



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 1135/2023

In the matter between:

FREDERICK WILHELM AUGUST LUTZKIE

APPLICANT

and

**COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICE**

RESPONDENT

Neutral citation: *Lutzkie v Commissioner for the South African Revenue Service*
(1135/2023) [2026] ZASCA 11 (06 February 2026)

Coram: PETSE, MBHA and DLODLO AJJA

Heard: 22 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 06 February 2026 at 11h00.

Summary: Practice and procedure – s 17(2)(f) of the Superior Courts Act 10 of 2013 – referral of decision refusing special leave to appeal to the court for reconsideration and, if necessary, variation – reconsideration competent only in

circumstances where a grave failure of justice would otherwise result or administration of justice may be brought into disrepute – threshold not met – application dismissed.

ORDER

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

The application for reconsideration referred to the court, of the decision made on 5 October 2023 refusing the applicant's application for special leave, in terms of the proviso to s 17(2)(f) of the Superior Courts Act 10 of 2013 is dismissed with costs, including costs of two counsel.

JUDGMENT

Petse AJA (Mbha and Dlodlo AJJA concurring):

Introduction

[1] This is an application for the reconsideration and, if necessary, variation of the order granted on petition by two judges of this Court on 5 October 2023, refusing special leave to appeal against a decision of the Full Court of the Gauteng Division of the High Court, Pretoria (Full Court),¹ upholding by majority the judgment of the Tax Court.² The application serves before this Court pursuant to a referral by the President of the Court in terms of the proviso to s 17(2)(f) of the Superior Courts Act³ (the SC Act). If the application for reconsideration succeeds and special leave

¹ *Lutzkie v The Commissioner for the South African Revenue Service* (case no A72/2021) (Mokose J, with Baloyi-Mbembele AJ concurring; Davis J dissenting).

² *Lutzkie v The Commissioner for the South African Revenue Service* (27 October 2020) (Fisher J).

³ Superior Courts Act 10 of 2013.

to appeal is granted two issues would arise for adjudication. First, whether the applicant discharged the onus of proof resting on him before the Tax Court that the amount of R1 670 099.85 paid to him on 15 June 2006 was not taxable income. Second, whether the respondent, the Commissioner for the South African Revenue Services, discharged the onus in relation to the additional tax of 90 per-cent imposed on account of the alleged understatement of income by the applicant.

The facts

[2] The dispute between the protagonists arose from an alleged understatement of gross income by the applicant, Mr Frederick Wilhelm August Lutzkie, and the penalty imposed therefor by the Commissioner for the South African Revenue Service. For convenience, I shall refer to the Commissioner for the South African Revenue Services as either the Commissioner or SARS as dictated by the context. There was no agreement between the parties as to the nature of the income, ie whether it was taxable or not, and the quantum of the penalty imposed by SARS. This was the genesis of the litigation that ultimately ensued between the parties.

[3] This happened as follows. In respect of the 2007 year of assessment the applicant submitted his return of income to SARS. SARS was not satisfied with the income declared by the applicant. This dissatisfaction prompted SARS to conduct a so-called 'lifestyle audit' of the applicant's financial affairs, conducted by its internal audit specialist, Ms Cecilia Moitse (Ms Moitse). At the heart of the dispute was, inter alia, an amount of R1 670 099.85 (ie the disputed amount) deposited into the applicant's bank account on 15 June 2006 from a corporate entity registered in the British Virgin Islands (the BVI). After a prolonged period of back and forth exchange of correspondence, and on 24 February 2010 SARS provided the applicant with its audit findings. Pursuant to its audit findings, SARS invited the applicant to

indicate if he disputed the audit findings and, if so, to provide reasons for disputing such findings. SARS further indicated that it proposed to include the disputed amount as part of applicant's taxable income for the 2007 year of assessment.

