THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1215/2023

In the matter between:

4 SEASONS LOGISTICS CC **APPLICANT**

and

NICHOLAS NGWANAMMOTO KGOTSE **RESPONDENT**

Neutral citation: *4 Seasons Logistics CC v Kgotse* (1215/2023) [2026] ZASCA 09 (04 February 2026)

Coram: PETSE, MBHA and DLODLO AJJA

Heard: 18 August 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 release to SAFLII. The date and time for hand down is deemed to be 04 February 2026 at 11h00.

Summary: Practice and procedure – application for reconsideration of a decision of the Supreme Court of Appeal refusing leave to appeal – finality of such decision – s 17(2)*(f)* of the Superior Courts Act 10 of 2013 – existence or absence of factors warranting variation of such decision.

ORDER

On application for reconsideration: (referred to the Court by the President in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013):

1 The following words in the order of the Western Cape Division of the high court, Cape Town granted on 30 August 2023, namely: 'which costs will not be borne by the insolvent estate, but by the members in their personal capacity' are deleted.

2 Save for the foregoing, the application in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013 referred to this Court for the reconsideration of the decision refusing leave to appeal is dismissed with costs, including the costs of two counsel which shall be costs in the liquidation.

JUDGMENT

Petse AJA (Mbha and Dlodlo AJJA concurring):

Introduction

[1] This is yet another one of a rapidly increasing number of matters referred to the Court lately by the President in terms of the proviso to s 17(2)*(f)* of the Superior Courts Act 10 of 2013 (the SC Act) for the reconsideration and, if warranted, variation of the decision of two judges of this Court in terms of which they, on petition, refused leave to appeal against the judgment or order of Kusevitsy J of the Western Cape Division of the High Court, Cape Town. On 30 August 2023,

Kusevitsy J had similarly refused 4 Seasons Logistics CC's application for leave to appeal against her judgment. The reconsideration order in issue in this case was granted by the President on 5 March 2024.

Parties

[2] As already mentioned in the preceeding paragraph, the applicant in this litigation is 4 Seasons Logistics CC (4 Seasons). As is apparent from its name, 4 Seasons is a close corporation incorporated in terms of the Close Corporation Act 69 of 1984. It carries on business both as a local and international logistics company in the courier sector from its principal place of business in Parow Industrial area, Cape Town. The respondent, Mr Nicholas Ngwanammoto Kgotse, is a business-person presently residing in Centurion, Gauteng Province.

Factual background

[3] On 8 June 2022, the respondent instituted legal proceedings on notice of motion seeking an order for the provisional winding-up of 4 Seasons on the basis that the close corporation was unable to pay its debts. The foundation for this assertion was that 4 Seasons was indebted to him in the sum of R1 695 000, this being the amount in which he obtained judgment jointly and severally against 4 Seasons and its sole member, Mr Grant Lewis.

[4] The respondent had, prior to the institution of the proceedings in issue here, previously instituted an action, as plaintiff, against 4 Seasons and Mr Lewis, as defendants, for payment of the balance due and payable under a 'Repayment Agreement' (the agreement) concluded between the parties on 12 January 2021. In terms of that agreement, 4 Seasons had acknowledged to be lawfully indebted to the respondent in the sum of R1 800 000 together with interest at 15 per cent per annum,

for ‘moneys lent and advanced’. According to the respondent, 4 Seasons failed to repay the amount owed to him as agreed. As a result, the respondent invoked the acceleration clause provided for in the agreement to claim the full balance then outstanding, it being common cause that 4 Seasons had made certain payments, albeit erratic, to the respondent in reduction of its indebtedness.

[5] Although 4 Seasons had, on 7 July 2021, delivered a notice of intention to defend the action through its attorneys, it failed to deliver its plea notwithstanding demand therefor in terms of rule 26[1] of the Uniform Rules of Court (the Uniform Rules). The respondent consequently took judgment by default of plea against 4 Seasons.[2] Thereafter, the respondent, in his quest to recover the judgment debt, issued a writ of execution against 4 Seasons. This did not yield the desired results, for it turned out that 4 Seasons was not possessed of sufficient goods to satisfy the judgment debt. To stave off further action, 4 Seasons renewed its previous undertaking to settle its indebtedness in instalments. However, once more, its avowed promises came to naught.

[6] Some nine months later, the respondent applied for the provisional liquidation of 4 Seasons on the grounds that the latter was unable to pay its debts. 4 Seasons opposed the application and also brought a counter-application for the rescission of the judgment granted against it and its sole member in default of plea.

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[1] Rule 26 of the Uniform Rules of Court to the extent relevant provides as follows:
‘[…] If any party fails to deliver any other pleading within the time laid down in these rules or within any extended time allowed in terms thereof, any other party may by notice served upon him require him to deliver such pleading within five days after the day upon which the notice was delivered. Any other party failing to deliver the pleading referred to in the notice within the time therein required…, shall be in the default of filing such pleading, and ipso facto barred…’

[2] Judgment was sought and obtained before the expiry of the period afforded in the notice of bar in terms of rule 26.

[7] On 8 November 2022 both the main application and counter-application served before Binns-Ward J. After hearing argument from both sides, the learned judge reserved judgment. The next day, Binns-Ward J delivered a well-reasoned judgment in terms of which he granted an order which, to the extent relevant for present purposes, read:

'1. The counter-application by 4 Seasons Logistics CC for the rescission of the judgment granted against it in case no. 10222/2021 is not acceded to at this stage on the basis explained in paragraph 32 of this judgment.

2. In the event of the provisional order of liquidation in para 4 below not being made final, the close corporation is granted leave to further pursue the counter-application for a variation of the judgment granted against it in case no. 10222/2021, provided that it does so by way of the delivery of appropriately supplemented papers within 15 days of the date of the order discharging the provisional order.

3. The costs of the close corporation's counter-application for the rescission of the judgment granted against it in case no. 10222/202 1 are reserved for later determination, if necessary, on the basis set forth in paragraph 33 of this judgment.

4. The respondent (4 Seasons Logistics CC) is hereby placed into provisional liquidation.

5. A rule *nisi* shall and does hereby issue calling upon all persons interested to show cause, if any, to this Honourable Court on Thursday, 1 December 2022, at 10h00 or as soon thereafter as the matter is called-

    5.1 why the respondent should not be placed into final liquidation,

    5.2 why the costs of the winding-up application (excluding the costs of opposition) should not be costs in the liquidation.

6 Service of this order shall be effected:

    6.1 by the Sheriff at the respondent's registered address;

    6.2 by the Sheriff on the respondent's employees at the respondent's place of business at Unit E11 Millenium Park, 42 Stellenberg Road, Parow Industrial, Cape Town, Western Cape;

    6.3 by the Sheriff on the South African Revenue Services in Cape Town; and

    6.4 by publication in one edition of the Cape Times and Die Burger newspapers.

7. The Registrar shall transmit a copy of this order to the Sheriff of the district in which the registered office of the respondent close corporation is situate and to the Sheriff of every other district in which it appears that the close corporation owns property and the said Sheriff(s) shall attach all property that appears to belong to the close corporation and transmit to the Master of the High Court, Cape Town, an inventory of all property so attached as provided for in s 19 of the Insolvency Act 24 of 1936.'

[8] On the return date of the rule nisi, ie. 1 December 2022, the matter served before Kusevitsky J, who confirmed the rule nisi, thus placing 4 Seasons in final liquidation. As already indicated, the learned judge subsequently refused leave to appeal. This adverse outcome prompted 4 Seasons to seek leave to appeal by way of petition to this Court. The petition was considered by two judges of this Court who dismissed it with costs on the grounds that the envisaged appeal would not have a reasonable prospect of success. And, in addition, there was no other compelling reason why the envisaged appeal should be heard.

