THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 807/2024

In the matter between:

JOAN MARIE MULLER	**FIRST APPLICANT**
ASTRID MULLER EQUESTRIAN	**SECOND APPLICANT**
and	
CARA DOROTHY MASUREIK	**FIRST RESPONDENT**
JOOST BERNARDUS VAN LIER	**SECOND RESPONDENT**
HOWARD ALEXANDER MULLER	**THIRD RESPONDENT**

Neutral citation: *Joan Marie Muller and Another v Cara Dorothy Masureik and Others* (807/2024) [2026] ZASCA 01 (08 January 2026)

Coram: HUGHES, KGOELE and KEIGHTLEY JJA and BLOEM and OPPERMAN AJJA

Heard: 4 November 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for the handing down of the judgment are deemed to be 11:00 on 08 January 2026.

Summary: Application for reconsideration – s 17(2)(*f*) of the Superior Courts Act 10 of 2013 – family law – marriage out of community of property with the inclusion of accrual rights – nature of accrual claim pending divorce – whether enforceable against third parties – accrual right contingent and not vested – cannot override proprietary rights – doctrine of notice not applicable – Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 – eviction justified – correct order to be granted upon a finding that the threshold requirements in section 17(2)*(f)* not met.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Holderness J, sitting as court of first instance):

1 The order of this Court dismissing the application for leave to appeal is confirmed.

2 The applicants are ordered to pay the respondents' costs jointly and severally, the one paying the other to be absolved.

JUDGMENT

Kgoele JA (Hughes JA and Bloem AJA concurring):

[1] Mrs Joan Marie Muller (the first applicant) is engaged in protracted divorce proceedings with Mr Howard Alexander Muller (Mr Muller), with whom she is married out of community of property, incorporating the accrual system. The current dispute pertains to the continued occupation of their matrimonial property (the property), which property Mr Muller sold to Cara Dorothy Masureik, the first respondent, and Joost Bernardus van Lier, the second respondent (the respondents). The application arises from an eviction order granted against the first applicant and Astrid Muller Equestrian (the second applicant), in favour of the respondents by the Western Cape Division of the High Court (the high court) on 14 December 2023. The high court denied the applicants' leave to appeal against this order. Similarly, the applicants' petition was also refused by two judges of this Court on 5 June 2024.

The application was referred to this Court by the President of this Court under s 17(2)(*f*) of the Superior Courts Act 10 of 2013 (the Superior Courts Act) for reconsideration and possible variation of the said order.

[2] The property was purchased by Mr Muller in 2003. Although he was the sole registered owner, it served as a family home until it was sold. Their daughter, Astrid Muller, resides on the property and operates a livery and horse-riding school therefrom. The business is cited as the second applicant. It is important to note at the outset that, in this application, the second applicant relies on the same grounds as those set out by the first applicant.

[3] The divorce proceedings were initiated by the first applicant in June 2010. She claimed, amongst other things, payment of half of the difference in the accruals of her and Mr Muller's respective estates, as well as lifelong spousal maintenance. Fifteen years later, the divorce proceedings are inexplicably still pending.

[4] The respondents are the registered owners of the property. They concluded a written Deed of Sale agreement (the agreement) with Mr Muller on 19 March 2022. According to clause 7.2 of the agreement, Mr Muller was to vacate the property upon transfer, which had to be done by 1 July 2022 or soon thereafter. As the first applicant and Mr Muller were still involved in divorce proceedings, her legal representative was informed of the agreement. On 23 May 2022, the legal representative of the first applicant in the divorce proceedings challenged the validity of the sale and stated that she would not vacate the property due to a substantial claim against Mr Muller. The letter also warned that unless an undertaking was given to halt the property transfer, urgent legal action would be taken. However, the threatened interdict was never filed, and negotiations over vacating the property continued without success.

[5] On 7 June 2022, by which time it had become patently clear that the applicants would not voluntarily vacate the property, the respondents and Mr Muller concluded an addendum to the agreement (the addendum). The addendum was made to avert the cancellation of the agreement, as Mr Muller lacked the funds to initiate eviction proceedings against the applicants. It included several amendments to the original agreement, most notably that the balance of the purchase price would be held in an interest-bearing account and released to Mr Muller only after the respondents were given vacant possession of the property.

[6] On 24 June 2022, the property was registered and transferred to the respondents. After the transfer, the respondents made further gratuitous offers to the applicants as a last attempt to secure vacant occupation on the basis that:

(a) All occupants were to vacate the property by no later than 31 January 2023.
(b) Mr Muller would agree to release R300,000 to the first applicant from the amount held by the respondents in trust.
(c) A similar amount would be released to the first applicant to help her find alternative accommodation and cover medical care.
(d) The respondents would agree to pay the first applicant an additional sum of R100,000 from their personal funds.
(e) The balance would be held by the respondents in a trust account pending the resolution of the divorce proceedings between the first applicant and Mr Muller.

