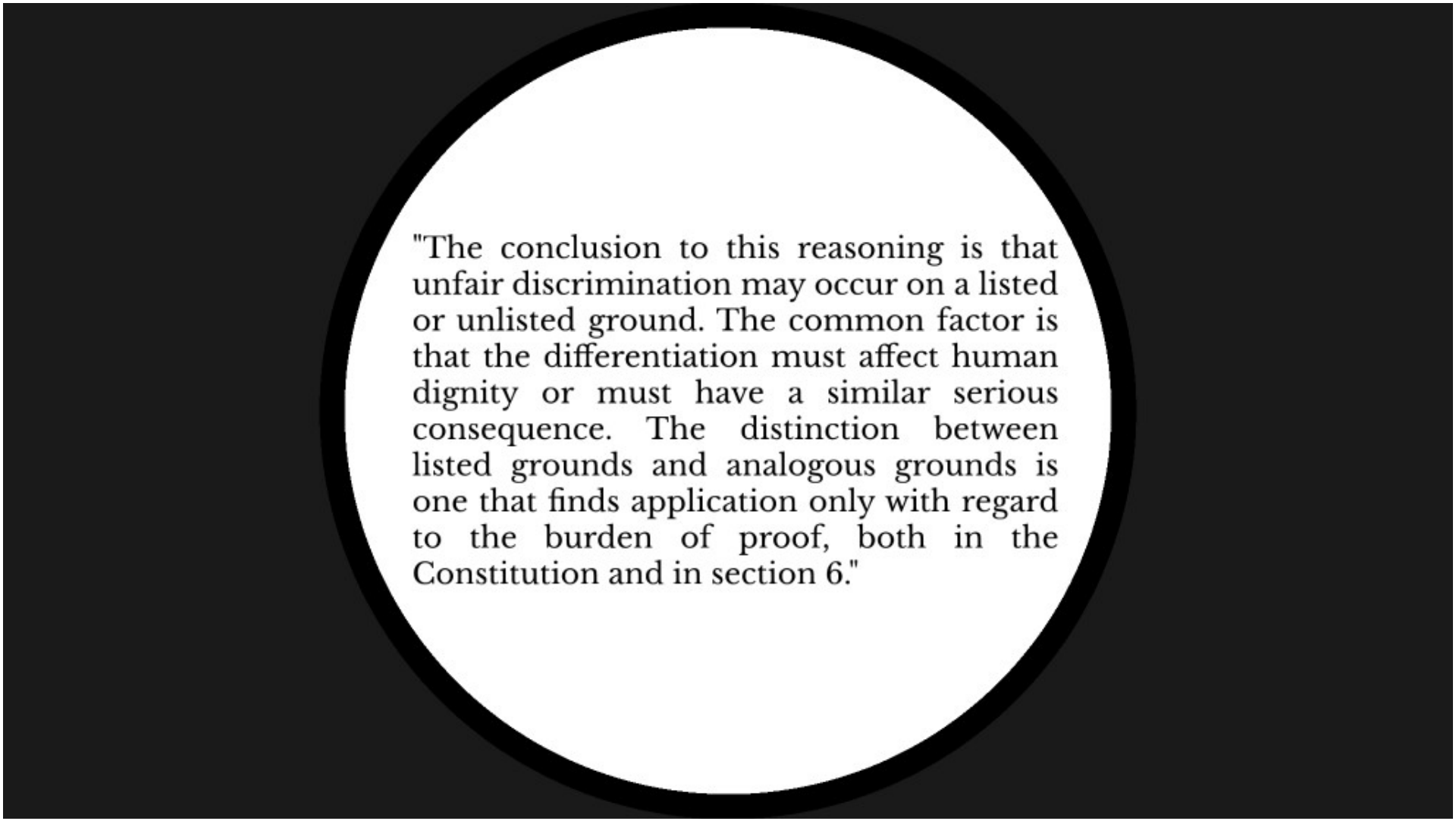
Are there 3 categories after the amendment?

- Discrimination on a listed ground
- On a ground analogous to a listed ground
- On any other arbitrary ground

Or 2?

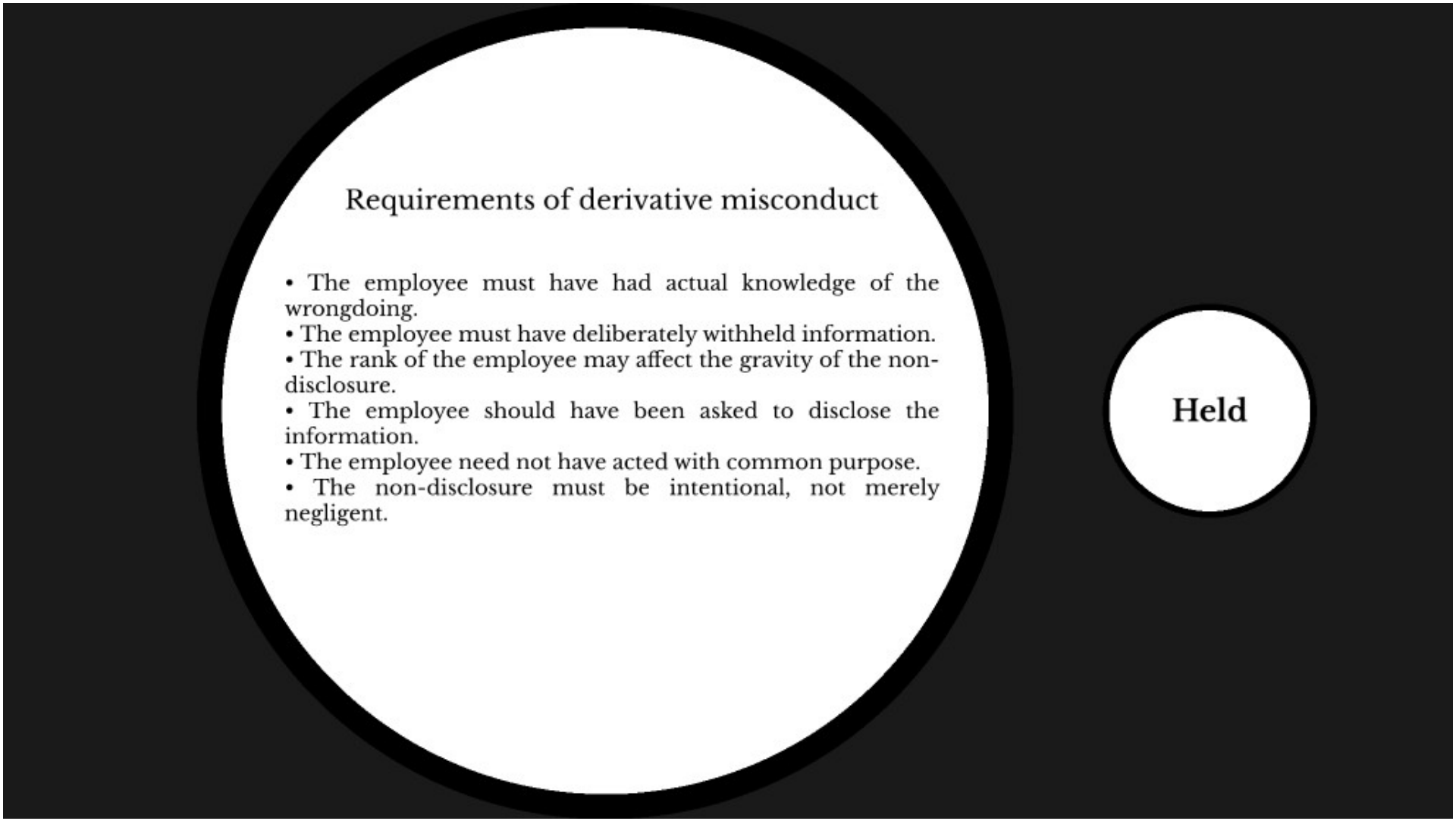
- Listed grounds
- Unlisted grounds that are analogous (affect human dignity etc)

Conclusion


"The conclusion to this reasoning is that unfair discrimination may occur on a listed or unlisted ground. The common factor is that the differentiation must affect human dignity or must have a similar serious consequence. The distinction between listed grounds and analogous grounds is one that finds application only with regard to the burden of proof, both in the Constitution and in section 6."


DERIVATIVE MISCONDUCT
Term of the art or misleading slogan?
NTM
vs
PRASA


National Transport Movement v
Passenger Rail Agency of SA
(2018) 39 *ILJ* (LAC)
PRASA suspected that trains had been burned by striking workers and striking workers who did not respond to a call for representations were dismissed.
Requirements

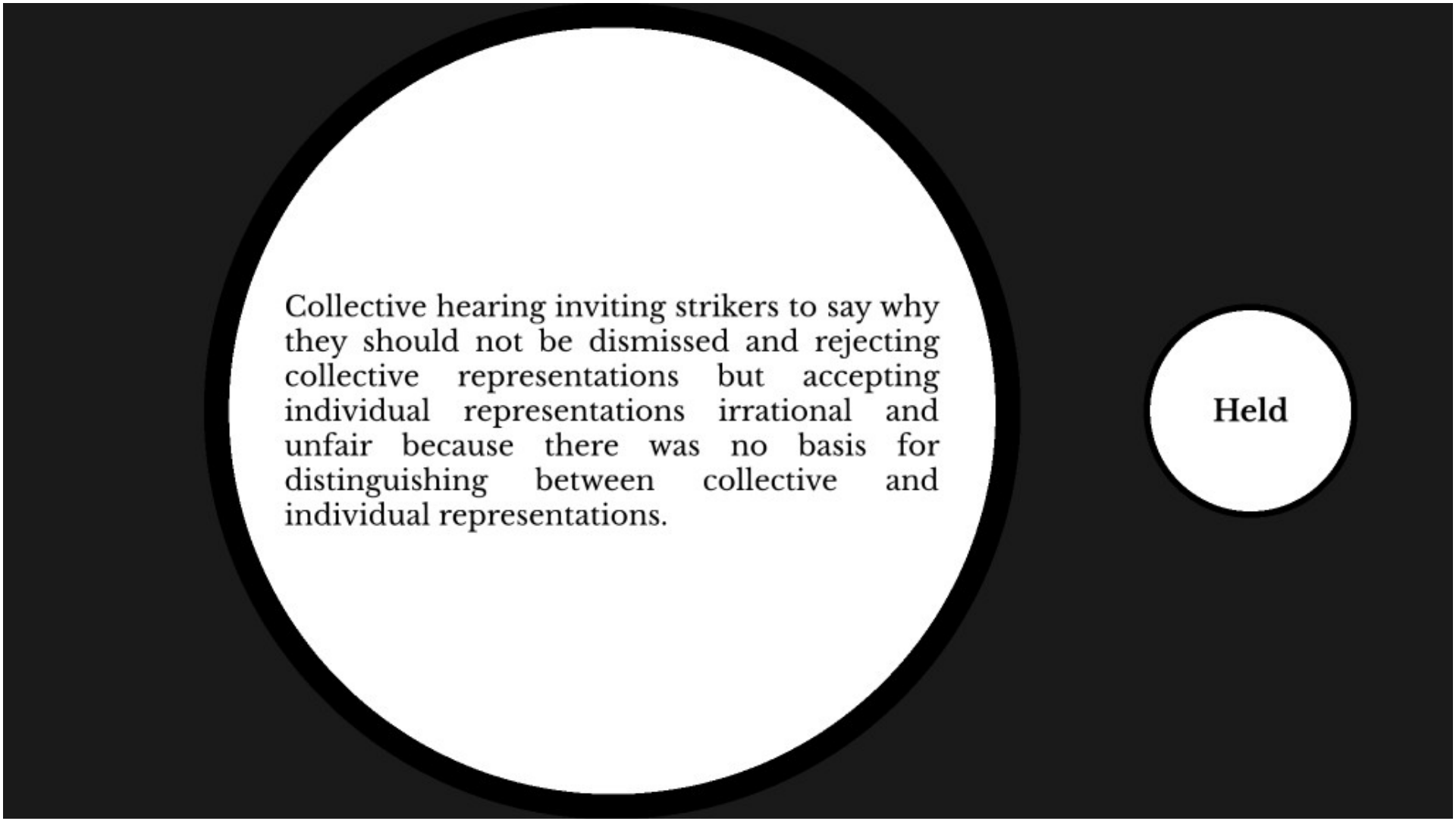

Requirements of derivative misconduct
• The employee must have had actual knowledge of the wrongdoing.
• The employee must have deliberately withheld information.
• The rank of the employee may affect the gravity of the non-disclosure.
• The employee should have been asked to disclose the information.
• The employee need not have acted with common purpose.
• The non-disclosure must be intentional, not merely negligent.
Held

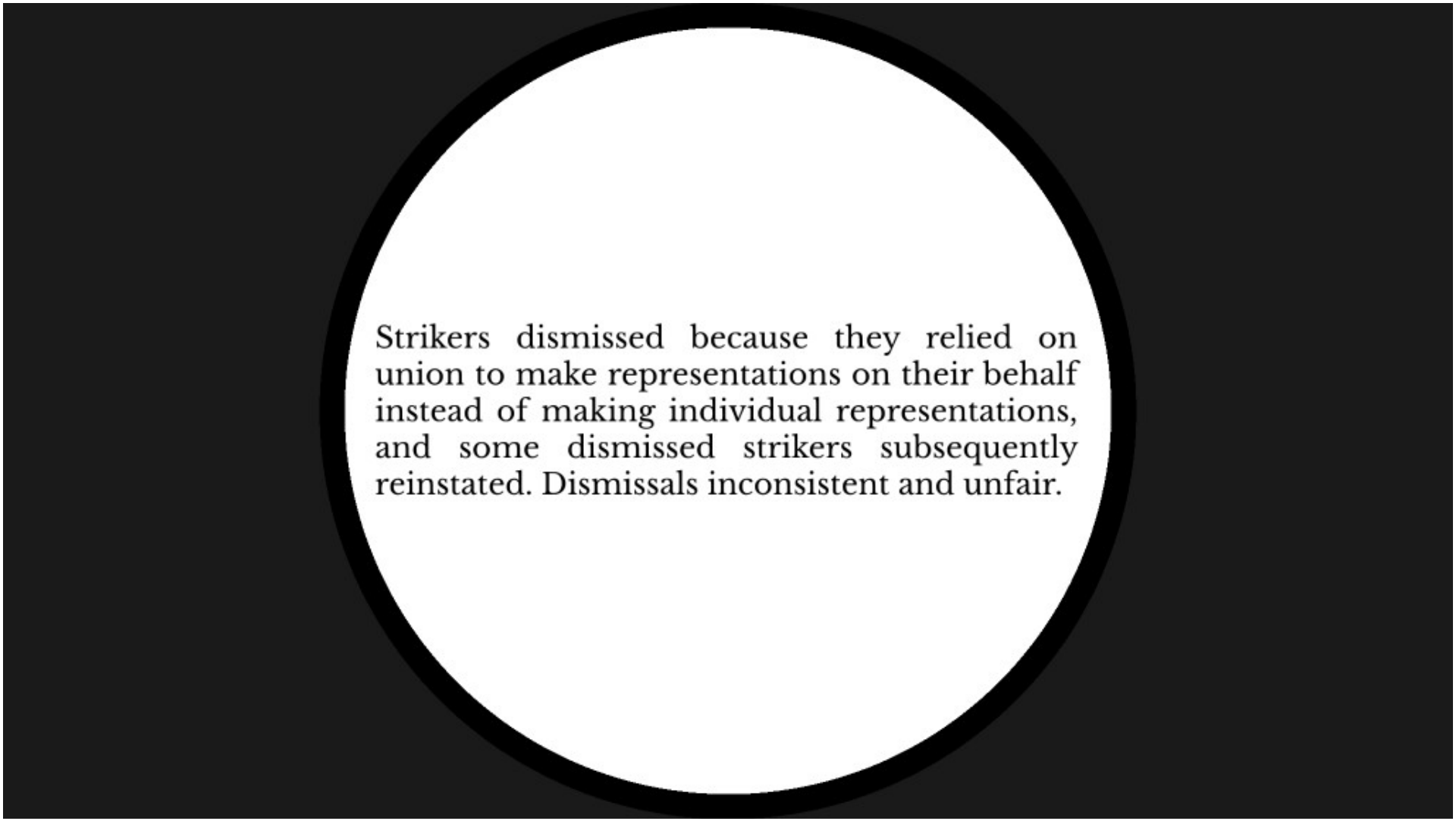
Derivative misconduct may be relied on by employers where there is no direct evidence that the dismissed employees committed the primary misconduct of which the employer complains.

In this case it was inherently unlikely that the union leaders would have advocated the burning of trains in the presence of management and the police and PRASA had failed to satisfy the court that the dismissed employees had actual knowledge of the incidents.

The reliance on derivative misconduct was misplaced and unjustified and rendered the dismissals substantively and procedurally unfair.