[9] Undaunted by this setback, on 30 November 2023, 4 Seasons brought an application in terms of s 17(2)*(f)* of the SC Act, seeking that the President refer the dismissal of its petition by two judges of this Court to the court for reconsideration and, if necessary, variation. The edifice on which its application rested was that the facts asserted in the affidavit in support of its application disclosed that there were exceptional circumstances present that warranted a referral to this Court, hence the application now before us.

The issues

[10] Despite several wide-ranging issues addressed by 4 Seasons' counsel in his heads of argument, there is in reality one principal issue, namely whether it can be

said, based on the facts of this case, that there is a legally tenable basis to warrant the grant of leave to appeal in this matter.

[11] It will be recalled that the application for the provisional liquidation of 4 Seasons was a sequel to a default judgment that the respondent had obtained against 4 Seasons. After the grant of the judgment, 4 Seasons was notified of this fact. Thereafter, there were several emails exchanged between the parties. It is significant to note that in all of these emails, representatives of 4 Seasons unequivocally made a firm undertaking to settle the arrears of R379 500 by the end of May 2022. They also undertook to ensure that future instalments in liquidation of the debt would be paid without fail, stating that 'weekly payments of R10 000 will continue to be made as per…previous email.' They proceeded to declare that their commitment to settle the debt was indicative of 'a measure of good faith…' on their part to resolve the dispute amicably. Notwithstanding these solemn undertakings, no payments were forthcoming, belying the promise made that thenceforth 4 Seasons would not renege on its undertaking to repay the debt.

Litigation history

High Court

[12] It is apposite at this stage to make reference to the judgment of Binns-Ward J who granted the provisional winding-up order on 9 December 2022 after hearing full argument from the parties the previous day. As to the application for the recission of the judgment granted against 4 Seasons in default of its plea, the learned judge opined that he found the 'explanation for the corporation's failure to conscientiously defend the action…singularly unconvincing.' He continued to say that he found it 'most improbable that an attorney who had given notice of intention to defend on behalf of [4 Seasons] would not contact the client for further instructions upon

receipt of the notice of bar.' This was because, so said the learned judge, the 'inherent probabilities are that an attorney in receipt of a notice of bar would explain to his or her client what the prejudicial consequences of a failure to deliver a plea within the demand period would be' hence 'the plausibility of the explanation for default was fundamentally undermined by an absence of evidence by the attorney in support of the explanation for default.'

[13] Insofar as the 'Repayment Agreement' concluded between the parties was concerned, the learned judge observed that despite its 'inept wording', 'it is clear enough,…that the funding advanced by the [respondent] constituted a contribution by him to the capitalisation of the close corporation's business in consideration for which he was given a joint beneficial interest in its assets…' He also rejected the argument advanced on behalf of 4 Seasons that the respondent had not complied with the procedures prescribed in terms of s 129[3] of the National Credit Act[4] (the NCA) before embarking on litigation. The further argument that the respondent was

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[3] Section 129 of the National Credit Act reads:
'(1) If the consumer is in default under a credit agreement, the credit provider –
(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
(b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before–
(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and
(ii) meeting any further requirements set out in section 130.
(2) Subjection (1) does not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order.
(3) Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.
(4) A credit provider may not re-instate a credit agreement after–
(a) the sale of any property pursuant to–
(i) an attachment order; or
(ii) surrender of property in terms of section 127;
(b) the execution of any other court order enforcing that agreement; or
(c) the termination thereof in accordance with section 123.'
[4] National Credit Act 34 of 2005.

precluded under s 8(3) of the NCA from reclaiming the moneys he advanced to 4 Seasons was similarly rejected. And so, too, was the unsubstantiated contention that the relevant funds were tainted because they were supposedly proceeds of crime.

[14] As to the relevance of s 129 of the NCA, whilst acknowledging that it would have meant that the default judgment would have been a nullity if it applied, regardless of any shortcomings in 4 Seasons' rescission application, the learned judge opined that the relevant agreement between the parties 'was not a credit facility as described in s 8(3)' of the NCA, or a credit transaction as described in s 8(4) nor a credit guarantee as described in s 8(5). Hence, one was not here dealing with a credit agreement as defined in s 1 or s 8(1) of the NCA. Insofar as the other defences advanced on behalf of 4 Seasons that were predicated on ss 39 and 40 of the Corporations Act, the learned judge held that those sections did not apply on the facts of the case before him. He explained that s 39 regulates instances where a close corporation itself acquired a member's interest in the corporation. On the other hand, he held that s 40 would have found application only in circumstances where a close corporation itself gave financial assistance for the acquisition by any person of a member's interest in the corporation.

[15] Binns-Ward J went on to add that Mr Lewis, 4 Seasons' sole member, 'failed to explain in an adequate and convincing manner the delay in taking any steps to apply to set aside the judgment after steps were taken by the [respondent] to execute it by attaching the [4 Seasons] property.' The learned judge also rightly observed that, on the contrary, Mr Lewis 'endorsed steps taken by a Mr Shane Fabian, who purported to be a manager of the close corporation's business, to negotiate terms for the settlement of the judgment debt. It is significant that the rescission application was brought only in response to the winding-up application: in other words, only

when the shoe began to pinch very badly.' He went on to remark that 4 Seasons' failure to explain how its default in defending the action came about 'reflect adversely on the purported bona fides of the application.' And that, in the context of the facts of the case before him, this shortcoming 'bears telling hallmarks of a stratagem of delay.'

[16] Taking into account all relevant considerations, the learned judge effectively refused the application for the rescission of the judgment in default of plea granted against 4 Seasons and, instead, granted a provisional winding-up order, being satisfied that a proper case for such an order had been made out. In refusing the application for rescission, the high court nevertheless afforded 4 Seasons, in terms of paragraph 2 of its order, a potential lifeline to apply, if so advised, for the variation of the judgment granted against it '*in the event that the provisional order of liquidation not being made final*.'[5] (Emphasis added.)

Return date of the provisional winding-up order

[17] As already indicated, on 1 December 2022, the provisional winding-up order was confirmed by Kusevitsky J before whom the matter served on the return date. Some nine months after the confirmation of the provisional order, the learned judge refused leave to appeal against the confirmation of the provisional order of liquidation. In her reasons for refusing leave, the learned judge remarked that the timing of the application for leave to appeal launched by 4 Seasons in the intervening period was a manifestation of lack of bona fides on the part of its sole member 'whose sole purpose was to delay the granting of the final order.'

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[5] Paragraph 2 of the provisional order of liquidation reads:
'That in the event of the provisional order of liquidation in para 4 below not being made final, the close corporation is granted leave to further pursue the counter-application for a variation of the judgment granted against it in case no 10222/2021, provided that it does so by way of delivery of appropriately supplemented papers within 15 days of the date of the order discharging the provisional order.'

[18] It is necessary to pause at this stage and remark that for reasons not readily apparent from the record, Kusevitsky J did not provide reasons in support of the order she made on 1 December 2022, notwithstanding a written request therefor delivered on behalf of 4 Seasons in terms of rule 49(1) of the Uniform Rules. Several attempts thereafter following up on their request to be provided with reasons for the confirmation of the rule nisi failed to yield any positive results. In the interim, 4 Seasons launched an application for leave to appeal the confirmation order of 1 December 2022 asserting that it did not want to fall foul of the provisions of rule 49(1)*(b)* that require that an application for leave to appeal must be made within 15 days after the date of the order appealed against. In delivering its application for leave to appeal before it was provided with reasons, 4 Seasons appears to have been oblivious to the first proviso to rule 49(1)*(b)*[6] which caters for situations where no reasons are furnished in support of the order made by a court.