[7] The applicants rejected this offer. Consequently, the respondents gave the applicants until 31 August 2022 to vacate the property. On 14 September 2022, the respondents filed an application in the high court under the Prevention of Illegal

Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act) to evict the applicants from the premises. They opposed the eviction proceedings for various reasons. Key amongst the reasons was that the property constitutes the principal asset for the purpose of establishing the first applicant's accrual claim against Mr Muller.

[8] Before the high court, the applicants persisted with their stance that they are not in unlawful occupation, as the first applicant has a right to remain in the property. They maintained that the first applicant enjoys quasi–proprietary or quasi–vindicatory rights by virtue of her accrual right to claim a share in the estate of Mr Muller. Further, that it matters not that her right to accrual is contingent in nature. In addition, they claimed that the first applicant's right to accrual will be prejudiced and diminished. The applicants based their argument on the case of *ND v MD*[1] in the Gauteng Division of the high court, wherein it was held:

'… the spouse need not establish all the requirements for interim interdictory relief given that his or her claim to share in the accrual, although contingent, is quasi–proprietary in nature.'

[9] Relying on the doctrine of notice, the applicants argued that, although real rights usually trump personal rights, it is trite – in accordance with the doctrine of notice – that a real right (in this case, the transfer of the property from Mr Muller to the respondents) does not supersede a pre-existing personal right in or to that property, which the purchaser was fully aware of at the time the purchaser entered into the agreement.

[10] According to the applicants, the respondents entered into the agreement fully aware that the first applicant's quasi-proprietary rights existed and, nevertheless,

[1] *ND v MD* [2020] ZAGPJHC 228; [2021] 1 All SA 909 (GJ) (*ND*) para 59.

colluded with Mr Muller to achieve her eviction. They cannot, therefore, find sanctuary behind their real right and the registration of the property, in circumstances where they acted *mala fide*. To bolster the doctrine of notice argument, the applicants relied on the case of *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO*,[2] wherein this Court held:

'Under the doctrine of notice, someone who acquires an asset with notice of a personal right to it which his predecessor in title has granted to another, may be held bound to give effect thereto. Thus, a purchaser who knows that the merx has been sold to another, may, in spite of having obtained transfer or delivery, be forced to hand it over to the prior purchaser. Reverting to my earlier example: if C had purchased with knowledge of the prior sale to B, B would be entitled to claim that the transfer to C be set aside and that transfer be effected from A to B, or B may perhaps even claim transfer directly from C.'

[11] Regarding the issue of collusion, the applicants argued that Mr Muller and the respondents colluded with each other to intentionally subvert the first applicant's claim in the divorce action through an unlawful scheme. According to them, the property comprises a significant portion of Mr Muller's estate; however, it was sold at a price substantially below its true value, thereby depriving her of the opportunity to present her case before the court.

[12] As a last resort, the applicants invoked the constitutional rights of the first applicant, asserting that any deliberate breach of her fundamental rights to housing, dignity, and access to court – protected by the Bill of Rights – would warrant a declaration that the sale and transfer of the property was unlawful, against public policy, and null and void. Additionally, they argued that any eviction predicated on these unlawful transactions should consequently be invalid.

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[2] *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO* [2011] ZASCA 30; 2011 (4) SA 1 (SCA) para 14.

[13] In dismissing all the grounds upon which the applicants relied, the high court found that:

(a) A spouse married out of community of property has no vested right to any of the assets of the other spouse.

(b) In terms of s 3 read with s 4(1)(*a*) of the Matrimonial Property Act 88 of 1984 (the MPA), a spouse only acquires a right to claim half of the net accrual of the other spouse's estate as at the date of dissolution of the marriage.

(c) Prior to dissolution of the marriage, a spouse only has a contingent right to claim half of the accrual in the estate of the other spouse and has no general right to prevent the other spouse from dealing freely with his own property.[3]

(d) Even if that contingent right could be protected by an interdict *pendente lite*, such an application would need to show that the other spouse has assets within the court's jurisdiction, that the other spouse has no bona fide defence against the first applicant's alleged contingent right, and has the intention to defeat the first applicant's claim or to render it hollow by dissipating or secreting assets. Additionally, such an applicant must show a well-grounded fear of irreparable loss should the interdict *pendente lite* not be granted.[4]

(e) There was no evidence of collusion between Mr Muller and the respondents.

[14] The high court concluded that the first applicant and those who occupy the property under her had no legal right to remain in occupation of the property; and the agreement or the addendum does not conflict with public policy or any constitutional values in the Bill of Rights. After evaluating their personal

[3] *PAF v SCF* [2022] ZASCA 101; 2022 (6) SA 162 (SCA) (*PAF*) paras 32–42.
[4] *Absa Bank Ltd v Moore and Another* [2016] ZACC 34; 2017 (1) SA 255 (CC); 2017 (2) BCLR 131 (CC) paras 37–40.

circumstances, the court concluded that it was just and equitable to issue the eviction order.