[4] In response, the applicant informed SARS that the disputed amount represented moneys lent and advanced to him by a corporate entity called Volaw Trust and was intended for payment of legal fees. In support of this assertion, the applicant produced an unsigned acknowledgement of debt in favour of Volaw Trust as evidence of his indebtedness to the latter. SARS was not persuaded by the applicant's explanation and, on 28 May 2010, proceeded to issue an assessment that included the disputed amount as part of the applicant's gross income. SARS also levied additional tax of 90 per-cent of the understated amount, ie R1 670 099.85.

[5] Undeterred by SARS' ruling in relation to what constituted his gross income, on 11 March 2011 the applicant lodged an objection against the Commissioner's assessment. In his notice of objection, the applicant sought to persuade SARS that the disputed amount ought not to have been included in his gross income because it was not, but, instead, represented a loan extended to him by Volaw Trust. However, SARS refused to budge and persisted in its stance. With an impasse having arisen, the applicant resorted to litigation and lodged an appeal to the Tax Court against SARS' decision.

[6] Against the foregoing backdrop therefore, our judicial task in this application essentially boils down to three issues. First, we are called upon to decide whether the Tax Court was correct in its conclusion that the disputed amount formed part of the applicant's gross income. Second, if the answer to the first issue is in the affirmative, we must then consider whether the Tax Court properly exercised its

own, original discretion in determining the extent or magnitude of the penalty imposed by SARS. On this score, it bears mentioning that in essence the applicant contested the excessiveness, as he saw it, of the penalty. According to the applicant, a penalty of no more than 10 per-cent would have been reasonable, fair and equitable bearing in mind that it was common ground between the parties that the understatement of income was not attributable to any intentional act or omission on his part. And, from what emerges from the record, it is not seriously disputed that the penalty was determined by a SARS committee on the recommendation of the audit specialist, Ms Moitse. Third, we must consider whether the applicant has met the threshold of establishing that substantial factors exist warranting a reconsideration of the decision of the two judges of this Court refusing the applicant's application for special leave to appeal against the decision of the full Court.

[7] It is apposite at this juncture to pause and observe that an appeal before the Tax Court amounts to 'a re-hearing of the case in the ordinary, well-known way in which this Court, while paying due regard to the findings of a Special Court on the facts and credibility of witnesses, is not necessarily bound by them.' This was stated by Trollip JA in *Hicklin v Secretary for Inland Revenue*.⁴ And, as it was noted by Van Heerden JA in *Commissioner for Inland Revenue v Da Costa*⁵ with reference to the decision of this Court in *Ex Parte Neethling and Others*,⁶ the powers of an appellate court against a decision of the Tax Court 'should be exercised according to the principles and subject to the restrictions applicable to appeals in general.'⁷ The

⁴ *Hicklin v Secretary for Inland Revenue* 1980 (1) SA 481(A) at 485E-F.

⁵ *Commissioner for Inland Revenue v Da Costa* 1985 (3) SA 768(A) (*Da Costa*).

⁶ *Ex Parte Neethling and Others* 1951 (4) SA 331 (A) at 335.

⁷ *Da Costa* at 775D-E.

learned judge of Appeal proceeded to observe that ‘...if a decision of the Special Court is based on the exercise of a discretion, this Court will interfere only if the Special Court did not bring an unbiased judgment to bear on the question, or did not act for substantial reasons, or exercised its discretion capriciously or upon a wrong principle.’⁸

Litigation history

Tax Court

[8] Two witnesses testified before the Tax Court. They were Mr Adriaan Sarel van Dyk (Mr van Dyk) on behalf of the applicant. Mr van Dyk was the applicant’s auditor who was appointed to investigate the nature of the deposit by Volaw Trust on 15 June 2006 in respect of the disputed amount, some 12 years after such deposit. I pause to mention that Mr van Dyk’s evidence must be considered in the context of the contents of certain emails produced on behalf of the applicant in response to enquiries and investigations conducted by him. With these emails, the applicant sought to disprove SARS’ case that the disputed amount formed part of his gross income, ie his taxable income. For his part, the Commissioner called one witness, Ms Moitse, who conducted the audit of the applicant’s financial affairs and later made a recommendation to SARS’ committee⁹ in relation to the extent of the penalty to be imposed for the understatement of applicant’s taxable income. The applicant himself did not testify before the Tax Court and was instead content to pin his hopes on Mr van Dyk to prove his case and disprove that of SARS as to the nature of the disputed amount.