[19] According to 4 Seasons, its application for leave to appeal, such as it was, was dismissed by the court without the parties having been afforded the opportunity to argue the matter in open court. The combined effect of the default judgment having been granted 'prematurely' and the application for leave to appeal being dismissed without 4 Seasons having been afforded an opportunity to be heard, so it was asserted, was that its procedural rights were undermined.

This Court

[20] Before us, the confirmation of the provisional winding-up order by the high court on 1 December 2022 was assailed on a number of grounds, most of which

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[6] The first proviso to rule 49(1)*(b)* reads:
'Provided that when the reasons or the full reasons for the court's order are given on a later date than the date of the order, such application may be made within fifteen days after such later date…'

amounted to no more than rehashing arguments advanced – and rejected – before the high court in resisting the grant of the provisional winding-up order. It is not intended to address all of these grounds in this judgment. I shall confine myself only to those grounds that raise substantive issues. The first one of these was the contention that the high court failed to determine the rescission application. This point is without merit. The fate of the rescission application was determined by Binns-Ward J in his well-reasoned judgment handed down on 9 December 2022. The learned judge found that the shortcomings in 4 Seasons' failure to explain its default and the delay in seeking rescission were stark. He opined that they bore 'telling hallmarks of a strategy to delay' and that its defences to the claim were weak. Ultimately, he concluded that 4 Seasons had not succeeded in showing good cause necessary to entitle it to rescission.

[21] Another contention advanced by counsel was that on the return date, the high court granted a final winding-up order on the basis that 'it would be just and equitable that the [corporation] be wound up' which, so it was contended, constituted a new basis for liquidation 'that was never pursued by the respondent' in the high court. True, the respondent did not invoke this ground for seeking the liquidation of 4 Seasons. However, its case that 4 Seasons was, in the context of the facts of this case, unable to pay its debts remained as the pleaded legally tenable ground for seeking 4 Seasons' liquidation. In a nutshell, the position then was the following. The respondent brought motion proceedings to have 4 Seasons provisionally wound up on the basis that it was unable to pay its debts. Despite its opposition, 4 Seasons was placed under provisional winding-up on the ground that it was unable to pay its debts. And on the return date, ie. 1 December 2022, its financial situation remained in distress, which circumstance would ordinarily justify the confirmation of the provisional winding-up order on the basis pleaded.

[22] There are three further issues raised by counsel for 4 Seasons in the heads of argument that require attention, albeit briefly. The first was the contention that a member of a close corporation, Mr Lewis in this instance, retains a residual power to appeal a final order of liquidation. Although such residual power was initially contested by counsel for the respondent, he however did not persist in this stance at the hearing of the application. This came about as a sequel to a recent judgment of this Court in *Dr W A A Gouws (Johannesburg) (Pty) Ltd v H R Computek (Pty) Ltd and Others*[7] handed down on 27 May 2025, which confirmed, with reference to certain decisions of our courts, that a member of a corporate entity retains such residual power. It is therefore not necessary for present purpose to broach the subject any further.

[23] The second issue was the submission that the employees and the member of the applicant 'wanted to intervene in the application for liquidation, but were not allowed to do so.' Therefore, it was asserted that if the provisional order is not discharged, their views will not be heard. However, there is no explanation as to how those employees who supposedly wanted to intervene were impeded from doing so, given that the provisional order of liquidation was served on the employees at their place of employment, ie at 4 Seasons' business address. What is more, those employees have not themselves come forward to explain why they did not do so, save to make common cause with the member of 4 Seasons. Those employees, if they seriously wished to oppose the provisional order of liquidation, could easily have done so. That there has been no attempt to proffer any plausible explanation as to the nature of the steps they took, if any, to safeguard their interests belies their belated, bald, and opportunistic assertion that they intended to mount fierce

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[7] *Dr W A A Gouws (Johannesburg) (Pty) Ltd v H R Computek (Pty) Ltd and Others* [2025] ZASCA 103; 2025 (6) SA 89 (SCA).

opposition to the winding-up application. In so far as the member of the applicant is concerned, the simple answer to his complaint is that the corporation was to all intents and purposes Mr Lewis' alter ego who was the sole driving force and controlling mind behind the corporation. He was the person who was instrumental in enlisting the services of attorneys and providing those attorneys with instructions not only to oppose the winding-up proceedings but also to counter-claim for receiving of the judgment granted against 4 Seasons some nine months previously. Therefor, it can hardly lie in his mouth to assert that he was not allowed to intervene in the liquidation proceedings.

[24] The third and last issue relates to the costs order made against Mr Lewis in his personal capacity as a member of 4 Seasons. There is nothing to go by to determine whether such a costs order was justified and what factors weighed with the learned judge that ultimately drove her to grant a costs order in those terms. But what is known from Mr Lewis' account is that he was not forewarned about this eventuality nor invited to address the court in relation thereto. Suffice it to say that a costs order *de bonis propriis* should not be made lightly, especially in relation to someone who is not a party to the proceedings. That the court might be of the view that the decision to embark on litigation was ill-advised will not in and of itself be sufficient to justify a personal costs order. There should be actual misconduct relating to how the litigation was conducted and, even then, the offending party must be afforded an opportunity to be heard first before such an order can be made. In these circumstances, the interests of justice dictate that the offending part of the high court order dismissing the application for leave to appeal should be deleted. The revision of the costs order of the high court therefore will be reflected in the order below. The remaining points advanced on behalf of 4 Seasons in relation to ss 39 and 40 of the Close Corporation Act, and those of the NCA, were adequately and

comprehensively dealt with by Binns-Ward J in his judgment. I accordingly agree with the views of the learned judge in relation to those issues. Thus, nothing more needs be said in that regard.

[25] It is necessary to recapitulate and emphasise that it is beyond question that indeed moneys exchanged hands from the respondent to 4 Seasons. The underlying purpose for the payments was to enable the respondent to acquire a financial interest in 4 Seasons with a view to him ultimately becoming a member. For reasons that are unnecessary to traverse in this judgment, the parties' objective did not materialise. As a result, they subsequently agreed on a repayment plan recorded in a 'Memorandum of Agreement' and later superseded by the 'Repayment Agreement.' And pursuant to the latter agreement, payments from 4 Seasons to the respondent in reduction of the former's indebtedness to the latter began to trickle in. However, these payments did not last long and, despite some prompting by the respondent urging 4 Seasons to resume payments, nothing happened.

[26] Consequently, the respondent instituted an action against 4 Seasons to recover what he asserted was lawfully due and owing to him. Whilst 4 Seasons entered an appearance to defend the action, it failed to deliver its plea notwithstanding demand therefor, resulting in a default judgment being granted. Execution to satisfy the judgment ensued. This drastic action awakened 4 Seasons from slumber and prompted it to renew its promise to resume payments. But it, once again, defaulted on its payments. The respondent, unrelenting in his quest to recover what was rightly owed to him, moved for the provisional liquidation of 4 Seasons. Now realising that the 'shoe began to pinch really badly', 4 Seasons not only opposed the liquidation proceedings but also counter-claimed for rescission of the judgment granted against it, some several months after it had become aware of such judgment. It bears

mentioning that 4 Seasons not only remained supine in the face of the judgment against it for some R1.6 million, but instead renewed its promises to resume payments to settle its indebtedness. In truth, far from contesting the judgment in any way legally possible, it consciously elected to perempt the judgment.