[15] The issue for this Court's consideration is whether a grave injustice or a threat to the integrity of the judicial process would result if the order of the two judges of this Court dismissing the applicants' petition is allowed to stand. Essentially, this Court is not considering the substantive merits on appeal; instead, it steps into the shoes of the two judges by re-looking at the high court's decision refusing leave to appeal and, if necessary, varying the decision of the two judges in respect of what was brought on petition.

[16] The threshold set in s 17(2)(*f*) of the Superior Courts Act is crucial in this type of application. The section was amended on 3 April 2024, and because the application for reconsideration was lodged after that date,[5] the amended provision governs the present case. Prior to its amendment, s 17(2)(*f*) required the President of this Court to be satisfied that 'exceptional circumstances' existed before referring a matter for reconsideration. Under the amended provision, however, the threshold has been reformulated: the President may now refer the matter for reconsideration only 'where a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute'.[6] The standard required is thus no longer one of mere exceptionality, but of grave injustice or a threat to the integrity of the judicial process.

[17] To determine whether the applicants meet the threshold, this Court must consider how the high court addressed the nature of the first applicant's rights arising

[5] The application for reconsideration was made on 26 August 2024.
[6] *Tarentaal Centre Investments (Pty) Ltd v Beneficio Developments* [2025] ZASCA 38 (*Tarentaal*) para 4.

from the marriage with Mr Muller. The answer to this question is found in s 3 of the MPA, which governs the first applicant's marriage regime with Mr Muller. It states:

'*At the dissolution of a marriage* subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, *acquires a claim* against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.

Subject to the provisions of section 8(1), a claim in terms of subsection (1) *arises* at the dissolution of the marriage and *the right of a spouse to share* in terms of this Act *in the accrual of the estate of the other spouse* is during the subsistence of the marriage not transferable or liable to attachment, and does not form part of the insolvent estate of a spouse.' (Emphasis added.)

[18] In an effort to demonstrate that the threshold has been satisfied, the applicants submitted to this Court that, in addition to asserting that the high court erred, the application raises fundamental and far-reaching legal questions concerning the interaction between ownership rights, the doctrine of notice, and the protection of matrimonial property interests. Primarily, they argued, the respondents sought to enforce their eviction rights as owners while overlooking the first applicant's existing rights in and to the property. This, in circumstances where they were aware of her rights at the time of the purported sale and transfer of the property.

[19] According to the applicants, the key legal issues necessitating this Court's intervention under s 17(2)(*f)* of the Superior Courts Act are:

'(a) The effect of the Doctrine of Notice – Whether purchasers who acquire property with full knowledge of a spouse's pre-existing rights can lawfully seek her eviction.

(b) The protection of a Spouse's Right to Occupation – Whether a long-standing matrimonial home can be sold to third parties in a manner that undermines a spouse's pending accrual and maintenance claims, effectively forcing her out before finalization of the divorce.

(c) Public Policy and Constitutional Considerations – Whether a contractual sale and transfer, structured to coerce the spouse into vacating her home or else face eroding her financial claims, is contrary to public policy and constitutional protections.'

As will be seen later, the latter argument evolved somewhat during the submissions in this Court.

[20] The applicants argued that these issues extend beyond the parties involved and have significant implications regarding the protection of matrimonial property rights, ensuring legal certainty in ownership and eviction cases, and preventing transactional abuse. They emphasised that guidance from this Court is therefore crucial.

[21] But for the last-mentioned issue above, the applicants rehashed the issues raised and addressed by the high court. As indicated earlier, the argument regarding public policy and constitutional protection mutated during the applicants' counsel's oral submissions. He contended that what elevated the applicants' case above the threshold of s 17(2)(*f*) of the Superior Courts Act was that the doctrine of notice had not previously been considered in the context of matrimonial property rights. In essence, the revised submission was that this Court should grant leave to appeal and develop the common law to recognise what was submitted to be the wife's right to occupy the matrimonial home until her divorce is finalised. It was submitted that this right is protected by s 26 of the Constitution. Effectively, the argument continued, this would permit the wife, in the first applicant's position, to employ the doctrine of notice to enforce a right of occupation against a third-party purchaser of the property who seeks her eviction and those occupying under her.

[22] Applying the threshold, it is evident that the applicants failed to demonstrate that the administration of justice would be brought into disrepute if reconsideration

were to be denied. As things stand, unless the common law is developed as argued, which issue will be addressed later in the judgment, the applicants merely requested the revisitation of the merits of their unsuccessful application because the current legal position does not provide for the first applicant's continued occupation of the property pending divorce. The right that she has is a contingent right to share in the value of the accrual determined at the dissolution of the marriage. That contingent right becomes a vested right only when the contingency materialises.[7] She, in fact, has no legally vested right to Mr Muller's assets, nor does she have a general right to prevent Mr Muller from freely dealing with his own property.[8] It is clear that the legal nature of the first applicant's right to accrual in the estate of Mr Muller was the epicentre of the issues considered by the high court, and in my view, it was adequately dealt with without any evident oversight or injustice.