⁸ *Da Costa* at 775F.

⁹ SARS’ witness testified that this was ‘an additional tax committee’ constituted to determine penalties for understatement of income in general.

[9] On 26 August 2020, this being the date on which the hearing previously adjourned on 29 October 2018 was set to commence before the Tax Court, the applicant applied for and was granted leave to amend his statement of grounds of appeal to align it with what Mr van Dyk's investigations had yielded. The effect of the amendment was that the deposit of R1 670 099.85 into the applicant's bank account made by Volaw Trust on 15 June 2006 was not a loan to the applicant for legal fees anymore. Rather, the case sought to be constructed by way of the amendment granted by the Tax Court was that the amount now represented the repayment of the applicant's loan account in a foreign corporate entity.

[10] Accordingly, as already indicated, the appeal proceeded on the footing that the deposit represented repayment of the applicant's shareholder's loan account. To underpin this hypothesis, Mr van Dyk entirely relied on excerpts from emails exchanged between himself and Ms Jody Gray (Ms Gray) of the entity called the VG Group in the Isle of Man. More will be said about the emails in question later.

[11] Quite at the outset of the testimony of Mr van Dyk in relation to his interaction with Ms Gray, counsel for SARS raised an objection to the nature of the evidence sought to be tendered, stating that it was hearsay¹⁰ and therefore inadmissible.¹¹

¹⁰ In terms of s 3(4) of the Law of Evidence Amendment Act 45 of 1988 (the LEAA) hearsay evidence for purpose of the Act means 'evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.'

¹¹ In turn, s 3(1) of the Act provides that 'subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—

- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
- (c) the court, having regard to—
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;

Counsel's stance in this regard prompted the Tax Court to proclaim unequivocally that no 'hearsay evidence [is] to be adduced in this matter...' The Tax Court proceeded to forewarn Mr van Dyk that he would 'have to tailor [his] evidence in order to accommodate' the Tax Court's ruling. And that Mr van Dyk would only be permitted 'to give evidence in relation to what he personally knows, not what [other] people told him.' I shall revert to this aspect later.

[12] Despite the court's ruling in relation to the evidence of Mr van Dyk being hearsay, the latter heedlessly persisted in tendering hearsay evidence. It is necessary to emphasise that no application was made on behalf of the applicant to admit the hearsay evidence of Mr van Dyk in terms of s 3(1) of the Law of Evidence Amendment Act¹² (the LEAA). And the cross-examination of Mr van Dyk by counsel for SARS sought, in the main, to underscore that his evidence woefully fell short of establishing the existence of the loan account relied upon by the applicant principally because Mr van Dyk had no personal knowledge of the facts in relation to which he testified. Instead, he entirely relied on the emails that he and Ms Gray had exchanged and what was allegedly conveyed to him when he travelled to Jersey. Counsel for SARS described the upshot of Mr van Dyk's evidence as speculative. This is also what happened when Mr van Dyk testified about what was allegedly conveyed to him by employees of Standard Bank of South Africa, First National Bank and the South African Reserve Bank. Here again, the Tax Court felt compelled, more than once, to intervene and reiterate that Mr van Dyk was not competent to

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.'

¹² Law of Evidence Amendment Act 45 of 1988.

testify in relation to procedures and processes of the said banks. At this juncture, counsel¹³ for the applicant was constrained to concede that it would not ‘serve a purpose any further that Mr van Dyk testify about the investigation that he conducted.’

[13] It is appropriate at this stage to make reference to the emails exchanged between Mr van Dyk on the one hand and Ms Gray on the other. Two of those emails are at the heart of the dispute between the parties. They were both exchanged on 16 July 2019. The first email to Ms Gray that set things in motion came from Mr van Dyk. In relevant parts,¹⁴ it states that:

¹³ Counsel who represented the applicant in the Tax Court did not take part in the application before this Court.