[27] Unsurprisingly, Binns-Ward J was not impressed by the explanation proffered for the delay in seeking rescission and the bona fides of 4 Seasons' sole member, who, it will be recalled, had previously endorsed the unfulfilled promises to redeem 4 Seasons' indebtedness to the respondent. Hence, the learned judge described Mr Lewis as being resourceful in latching on to whatever defence he could marshal to thwart endeavours to recover the debt. In the light of the cumulative effect of what has already been said, it is difficult to escape the inference that 4 Seasons is in truth seeking to have a third bite at the proverbial cherry, which is not the underlying purpose that s 17(2)*(f)* is designed to serve. Whilst on this topic it is apposite to make reference to the remarks of Millar JA in *Chetty v Law Society, Transvaal*[8] which are instructive. The learned judge said the following:

'As I have pointed out, however, the circumstance that there may be reasonable or even good prospects of success on the merits would satisfy only one of the essential requirements for rescission of a default judgment. It may be that in certain circumstances, when the question of the sufficiency or otherwise of the defendant's explanation for his being in default is finely balanced, the circumstance that his proposed defence carries reasonable or good prospects of success on the merits might tip the scale in his favour in the application for rescission. (*Cf Melane v Santam Insurance Co Ltd* 1962 (4) SA 531(A) at 532.) But this is not to say that the stronger the prospects of success the more indulgently will the Court regard the explanation of the default. An unsatisfactory and unacceptable explanation remains so, whatever the prospects of success on the merits. In the light of the finding that appellant's explanation is unsatisfactory and unacceptable it

[8] *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A).

is therefore, strictly speaking, unnecessary to make findings or to consider the arguments relating to the appellant's prospects of success.'[9]

The principle that can be extracted from this passage is that absent a satisfactory and acceptable explanation for the default, a party seeking rescission is not out of the starting blocks, however strong the prospects of success on the merits may be. Here, far from having strong prospects of success on the merits, 4 Seasons' defences to the respondent's claim are exceptionally weak.

[28] However, one must accept that along the way there was a procedural misstep that culminated in default judgment being granted prematurely. And that once the provisional order of liquidation was granted, not only did further procedural missteps occur, but also substantive blunders on the part of the judge before whom the case served on the return date of the provisional order. It is no exaggeration to say that once the matter served before Kusevitsy J, things went awry. This is regrettable and must be deprecated in the strongest terms. The requirement for judicial officers to provide reasons for their decisions cannot be overemphasised. This was reiterated by this Court in *Botes v Nedbank Ltd*[10] where Corbett JA said the following:

'I fully concur in the judgment and order of my Brother Howard. I merely wish to add certain observations with reference to two features of this appeal. The first is that the Judge who heard the exception and application to strike out made the orders dismissing the exception and allowing, in part, the motion to strike out without giving any reasons. In my view, this represents an unacceptable procedure. In a case such as this, where the matter is opposed and the issues have been argued, litigants are entitled to be informed of the reasons for the Judge's decision. Moreover, a reasoned judgment may well discourage an appeal by the loser. The failure to state reasons may have the opposite effect. In addition, should the matter be taken on appeal, as happened in this

[9] Ibid at 767J-768D.
[10] *Botes v Nedbank Ltd* 1982 (3) SA 27 (A).

case, the Court of Appeal has a similar interest in knowing why the Judge who heard the matter made the order which he did.'[11]

[29] This theme was endorsed and elaborated upon by the Constitutional Court in *Mphahlele v First National Bank of SA Ltd*[12] in which the following was stated:

'There is no express constitutional provision which requires Judges to furnish reasons for their decisions. Nonetheless, in terms of s 1 of the Constitution, the rule of law is one of the founding values of our democratic state, and the Judiciary is bound by it. The rule of law undoubtedly requires Judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters. It may well be, too, that where a decision is subject to appeal it would be a violation of the constitutional right of access to courts if reasons for such a decision were to be withheld by a judicial officer.'[13]

[30] In the context of the facts of this case, the judge in question failed to fulfil her judicial duty to the litigants and provide reasons underlying her order when requested by the unsuccessful party. On this score, I am constrained to observe that her failure to do so is inexcusable. She could not have been under any illusion that she was duty-bound to provide reasons for her order expeditiously when a request therefor was made.

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[11] At 27H-28A; See also *Commissioner, South African Revenue Service v Sprigg Investment 117 CC t/a Global Investment* [2010] ZASCA 172; 2011 (4) SA 551 (SCA); [2011] 3 All SA 18 (SCA) at 561A-E.
[12] *Mphahlele v First National Bank of SA Ltd* [1999] ZACC 1; 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC).
[13] Ibid para 12; See also *Strategic Liquor Services v Mvumbi NO And Others* 2010 (2) SA 92 (CC) at 96G-97A.

Application for reconsideration

[31] Some six years ago I had occasion to observe that applications of the kind with which we are concerned in this case are hybrid in nature in the sense that their consideration also generally requires, for their determination, full argument as if the envisaged appeal itself were considered.[14] Hence, in terms of the order granted by the President referred to in paragraph 1 above the parties were forewarned that they must be prepared, if called upon to do so, to address the court on the merits. This is precisely what happened in this case. Consequently, having had the benefit of reading the record as well as heads of argument and, above all, listening to oral argument the Court gained a better insight into the merits of the envisaged appeal.

[32] As indicated at the outset[15] what serves before us is an application for the reconsideration of the order of 1 November 2023, granted by two judges of this Court, refusing the applicant's application for leave to appeal the judgment of the high court. This came about pursuant to the order granted by the President in terms of the proviso to s 17(2)*(f)* of the SC Act. At the material time, s 17(2)*(f)* of the SC Act read as follows:

'The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: *Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.*' (Emphasis added.)

[33] As the referral order was granted on 5 March 2024, following an application therefor made some months earlier,[16] it was common cause between the parties that

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[14] See in this regard: *Beadica 231 CC v Sale's Hire CC* (1191/2018) [2020] ZASCA 76 (30 June 2020).
[15] See para 1 above.
[16] The application in terms of s 17(2)*(f)* was delivered on 30 November 2023.

it is the pre-amendment version[17] of the SC Act that regulates the referral with which we are concerned in this case. The material change effected by the amendment was the substitution of the words 'in exceptional circumstances' with the phrase 'in circumstances where a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute.'

[34] It is significant that s17(2)*(f)* explicitly states that 'the decision of the majority of the judges considering an application referred to in paragraph (b),[18]…, to grant or refuse the application *shall* be *final*: Provided…' (Emphasis added.) Nevertheless, as the Constitutional Court aptly observed:

'The proviso in section 17(2)*(f)* is broad. It keeps the door of justice ajar in order to cure errors or mistakes and for the consideration of a circumstance, which, if it was known at the time of the consideration of the petition might have yielded a different outcome. It is therefore a means of preventing an injustice. This would include new or further evidence that has come to light or became known after the petition had been considered and determined.'[19]

[35] The Court however went on to dispel any notion that the proviso to s 17(2)*(f)* served as an 'open sesame.' It emphasised that this provision was not intended to afford litigants a further attempt at procuring relief that has already been refused.

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[17] After its amendment that took effect on 3 April 2024 s 17(2)*(f)* now reads:
'The decision of the majority of the judges considering an application referred to in paragraph *(b)*, or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may, in circumstances where a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.'