[23] The applicants' reliance on *HM v LM* [9] is entirely misplaced. The facts of that case are distinguishable. That case involved an application to interdict the sale and transfer of a property. In the present case, the property has been sold and transferred. A case that better illustrates the first applicant's rights, although not in support of her proposition, is *SGB v SLB*,[10] which makes it clear that any alleged right of a wife to reside in the property was an incident of the duty of support, if any, owed by Mr Muller to her. As such, any right that the first applicant may have enjoyed in this regard was rendered nugatory upon the property being sold and transferred. Further, the *dictum* in the matter of *ND v MD*[11] relied on by the applicants, even if it was correctly decided, does not mean that the first applicant has a quasi-proprietary right

[7] *Reeder v Softline Ltd and Another* 2001 (2) SA 844(W) at 849H-I.
[8] *PAF* fn 3 above.
[9] *HM v LM (*19881/2019) [2020] ZAWCHC 24 (26 March 2020).
[10] *SGB v SLB* (D951/2020) [2020] ZAKZDHC 67 (30 December 2020).
[11] *ND* fn 1 above para 59.

in or to the property; on the contrary, and at best for the first applicant, she has a quasi-proprietary right to share in the accrual of Mr Muller's estate.

[24] As a result of the fact that the first applicant has no vested right, the applicants cannot rely on the doctrine of notice or on the collusion they bemoan. At any rate, the high court's conclusion that there was no evidence of collusion on the facts before it seems unassailable, having regard to the high bar the applicants in this type of application must cross for this Court to interfere with a factual finding. The first applicant clearly does not have a proprietary right in the property, whether real or personal; her reliance on the doctrine of notice is likewise misplaced.

[25] The development of the common law issue also flounders for several reasons. First, it was raised for the first time in this Court. Second, it was not adequately pleaded from the outset. This is why counsel representing the applicants was at pains to reformulate the issue when engaged by this Court. Third, because the pleadings are inadequate, they do not meet the criteria that must be satisfied when developing the common law. In *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and Another*,[12] the Constitutional Court stated the criteria for the development of the common law as follows:

'Before a court proceeds to develop the common law, it must *(a)* determine exactly what the common-law position is; *(b)* then consider the underlying reasons for it; and *(c)* enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must *(d)* consider precisely how the common law could be amended; and *(e)* take into account the wider consequences of the proposed change on that area of law.'

[12] *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and Another* [2015] ZACC 34; 2016 (1) SA 621 (CC); 2016 (1) BCLR 28 (CC) para 38.

Lastly, developing the common law, as argued, will require a complete overhaul of our matrimonial law and the existing jurisprudence on the right to access to adequate housing.

[26] On a conspectus of all the above considerations, I am of the view that the first applicant failed to meet the threshold required at this stage on the lawfulness of her occupation of the property. The second applicant's unlawful occupation also suffers the same fate, as the notice of appeal indicated that it derives its right of occupation from the first applicant. In addition, as a business entity, the PIE Act does not apply, especially as Astrid Muller, personally, has not applied for leave to appeal. The only issue remaining for consideration is whether the high court's exercise of its discretion to grant or refuse the eviction application justifies granting leave within the criteria outlined in s 17(2)(*f*) of the Superior Courts Act.

[27] From the facts of this case, the first applicant does not claim any infringement of her right to access adequate housing. Instead, she simply prefers to stay in the property, in her own words, 'as she would not be able to secure another comparable affordable residence'. It is significant to state that, when issuing the eviction order, the high court exercised a wide discretion under ss 4(7) and 4(8) of the PIE Act. The applicants did not address this issue at all, and in particular, whether the discretion was exercised arbitrarily. *Ex facie* the record, there is no evidence that the high court exercised its discretion in a way that would amount to a grave failure of justice. In addition, there is nothing further to say regarding the second applicant, as the provisions of the PIE Act do not apply to it because it is not a natural person. The same applies to the high court's discretion regarding the period during which the applicants must vacate the property. The three months from the date of the order, as set by the high court, provide the applicants with sufficient time to find alternative

accommodation. These are additional factors indicating that the applicants failed to satisfy the statutory threshold for this type of application.

[28] As a conclusion, and with the risk of repetition, it is important to re-emphasise that reconsideration under s 17(2)(*f*) of the Superior Courts Act is not a parallel appeal process, nor is it a mechanism to revisit the merits of an unsuccessful application for leave to appeal. It is a residual safeguard invoked only to prevent an obvious miscarriage of justice or to prevent a demonstrable injustice if the application is not granted. The applicants' case does not fall within that category. The record discloses no error of law or fact so egregious that, if left uncorrected, it would bring the administration of justice into disrepute.