¹⁴ The full text of the email reads:

‘The situation is as follows, namely:

The South African Revenue Services (“SARS”) did what is called a “lifestyle audit” on Mr Lutzkie...One of these payments included in the audit was this amount received from VG (previously “Volaw Trust”).

On the bank statement appears the deposit through the reserve bank as “Volaw Trust”. SARS then calculated an understatement penalty of 90% on this amount.

In the original audit, Mr Wagner, the then accounting officer, explain to SARS that the amount was part of an purchase agreement with Ilanga Coal and that the amount was paid in terms of the cancellation of the agreement. Documents to this effect were presented.

Further to this a “acknowledgement of debt” was presented to SARS to shown that this was actually a loan from Volaw Trust. After our discussion I explained to the SARS officials and their legal team that although there was an application of a loan and “acknowledgment of debt” this did not happen and there was no loan to Mr Lutzkie.

In order to present the case to our legal team, I suggested to do an affidavit as an expert witness to confirm the following, namely:

1. That Mr Lutzkie was the beneficial owner of the M.C.M Development Limited since the inception of the BVI entity.
2. The transactions of income and capital of nature occur in the BVI entity (M.C.M Development Limited) and that there were loans made by Mr Lutzkie to the M.C.M Development Limited.
3. That the company was dissolute on 18 May 2006 and that the funds in the bank account were paid to Volaw Trust as the “owner” of the shares on behalf of the beneficial owner of the shares. This amount was the loan account in the books and accounts of M.C.M Development Limited, as a shareholder loan. The closing of the bank account the amount left in the bank account was equal to the remainder of the shareholder’s loan.
4. That the shareholder’s loan of the beneficial owner (due to his status as a non-resident) was refunded and paid to Mr Lutzkie.
5. That although there were discussions on a loan and therefore an acknowledgement to debt, the loan and acknowledgement of debt did not happen or occur and that the acknowledgement of debt was therefore cancelled.’

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5. That although there were discussions on a loan and therefore an acknowledgement to debt, the loan and the acknowledgement of debt did not happen or occur and that the acknowledgement of debt was therefore cancelled.’

[14] The thesis of Mr van Dyk’s email to Ms Gray is that there was a shareholder’s loan in the books of Volaw Trust and that the applicant was the beneficial owner of shares held in the corporate entity known as M.C.M Development Limited. In developing this thesis, he postulated that when this entity was wound up on 18 May

2006 the funds in its banking account were paid to Volaw Trust for the benefit of the applicant as the ultimate beneficial owner of the shares in M.C.M Development Limited. Thus, the amount of R1 670 099.85 paid to the applicant constituted a repayment of a shareholder's loan owed to the applicant, as the beneficial owner of the shares, since he could not – as a non-resident – hold the shares in his own name.

[15] In response to the email from Mr van Dyk, Ms Gray, after thanking the former for his explanation,¹⁵ said the following:

'To confirm, Volaw Trust was not the owner of the shares but the provider of administrative services. The funds would have been remitted to Volaw Trust's client account as the bank account in the name of the company would have been closed upon dissolution. [Emphasis added.]

I pause to observe that the wording used by Ms Gray in her email is telling. She asserted that the funds 'would have' been remitted to Volaw Trust...as the bank account of the company 'would have been closed...'At this stage it suffices to remark that her statement implies that she herself had no personal knowledge of the matters about which she ventured to comment on.

[16] It bears mentioning that previously, on 10 October 2018, Mr van Dyk had sent an email to Ms Gray to enquire if 'any records [were] available regarding the remittance to the beneficial owner...', this being a reference to the deposit of R 1 670 099.85 into the applicant's account. Ms Gray responded and said that there were no records available as the company closed some 10 years earlier and therefore no company records were available. She proceeded to state that she was able 'to locate some documents saved to the client directory albeit there is little information around the time the company was dissolved.' Tellingly, the nature and contents of

¹⁵ See footnote 14 above.

those documents and who they related to was not explained. Nevertheless, she went on to again venture some speculative explanation and stated that: ‘Notwithstanding this, *I think it is likely the funds were transferred as a repayment of shareholder loan rather than a dividend.*’ [Emphasis added.] As already mentioned, the applicant himself elected not to testify in support of his case even though he would have been better placed to explain the nature and source of the deposit.