[18] Paragraph *(b)* of s 17(2) reads:
'If leave to appeal in terms of paragraph (a) is refused, it may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after such refusal, or such longer period as may on good cause be allowed, and in the Supreme Court of Appeal may vary any order as to costs made by the judge or judges concerned in refusing leave.'

[19] See in this regard: *Lieshing and Others v S* [2016] ZACC 41; 2017 (4) BCLR 454 (CC); 2017 (2) SACR 193 (CC) (*Lieshing I*) para 54.

The Court made plain that s 17(2)*(f)* was intended to enable the President to deal with truly deserving cases where a failure of justice might otherwise result.[20]

[36] Apropos the phrase 'exceptional circumstances' this Court in *Avnit v First Rand Bank Ltd*[21] stressed that:

'In the context of s 17(2)*(f)* the President will need to be satisfied that the circumstances are truly exceptional before referring the considered view of two judges of this court to the court for reconsideration. I emphasise that the section is not intended to afford disappointed litigants a further attempt to procure relief that has already been refused. It is intended to enable the President of this Court to deal with a situation where otherwise injustice might result. An application that merely rehearses the arguments that have already been made, considered and rejected will not succeed, unless it is strongly arguable that justice will be denied unless the possibility of an appeal can be pursued. A case such as *Van der Walt* may, but not necessarily will, warrant the exercise of the power. In such a case the President may hold the view that the grant of leave to appeal in the other case was inappropriate.'[22]

[37] This theme was elaborated upon again by this Court in *Motsoeneng v South African Broadcasting Corporation SOC Ltd and Others*[23] where the following was stated:

'[t]he necessary prerequisite for the exercise of the President's discretion in 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.'[24]

In *Motsoeneng* it was accepted by the parties, without more, that an applicant in a reconsideration application referred to the Court by the President is required to satisfy the Court that exceptional circumstances existed that warranted the exercise

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[20] See in this regard: *S v Liesching and Others* [2018] ZACC 25; 2018 (11) BCLR 1349 (CC); 2019 (1) SACR 178 (CC); 2019 (4) SA 219 (CC) para s 138-139 (*Liesching II*).
[21] *Anvit v First Rand Bank Ltd* [2014] ZASCA 132 (23 September 2014) (*Anvit*).
[22] Ibid para 6.
[23] *Motsoeneng v South African Broadcasting Corporation SOC Ltd and Others* [2024] ZASCA 80; 2025 (4) SA 122 (SCA) (*Motsoeneng*).
[24] Ibid para 14.

of the President's powers under the proviso to s 17(2)*(f)*. And *Motsoeneng* proceeded to hold that 'exceptional circumstances' is a *jurisdictional fact* that must be established before the Court to which the decision by the two judges had been referred for reconsideration may entertain such application and therefore 'steps into the shoes of the two judges' of this Court who refused leave under s 17(2)*(b)*.

[38] In *Bidvest Protea Coin Security (Pty) Ltd v Mandla Wellem Mabena*,[25] Unterhalter JA put things beyond doubt and held that the existence of 'exceptional circumstances' is *a jurisdictional fact that must be satisfied before reconsideration of the order refusing leave can be entertained*. (Emphasis added.) Save for two dissenting voices, the decisions in *Motsoeneng* and *Bidvest* have been consistently reaffirmed in subsequent cases,[26] most recently in *Rock Foundation Properties and Another v Chaitowitz*.[27]

[39] The first dissenting voice came from Coppin JA in *Lorenzi*, *w*hose view was that in a reconsideration application referred to the Court by the President, it is not incumbent upon an applicant to satisfy the court upfront, as a jurisdictional fact, that exceptional circumstances exist before the court may entertain the reconsideration application. This was because, the learned judge opined, in the language of s 17(2)*(f)* it was the President, and not the court, who was empowered to make that call. Thus, once the President is satisfied that exceptional circumstances exist and, as a result, refers the matter to the court for reconsideration of the decision of the two judges

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[25] *Bidvest Protea Coin Security (Pty) Ltd v Mabena* [2025] ZASCA 23; 2025 (3) SA 362 (SCA) (*Bidvest*).
[26] *Spar Group Ltd and Others v Twelve Gods Supermarket (Pty) Ltd and Others* [2025] ZASCA 7; 2025 (3) SA 137 (SCA); *Doorware CC v Mercury Fittings CC* [2025] ZASCA 25 (27 March 2025); *Lorenzi v S* [2025] ZASCA 58 (13 May 2025) (*Lorenzi*); *Ekurhuleni Metropolitan Municipality v Business Connexion (Pty) Ltd* [2025] ZASCA 41; 2025 JDR 1488 (SCA); *Tarentaal Centre Investments (Pty) Ltd and Another v Beneficio Developments (Pty) Ltd* [2025] ZASCA 38; 2025 JDR 1461 (SCA); *Nel v S* [2025] ZASCA 89; 2025 JDR 2552 (SCA); *Japhtha v S* [2025] ZASCA 80; 2025 (2) SACR 305 (SCA).
[27] *Rock Foundation Properties and Another v Chaitowitz* [2025] ZASCA 82 (9 June 2025).

made under s 17(2)*(b)*, refusing leave, the court must without further ado entertain the reconsideration application, and 'effectively steps into the shoes of the two judges' and decide whether to grant or refuse the application for leave to appeal previously refused or granted, as the case may be, by the two judges under s 17(2)*(b)*.

[40] The learned judge went on to say that s 17(2)*(f)* was clear enough as to admit of no ambiguity. He emphasised that 'what is referred for reconsideration is not the exercise by the President of her discretion, but the refusal by the two judges…to grant the applicant the leave that is being sought.' And that the President's decision to refer the matter to the court 'for reconsideration is not itself up for reconsideration, or review…'

[41] Hot on the heels of *Lorenzi* was the second dissenting voice of Matojane JA in *Schoeman v Director of Public Prosecutions*.[28] The learned judge, too, held that whilst the existence of exceptional circumstances is a jurisdictional fact for the proper exercise by the President of the powers for which s 17(2)*(f)* provides, this is, however, not a question that arises for the court to determine upfront before entertaining the referral for reconsideration made by the President. After undertaking an interpretive exercise, the learned judge held that on the clear wording of s 17(2)*(f)* the exercise of the President's power 'inherently links the existence of exceptional circumstances directly to the President's power to refer.' The effect of this, the learned judge reasoned, was that the President alone is the repository of the power to decide whether exceptional circumstances exist. And once that threshold is, in the President's view, met, that is the end of the enquiry. The court itself must thereafter proceed to determine whether variation of the decision refusing leave is warranted.

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[28] *Schoeman v Director of Public Prosecutions* [2025] ZASCA 124; 2025 (2) SACR 561 (SCA) (*Schoeman*).

[42] Accordingly, Matojane JA held that *Bidvest* and all those decisions that followed in its wake were 'wrongly decided and [their] interpretation of s 17(2)*(f)* should not be followed.'[29] After making reference to decisions of our courts in relation to the doctrine of *stare decisis*,[30] he concluded that *Bidvest* was clearly wrong. And that had he commanded a majority, he would therefore have overruled *Bidvest*.