[29] Before I conclude, it is pertinent – though not customary – to explain the reasons for the order as outlined in para 1, confirming the decision of the two judges, as the appropriate relief. This approach is prompted by the second judgment's contention that the order is incorrect. The second judgment asserts that the correct order that should be followed is striking the matter off the roll, which was made in the 'current binding authority of this Court*: Bidvest Protea Coin Security (Pty) Ltd v Mabena* (*Bidvest*)'.[13] Consequently, the reasons are confined to the formulation of the order itself, not to the two approaches that evolved regarding the interpretation of the threshold under s17(2)(*f*) of the Superior Courts Act, which has since 2025 become a focal point of divergent opinions in this Court. The Constitutional Court also, though in a minority judgment, already expressed concerns about one of the approaches.[14]

[13] *Bidvest Protea Coin Security (Pty) Ltd v Mabena* [2025] ZASCA 23; 2025 (3) SA 362 (SCA) (*Bidvest)*; See para 44 fn 28 of the second judgment.
[14] *Godloza and Another v S* [2025] ZACC 24; 2025 (12) BCLR 1349 (CC) para 145.

[30] I disagree with the assertion that the order below is incorrect. At the outset, it is important to note that many s 17(2)*(f)* applications filed before and after 2025 were dismissed for failing to meet the required thresholds. Those struck off the roll only started in 2025.

[31] I am of the view that it is better to state the obvious as the starting point, that the ordinary grammatical interpretation of the word 'reconsideration' is crucial. The Oxford Dictionary definition of the word 'reconsideration' is 'the act of considering something again; review'. The Cambridge Dictionary describes it as 'the act of thinking again about a decision or opinion and deciding if you want to change it'. The synonyms listed are review, re-examination, re-assessment, and re-evaluation. Recently, in his article featured in De Rebus concerning the new threshold introduced by the recent legislation, Professor Marumoagae noted that the purpose of s 17(2)*(f)* of the Superior Courts Act is that those dissatisfied with the decision of the two judges who dismissed their application for leave to appeal, may apply to the President of this Court, to exercise her discretion to refer the matter for reconsideration by a different panel of judges of [that] court.[15] This is consistent with the definition of the term 'reconsideration' as outlined above. Therefore, a new panel of judges can confirm, vary, or set aside the earlier decision after re-evaluating the applicant's grounds provided in the application.

[32] As far as the proposition regarding the correct order in terms of s 17(2)(*f*) of the Superior Courts Act is concerned, sight should not be lost of the fact that the case of *Former Way Trade and Invest (Pty) Limited v Bright Idea Projects 66 (Pty) Limited*

[15] C Marumoagae 'Reconsideration in terms of s 17(2)(*f*) of the Superior Courts Act' *De Rebus 2025 (Sept) DR 23* which sets out the same idea (that s 17(2)(*f*) is a narrow procedure and that the decision refusing leave to appeal is final except in the narrow reconsideration route). The wording in De Rebus is a paraphrase, not an identical sentence.

(*Former Way Trade*),[16] is also one of the current judgments of this Court, where the order dismissing the application for leave to appeal by the two judges was confirmed. The decision was made prior to the enactment of the new Act but remains pertinent to this matter. Aggrieved by this decision, the parties approached the Constitutional Court (CC). It is noteworthy to quote the following remarks by the CC that are relevant to the issue concerning the formulation of the order:

'The Supreme Court of Appeal dismissed an application for leave to appeal. The applicant applied for the reconsideration of the order refusing leave to appeal in terms of section 17(2)(f) of the Superior Courts Act. This resulted in the application being referred for oral argument for *reconsideration* of the order.

. . .

The Supreme Court of Appeal held that no new franchise agreement had been concluded. *As a consequence, there were no reasonable prospects of success of establishing the factual defence at the section 12B arbitration. Therefore, the order dismissing the application for leave to appeal was confirmed*.' (Emphasis added)

[33] If the formulation of this Court's order was incorrect, as the second judgment asserts, the CC would have said something about it. The same applies to matters that went to the CC, where the reconsideration was dismissed. This reinforces the view that when this Court reconsiders a refusal of leave to appeal and upholds the earlier decision of the two judges of this Court, the original refusal remains valid and enforceable. The judgment of *S v Liesching and Others*[17] explicitly states that the power under s 17(2)(*f*) is not intended as a second bite at the appeal cherry – i.e., it protects finality and permits reconsideration only in exceptional circumstances. In fact, the old and current jurisprudence on s 17(2)(*f*) of the Superior Courts Act

[16] *Former Way Trade and Invest (Pty) Limited v Bright Idea Projects 66 (Pty) Limited* [2021] ZACC 33; 2021 JDR 2223 (CC); 2021 (12) BCLR 1388 (CC).
[17] *S v Liesching and Others v* [2018] ZACC 25; 2019 (4) SA 219 (CC); 2018 (11) BCLR 1349 (CC); 2019 (1) SACR 178 (CC); (*Liesching II*) paras 138-139.

emphasizes that reconsideration is an exceptional and narrow procedure, aimed at preventing grave injustice rather than re-litigating settled issues.[18] Where reconsideration is dismissed due to the absence of exceptional circumstances, the original two-judges' refusal remains binding.[19] Where reconsideration is confirmed, the Court explicitly endorses the earlier decision, reinforcing finality and legal certainty.[20]

[34] Therefore, as a matter of principle, I find no fault with the decisions of this Court in the cases where the applications were dismissed. In *Motsoeneng v South African Broadcasting Corporation Soc Ltd and Others (Motsoeneng),*[21] this Court, referencing its earlier decision, explained the threshold as follows:

'It is important to distinguish between an application for leave to appeal and an application under subsection (2)*(f)*. The latter is an application to the President for the referral to the Court for reconsideration of the considered decision of the two judges refusing leave to appeal. The necessary prerequisite for the exercise of the President's discretion is the existence of "exceptional circumstances". *If the circumstances are not truly exceptional, that is the end of the matter.* The application under subsection 2(f) must fail *and falls to be dismissed.* If, however, exceptional circumstances are found to be present, it would not follow, without more, that the decision refusing leave to appeal must be referred to the court for reconsideration. *The President may, in the exercise of her discretion, nonetheless decline to do so. If the President refers the decision of the two judges for reconsideration, the court effectively steps into the shoes of the two judges*. *Upon reconsideration,* it may grant or refuse the application and, if the former, vary the order of the two judges dismissing the application to one granting leave either to this Court or the relevant high court.' (Emphasis added.)

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[18] *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 (*Avnit)* at paras 6-7 (confirming that s 17(2)*(f)* is a narrow, exceptional remedy and not a second bite at the appeal cherry).
[19] *Rugnanan v S* [2020] ZASCA 166 paras 26-31.
[20] *Avnit* fn 18 above para 8.
[21] *Motsoeneng v South African Broadcasting Corporation Soc Ltd and Others* [2024] ZASCA 80; 2025(4) SA 122 (SCA) (*Motsoeneng*) para 14.

[35] The *Motsoeneng* matter is also recent, and this Court did not strike the application off the roll. In dismissing the condonation to revive the application, it held that the application should fail because it did not meet the threshold set out in s 17(2)(*f*) of the Superior Courts Act.[22] In my view, the formulation of an order where the intended order and the available permissible one yield the same results is a matter of discretion because it depends on the circumstances or facts of a particular application. By dismissing the application, the court rejects the reconsideration application (usually on the grounds that the threshold was not met), leaving the original order intact but without expressing its endorsement of the merits of the appeal. Both outcomes uphold the finality of the original judgment, but confirmation carries a stronger doctrinal imprimatur. Also, in *Minister of Police and Another v Ramabanta,*[23] this Court did not strike the matter off the roll but dismissed the application. The importance of this matter is that it was decided in 2025 but after *Bidvest*, which fortifies the viewpoint. This matter also, extensively addressed the role of the President in reconsideration applications and followed the Constitutional Court's precedents.

[36] An order striking the matter from the roll has the potential of causing legal confusion and is not helpful, as it does not end the matter, as was said in *Turner and Another v Ntintelo and Another.*[24] In that matter, the difference between striking the matter off the roll and dismissing the matter was dealt with. When a matter is struck off the roll, it often indicates that a procedural issue caused the court to decline to hear the application, or that the court believes the matter should not have come before it in the first place. This may not necessarily preclude the parties from resolving the issue and once resolved, returning the matter to the court. As an example, in this Court,

[22] Ibid para 20.
[23] *Minister of Police and Another v Ramabanta* [2025] ZASCA 95; 2026 (1) SA 100 (SCA).
[24] *Turner and Another v Ntintelo and Another* [2023] ZAWCHC 51 para 62.

cases struck off the roll before 2025 were mainly due to no proper record, no proper appeal, and no proper application.[25] In *Simon Lindsay Draycott v Max Hurbert and Others*,[26] this Court struck the reconsideration under s 17(2)(*f*) of the Superior Courts Act off the roll for want of a proper application before it, and not because the threshold was not met. This matter, too, was decided in 2025 after *Bidvest*. Even though it did not pertinently address the issue of the formulation of the order(s), its peculiar facts and circumstances strengthen this view.

[37] Lastly, striking the matter off the roll in the context of s17(2)(*f)* of the Superior Courts Act flies against the principle of finality, especially in applications to the SCA, and runs counter to the section's narrow purpose. Whilst recognising that finality is not absolute and that it should not be allowed to swamp all other considerations,[27] it could not have been the legislature's intention that parties who are non-suited by two judges of this Court be granted endless opportunities to return to this Court. The principle of finality in these types of applications ensures that properly made decisions remain binding unless invalidated or modified. In the same breath, it is difficult to decipher how the word [re]consideration used by the legislature, which has been widely interpreted and accepted to mean 'stepping into the shoes of the two judges', can lead to the matter being struck off the roll. Otherwise, this would mean that this Court did not re-evaluate the factors in the application referred to it by the President but treated them as a condition precedent.

[38] There is no reason why costs should not follow the result.

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[25] *Jeebhai and Others v Minister of Home Affairs and Another* [2008] ZASCA 160; 2009 (4) SA 662 (SCA); *Atholl Developments (Pty) Ltd v Valuation Appeal Board for the City of Johannesburg and Another* (209/2014) [2015] ZASCA 55 (30 Marc 2015).
[26] *Simon Lindsay Draycott v Max Hurbert Bega and Others* (69/2024) [2025] ZASCA 123 (2 September 2025).
[27] *Liesching and Others v S and Another* [2016] ZACC 41; 2017 (4) BCLR 454 (CC); 2017 (2) SACR 193 (CC) *(Liesching I)* paras 52 and 53.