[17] Ms Moitse testified on behalf of SARS. Her evidence had to do only with the penalty imposed by the Commissioner for the omission of the disputed amount from the applicant’s tax return. The upshot of her evidence was that she was the official who had recommended to the relevant SARS three-member committee that a penalty of 90 per-cent of the disputed amount be imposed. She explained that the maximum penalty chargeable in terms of the Income Tax Act¹⁶ (the Act) is 200 per-cent. However, in this instance a 90 per-cent penalty was imposed, taking into account that there were mitigating factors. She mentioned that a Mr Johann Wagner, the tax practitioner who assisted the applicant at the time of the assessment, had co-operated with the audit team and provided the documentation requested. She further clarified that it took some two years to finalise the audit because the applicant not only sought several extensions to provide the required information but, on occasions, he also neglected to respond to correspondence either timeously or at all. The latter consideration, she asserted, counted against the applicant as an aggravating factor. She further stated that ultimately it was the prerogative of the relevant SARS committee to determine the additional amount to be paid as a penalty. None of the three members of the committee testified as to how the penalty was determined.

¹⁶ Income Tax Act 58 of 1962.

However, what cannot seriously be disputed is that the committee itself determined the extent of the penalty, ie 90 per-cent.

[18] The approach of the Tax Court to the evidence presented and its impressions of the witnesses who testified is apparent from certain portions of its judgment. As to the evidence of Mr van Dyk, the Court said:

‘The appellant did not testify, instead he relied on the evidence of Mr van Dyk who testified as to his investigations into the reason for the payment. These investigations were undertaken more than twelve years after the fact. The matter had previously been dealt with by Mr Johann Wagner who, at that stage (2011), managed the financial affairs of the appellant.

Mr van Dyk’s testimony, in the main, entailed taking the Court through correspondence which he had entered into with employees of VG which, as I have said, was previously Volaw Trust. An examination of these communications is core to the determination of this appeal.’

[19] The Court continued:

‘The obvious problem in relation to the case of the appellant is that there is no direct evidence from the appellant to confirm any particular version. The case is built on an attempt by Mr van Dyk to construct a version out of nothing. A troubling feature of the case is the unexplained presence of the acknowledgement of debt for the precise amount of the payment which was initially offered in support of the loan version. The appellant has not explained how this document came about or why it was later discarded. In the absence of any explanation, this is strongly suggestive of an attempt to fabricate evidence. A further aspect which gives me disquiet is the unexplained settlement agreement. One must assume that the appellant has some background information in relation to MCM and the transaction that emerges from the settlement agreement. However, again the appellant fails to explain the receipt of these funds and indeed how they were treated after payment.

The case of the appellant falls hopelessly short of discharging his burden. The impression created is one of contrivance and intentional obfuscation rather than an attempt to offer a proper account of the payment. The tactic adopted is clearly also one of delay and frustration of the proceedings.’

[20] Insofar as the evidence of Ms Moitse on behalf of SARS is concerned the Court, after noting that she was an audit specialist of some 14 years’ experience and that the Court was called upon to exercise its own original discretion, irrespective of the penalty imposed by the Commissioner, said:

‘Ms Moitse testified that she undertook the audit, and discovered the undeclared amount in issue. She drew a report for the SARS Committee which made the determination of the penalty. She testified that her recommendation of 90% was born out of the fact that she had obtained some so-operation in relation to the audit undertaken.