Held

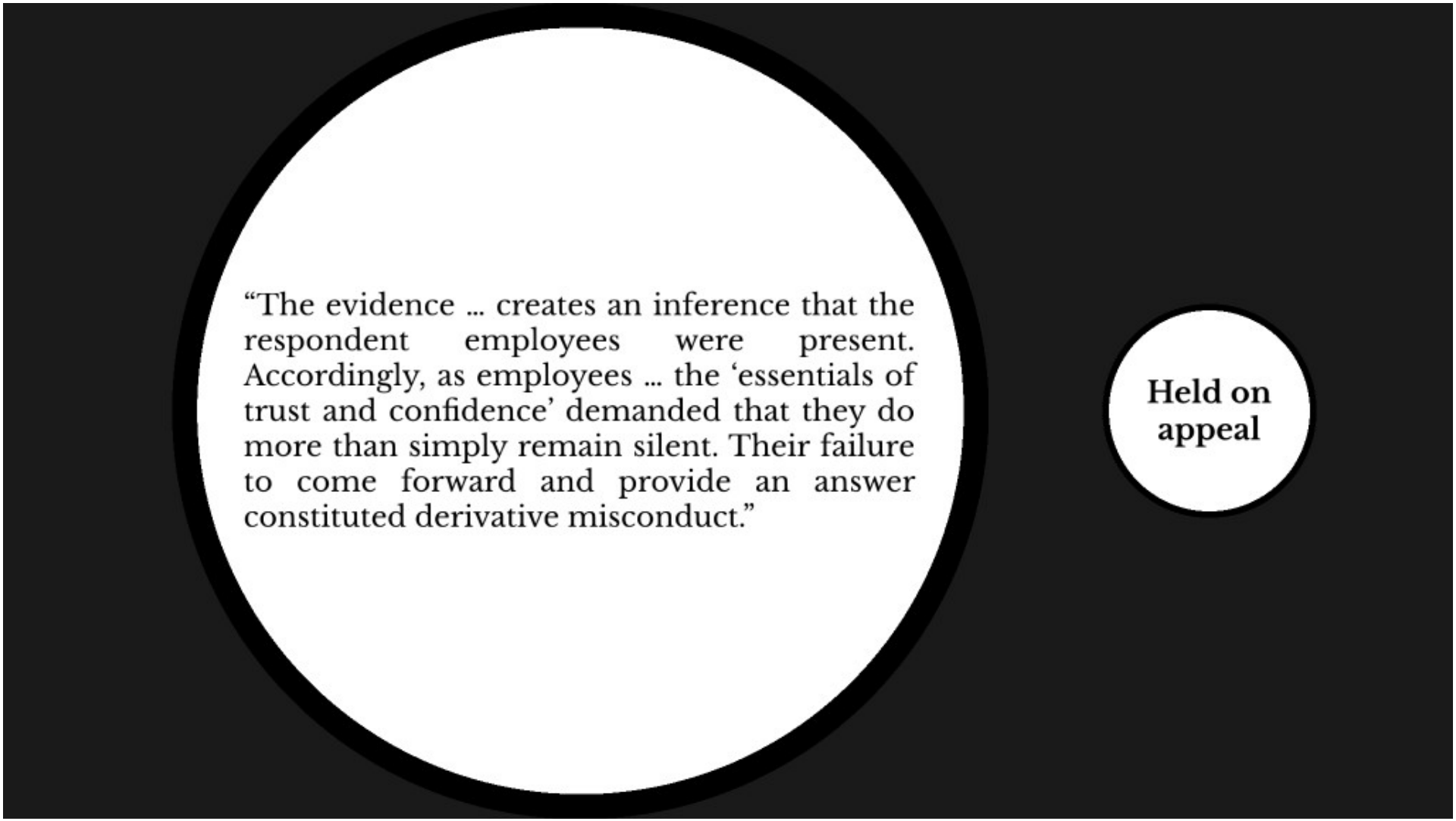

Collective hearing inviting strikers to say why they should not be dismissed and rejecting collective representations but accepting individual representations irrational and unfair because there was no basis for distinguishing between collective and individual representations.
Held


Strikers dismissed because they relied on union to make representations on their behalf instead of making individual representations, and some dismissed strikers subsequently reinstated. Dismissals inconsistent and unfair.

National Union of Metalworkers of SA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd
DA16/2016 17/07/2018

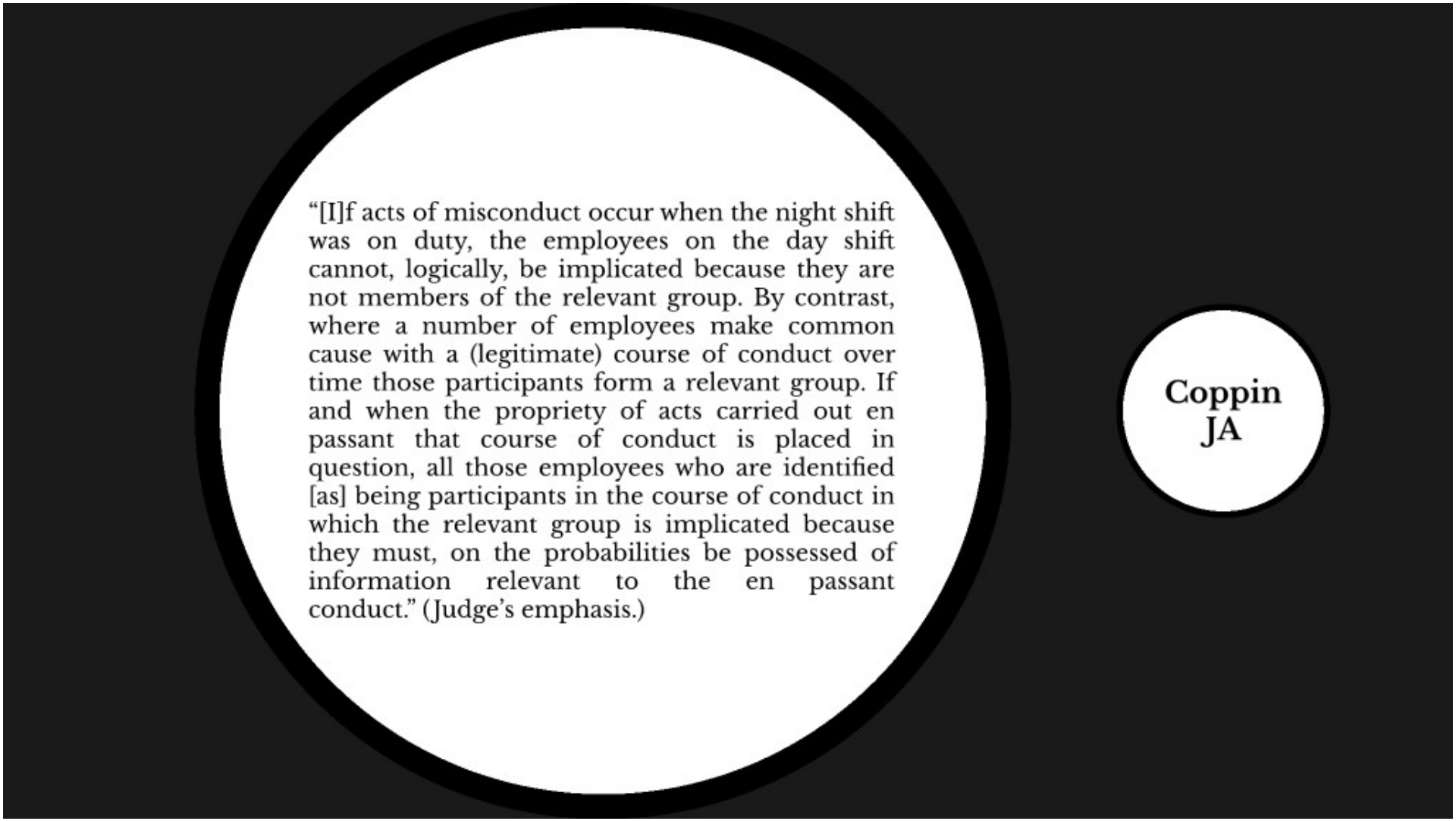
76 workers had been dismissed for failing to disclose information to their employers that could lead to the identification of acts of violence and criminality during a protected strike. A CCMA Commissioner found their dismissal unfair because he was not satisfied that the workers were present when the misconduct was committed. The Labour Court set the award aside on the basis that the Commissioner had failed to consider evidence pointing to the probability that the workers were in fact present (*see Dunlop Mixing and Technical Services (Pty) Ltd and others v National Union of Metalworkers ("NUMSA") obo Nganezi and others* [2016] 10 BLLR 1024 (LC)).

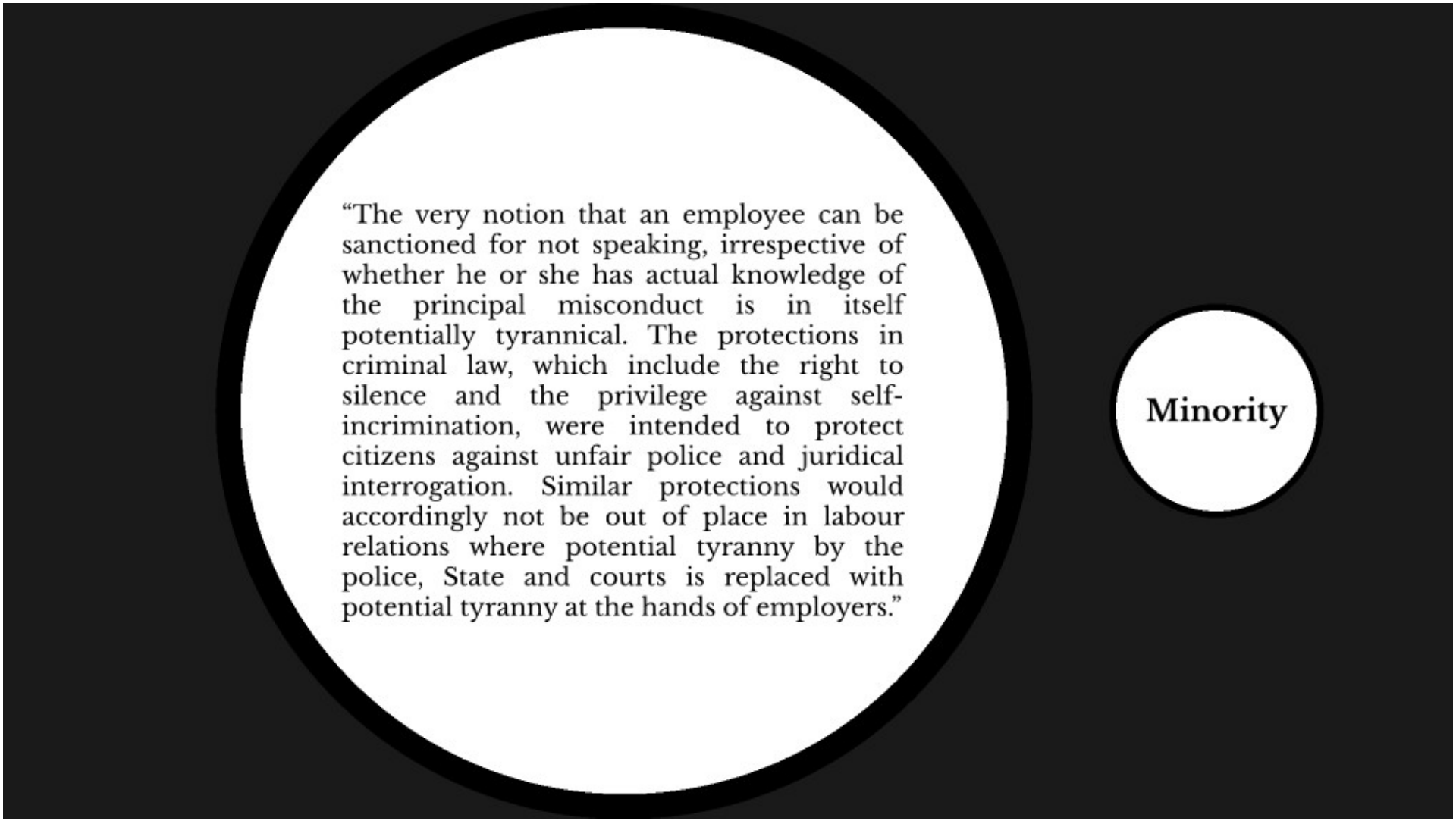
Gush J

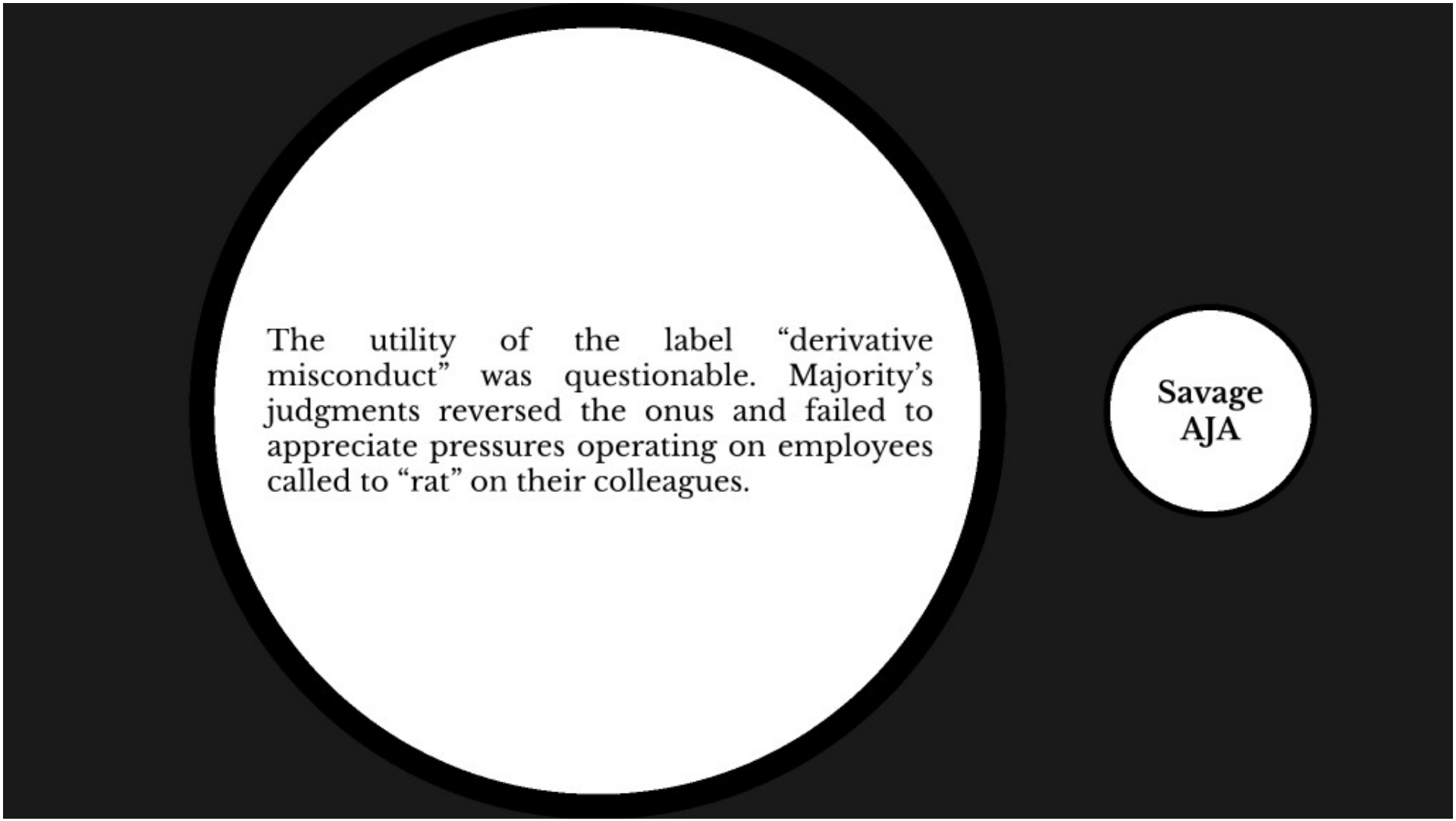

"The evidence ... creates an inference that the respondent employees were present. Accordingly, as employees ... the 'essentials of trust and confidence' demanded that they do more than simply remain silent. Their failure to come forward and provide an answer constituted derivative misconduct."
Held on appeal

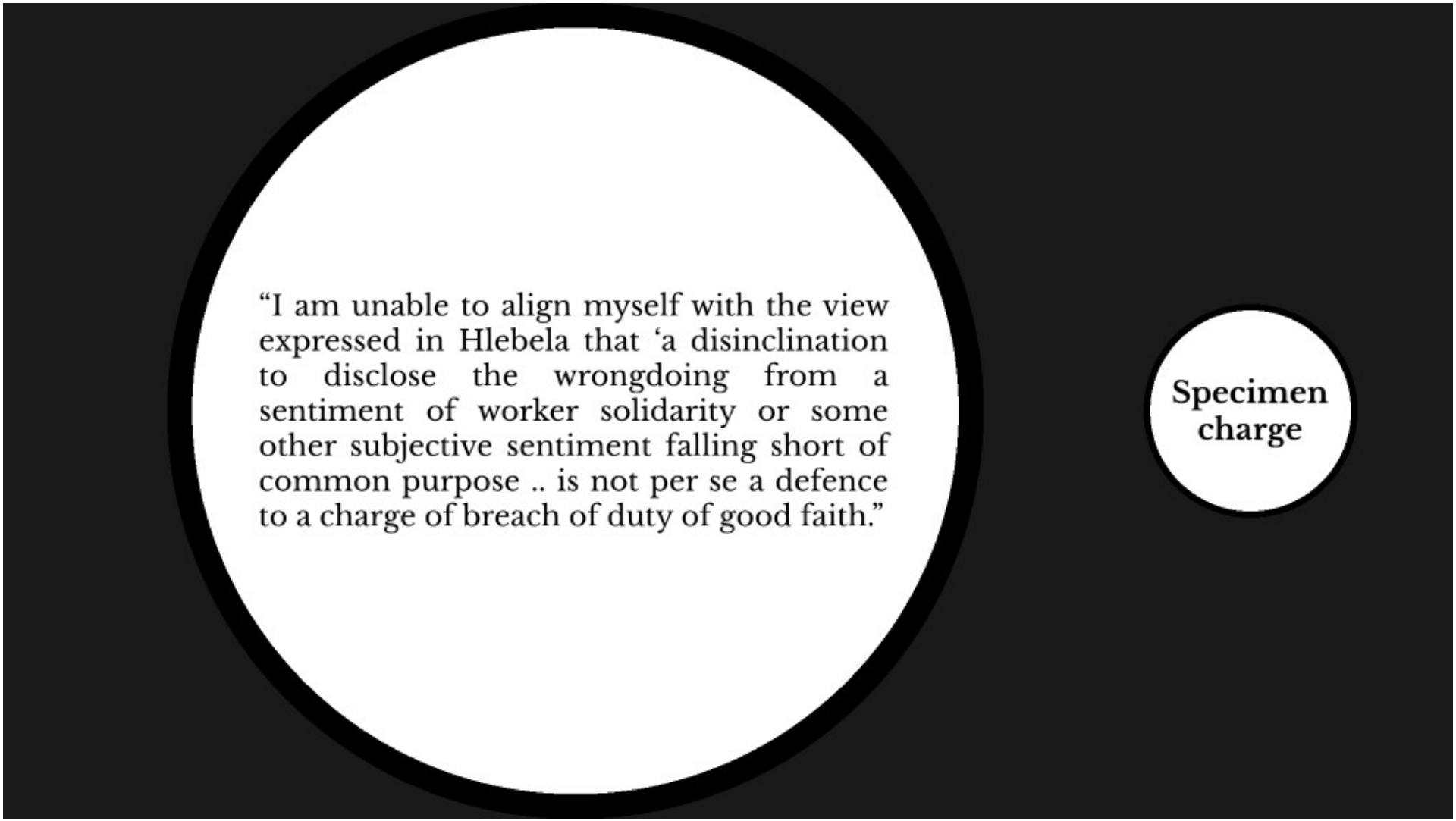
The case turned on the complex notion of "derivative misconduct", which occurs when employees fail to come forward with material information about activities that have harmed their employers. Majority satisfied that the employers had discharged the onus of proving that the employees were present when the misconduct was committed, and that the burden then shifted to the employees to exonerate themselves. But the employees had simply denied that any violence had occurred, a claim which the Commissioner had rejected as false.