[39] Consequently, the following order is made:

1 The order of this Court dismissing the application for leave to appeal is confirmed.

2 The applicants are ordered to pay the respondents' costs jointly and severally, the one paying the other to be absolved.

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A M KGOELE

JUDGE OF APPEAL

Keightley JA (Opperman AJA concurring)

[40] I agree that the applicants' attempt to seek a reconsideration of the outcome of their petition must fail. I also agree that this is because the applicants have failed to satisfy the threshold requirements for the exercise of the reconsideration power accorded by s 17(2)(*f*) of the Superior Courts Act. However, I respectfully disagree with the nature of the order granted in the judgment of my Sister, Kgoele JA (the first judgment), as well as the reasons provided for the order.

[41] The applicants' resistance to the application for their eviction was founded primarily on the doctrine of notice. They averred that the respondents could not enforce their rights, as owners of the property, to evict them in circumstances where the respondents had taken transfer of ownership with knowledge of the applicants' pre-existing personal rights of occupation. To succeed in their defence, the applicants had to establish that they had a pre-existing personal right of occupation.

[42] The applicants' case was misconceived from the outset. It was premised on the first applicant's assertion that the sale of the property unlawfully interfered with her accrual rights. As the first judgment correctly observes, s 3 of the MPA makes it clear that any accrual claim she may have to a portion of Mr Muller's estate only arises 'at the dissolution of [the] marriage'. More fundamentally, however, her future accrual claim does not translate into a personal right of occupation of the property.

[43] The underlying difficulty with the applicants' case is that it confuses a contingent claim to a share in Mr Muller's accrual, which is in essence a financial claim, with a right of occupation. This confusion pervades their grounds for applying for relief under s 17(2)(*f*) of the Superior Courts Act and is fatal to their case. For the reasons stated in the first judgment, I agree that there is also no merit in the applicants' attempts to advance a new constitutional basis in support of their application for reconsideration.

[44] As to the correct form of the order that should follow, I believe that the starting point is the current binding authority of this Court. In *Bidvest,*[28] this Court endorsed the interpretation of s 17(2)(*f*) of the Superior Courts Act adopted in *Motsoeneng*.[29] More recently, in *The Road Accident Fund & Others v Mautla and Others*,[30] it confirmed *Motsoeneng* and *Bidvest* to be binding authority until set aside. Both the latter cases dealt with the formulation of that section prior to its recent amendment. However, in *Tarentaal Centre Investments (Pty) Ltd v Beneficio Developments*[31] this Court held that the amendment did not alter the nature of the President's discretion. Placing reliance on the Constitutional Court's judgment in *S v Liesching*[32] this Court

[28] *Bidvest* fn 13 above.
[29] *Motsoeneng* fn 21 above para 19.
[30] *Road Accident Fund & Others v Mautla and Others* (414/2024) [2025] ZASCA 200 (19 December 2025) para 19.
[31] *Tarentaal* fn 6 above.
[32] *Liesching II* fn 17 above para 138.

reasoned that the phrase 'exceptional circumstances' encompasses the new jurisdictional factors of 'a grave failure of justice' and the administration of justice being brought 'into disrepute'. Consequently, the earlier jurisprudence addressing the section prior to its amendment remains relevant.

[45] As stated in *Bidvest*:

'. . . exceptional circumstances must exist for the President to enjoy the power of referral. Exceptional circumstances thus constitute, as this Court found in *Motsoeneng*, a jurisdictional fact. If they do not exist, the Court to which the referral is made is duty-bound to so find. *Absent the existence of exceptional circumstances, there is no basis for the exercise of the power conferred upon the President, and hence, no basis for this Court to consider again the merits of the decision on petition*.'[33] (Emphasis added)

Further:

'. . . we are required, as a threshold question, to determine whether there are exceptional circumstances that permit of the referral to us for reconsideration of the decision on petition to refuse special leave. If we should find that there are not exceptional circumstances, *then that puts an end to the matter, and we need not consider whether the refusal to grant leave on petition was correctly decided*, much less whether the judgment and order of the full court are correct.'[34] (Emphasis added)

[46] As I understand the position, the existence of either a grave injustice or the possibility of the administration of justice being brought into serious disrepute (the grave injustice or serious disrepute factors) are jurisdictional facts that must be found to exist before the referral for reconsideration is properly before the Court to which the President has made the referral. Put differently, the power to consider the application for reconsideration only comes into being if the threshold, jurisdictional facts are found to have been established. It is only if this is found to be the case that

[33] *Bidvest* fn 13 above para 12.
[34] *Bidvest* fn 13 above para 17.

the Court to whom the referral has been made can consider whether there are grounds to interfere with the petition order refusing leave to appeal.