I was impressed by the evidence of Ms Moitse. It emerges from the papers filed in this matter that such co-operation as there was, emanated from Mr Wagner. That there was no co-operation as to the income in issue is clear regard being had to the manner in which the appellant and Mr van Dyk have dealt with this matter. Indeed, as I have said, the evidence and the manner in which it was derived and presented shows guile on the part of the appellant in relation to the source of the income Bearing in mind that such conduct amounts to evasion, and given that under such circumstances SARS was enjoined by the relevant legislation to impose a 200% additional tax, it seems to me that the appellant has been treated leniently by SARS.’

[21] It then concluded:

‘The appellant has fallen far short of discharging his onus as to the incorrectness of the assessment. Indeed, the submissions show that the attempts to do so were contrived. SARS on the other hand was able to establish that the imposition of the additional tax was more than reasonable and competent in the circumstances of the case.’

The Full Court

[22] With the leave of the Tax Court, the applicant appealed to the Full Court of the Gauteng Division of the High Court, Pretoria. As already mentioned, the Full Court's judgment was not unanimous. The majority endorsed the conclusion of the Tax Court that the applicant failed to discharge the onus resting on him, namely that the deposit represented repayment of a shareholder's loan. As a result, it found that the 'Tax Court was correct in its finding that the amount of R1 670 099.85 received by the appellant from Volaw was taxable income.'

[23] As to the penalty, the Full Court held that the Tax Court had properly exercised its original discretion and, therefore, interference with that exercise was not warranted. Hence, its dismissal of the appeal. On the contrary, the minority judgment held that the appeal should have been allowed. Whilst accepting that Mr van Dyk's evidence was hearsay, it said that 'once the Tax Court...admitted the hearsay evidence, it was incumbent upon it to consider the weight and value thereof in deciding whether or not the taxpayer had discharged the onus...' I pause here to observe that it is not clear from the record what the source of this statement is. The Tax Court did not explicitly nor even impliedly rule on the admissibility or otherwise of Mr van Dyk's evidence. On the contrary, what emerges from the record, as already indicated in paras 11, 18 and 19 above, is that whenever Mr van Dyk strayed into the realm of hearsay evidence, it was at pains to remind both the witness and applicant's counsel that the witness should refrain from adducing hearsay evidence. In addition, the minority held that 'before the Tax Court, counsel for SARS, had failed to challenge the truth or correctness of van Dyk's evidence in any material respect, save to argue that it was mere speculation.'

[24] Moreover, the minority noted that since it was common cause that the applicant was the beneficial shareholder of M.C.M Development Limited, it was

‘not uncommon upon dissolution of a company, that the loans of shareholders as members of such a company, are repaid.’ In addition, it held that the contents of certain emails from Ms Gray were ignored. In particular, it made reference to the email of 10 October 2018 in which Ms Gray said: ‘I think it is likely the funds were transferred as a repayment of a shareholder loan rather than a dividend.’ Proceeding from this premise, the minority held that Ms Gray’s email of 16 July 2019 that: ‘I can only confirm that there was a shareholder’s loan which was either repaid in full or in part’ makes perfect sense. Thus, in the view of the minority, Ms Gray’ ‘had identified the nature of the payment, which was what [the applicant] had set out to prove.’ It must, however, be pointed out that Ms Gray did not state as a fact that the funds in question represented repayment of a shareholders’ loan. Rather, she did no more than express a belief about something that she, understandably, could not substantiate with facts.

[25] Finally, the minority held that in assessing the probabilities, the Tax Court ought to have weighed up the evidence of Mr van Dyk and Ms Gray’s emails to determine whether the applicant had succeeded in discharging the onus. And that absent any countervailing evidence ‘the probabilities must swing towards the taxpayer’ and it mattered not that the applicant did not himself testify. This conclusion, rendered it unnecessary for the minority to consider whether the level of the penalty imposed by SARS was supportable on the evidence.