[43] The intrinsic value of the doctrine of precedent is beyond question. This was made plain by the Constitutional Court in *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another*.[31] The Court said the following:

'Observance of the doctrine has been insisted upon, both by this Court and by the Supreme Court of Appeal. And I believe rightly so. The doctrine of precedent not only binds lower courts but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. Stare decisis is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos.'[32]

[44] In *Schoeman*, Unterhalter JA who penned the majority judgment in effect aligned himself with what Ponnan JA said in *Motsoeneng* and held that the court to which the President refers the decision of the two judges refusing leave to appeal is: '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 no exceptional circumstances, then that puts an end to the matter, and we need not consider whether

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[29] Ibid para 7.
[30] Literally means 'stand by previous decisions' ie precedent.
[31] *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* [2010] ZACC 19; 2011 (2) BCLR 121 (CC); 2011 (4) SA 42 (CC).
[32] Ibid para 28.

the refusal to grant leave on petition was correctly decided, much less whether the judgment and order of the full court are correct.'[33] Having found that no exceptional circumstances existed, the court ordered that the application for reconsideration be struck from the roll.

[45] Thus, according to the majority judgment in *Schoeman* the court to which the President refers the decision of the two judges for reconsideration and, if necessary, variation must itself revisit the same question that the President alone is empowered to determine in terms of the proviso to s 17(2)*(f)*. And only if, on this thesis, the Court is satisfied that exceptional circumstances exist will it proceed to reconsider the decision of the two judges. The majority judgment justifies this approach by stating that:

'A referral to this Court by the President is then not a decision as to whether exceptional circumstances exist. The referral is simply a decision that if this Court should find that there are exceptional circumstances, the President considers that the decision on petition warrants reconsideration. This Court does not review or reconsider the President's decision in any way. This Court alone decides whether there are exceptional circumstances. On the jurisdictional fact interpretation, this Court alone enjoys the competence to do so, and the President does not. If this Court should find that there are exceptional circumstances, the President's discretionary judgment that the decision on petition should be reconsidered stands. That decision is not reviewed or subject to correction by this Court. It is not subject to any kind of judicial validation by this Court.'[34]

[46] The passage quoted from *Schoeman* in the preceding paragraph begs the question as to why then, if this is how the language of the proviso should be construed, the legislature did not explicitly say so. The upshot of this passage implies that in referring the matter to the Court for reconsideration the President does no

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[33] *Bidvest* above fn 32para 17.
[34] *Schoeman* above fn 35 para 68.

more than require the Court 'if it should find that there are exceptional circumstances' to warrant reconsideration of the decision of the two judges who refused or granted leave to appeal, the President considers that the decision on petition warrants reconsideration. To my mind this is, with respect, a convoluted reasoning that is subversive of the manner in which meaning to the words used in a statutory instrument is ascribed.

[47] If the correct construction of the proviso to s 17(2)*(f)* favoured in *Schoeman* is indeed the one intended,[35] it is difficult to conceive of any plausible reason why the legislature did not explicitly say so. There are potential anomalies that could arise if the proviso were to be construed in the way propounded in *Schoeman*. One that readily comes to mind is this: what happens in instances where the President has refused a s 17(2)*(f)* application on the basis that no exceptional circumstances to warrant a referral to the court have been established if in these types of applications the President cannot make a legally effective decision because she lacks the competence to do so, as *Schoeman* posits. And what happens to the decision of the court itself when it entertains a 'referral application' bearing in mind that the President has not made a definitive decision as enjoined by s 17(2)*(f)* where exceptional circumstances exist.[36] In these circumstances there is nothing to be gained by construing the proviso to s 17(2)*(f)* in this way. On the contrary, to do so frustrates its manifest purpose, sowing seeds of confusion as to its true meaning. What is more, this situation is exacerbated by the fact that the passage referenced in paragraph 45 above is incongruent with binding judicial authority whose categorical

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[35] I use the word 'intended' and the phrase 'the intention of the legislature' guardedly mindful of the trenchant criticism levelled against the use of this and similar terms when interpreting legislation as unrealistic and misleading. See in this regard: *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) paras 20-24 (*Endumeni*).

[36] Presently, the President will refer the decision to the Court for reconsideration only if satisfied that not to do so would result in a grave failure of justice or the administration of justice may be brought into disrepute.

import is that it is the President alone who determines the existence or absence of exceptional circumstances. To borrow the expression used elsewhere the discretionary power conferred by the proviso to s 17(2)*(f)* on the President is both 'pre-eminent and exclusive'.

[48] Accordingly, is difficult to understand how in the face of the clear language employed in the proviso to s 17(2)*(f)* the referral by the President of the decision of the two judges to the court for reconsideration and, if necessary, variation – notwithstanding what is said in *Schoeman* to the contrary – requires validation or ratification by the court to which the matter is referred before it may stand. The language of the proviso could not be clearer. It explicitly confers a discretion on the President – and no one else – which must be exercised judiciously, like any other discretionary power, to decide whether there are exceptional circumstances that justify a referral of the decision of the two judges to the court for reconsideration and, if necessary, variation. That much was accepted by the Constitutional Court in *Liesching I* some nine years ago. And in the event that the President determines that no exceptional circumstances exist, the application for reconsideration would fail on that score. It bears mentioning that once the application for reconsideration is refused by the President because, in her view, no exceptional circumstances exist, the unsuccessful litigant for reconsideration will consequently have exhausted his or her legal remedies in this Court and no referral to the court would ensue. Indeed, more than a decade ago in *Avnit* Mpati P had occasion to make some pertinent observations regarding the identity of the judge in whom the power conferred by the proviso to s 17(2)*(f)* vests. The learned President said the following:

'As s 17(2)*(f)* is a new section vesting the President of this court with a power that the incumbent has not hitherto possessed, I think it desirable to set out the approach to be taken to such applications.

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The origin of the section no doubt lies in the situation that arose in *Van der Walt v Metcash Trading Co Ltd* [2002] ZACC 4; 2002 (4) SA 317 (CC) where one panel of judges of this court dismissed Mr van der Walt's application for leave to appeal and a differently composed panel granted an identical application raising the same point of law. It is not, however, confined to that kind of situation but is a power available to be exercised by the President of this court in exceptional circumstances.'[37]

The judgments in *Motsoeneng*, *Bidvest* and the majority in *Schoeman* and *Lorenzi* did not advert to *Avnit* in relation to this issue, a judgment of this Court by which they were bound unless of course *Avnit* were found to be clearly wrong.[38]

[49] The principles to be applied in the interpretation of legislation – which is essentially a process of assigning meaning to the words used – are now well settled. The 'inevitable point of departure is the language of the provision itself', 'read in context and having regard to the purpose of the provision…' And a 'sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or *undermines the apparent purpose*[39] of the provision'. (Emphasis added.) In this regard, it is as well to remember, as the Constitutional Court made plain in *Chisuse* that even whilst adopting the purposive and contextual approach to statutory interpretation it is still necessary to 'remain faithful to the literal wording of the statute'[40] under consideration. In *Liesching I*, the Constitutional Court said that '[t]he President is given a discretion, to be exercised judiciously, to decide whether there are exceptional circumstances that warrant referral of the matter to the Court for

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[37] *Avnit* above fn 28 paras 1 and 3.
[38] *Bloemfontein Town Council v Richter* 1938 AD 105 at 232.
[39] *Endumeni* above fn 42 para 18. See also: *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd* [2019] ZACC 12; 2019 (6) BCLR 749 (CC); 2019 (5) SA 29 (CC); *Minister of Police and Others v Fidelity Security Services (Pty) Ltd and Others* [2022] ZACC 16; 2022 (2) SACR 519 (CC); 2023 (3) BCLR 270 (CC); *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20; 2020 (10) BCLR 1173 (CC); 2020 (6) SA 14 (CC) (*Chisuse*).
[40] *Chisuse* above fn 45 para 52.

reconsideration or, if necessary, variation.'[41] The Court went on to emphasise that the 'President must therefore decide whether there are exceptional circumstances.'[42]

[50] That the wording of a statutory instrument plays a pivotal role in the process of statutory interpretation was endorsed by the Constitutional Court some six years earlier in its decision in *Cool Ideas 1186 CC v Hubbard and Another.*[43] The Court said:

'A fundamental tenet of statutory interpretation is that words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity.'[44]

[51] From the dicta referenced in the preceding three paragraphs it becomes readily apparent that it is only the President who is vested with the discretion located in the proviso of s 17(2)*(f)* and not the court to which the President refers the final decision 'of the majority of the judges considering an application referred to in paragraph *(b)*…to grant or refuse the application.'