[47] The legal position, therefore, is that s 17(2)(*f*) of the Superior Courts Act referral encompasses a two-stage procedure. The first involves the question of whether the jurisdictional facts for the referral have been established. If so, the jurisdiction of this Court is established, and the second stage commences. The second stage involves the question of whether the applicant has satisfied the Court that grounds exist for interfering with the petition order refusing leave to appeal.

[48] The first judgment overlooks this important principled distinction between the two stages of the inquiry. Respectfully, it does not appreciate that it is necessary for the Court to be satisfied that there has been compliance with the first stage requirements before it has the power to grant the reconsideration application, or to dismiss it, or to make an order confirming the petition Judges' refusal of leave to appeal. Unless that door is opened, the Court has no power to make any of these orders. In that case, the correct order is one striking the matter from the roll.

[49] It is important, too, not to confuse the effect of this Court striking a matter for want of jurisdiction in a s 17(2)(*f*) application, on the one hand, with the power of the Court to make an order confirming the petition judges' refusal of leave to appeal, on the other. Where the jurisdictional facts are not established the order striking the matter from the roll has the legal effect that the petition order refusing leave is confirmed. However, this does not equate to the Court, in those circumstances, having the power to make an order in those terms: it cannot do so because its jurisdiction is not established. Similarly, it has no discretion to do so.

[50] It is for this reason, too, that the first judgment's concern with finality is unnecessary. When this Court strikes a s 17(2)(*f*) application because of the applicant's failure to satisfy the jurisdictional requirements, that is the end of the matter: it can never be re-enrolled because this Court has finally determined that it has no power (jurisdiction) to consider the application. The effect, as noted above, is that the refusal of leave to appeal stands as a final order. There is no prospect of the proverbial second bite at the cherry.

[51] In the present case, both judgments find that the applicants have failed to establish the existence of the grave injustice or serious disrepute factors. The first stage requirements have not been met. The legal consequence of this finding, following *Bidvest*, is that this Court has no jurisdiction to consider the application for reconsideration. The proper order in such circumstances, where the matter is not properly before a court for want of jurisdiction, is to strike the matter from the roll. This was the order made in *Bidvest*.[35] It is so that the Court in *Motsoeneng* did not make an order in the same terms. However, this was for the simple reason that the applicant in that matter had first to persuade the Court that condonation should be granted for the late filing of the s 17(2)(*f*) application. The condonation application was dismissed, and it was consequently unnecessary for the Court to make an order directly addressing the fate of the s 17(2)(*f*) application.

[52] The first judgment prefers an order confirming the dismissal of the application for leave to appeal by the petition judges. It points to this Court's order in *Former Way Trade* as supporting this view. The fact that this case preceded *Motsoeneng* and *Bidvest* is significant. It was *Motsoeneng* and *Bidvest* that clarified the current legal position as requiring an applicant in a s 17(2)*(f)* application first to satisfy the Court

[35] *Bidvest* fn 13 above para 24.

that it has jurisdiction to consider the application. Prior to those judgments, the jurisdictional question was not pertinently considered, as is clearly demonstrated in the judgment of *Former Way Trade*. For this reason, the order in that judgment has no bearing on the issues addressed in this matter.

[53] Nor, for that matter, does Professor Morumoagae's article in *De Rebus*, which neither references nor discusses *Bidvest* and the minority judgments in this Court penned by Matojane JA[36] and Coppin JA.[37] These latter two minority judgments are effectively supported by Dodson AJA in his minority judgment in *Godloza*. While *Bidvest* may be revisited and set aside in future, either by this Court or a majority of the Constitutional Court, until that occurs, and as emphasized in *Schoeman*[38] and *Mautla*,[39] this court is duty bound to follow precedent. Thus, if this court does not have jurisdiction, it cannot confirm or dismiss any order; put differently, it has no authority to 'step into the shoes of the two judges'. It follows that the only order open to this court is one in which the application serving before this court is struck off the roll.

[54] I conclude, therefore, that as this Court has no jurisdiction to consider the merits of the petition order, it has no jurisdiction to confirm it.[40] Consequently, the correct form of the order is that the matter should be struck from the roll.

[55] For these reasons, I would have granted an order in the following terms:

1 The matter is struck from the roll.

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[36] *Schoeman v Director of Public Prosecutions* [2025] ZASCA 124; 2025 (2) SACR 561 (SCA) (*Schoeman*).
[37] *Lorenzi v S* [2025] ZASCA 58.
[38] *Schoeman* fn 36 above para 77.
[39] *Mautla* fn 39 above para 19.
[40] *Bidvest* fn 13 above para 23.

2 The applicants are directed to pay the costs of the respondents jointly and severally, the one paying the other to be absolved.

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R M KEIGHTLEY

JUDGE OF APPEAL

Appearances

For the applicants:	M V Combrink
Instructed by:	Van Wyk Van Heerden Attorneys Inc., Cape Town c/o Symington De Kock Attorneys, Bloemfontein
For the 1st & 2nd respondents:	D Van Der Merwe
Instructed by:	C & A Friedlander Inc., Claremont c/o Neuhoff Attorneys, Bloemfontein.