This Court

[26] In this Court, whilst accepting that the evidence by Mr van Dyk was hearsay, counsel for the applicant submitted that although the Tax Court did not make reference to s 3 of the LEAA, it impliedly admitted the evidence of Mr van Dyk and proceeded to consider it, albeit partially. Therefore, counsel argued that the Tax

Court was duty-bound to properly evaluate such evidence to determine its probative value. This broad proposition was then used as a springboard to argue that the Tax Court breached the applicant's right to a fair hearing by not properly examining the probative value of Mr van Dyk's evidence. For this submission, counsel called into his aid the most recent judgment of the Constitutional Court in *Vodacom (Pty) Ltd v Makate and Another*.¹⁷ He argued that because the Tax Court effectively brushed aside the hearsay evidence tendered on behalf of the applicant and, as a result, such evidence was not accorded sufficient weight in breach of the applicant's fair hearing rights entrenched in s 34 of the Constitution of the Republic of South Africa.¹⁸ This submission cannot prevail.

[27] First, the overarching principle that one can distil from what the Constitutional Court said in *Vodacom* is that a court faced with diametrically opposed contentions as advanced by the litigants is duty-bound to decide which of those contentions must prevail. On this score, it bears emphasising that whatever contention the court upholds must be underpinned by intelligible and coherent reasoning taking into account the facts of a particular case, the issues at stake and argument presented. Whether the underlying reasoning is sound and supportable on the facts in a different matter. For as long as the court has addressed the substantial points raised by the litigants, explained intelligibly its process of reasoning leading from the evidence to the findings and ultimately to its final conclusion, that will suffice.¹⁹ Once, and if,

¹⁷ *Vodacom (Pty) Ltd v Makate and Another* [2025] ZACC 13; 2025 (10) BCLR 1174 (CC); [2025] 11 BLLR 1105 (CC); 2025 (6) SA 352 (CC) (*Vodacom*).

¹⁸ Section 34 of the Constitution which is headed 'Access to courts' read:

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

¹⁹ *Vodacom* paras 55-56.

this is done the court will have fulfilled its constitutional adjudicative duty to the litigants.²⁰

[28] Moreover, as is apparent from its judgment the Constitutional Court itself was cognisant of the fact that ‘there is no duty on a judge in giving...reasons to deal with every argument presented by counsel in support of [their] case.’ What matters the most, the Court emphasised, is the substance of the judgment ‘viewed holistically.’ The Court went on to stress that ‘[i]t is enough if the judgment identifies the issues that were vital to the determination of the matter and then shows how they were determined.’²¹ And, obviously recognising that no judgment is perfect and all-encompassing, the Court went on to say: ‘The fact that there are defects in a judgment does not necessarily mean that there was non-compliance with the duty of proper consideration.’²² Accordingly, it does not mean, as counsel would have it, that both the underlying reasoning and ultimate conclusion must be correct. Counsel for the applicant characterised the shortcomings in the judgment of the Tax Court and that of the majority in the Full Court as fundamental and pervasive. It was then contended that both judgments fell short of the standard required in terms of the principle enunciated in *Vodacom*. I do not agree. To pitch the bar at the level for which counsel contended would be elevating judges to the status of super human beings, which they are not – a fact recognised by the Constitutional Court itself²³ – ignoring the reality that human beings are in their very nature fallible.

[29] It needs only be mentioned by way of emphasis that all that s 34 of the Constitution does is to accord everyone the right to have any dispute decided in a

²⁰ *Vodacom* paras 51-56.

²¹ *Ibid* para 57.

²² *Ibid* para 59.

²³ *Ibid* para 43

fair public hearing before a court by the application of law to the dispute, nothing more. It does not also entail that the litigant is entitled to a correct decision in relation to such dispute.²⁴ Put differently, it does not mean that when a court reaches an incorrect decision it will thereby have breached a litigant's s 34 fair hearing right.

[30] I now turn to the evidence of Mr van Dyk which was admittedly hearsay. The admission of hearsay evidence is regulated by, inter alia, s 3 of the LEAA. Section 3(1) of the LEAA has already been referenced in paragraph 11 above, albeit in a footnote. For purposes of the present discussion, it will be convenient to quote it in the text of this judgment. It provides as follows:

‘Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to—

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.’