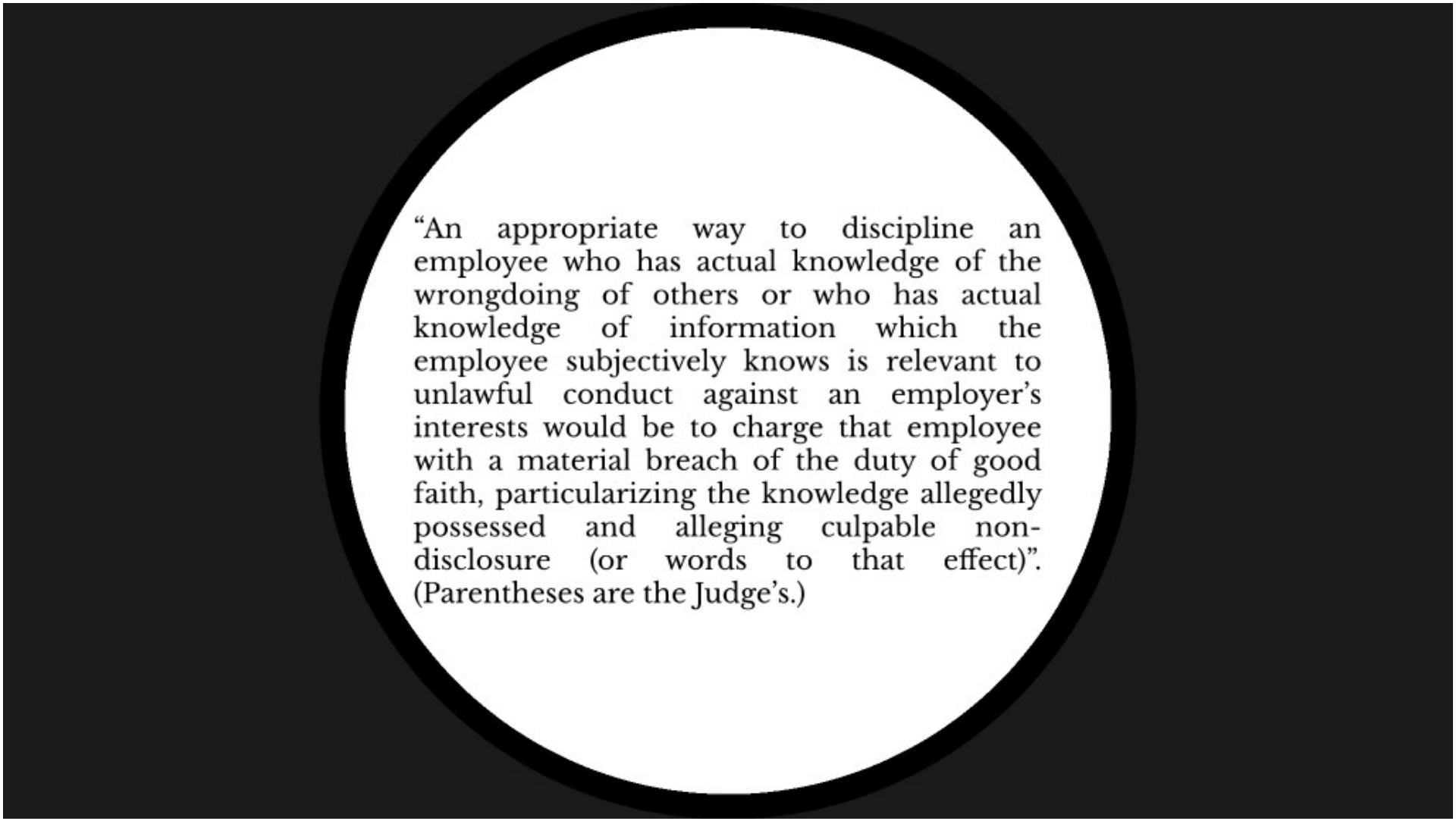
Sutherland JA


"[I]f acts of misconduct occur when the night shift was on duty, the employees on the day shift cannot, logically, be implicated because they are not members of the relevant group. By contrast, where a number of employees make common cause with a (legitimate) course of conduct over time those participants form a relevant group. If and when the propriety of acts carried out en passant that course of conduct is placed in question, all those employees who are identified [as] being participants in the course of conduct in which the relevant group is implicated because they must, on the probabilities be possessed of information relevant to the en passant conduct." (Judge's emphasis.)
Coppin JA


"The very notion that an employee can be sanctioned for not speaking, irrespective of whether he or she has actual knowledge of the principal misconduct is in itself potentially tyrannical. The protections in criminal law, which include the right to silence and the privilege against self-incrimination, were intended to protect citizens against unfair police and juridical interrogation. Similar protections would accordingly not be out of place in labour relations where potential tyranny by the police, State and courts is replaced with potential tyranny at the hands of employers."
Minority


The utility of the label "derivative misconduct" was questionable. Majority's judgments reversed the onus and failed to appreciate pressures operating on employees called to "rat" on their colleagues.
Savage AJA


"I am unable to align myself with the view expressed in Hlebela that 'a disinclination to disclose the wrongdoing from a sentiment of worker solidarity or some other subjective sentiment falling short of common purpose .. is not per se a defence to a charge of breach of duty of good faith."
Specimen charge


"An appropriate way to discipline an employee who has actual knowledge of the wrongdoing of others or who has actual knowledge of information which the employee subjectively knows is relevant to unlawful conduct against an employer's interests would be to charge that employee with a material breach of the duty of good faith, particularizing the knowledge allegedly possessed and alleging culpable non-disclosure (or words to that effect)". (Parentheses are the Judge's.)

Simmadari v Absa Bank Limited
[2018] ZALCCT 7

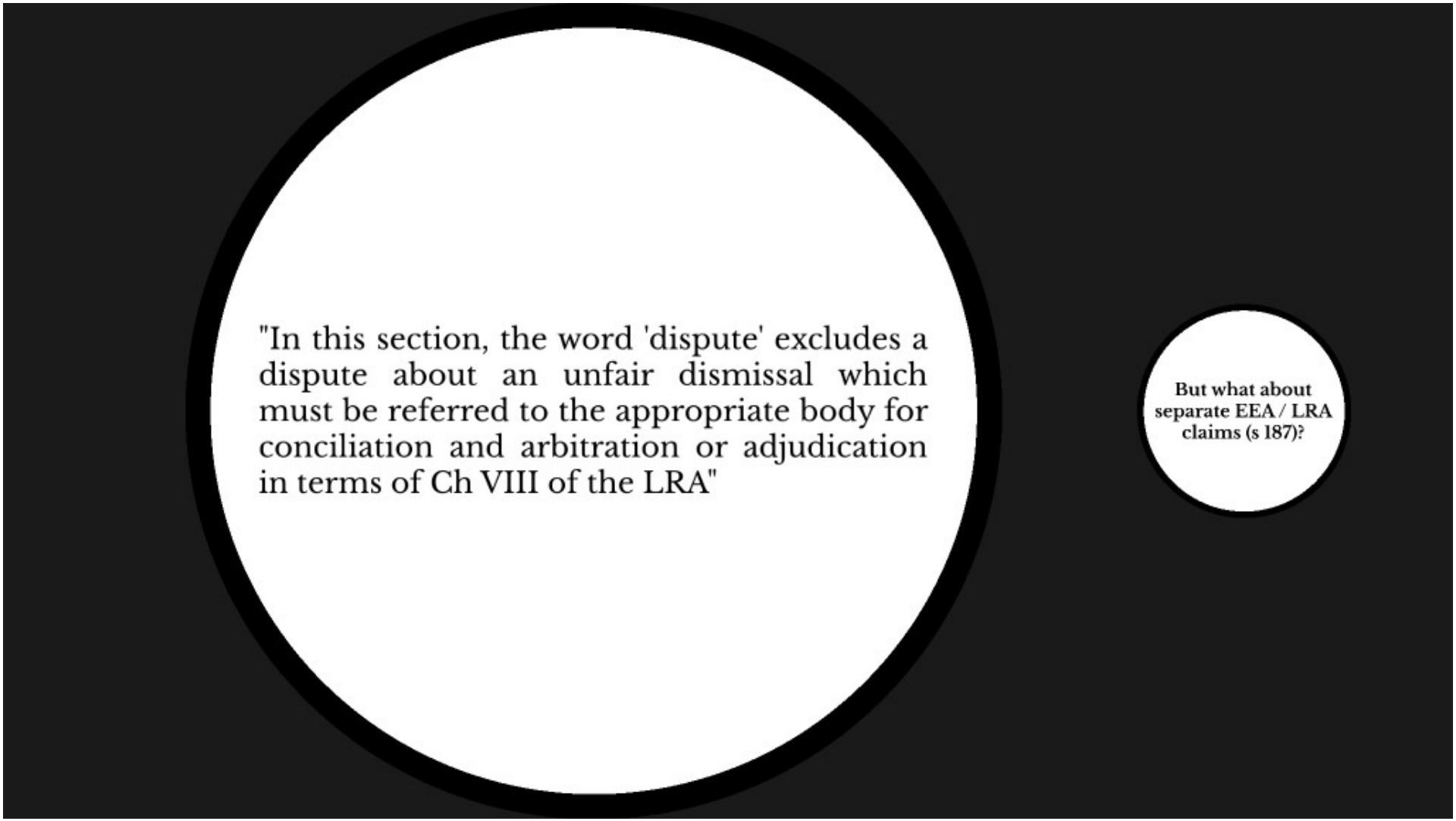
Dismissal based on gross misconduct comprising harassment and bullying, making racist, ageist and other inappropriate comments

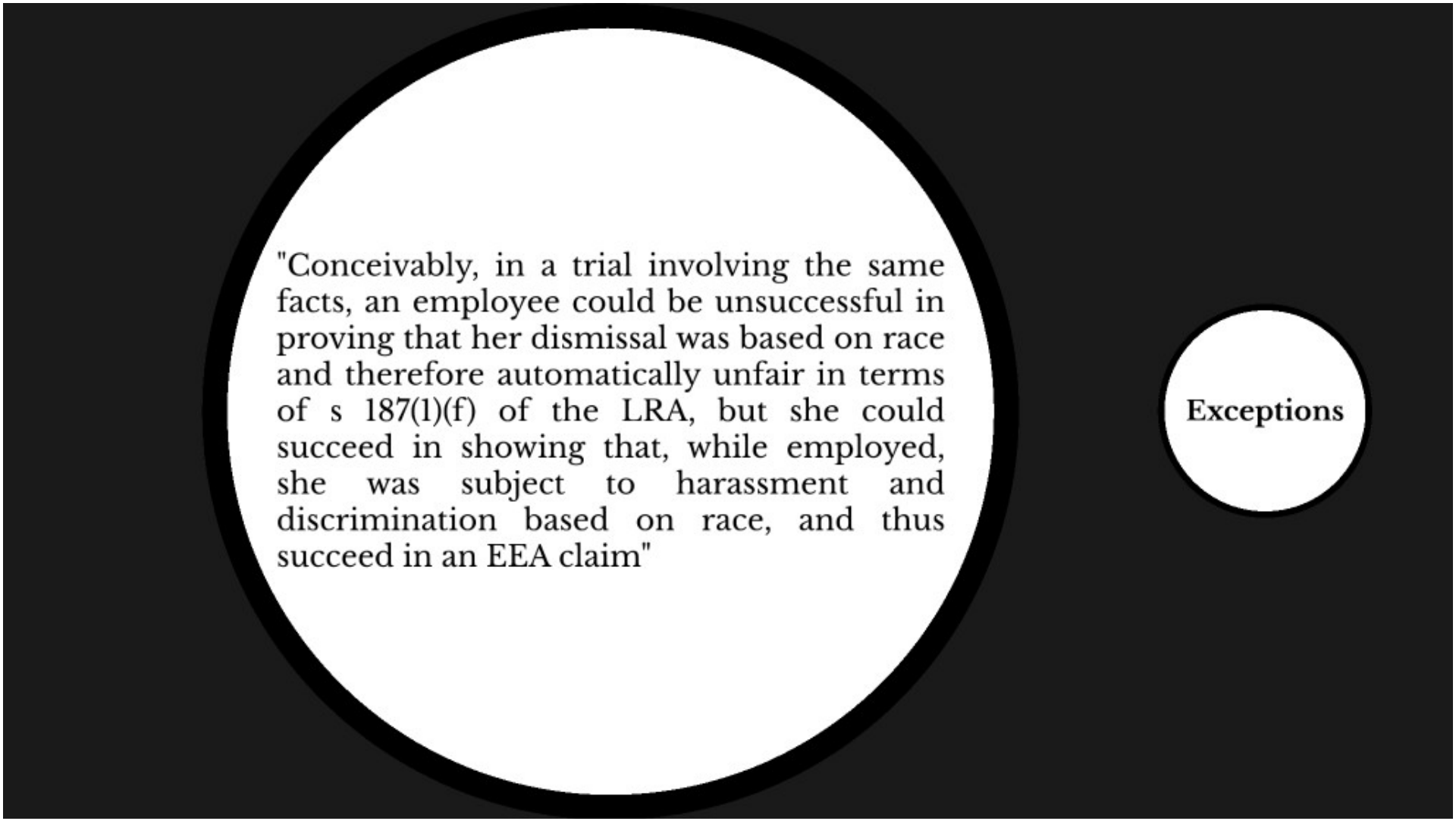
Alleged dismissal based on race, gender, conscience

Jurisdictional point and exceptions

Real case = unfair dismissal
No jurisdiction to hear EEA claim

S 10(1) of the EEA


"In this section, the word 'dispute' excludes a dispute about an unfair dismissal which must be referred to the appropriate body for conciliation and arbitration or adjudication in terms of Ch VIII of the LRA"
But what about separate EEA / LRA claims (s 187)?


"Conceivably, in a trial involving the same facts, an employee could be unsuccessful in proving that her dismissal was based on race and therefore automatically unfair in terms of s 187(1)(f) of the LRA, but she could succeed in showing that, while employed, she was subject to harassment and discrimination based on race, and thus succeed in an EEA claim"
Exceptions

- Simmadari should have alleged and proved that her victimisation was because of her race
- Failed to do so - no comparator identified
- And relied on own inaction to sustain a cause of action

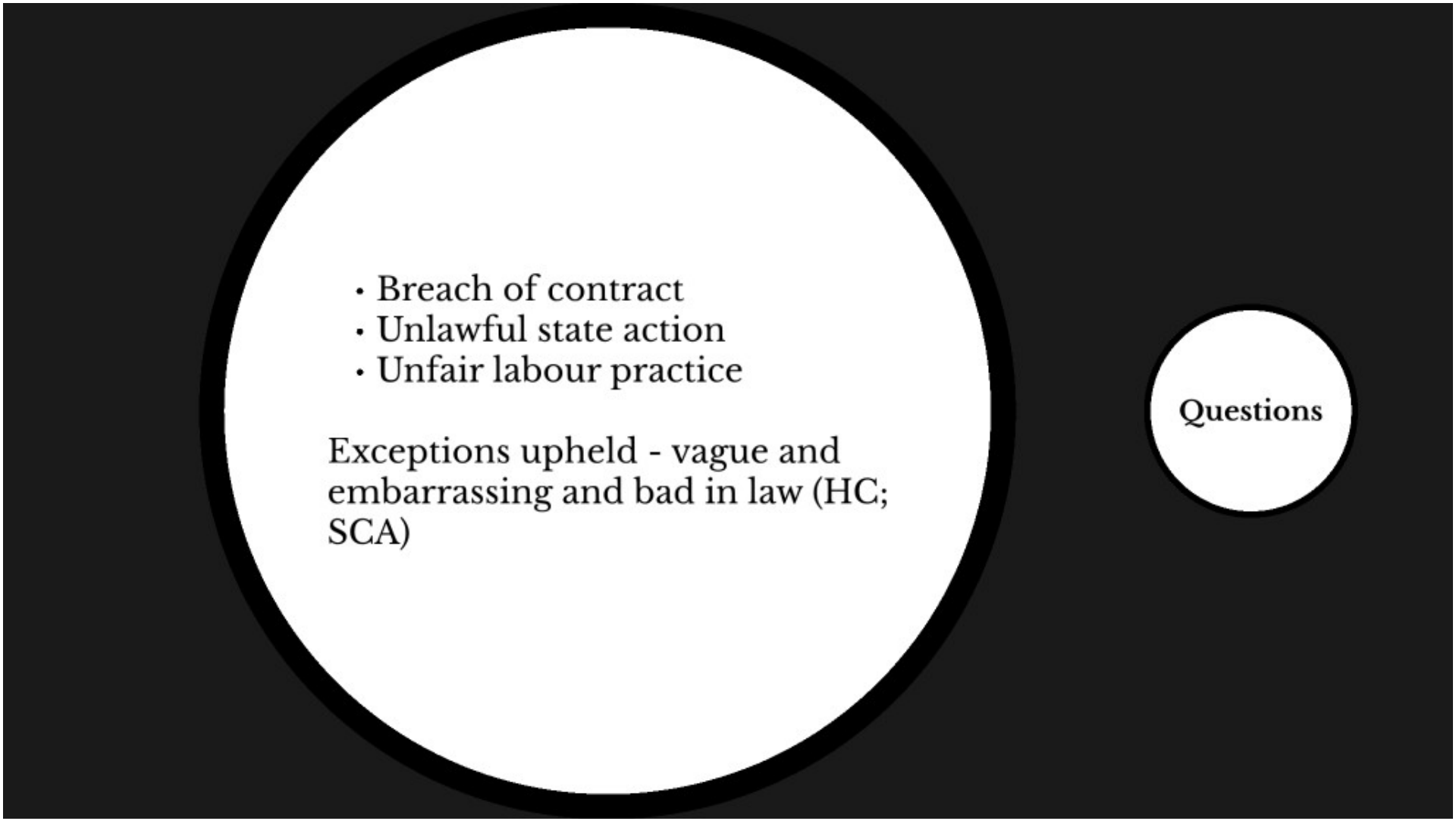
Exception upheld (in relation to both claims) with costs