[52] To conclude on this issue, it bears mentioning that in a most recent decision of this Court, it was stated that a referral to the court pursuant to s 17(2)*(f)* 'encompasses a two-stage procedure'. The first stage is said to involve 'the question whether the jurisdictional facts for the referral have been stablished'. This means that the Court must perforce pre-occupy itself with the same question that the proviso to s 17(2)*(f)* requires the President to determine, namely whether 'exceptional circumstances'[45] exist or, in terms of the current operative formulation of the

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[41] *Liesching I* above fn 26 para 54.
[42] *Liesching I* above fn 26 para 55.
[43] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (*Cool Ideas*).
[44] Ibid para 28.
[45] As required by s 17(2)*(f)* before its amendment that took effect on 4 April 2024.

proviso, absence of 'a grave failure of justice' or where no prospect of 'the administration of justice being brought into disrepute' if the decision under s 17(2)*(b)* is not referred to the Court by the President for reconsideration and, if necessary, variation. Regrettably, I respectfully find myself unable to subscribe to that view.

[53] To my mind, a referral in terms of the proviso to s 17(2)*(f)* begins and ends with what has been classified as the second stage that 'involves the question of whether the applicant has satisfied the Court that grounds exist for interfering with the petition order refusing leave to appeal'.[46] As propounded in *Motsoeneng*, the court to which the President has referred the decision made under s 17(2)*(b)* effectively 'steps into the shoes of the judges who made the decision' and determines whether leave to appeal should have been granted or refused, as the case may be. In the event the court comes to the conclusion that the decision under s 17(2)*(b)* cannot, in the context of the facts of a given case, be faulted such decision would stand. If not, the court would, for example, grant leave where leave was, in its view, erroneously refused. Thereafter, the court would ordinarily determine the merits of the appeal itself.

[54] However, what requires to be emphasised is that if and when the President refers the decision made under s 17(2)*(b)* to the court for reconsideration in circumstances where either no exceptional circumstances existed or no grave failure of justice would otherwise result or the administration of justice would not be brought into disrepute if such decision is not reconsidered, the President's erroneous view of the matter cannot endow the court to which she or he has referred the decision for reconsideration with legal competence to revisit the referral decision of

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[46] See, in this regard: *J.M.M and Another v Cara Dorothy Masureik and Others* [2026] ZASCA 1 para 47.

the President, an issue already determined by the President herself in whose exclusive domain, after all, the power and discretion vest. This is because, as already mentioned, what the President refers to the Court for reconsideration and, if necessary, variation is only the decision made under s 17(2)*(b)*, nothing more.

[55] Accordingly, in my view there is much to be said for the contrary views expressed in the minority judgments in both *Lorenzi* and *Schoeman*. *Schoeman* emphasised, just as *Lorenzi* before it had pretty much in a similar vein held, that the 'subject of the referral is the original decision [ie the decision of the two or three judges refusing or granting leave], not the President's reasons for the referral. The *Bidvest* interpretation conflates these two steps, effectively requiring the Court to perform the President's function. It is "clearly wrong" and warrants departure'.[47]

[56] At the risk of stating the obvious, it bears mentioning that the question whether or not exceptional circumstances exist in the context of a s 17(2)*(f)* application for reconsideration is the exclusive preserve of the President. It therefore goes without saying that once the President, in the exercise of her discretion, decides to refer the decision under s 17(2)(*b)* to the court for reconsideration this will be the sole judicial task that the Court will be called upon to perform, ie only to decide whether the two or three judges correctly refused or granted leave to appeal, as the case may be.

[57] In the light of the foregoing, it is difficult to understand why the Court in *Motsoeneng* said that: '…[t]he requirement of the existence of exceptional circumstances is a jurisdictional fact that had to be first met, and that, absent exceptional circumstances, the section 17(2)*(f)* application was not out of the starting

[47] *Schoeman* above fn 35 para 30.

stalls.'[48] The 'section 17(2)*(f)* application' in relation to the existence or otherwise of exceptional circumstances to which reference was made in *Motsoeneng* was not before the Court, having already been dealt with and disposed of by the President. It was therefore not open to the Court to second-guess the President who had already decided the matter or to re-open the inquiry as to the existence or otherwise of exceptional circumstances. On this score, it is as well to remember the word of caution sounded by the Constitutional Court in *Albutt v Centre for the Study of Violence and Reconciliation and Others*[49] that: '[s]ound judicial policy requires [the courts] to decide only that which is demanded by the facts of the case and is necessary for its proper disposal.'[50]

[58] Accordingly, what is demanded by the facts of a referral to the court made by the President pursuant to s 17(2)*(f)* is the reconsideration of the decision of the two judges who refused leave to appeal. Put differently, the Court must, without more ado, step into the shoes of the two judges, consider the application for leave to appeal on its merits. Indeed, on a proper reading of the wording of the proviso to s 17(2)*(f)* it is beyond question that what is referred to the court by the President – upon her being satisfied that exceptional circumstances exist – is, as borne out by the scheme of s 17(2)*(f)* read holistically, the 'decision of the majority of the judges [who considered and disposed of the] application referred to in paragraph *(b)*,…,to grant or refuse the application…'and nothing more. Significantly, in the language employed in the proviso itself such decision is referred to the court specifically for the court to reconsider it and, if necessary, vary it.

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[48] *Motsoeneng* above fn 30 para 19.

[49] *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC) ; 2010 (2) SACR 101 (CC) ; 2010 (5) BCLR 391 (CC).

[50] Ibid para 82.

[59] It necessary to pause here and remark that it would be necessary to vary the decision made under paragraph *(b)* only if the court decides, on reconsideration, that leave ought to have been granted or refused, as the case may be, by the majority of the judges concerned. In this regard, it is necessary to stress that the court to which the President refers the matter for reconsideration has only one circumscribed task to perform. That task is: to determine whether the two (or three) judges who considered the petition were right or wrong in reaching the decision they did in relation to the petition. If the court determines that they were right, this would be the end of the matter and the reconsideration application would fail. However, if the court concludes that the two (or three) judges were, for example, wrong in refusing leave to appeal, it would vary the order refusing leave and, instead, grant leave to appeal. In that event, the court would then enter into the substantive merits of the appeal itself and determine its fate in accordance with paragraph 4 of the President's referral order.

[60] Like my colleagues who were in the minority in *Lorenzi* and *Schoeman*, I have no hesitation in concluding that the requirement that an applicant in a referral to the court by the President for reconsideration of the decision of the two judges made in terms of s 17(2)*(b)* of the SC Act must establish that exceptional circumstances exist as a jurisdictional fact that must first be met before the referral may be entertained as propounded in *Motsoeneng* is plainly at odds with the clear and unambiguous wording of the proviso to s 17(2)*(f)*. The same applies to the statement by the majority in *Schoeman* that on the so-called 'jurisdictional fact interpretation' the court alone 'decides whether there are exceptional circumstances.' And so is the statement in the same case that the court alone 'enjoys the competence to do so' whilst 'the President does not.' With respect, the interpretation espoused in

Motsoeneng and by the majority in *Schoeman* is subversive of the manifest purpose of the proviso to s 17(2)*(f)* and the clear language in which the proviso is couched.