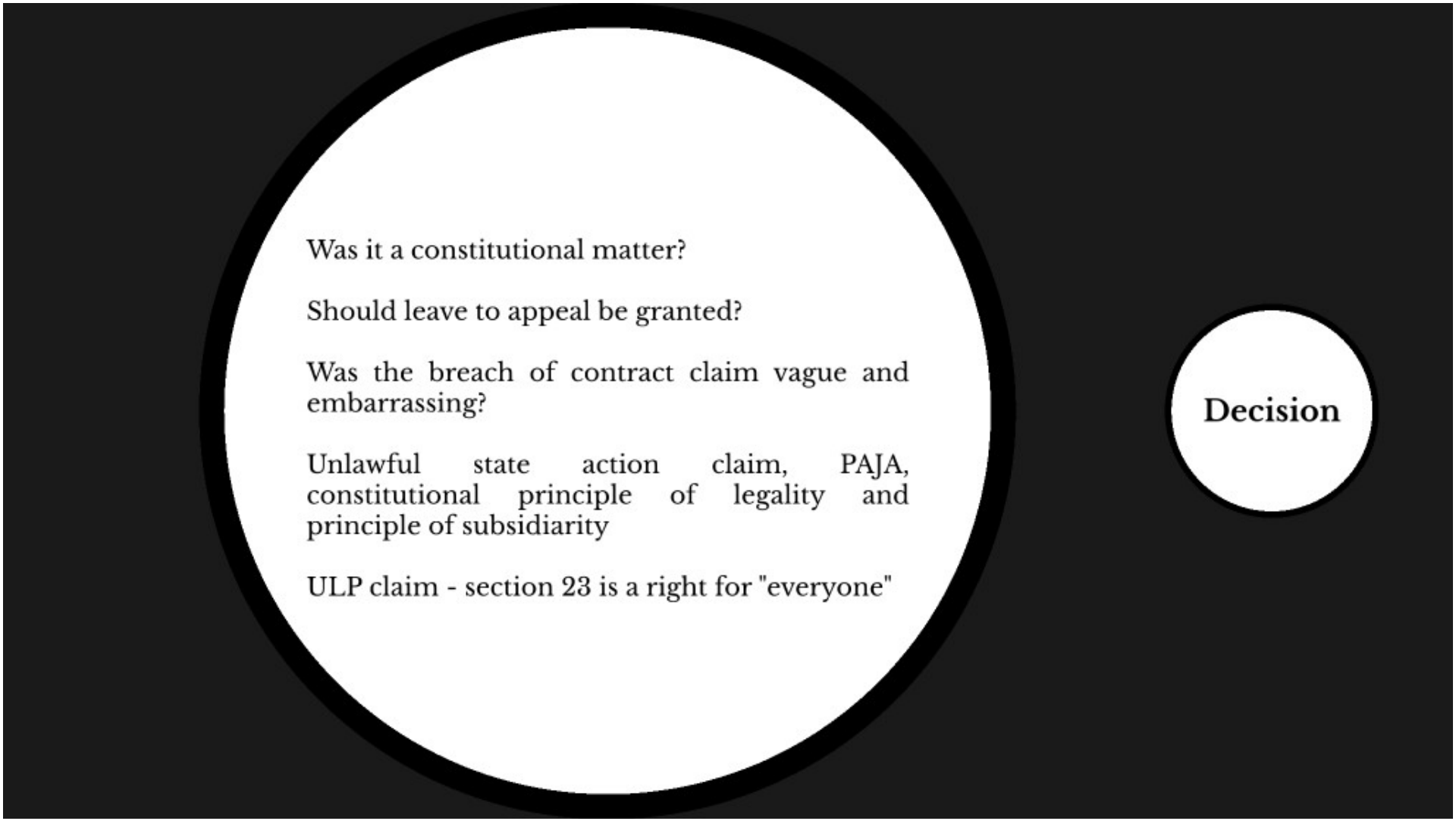
Pretorius and another v Transport Pension Fund and Others
[2018] ZACC 10

Promise in 1989 that would receive same pension benefits under Transnet as under old SA Transport Services

Discontinued after 2003 - failure to grant any pension increases beyond minimum thereafter

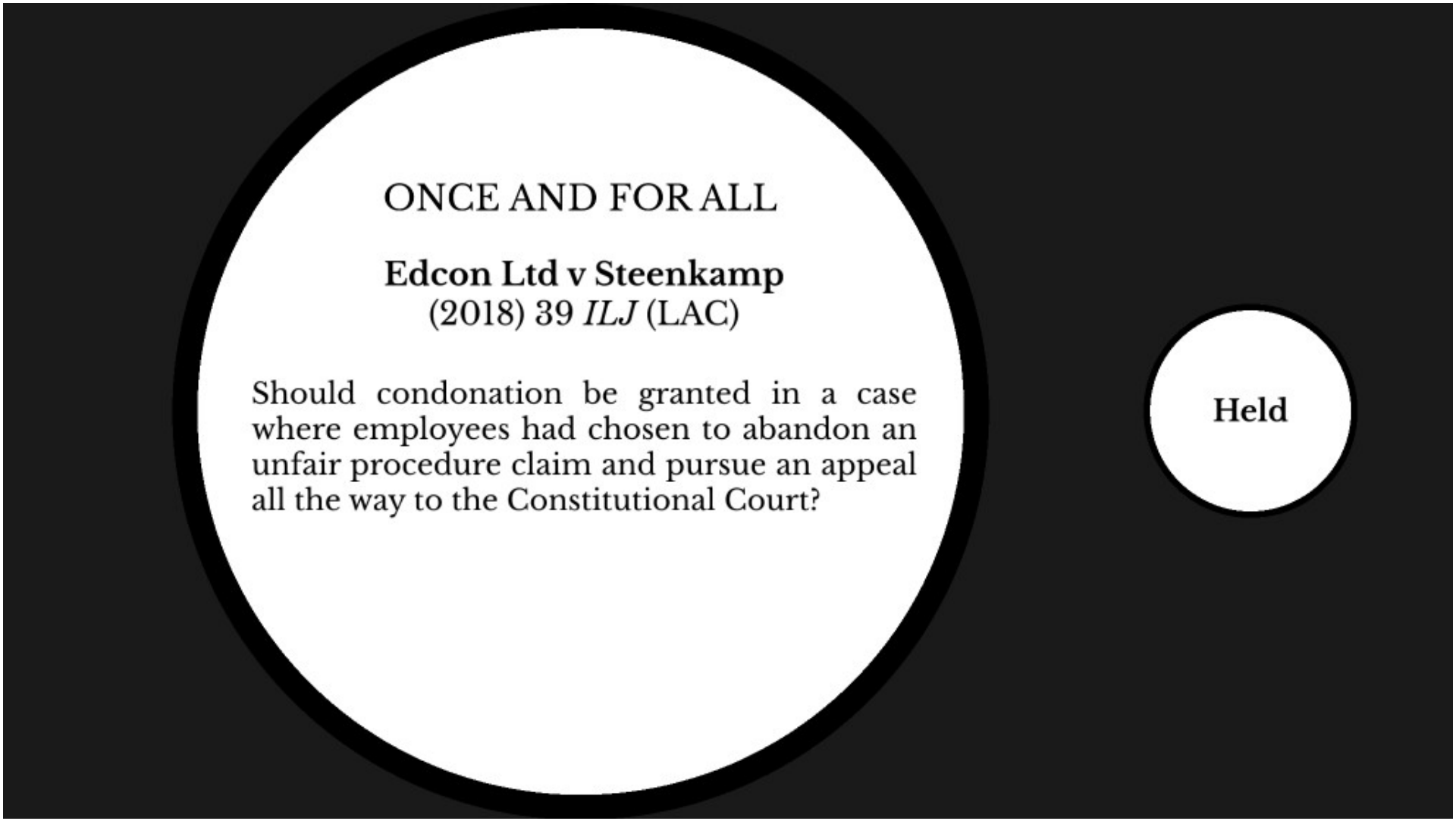
3 causes of action


• Breach of contract
• Unlawful state action
• Unfair labour practice
Exceptions upheld - vague and embarrassing and bad in law (HC; SCA)
Questions

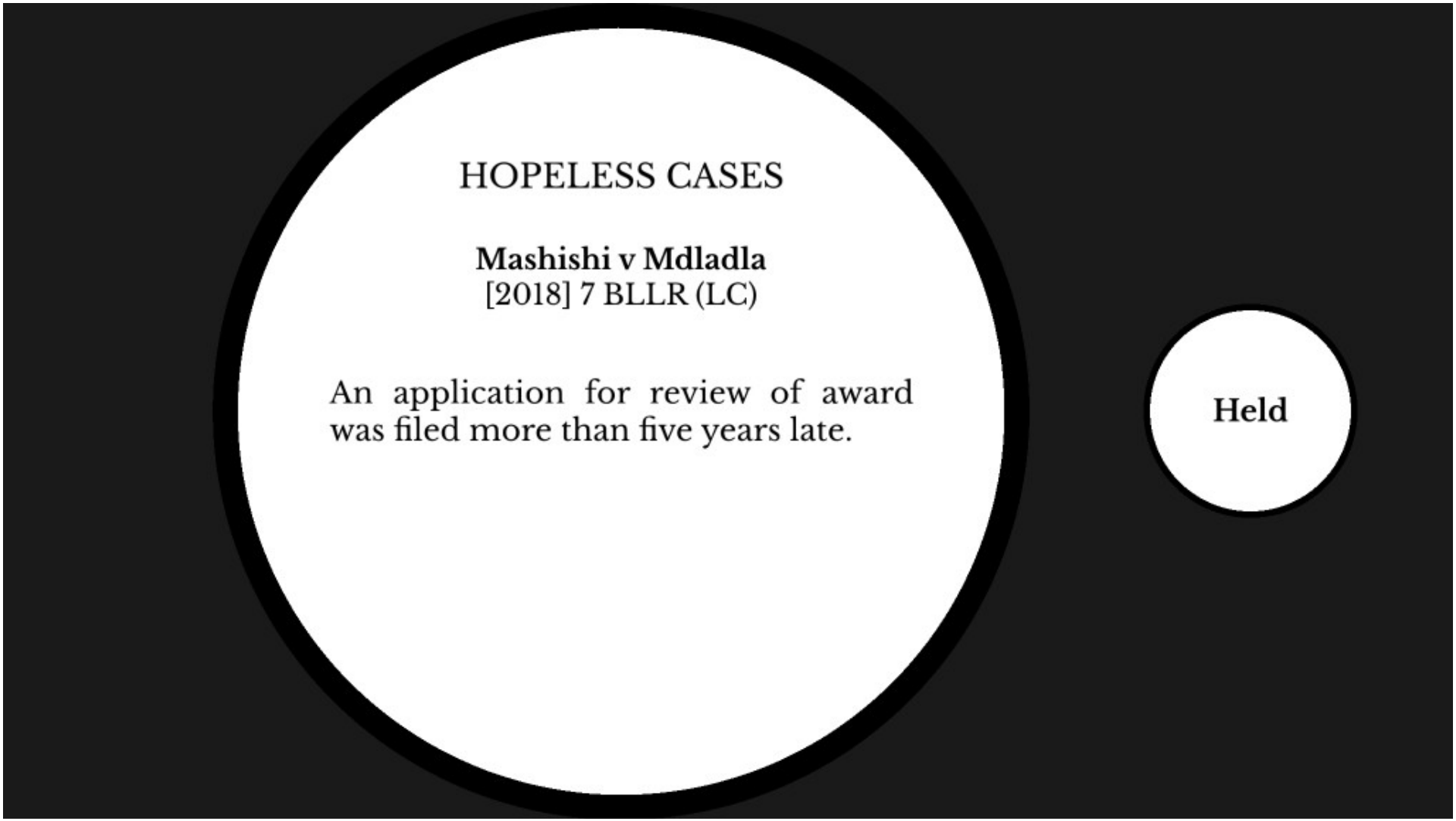

Was it a constitutional matter?
Should leave to appeal be granted?
Was the breach of contract claim vague and embarrassing?
Unlawful state action claim, PAJA, constitutional principle of legality and principle of subsidiarity
ULP claim - section 23 is a right for "everyone"
Decision

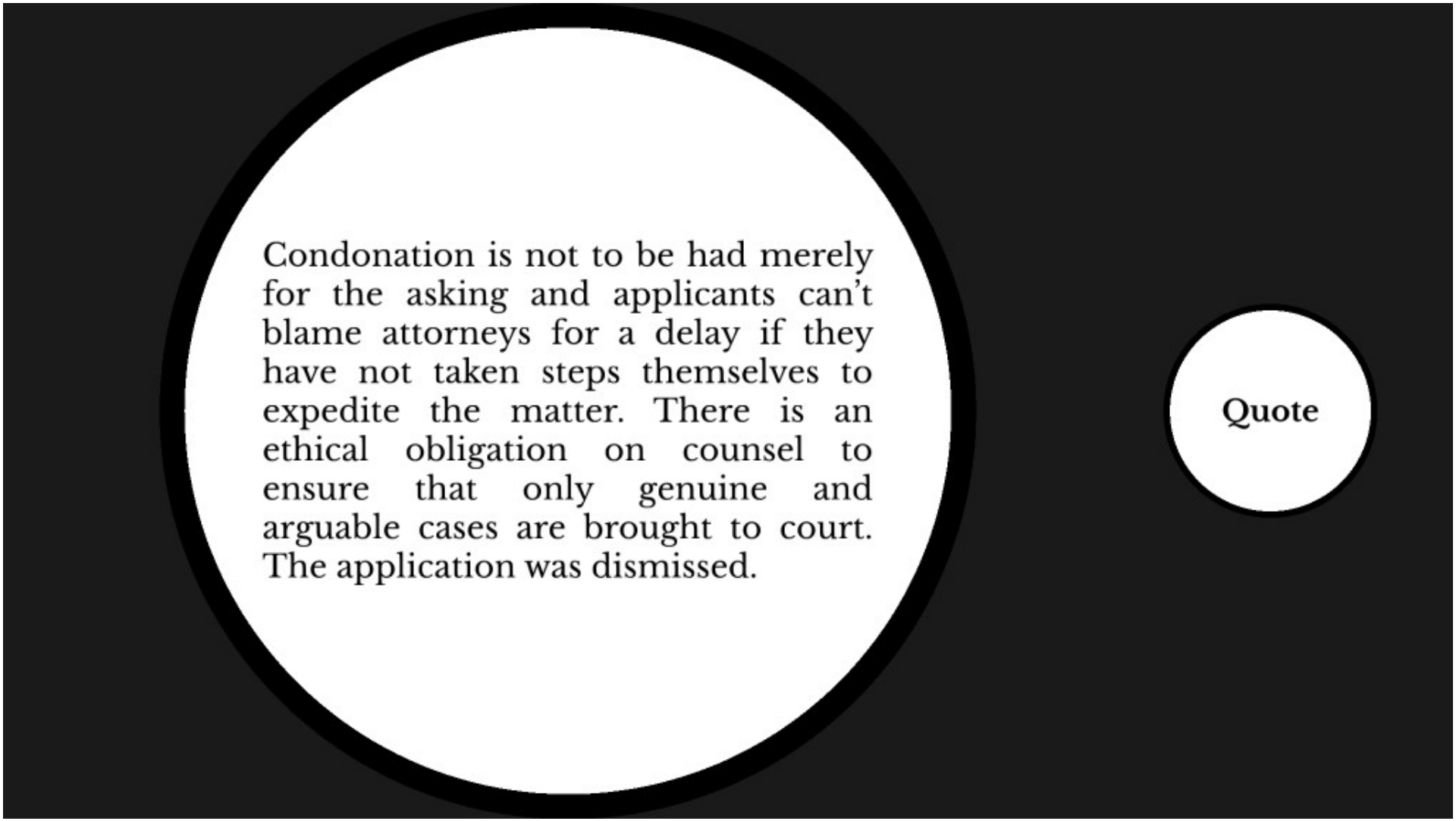
"Contemporary labour trends highlight the need to take a broad view of fair labour practice rights in section 23(1). Fewer and fewer people are in formal employment; fewer of those in formal employment have union backing and protection. More and more people find themselves in the "twilight zone" of employment as supposed "independent contractors" in time-based employment subject to faceless multinational companies who may operate from a web presence"

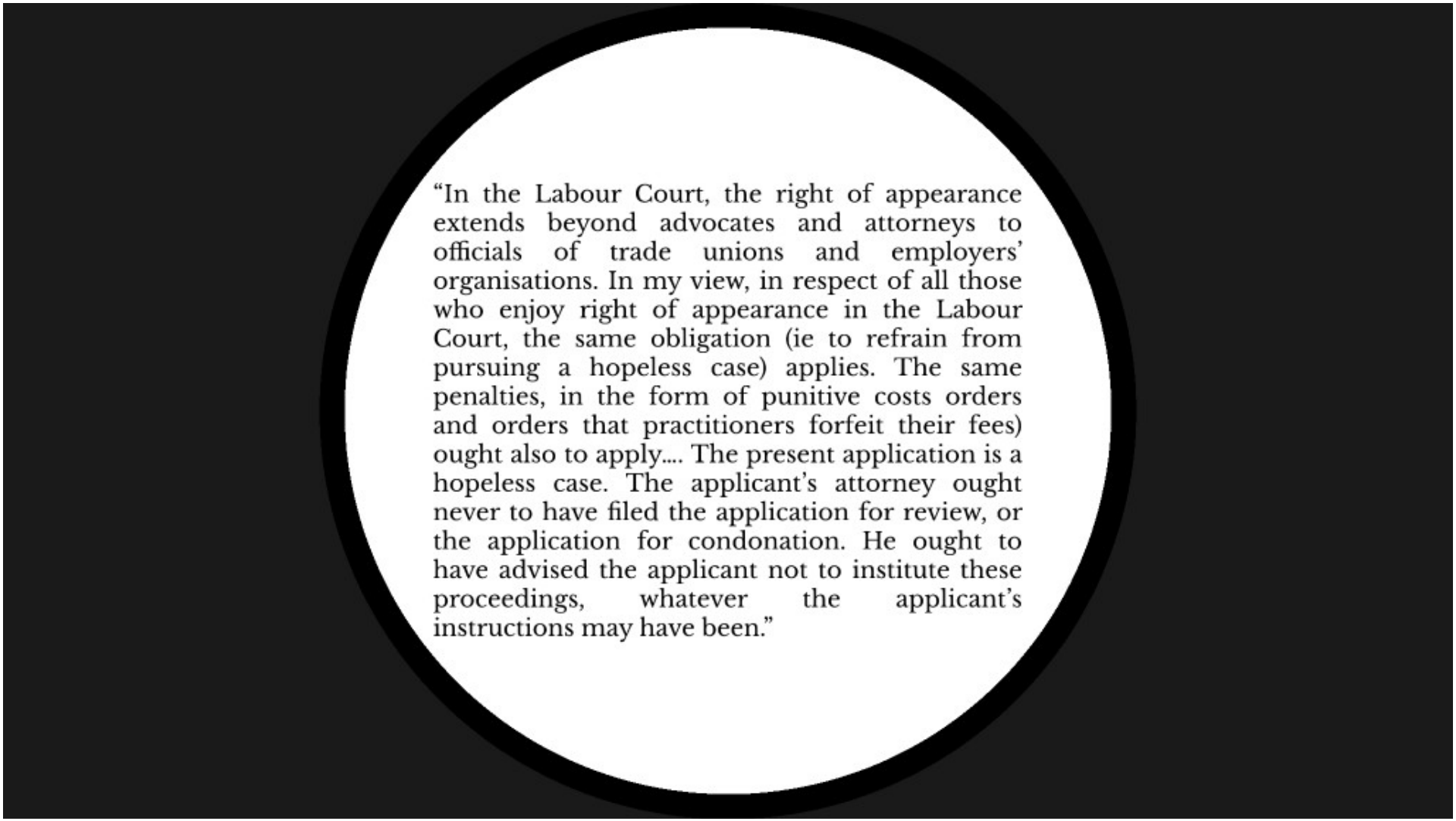
Appeals against the upholding of
the exceptions succeeded with costs


ONCE AND FOR ALL
Edcon Ltd v Steenkamp
(2018) 39 ILJ (LAC)
Should condonation be granted in a case where employees had chosen to abandon an unfair procedure claim and pursue an appeal all the way to the Constitutional Court?
Held

Such changes in tack in litigation are unacceptable in principle and cannot be condoned. It cannot be in the interests of justice to rescue a litigant whose case has come to a dead end. Condonation of the late filing of the employees' unfair dismissal claim was refused.


HOPELESS CASES
Mashishi v Mdladla
[2018] 7 BLLR (LC)
An application for review of award was filed more than five years late.
Held


Condonation is not to be had merely for the asking and applicants can't blame attorneys for a delay if they have not taken steps themselves to expedite the matter. There is an ethical obligation on counsel to ensure that only genuine and arguable cases are brought to court. The application was dismissed.
Quote


"In the Labour Court, the right of appearance extends beyond advocates and attorneys to officials of trade unions and employers' organisations. In my view, in respect of all those who enjoy right of appearance in the Labour Court, the same obligation (ie to refrain from pursuing a hopeless case) applies. The same penalties, in the form of punitive costs orders and orders that practitioners forfeit their fees) ought also to apply.... The present application is a hopeless case. The applicant's attorney ought never to have filed the application for review, or the application for condonation. He ought to have advised the applicant not to institute these proceedings, whatever the applicant's instructions may have been."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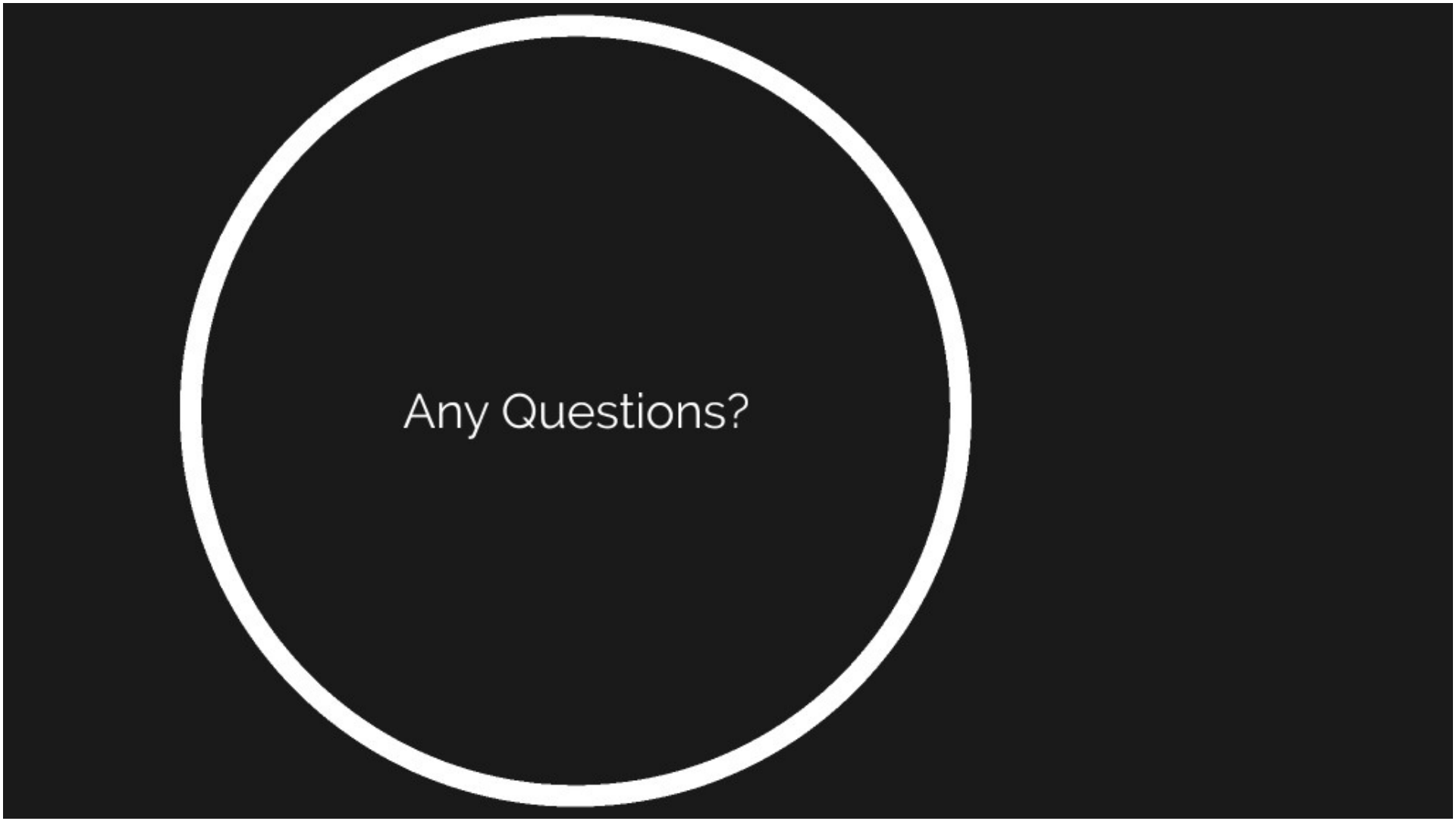
Any Questions?


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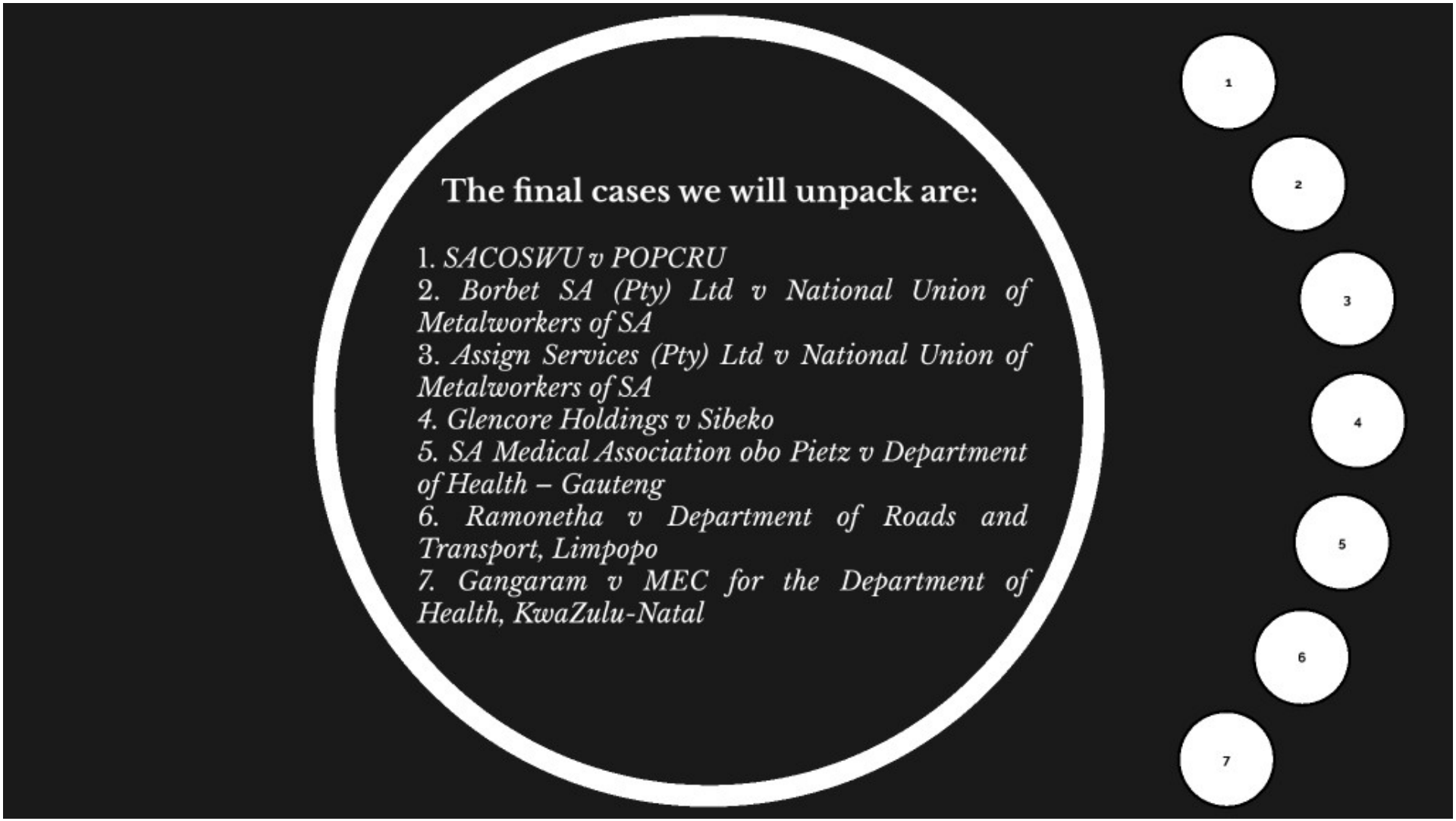
The final cases we will unpack are:
1. SACOSWU v POPCRU
2. Borbet SA (Pty) Ltd v National Union of Metalworkers of SA
3. Assign Services (Pty) Ltd v National Union of Metalworkers of SA
4. Glencore Holdings v Sibeko
5. SA Medical Association obo Pietz v Department of Health – Gauteng
6. Ramonetha v Department of Roads and Transport, Limpopo
7. Gangaram v MEC for the Department of Health, KwaZulu-Natal
1
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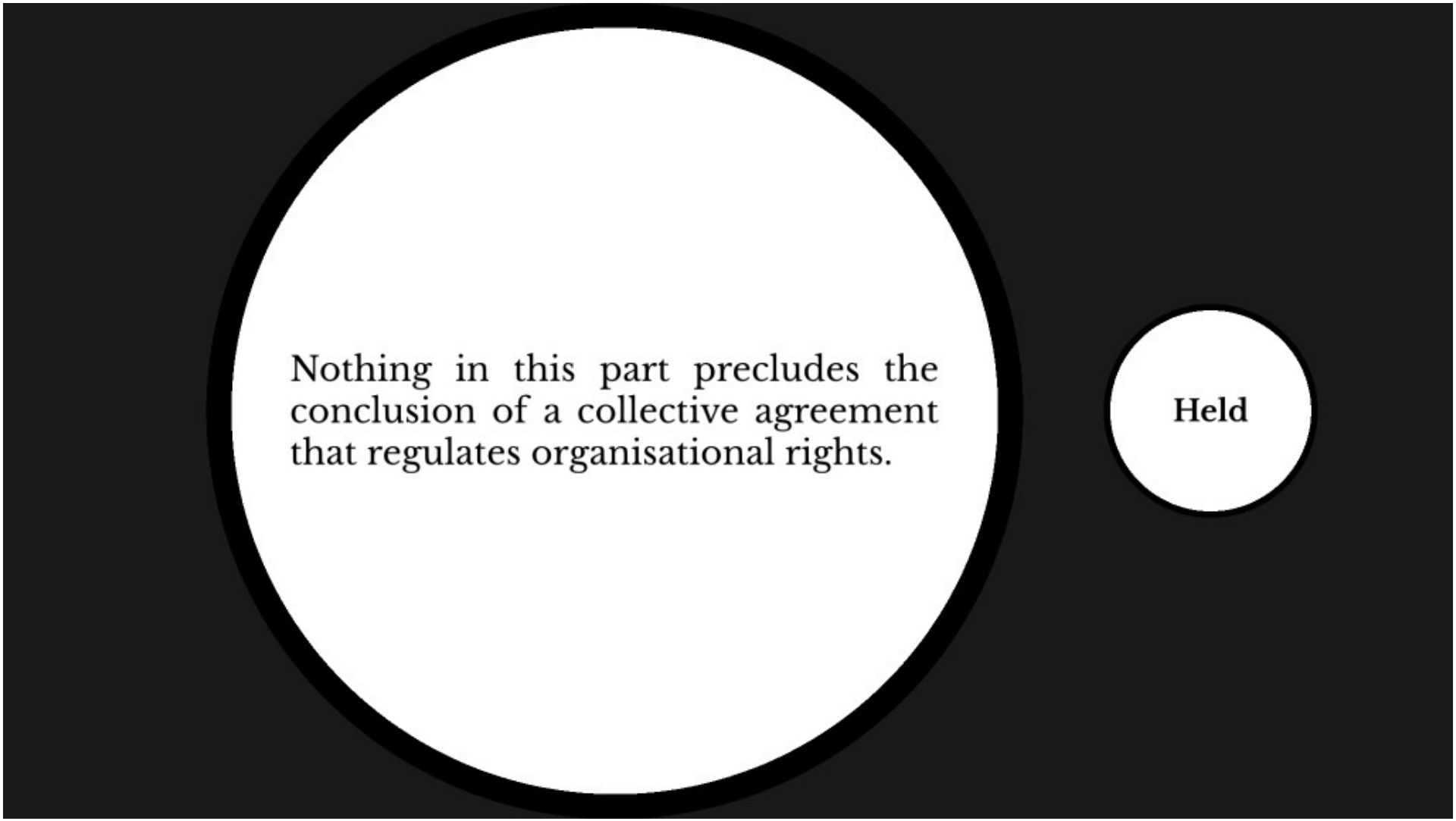
SACOSWU v POPCRU
(2017) 38 *ILJ* 2009 (LAC)

SACOSWU, a minority union, was granted organisational rights by the DCS, to which POPCRU argued it was not entitled to because it did not satisfy the threshold set by a collective agreement.

Section 18


An employer and a registered trade union whose members are a majority of the employees employed by that employer in a workplace ... may conclude a collective agreement establishing a threshold or representativeness required in respect of one or more of the organisational rights referred to in section 12, 13, and 15.
Section 20


Nothing in this part precludes the conclusion of a collective agreement that regulates organisational rights.
Held

All a threshold agreement does is to establish a minimum which, once reached, permits the employer to grant the rights without the minority union having to bargain for them. But minority unions are not barred by such agreements from bargaining for those rights if they can and SACOSWU was entitled to exercise the rights for which it had bargained.

NUMSA v SACOSWU (CC)

Minority

Matter moot. Leave to appeal refused.

Majority

Matter moot, but leave to appeal granted.

"When properly construed Chapter III of the LRA reveals that a minority union may access organisational rights in sections 12, 13 and 15 in a number of ways. First, it may acquire those rights if it meets the threshold set in the collective agreement between the majority union and the employer. In that event, a minority union does not have to bargain before exercising the rights in question. Second, such union may bargain and conclude a collective agreement with an employer, in terms of which it would be permitted to exercise the relevant rights. Third, a minority union may refer the question whether it should exercise those rights to arbitration in terms of section 21(8C) of the LRA. If the union meets the conditions stipulated in that section, the arbitrator may grant it organisational rights in the relevant provisions."

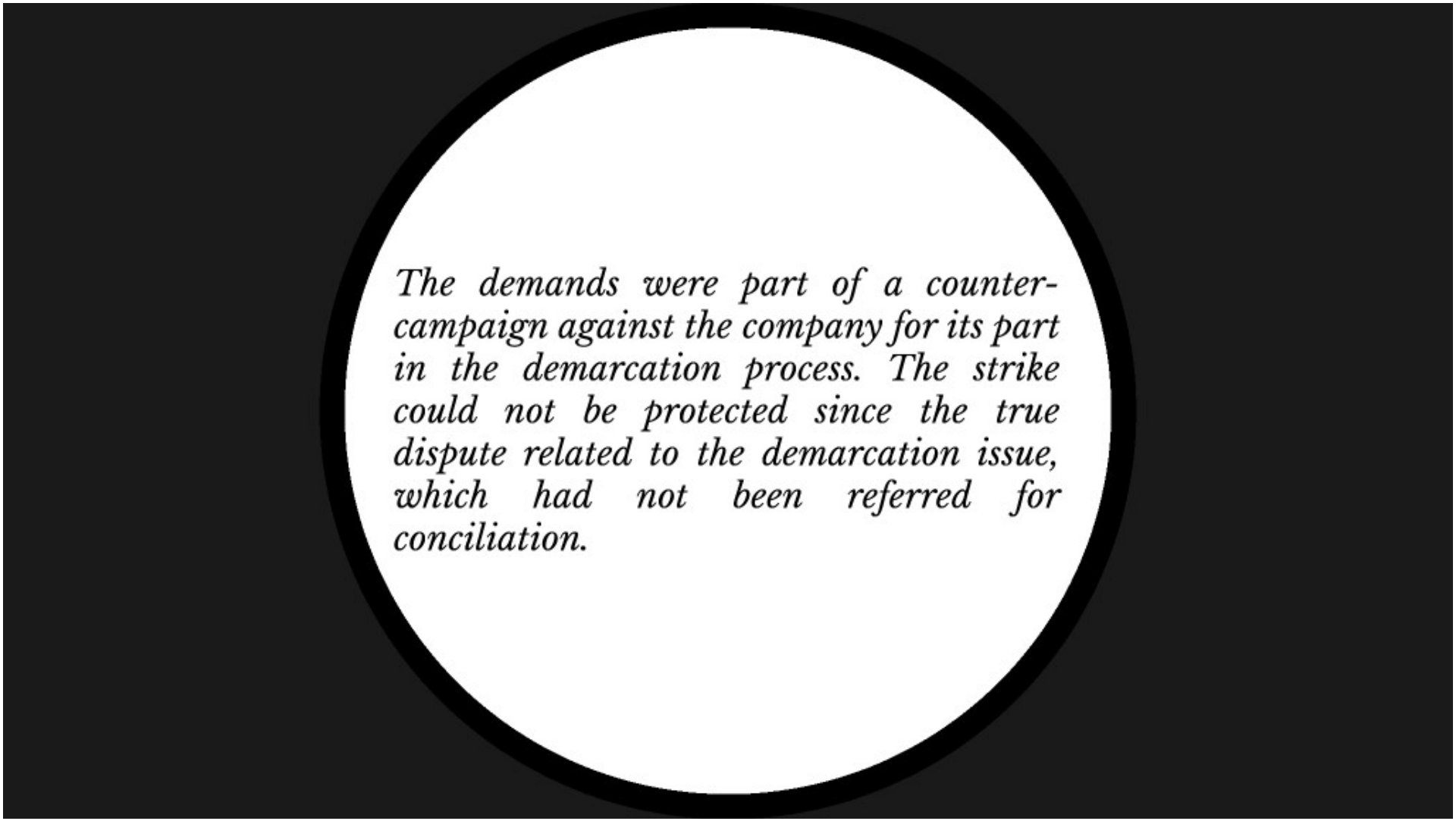
Zondo DJP

Distinction between organizational rights acquired by statute and those acquired by agreement. Statutory organizational rights acquired automatically. Contractual organizational rights acquired by negotiation. Former cannot be revoked while union meets threshold. Latter can be revoked on reasonable notice.