[61] As this Court cautioned in *Endumeni* '[j]udges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation.'[51] And as Harms DP rightly noted, albeit in a different context, that in discharging their judicial functions 'judges are themselves constrained by the law',[52] meaning, for example, that when interpreting legislation the judge's function is limited to interpreting and giving effect to what has already been made law by the legislative authority.[53] Since the advent of our constitutional democracy, this principle is now also underpinned by the doctrine of separation of powers.[54] This then leads to the ineluctable conclusion that the relevant dicta made in *Motsoeneng*, *Bidvest* and *Schoeman* discussed above were clearly wrong. To the extent that those judgments – and others that followed them – adopted the so-called 'jurisdictional fact interpretation', that contradicts what the Constitutional Court said in *Liesching I* and *Liesching II* in a most fundamental way as explained above, they are overruled.

[62] As will have been realised from the discussion above, one is here dealing with a classic case where the same words have meant different things to different judges of this Court. Consequently, there have been differences of opinion as to the proper meaning of a legislative provision, ie. the proviso to s 17(2)*(f)*. In a different context,

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[51] *Endumeni* above fn 42 para 18.
[52] *National Director of Public Prosecutions v Zuma (Mbeki and Another intervening)* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393 (SCA); [2009] 2 All SA 243 (SCA) para 15.
[53] Expressed in the Latin maxim:'Iudicis est jus dicere et non jus facere.'
[54] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) and the authorities therein cited.

Schutz JA eloquently described a situation similar to the one confronting us in this case as helping 'to keep the forensic pot boiling'.[55] Hopefully, I daresay, a point has now been reached at which the controversy that has been raging on since the decisions in *Lorenzi* and *Schoeman* has finally been put to bed.

[63] Reverting to the merits of the present referral, the critical question remains: are there any compelling and substantial factors in this case indicative of the existence of exceptional circumstances or a probability of the administration of justice being brought into disrepute or a grave failure of justice ensuing if the decision of the two judges of this Court refusing leave to appeal is not varied? If the answer to this question is in the negative, such an outcome would render it unnecessary to consider the substantive merits of the envisaged appeal. In the view I take of the matter, and after anxious consideration, no exceptional circumstances of the nature required are discernible despite what I earlier described as procedural missteps and judicial ineptitude. That being so, it follows that the application for reconsideration of the decision refusing leave to appeal becomes stillborn and must therefore fail.

[64] The reasons that weighed heavily with this Court in declining the invitation by 4 Seasons to afford it a 'further bite at the proverbial cherry' have been summarised in paras 25 to 27 above and will not be repeated here.

[65] Whilst one has sympathy for 4 Seasons because of how things turned out in the high court subsequent to the grant of the provisional winding-up order, I am not convinced, having regard to the long history of this matter, as already indicated above, that the interests of justice dictate that the matter should be delayed further.

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[55] See *Langston Clothing (Properties) CC v Danco Clothing (Pty) Ltd.* [1998] ZASCA 66; 1998 (4) SA 885 (SCA) at 887C.

This is even more so when it is borne in mind that after becoming aware of the judgment of some R1.6 million, 4 Seasons evinced a clear and unmistaken intention to settle the judgment debt by first undertaking to settle the arrear amount of R379 500, then outstanding as at 19 April 2022, and thereafter maintain weekly payments of R10 000 in order to liquidate the debt in full. Such conduct, no doubt, constituted an unequivocal acceptance of its fate and was, as a result, inconsistent with any denial of liability.

[66] Inexplicably, 4 Seasons belatedly sought to contest its liability only when, as Binns-Ward J aptly put it, it realised that 'the shoe began to pinch very badly.' Thus, its quest to 'unscramble the egg' so late in the day and after its prolonged interactions with the respondent culminating in its unequivocal admission of liability, is nothing short of an abuse of the court's process.

[67] In the light of the foregoing, it is beyond question that 4 Seasons perempted its rights to challenge not only its indebtedness but also the very judgment that it had consistently acquiesced in as detailed in the factual background above. It is trite that peremption is part of our law and its principles are well settled. These enduring principles were restated by Innes CJ more than a century ago in *Dabner v South African Railways and Harbours*[56] thus:

'The rule with regard to peremption is well settled, and has been enunciated on several occasions by this court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the *onus* of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven.'[57]

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[56] *Dabner v South African Railways and Harbours* 1920 AD 583.
[57] Ibid at 594.

[68] Some 50 years later, in *Gentiruco AG v Firestone SA (Pty) Ltd*,[58] the following is what Trollip JA also said concerning the same topic:

'The right of an unsuccessful litigant to appeal against an adverse judgment or order is said to be perempted if he, by unequivocal conduct inconsistent with the intention to appeal, shows that he acquiesces in the judgment or order…Conceivably such acquiescence may occur, albeit rarely, before the judgment or order is actually given against him, as, for example, where he expressly or impliedly agrees in advance to be bound by it.'[59]

[69] Here it is as well to remember that 4 Seasons' representatives, including Mr Lewis himself, expressly acknowledged 4 Seasons' indebtedness to the respondent once all concerned came to accept that the respondent's contribution to the capitalisation of the close corporation in return for the respondent acquiring a joint beneficial interest in the corporation was no longer feasible. Hence, the parties concluded the 'Repayment Agreement' in terms of which the money previously 'invested' in the corporation by the respondent was to be repaid to the latter. Moreover, when 4 Seasons was informed of the default judgment obtained against it by the respondent, the former, as already indicated, by its unequivocal conduct manifested an acquiescence in the default judgment by renewing its undertaking to settle the judgment debt in instalments after liquidating substantial arrears in one fell swoop. Accordingly, all of this is indubitably indicative of the fact that 4 Seasons' conduct was consistent with an intention not to contest its indebtedness to the respondent. That being the case, 4 Seasons' application for the reconsideration of the decision refusing it leave to appeal is ill-founded.

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[58] *Gentiruco AG v Firestone SA (Pty) Ltd* 1972(1) SA 589 (A).
[59] Ibid at 600 A-B.

[70] In this case, unlike in *Molaudzi v S*,[60] by refusing to come to the aid of 4 Seasons despite what happened before Kusevitsy J does not equate to perpetuating an error. For all the reasons already given, I feel no anxiety of such a nature so as to induce 'a compulsion of judicial conscience' in me to come to 4 Seasons' assistance.

Order

[71] In the result the following order is made:

1 The following words in the order of the Western Cape Division of the high court, Cape Town granted on 30 August 2023, namely: 'which costs will not be borne by the insolvent estate, but by the members in their personal capacity' are deleted.

2 Save for the foregoing, the application in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013 referred to this Court for the reconsideration of the decision refusing leave to appeal is dismissed with costs, including the costs of two counsel which shall be costs in the liquidation.

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X M PETSE

ACTING JUDGE OF APPEAL

[60] *Molaudzi v S* [2015] ZACC 20; 2015 (8) BCLR 904 (CC); 2015 (2) SACR 341 (CC) para 30.

Appearances

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Instructed by:	Van Rensburg & CO, Cape Town
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For the respondent:	H Loots SC with A Titus
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	McIntyre van der Post Inc., Bloemfontein