Borbet SA (Pty) Ltd v National Union of Metalworkers of SA
[2018] 4 BLLR (LC)

Borbet referred a demarcation dispute which resulted in NUMSA presenting a set of demands and issuing a strike notice.

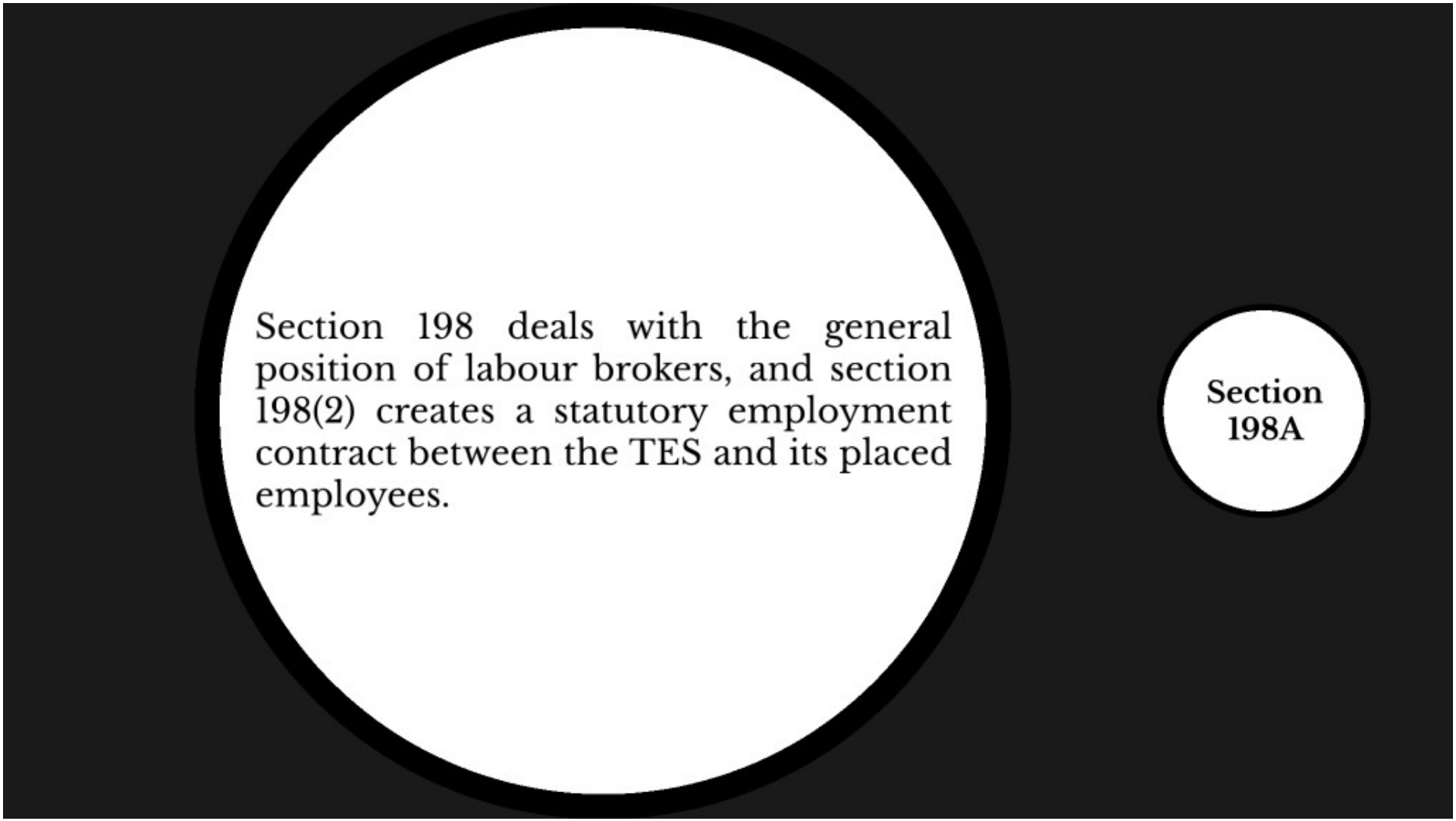
Held

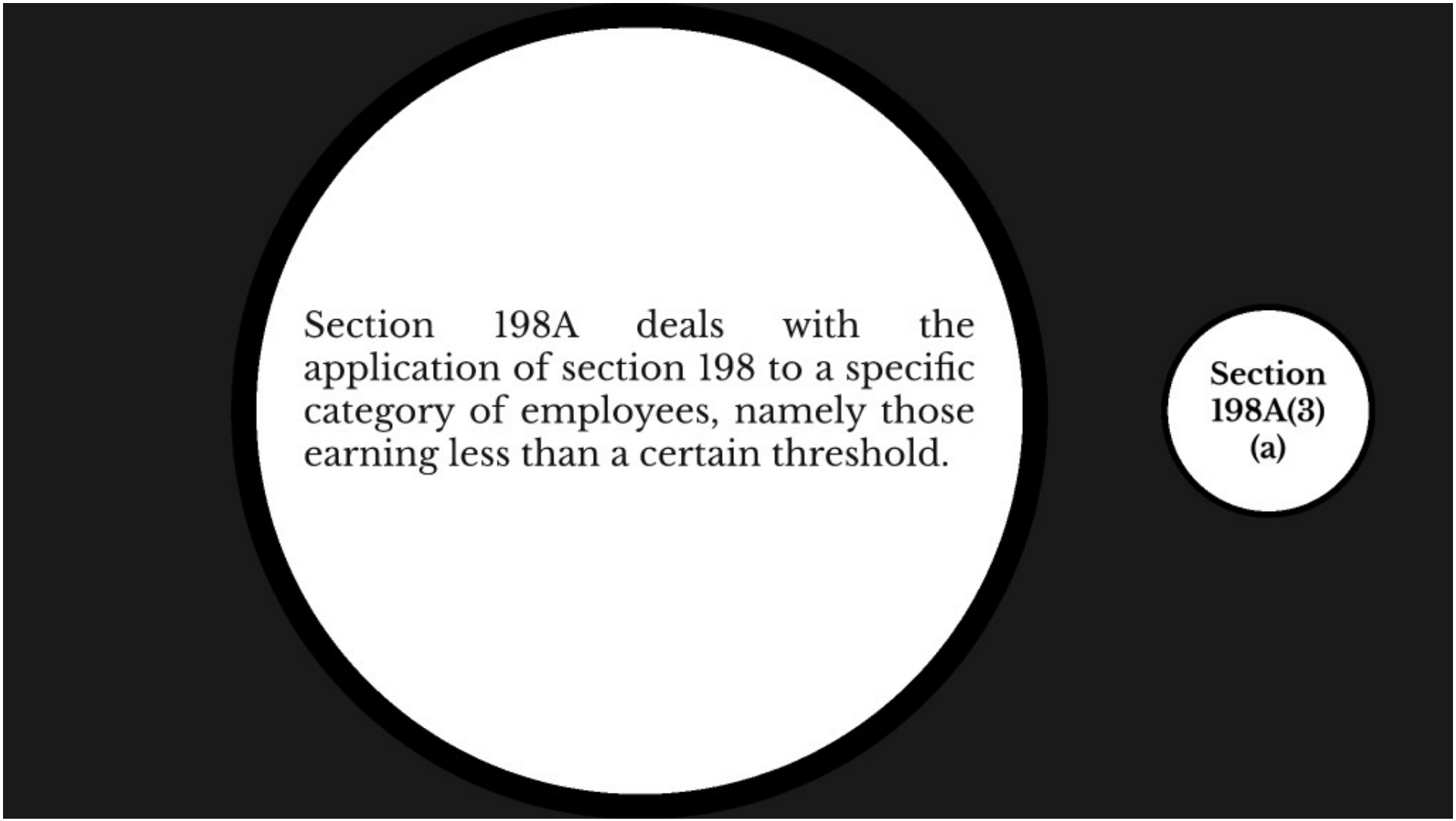

The demands were part of a counter-campaign against the company for its part in the demarcation process. The strike could not be protected since the true dispute related to the demarcation issue, which had not been referred for conciliation.

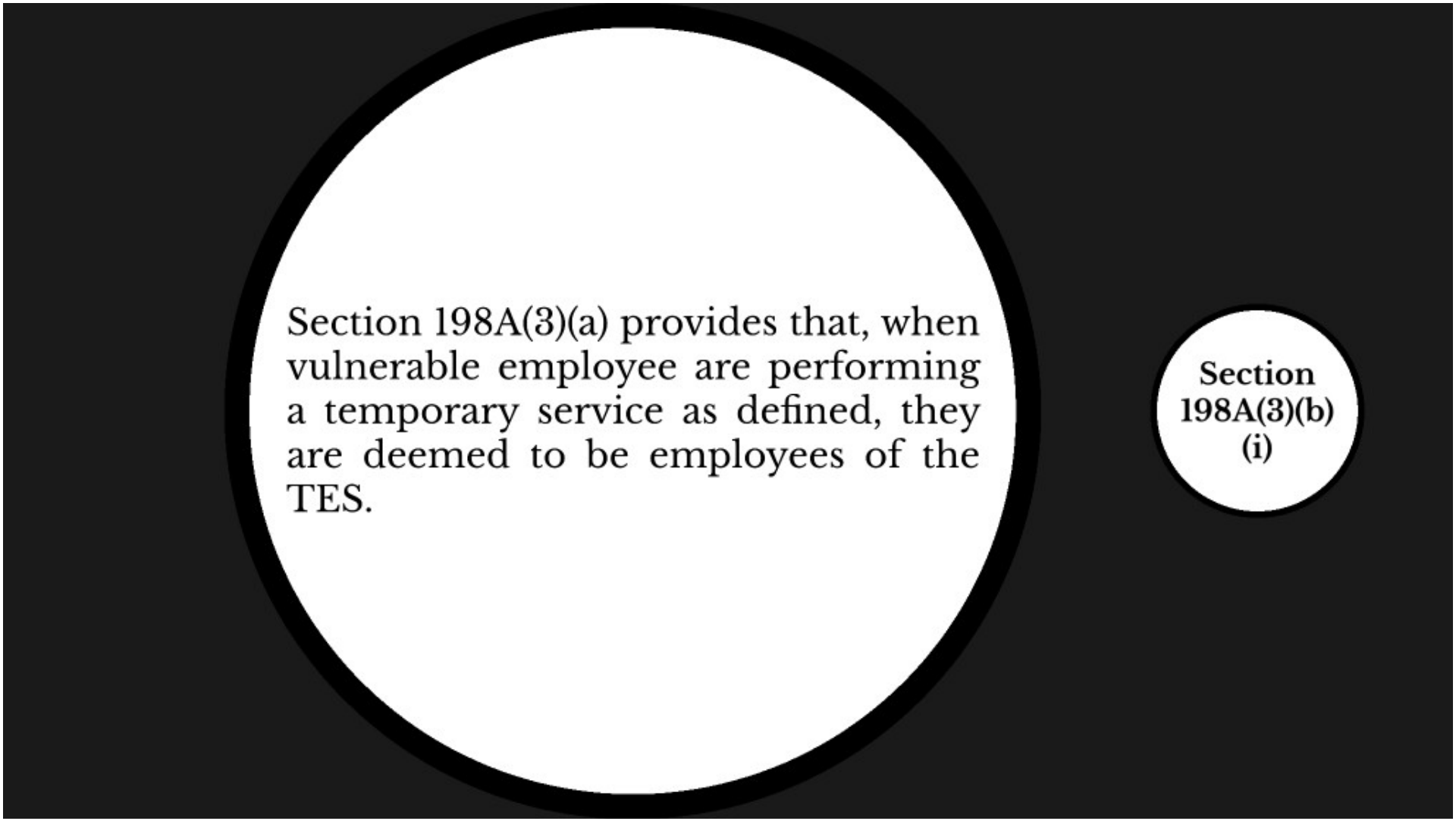
Assign Services (Pty) Ltd v National Union of Metalworkers of SA
CCT194/17, 26/07/2018

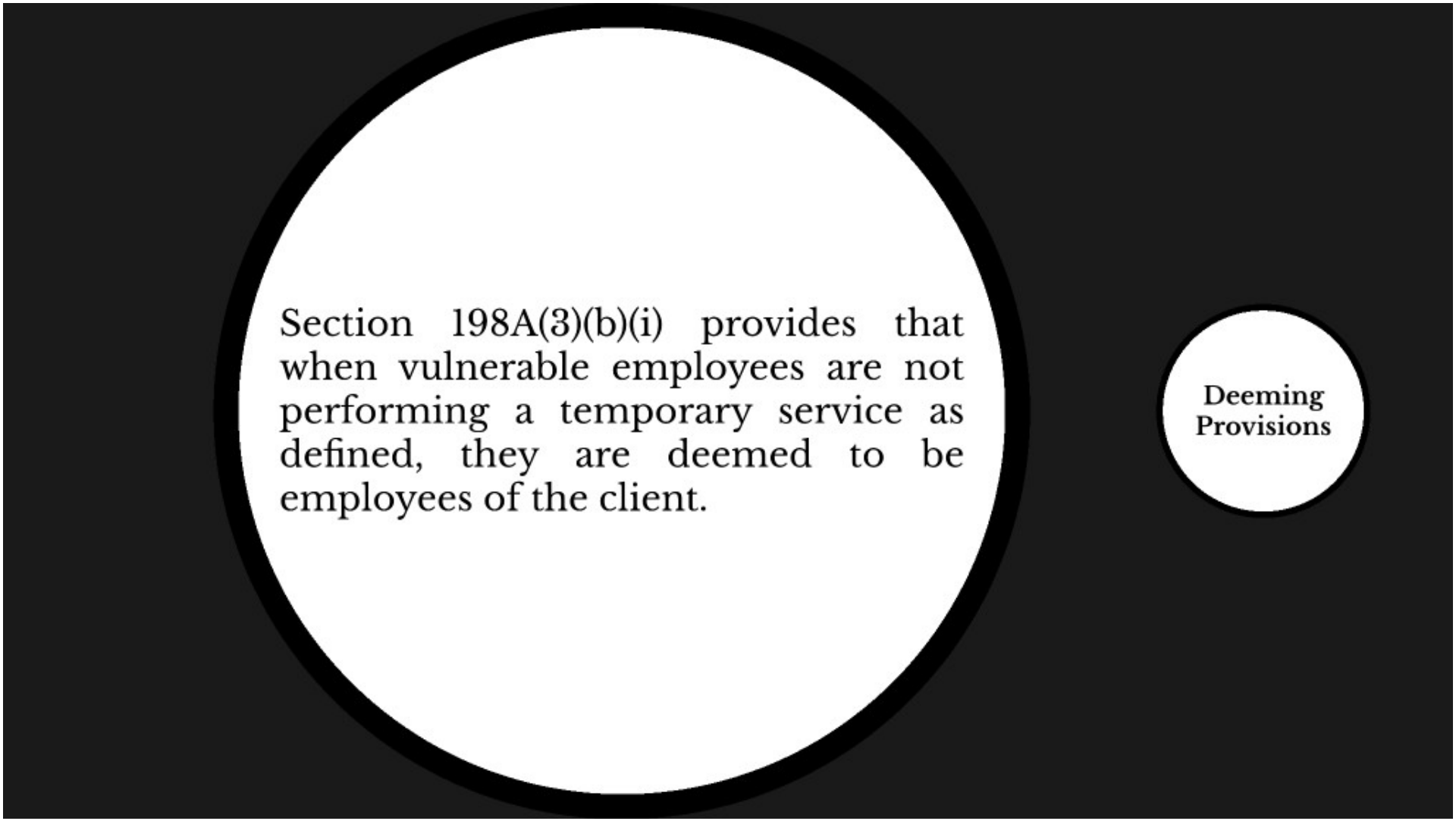
The issue was whether, after three months, a labour broker and its client remain co-employers of the "placed" workers, or whether the client becomes the sole employer and the broker drops out of the picture.

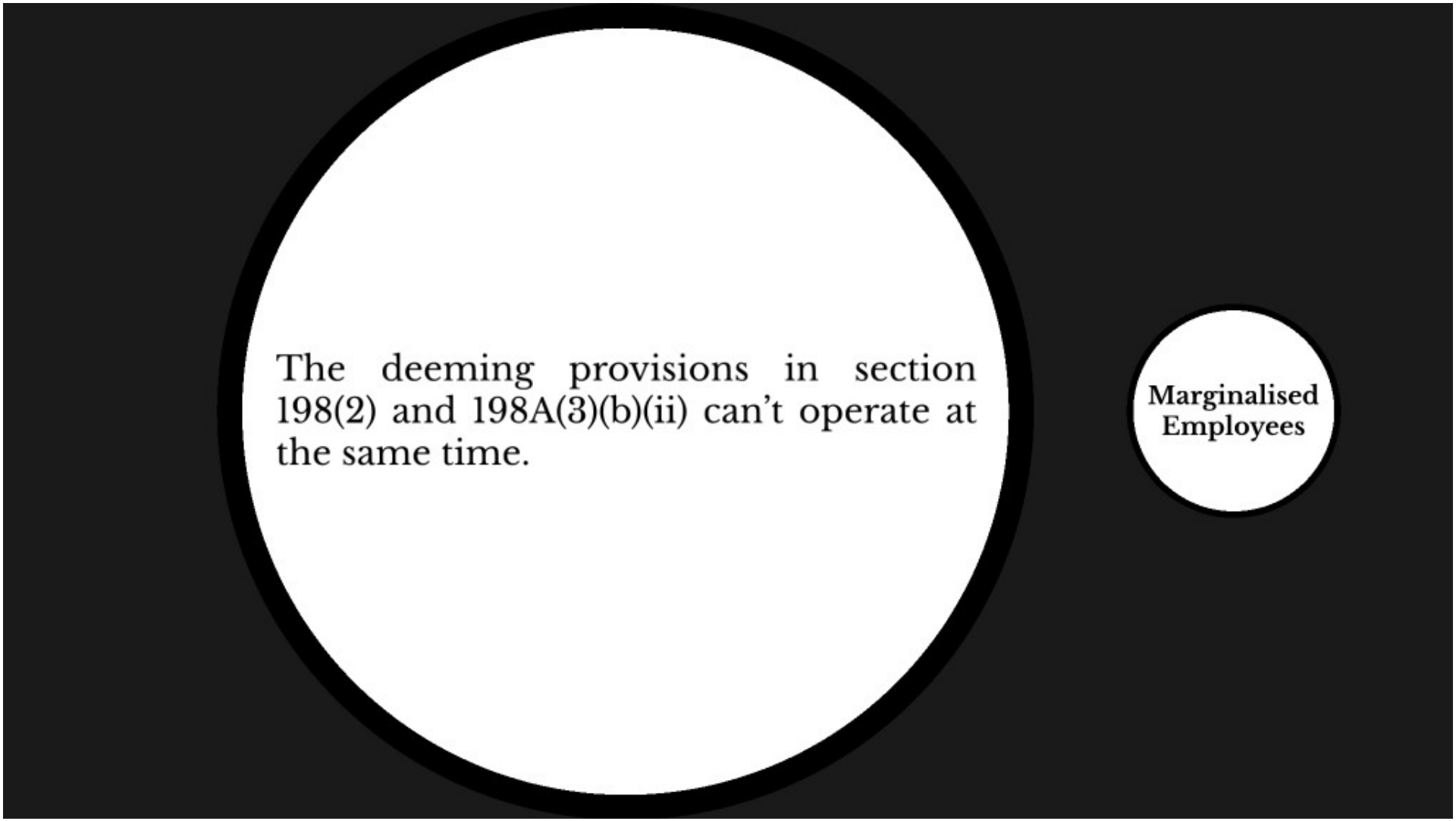
Held


Section 198 deals with the general position of labour brokers, and section 198(2) creates a statutory employment contract between the TES and its placed employees.
Section 198A


Section 198A deals with the application of section 198 to a specific category of employees, namely those earning less than a certain threshold.
Section 198A(3)(a)

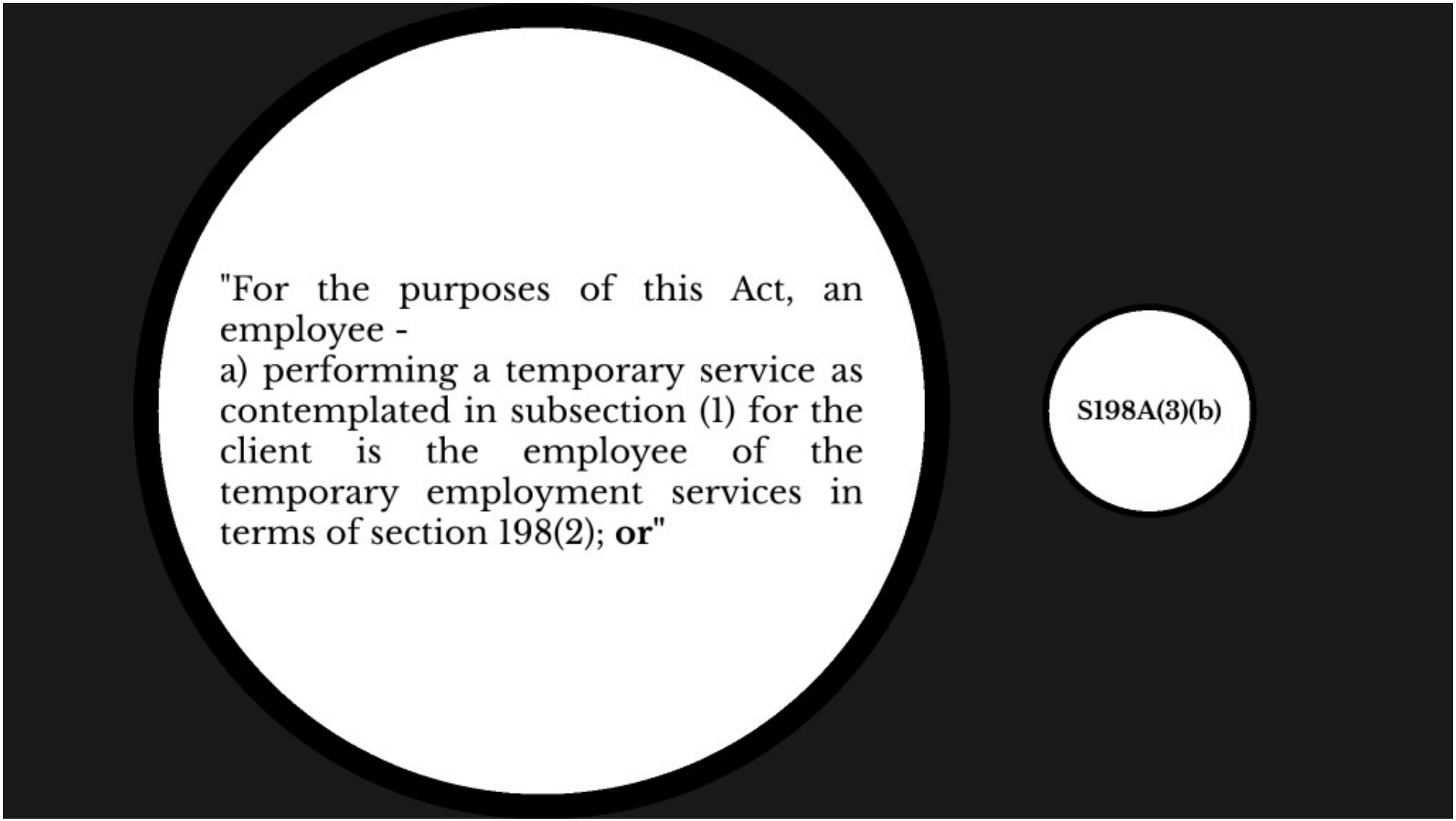

Section 198A(3)(a) provides that, when vulnerable employee are performing a temporary service as defined, they are deemed to be employees of the TES.
Section 198A(3)(b)(i)


Section 198A(3)(b)(i) provides that when vulnerable employees are not performing a temporary service as defined, they are deemed to be employees of the client.
Deeming Provisions


The deeming provisions in section 198(2) and 198A(3)(b)(ii) can't operate at the same time.
Marginalised Employees

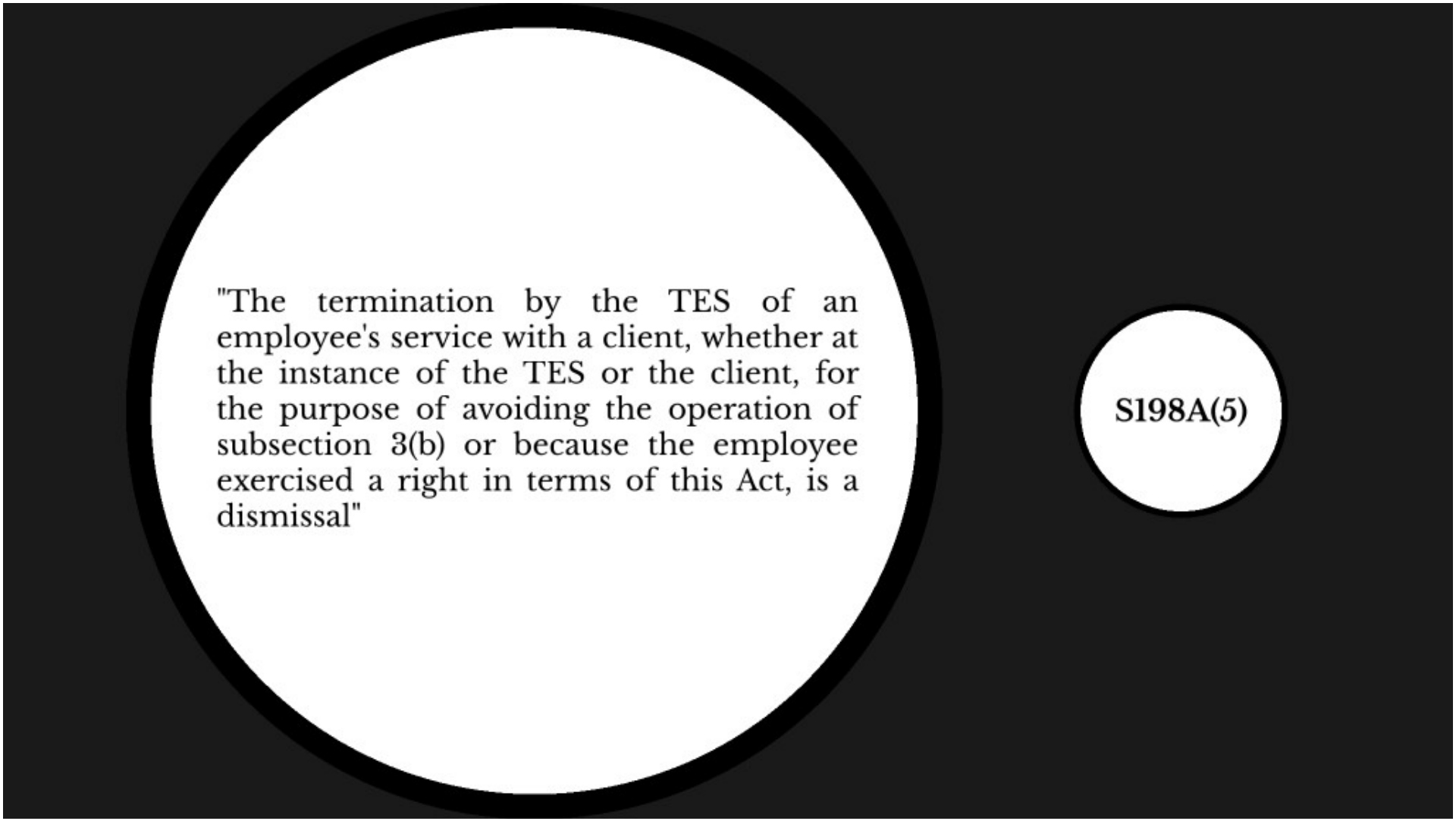
When marginalised employees are not performing a temporary service as defined, section 198A(3)(b)(ii) replaces section 198(2) as the operative deeming clause for the purpose of determining the identity of the employer.

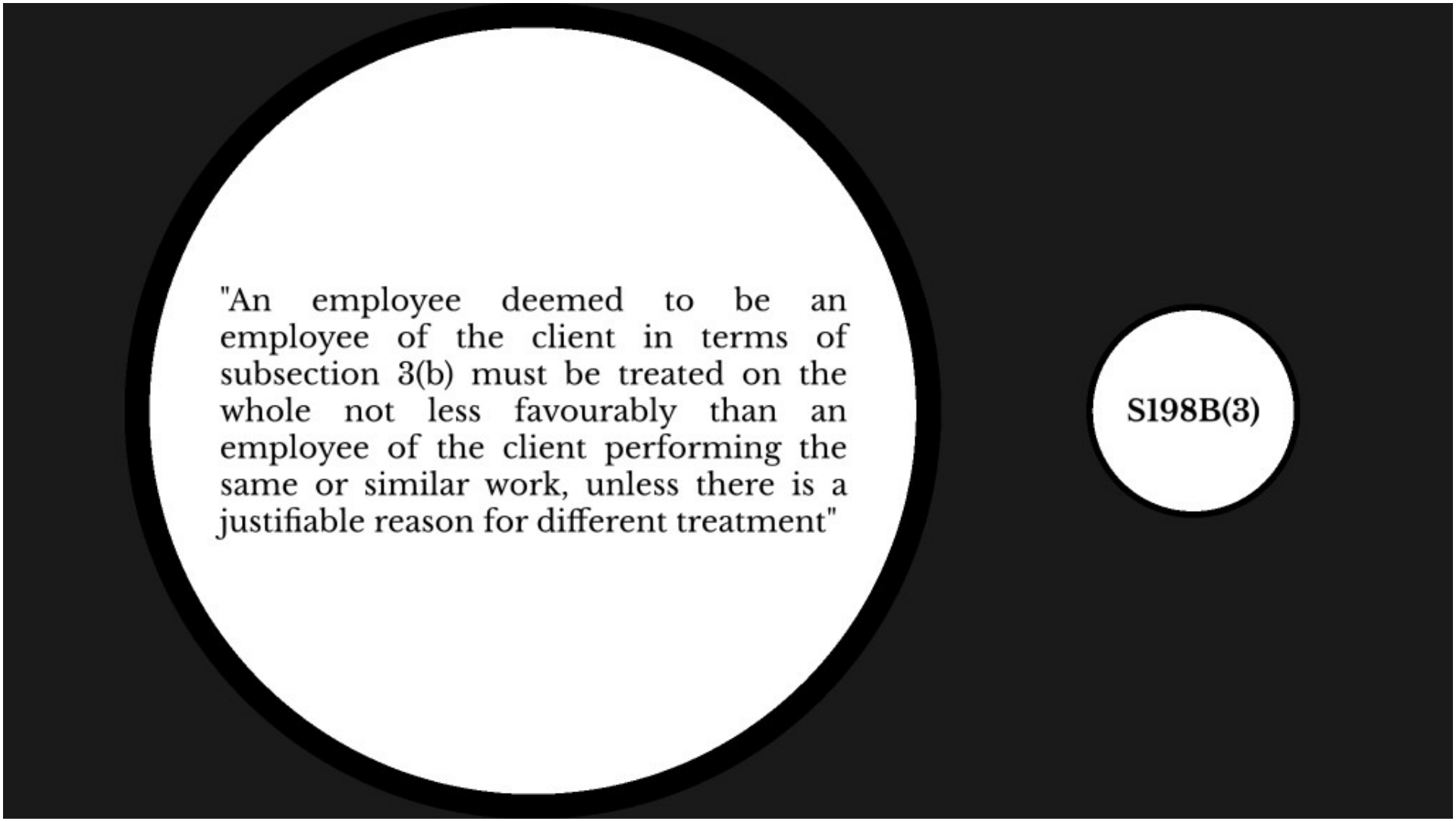
S198A(3)(a)

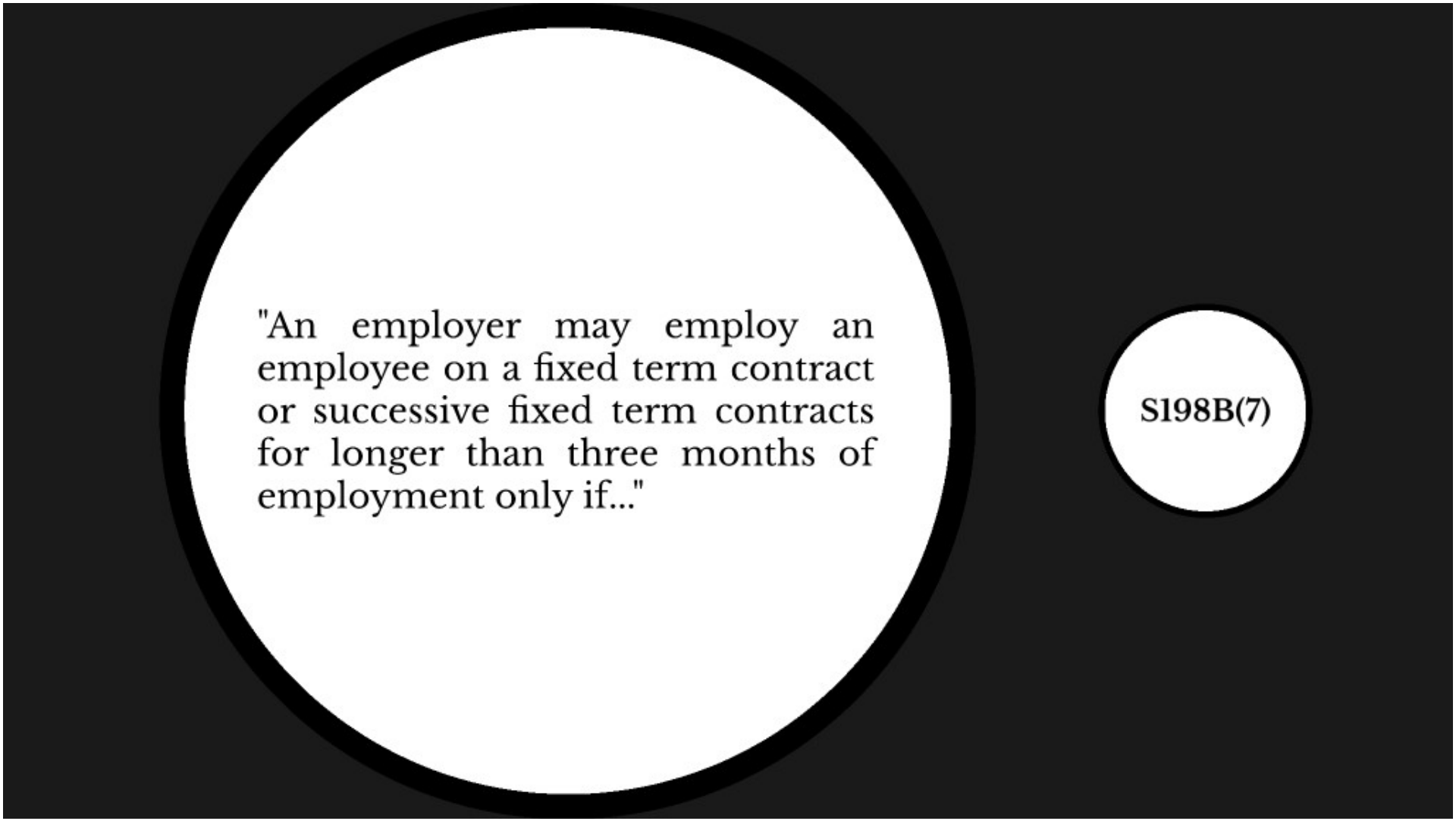

"For the purposes of this Act, an employee -
a) performing a temporary service as contemplated in subsection (1) for the client is the employee of the temporary employment services in terms of section 198(2); **or**"
S198A(3)(b)

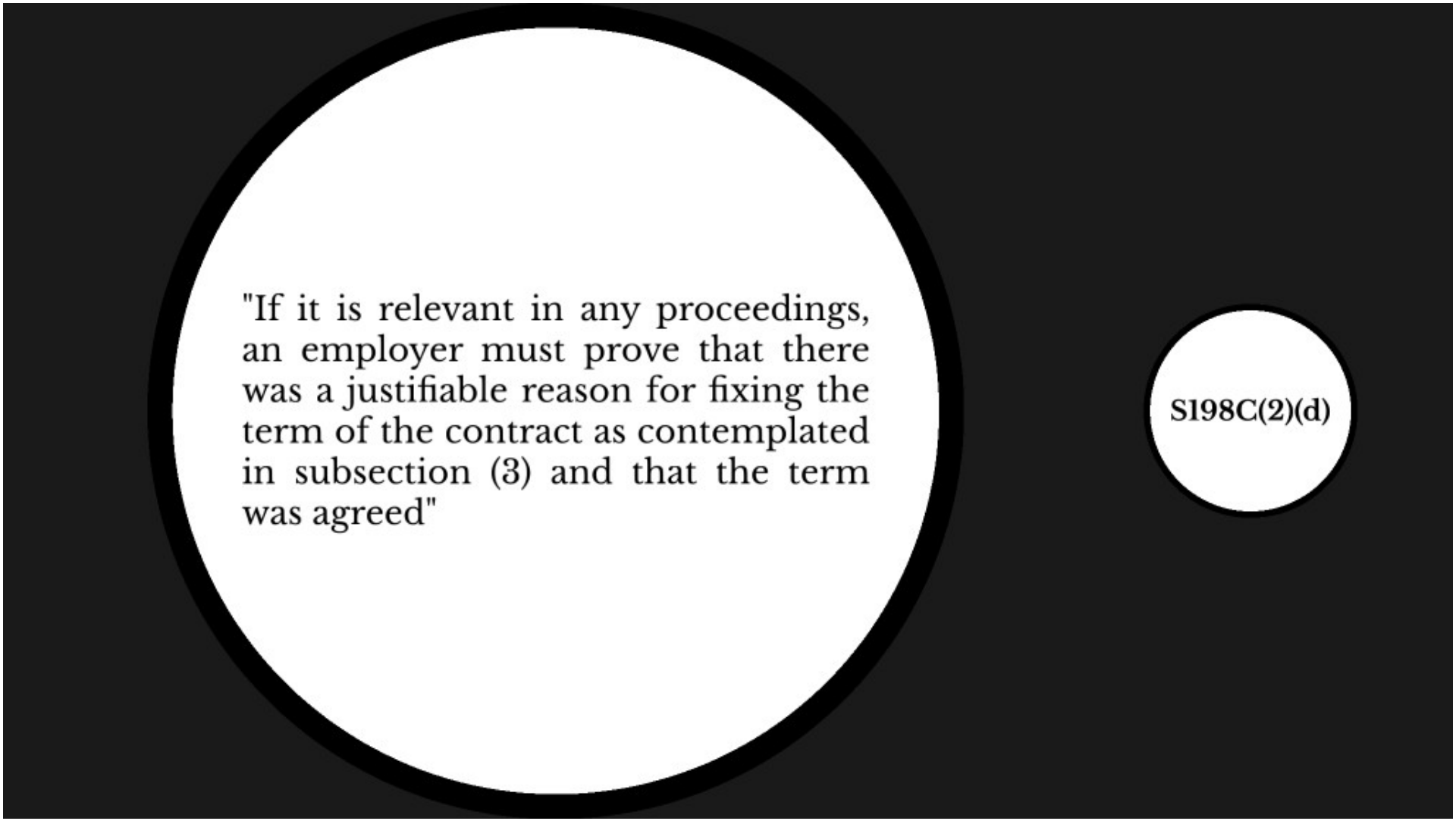
"not performing such temporary service for the client is -
i) deemed to be the employee of that client and the client is deemed to be the employer; and
ii) subject to the provisions of section 198B, employed on an indefinite basis by the client"

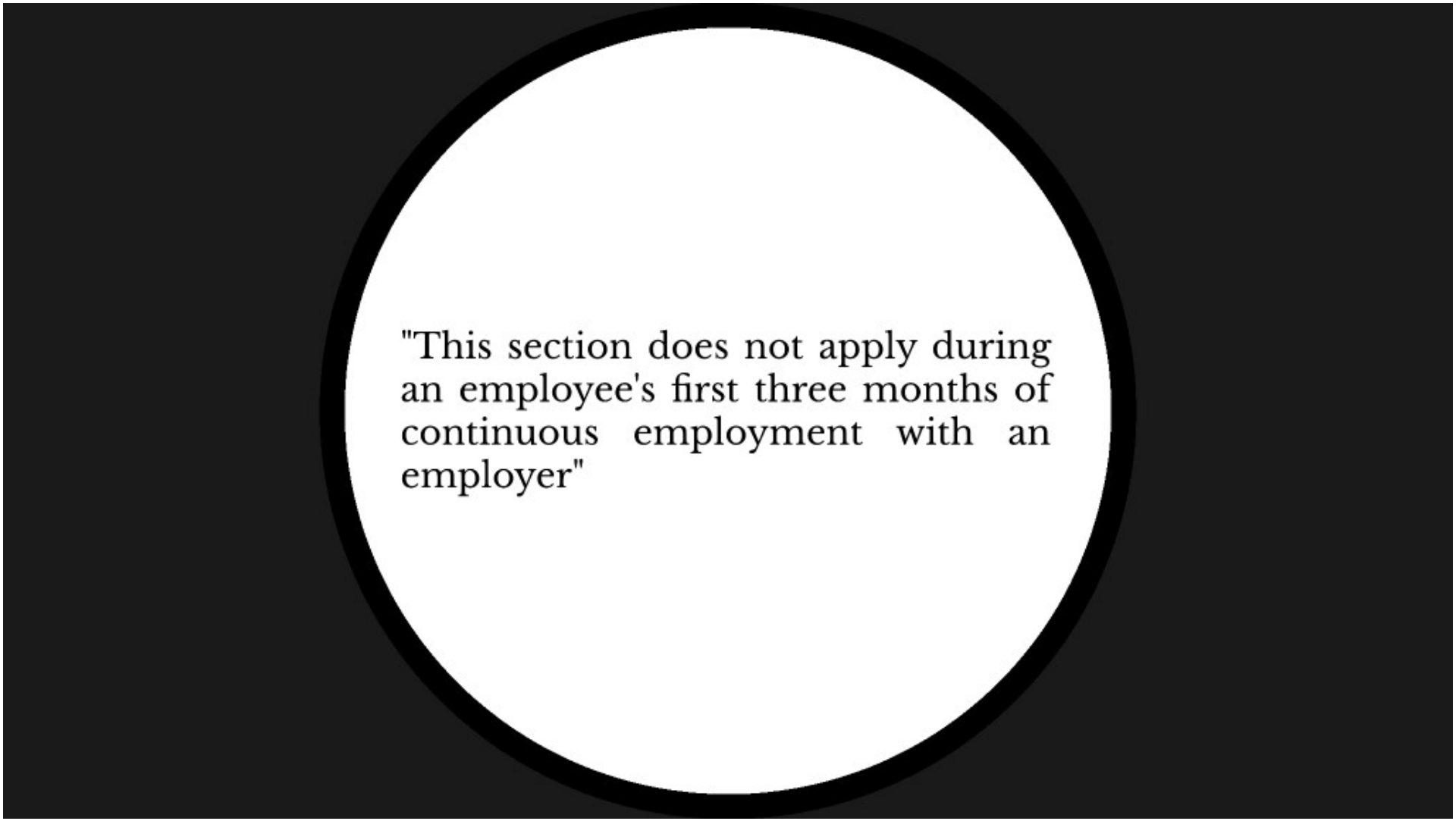
S198A(4)


"The termination by the TES of an employee's service with a client, whether at the instance of the TES 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"
S198A(5)


"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"
S198B(3)


"An employer may employ an employee on a fixed term contract or successive fixed term contracts for longer than three months of employment only if..."
S198B(7)


"If it is relevant in any proceedings, an employer must prove that there was a justifiable reason for fixing the term of the contract as contemplated in subsection (3) and that the term was agreed"
S198C(2)(d)


"This section does not apply during an employee's first three months of continuous employment with an employer"

REMEDIES
REINSTATEMENT

Glencore Holdings v Sibeko
(2018) 39 *ILJ* 138 (LAC)

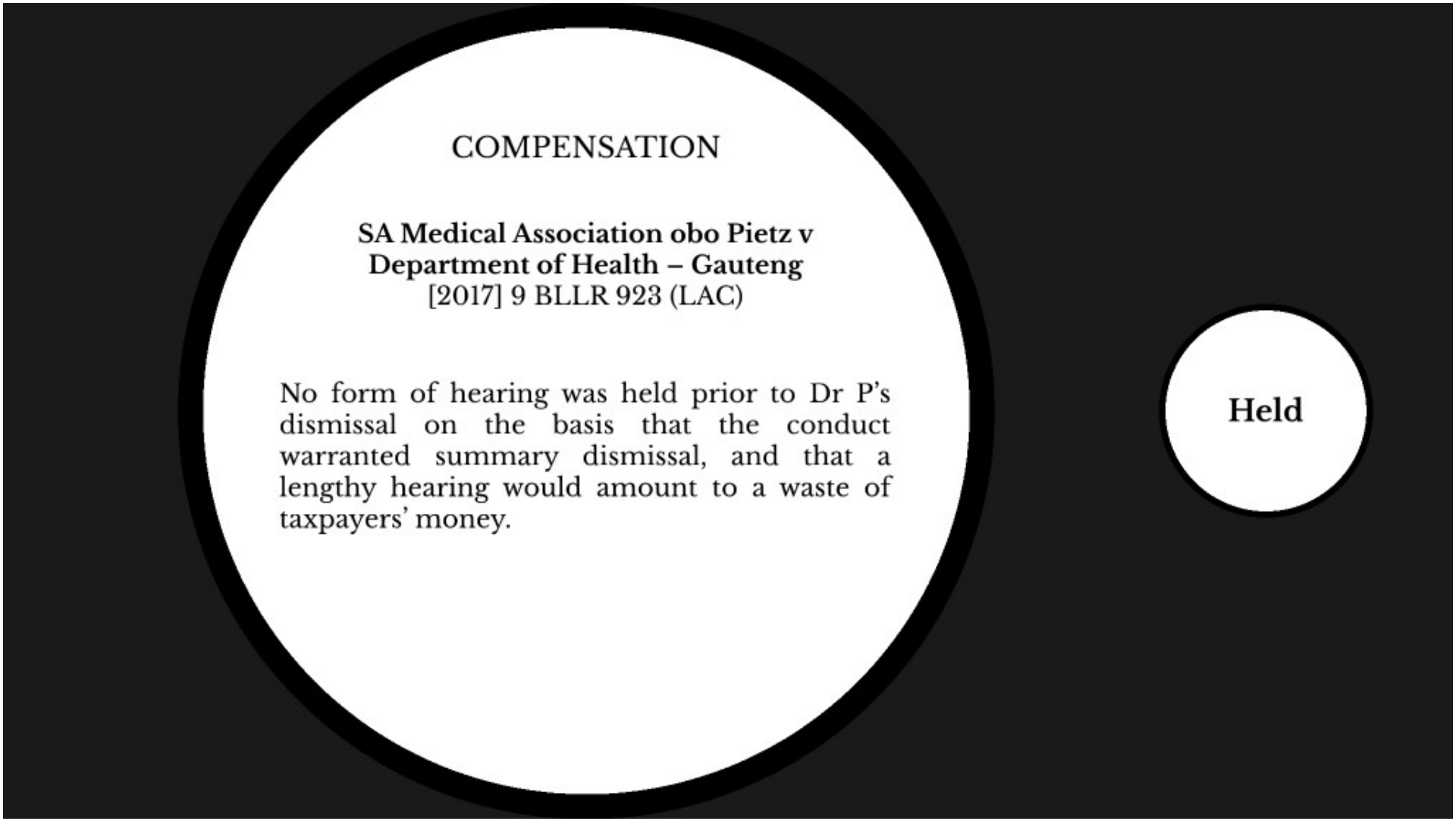
Mr S was fired for not wearing his protective earmuffs while driving a bulldozer. Reinstatement was not awarded because of S's behaviour during hearing. The Labour Court substituted an award of reinstatement.

Held on Appeal

There was no jurisprudential basis for the commissioner to have deviated from the primary remedy of reinstatements. The exception of the relationship being "intolerable" did not apply because this had to relate to the circumstances at the time of the dismissal.

Quote

"He concluded that Sibeko's conduct, even if deserving of reproach could not be construed to inhibit his reinstatement as a dozer driver, and thus his reinstatement was not, as imagined by the arbitrator, "impracticable" in the sense meant in (c). This conclusion is unquestionably correct because the role performed by Sibeko as a dozer driver did not embrace a dimension that a display of bad manners in the arbitration proceedings would render a reinstatement inappropriate."


COMPENSATION
SA Medical Association obo Pietz v Department of Health – Gauteng
[2017] 9 BLLR 923 (LAC)
No form of hearing was held prior to Dr P's dismissal on the basis that the conduct warranted summary dismissal, and that a lengthy hearing would amount to a waste of taxpayers' money.
Held

The commissioner had based his decision to deny compensation solely on issues which fell within the ambit of the inquiry into substantive fairness, which was an incorrect and unreasonable approach. Compensation equal to three months' salary was awarded.

DEEMED DISMISSALS

Ramonetha v Department of Roads and Transport, Limpopo
(2018) 39 *ILJ* 384 (LAC)

Mr Ramonetha returned to work four months after leaving work to see a Doctor, and presented a letter from a traditional healer. A chairperson considered him to have been "deemed dismissed" in terms of section 17(3)(a)(i) of the Public Service Act, 1994.

Held

Ramonetha had not been informed of the deemed dismissal and his services were used for nearly a year. This amounted to a waiver of any right the department may have had to invoke section 17(3)(a)(i). He was reinstated.

Gangaram v MEC for the Department of Health, KwaZulu-Natal
(2017) 38 *ILJ* 2261 (LAC)

Was section 17(3) properly invoked to dismiss Gangaram?

Held

A deemed dismissal can occur only if an employee is absent from work without permission for a period exceeding one calendar month. Gangaram had submitted leave application forms with medical certificates attached and was entitled to assume that her sick leave had been approved. The deeming provision did not apply and the department was ordered to reinstate Gangaram.

Footnote

Is s 17(3) constitutional – see now *PSA obo Ubogu v Head of Department of Health, Gauteng* (2018) 39 *ILJ* 337 (CC)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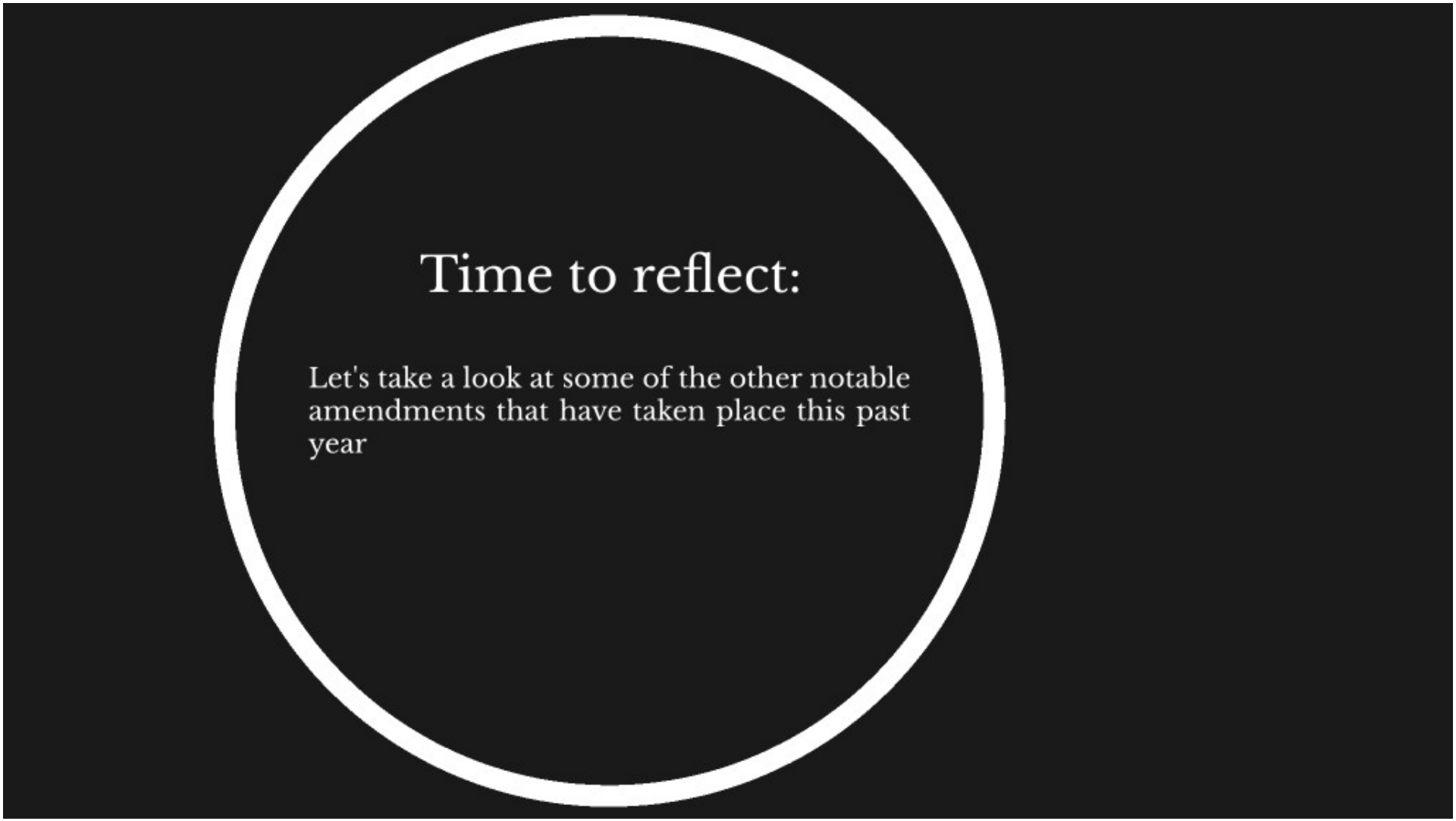
Time to reflect:
Let's take a look at some of the other notable amendments that have taken place this past year


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