²⁴ See, for example in this regard: *Lane and Fey NNO v Dabelstein and Others* [2001] ZACC 14; 2001 (2) SA 1187 (CC); 2001 (4) BCLR 312 para 4; *Besserglik v Minister of Trade Industry and Tourism and Others (Minister of Justice intervening)* [1996] ZACC 8; 1996 (6) BCLR 745; 1996 (4) SA 331 para 11.

[31] Subsection (4) of the LEAA, in turn, defines hearsay evidence thus:

“‘hearsay evidence’ means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.’

As is apparent from s 3(1)(a) of the LEAA, a party against whom hearsay evidence is to be adduced must consent to the admission of such evidence at the relevant proceedings. Absent such consent from the adversary, the party wishing to tender hearsay evidence may invoke s 3(1)(c) of the LEAA. And the court may admit such evidence if, in its opinion, it is in the interests of justice to do so, having regard to the requirements set out in paragraphs (i) to (vii) of s 3(1)(c).

[32] It is trite that as a general rule our courts eschew litigation by ambush. Thus, a party wishing to rely on hearsay evidence to prove or disprove either party’s case must indicate unequivocally that this is its intention. This Court in *S v Ndhlovu and Others*²⁵ succinctly explained the position as follows:

‘[A]n accused cannot be ambushed by the late or unheralded admission of hearsay evidence. The trial court *must be asked clearly and timeously* to consider and rule on its admissibility. *This cannot be done for the first time at the end of the trial, nor in argument, still less in the court’s judgment, nor on appeal.* The prosecution, before closing its case, must clearly signal its intention to invoke the provisions of the Act, and, before the State closes its case, the trial Judge must rule on admissibility, so that the accused can appreciate the full evidentiary ambit he or she faces.’²⁶
[Emphasis added.]

[33] Although the remarks referred to in the preceding paragraph were made in the context of criminal proceedings, this Court in *Giesecke & Devrient Southern Africa*

²⁵ *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA); [2002] 3 All SA 760 (SCA); 2002 (6) SA 305 (SCA) (*Ndhlovu*).

²⁶ *Ibid* para 18.

*(Pty) Ltd v Minister of Safety and Security*²⁷ stated that the position is the same even in civil proceedings. The Court explained that this is derived from s 34 of the Constitution ‘which also entitles both parties to civil proceedings to a fair public hearing.’²⁸ The Court went on to reiterate that ‘...[i]t is essential for a proper exercise of these rights that the defendant should know whether the court considers the hearsay evidence relied upon..., admissible or not. Stated...differently, in order to decide whether [the party bearing the onus] has made out a case to answer, a defendant is entitled to know the constituent elements of that case.’²⁹

[34] As is evident from what has already been said in paragraph 12 above, counsel who represented the applicant in the Tax Court accepted that the evidence of Mr van Dyk in regard to the oral and written communications he had with various officials in the BVI concerning the underlying reason for the payment made by Volaw Trust to the applicant was hearsay. That notwithstanding, counsel who appeared on behalf of the applicant in this Court nevertheless argued that although the Tax Court made no reference whatsoever to s 3 of the LEAA, it in fact admitted Mr van Dyk’s evidence and then considered it, albeit only partially. Building on this thesis, counsel argued, relying on *Makhathini v Road Accident Fund*,³⁰ that the Tax Court was duty-bound to evaluate such evidence and determine its probative value to enable it to decide whether the appellant had discharged the onus resting on him that the payment received by him from Volaw Trust was not income but repayment of a shareholder’s loan.

²⁷ *Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security* [2011] ZASCA 220; 2012 (2) SA 137 (SCA); [2012] 2 All SA 56 (SCA).

²⁸ *Ibid* para 24.

²⁹ *Ibid* para 24.

³⁰ *Makhathini v Road Accident Fund* [2002] 1 All SA 413 (A); 2002 (1) SA 511 (SCA) para 27.

[35] In the second place, it was contended that the cross-examination of Mr van Dyk by counsel for SARS, such as it was, fell short of constituting a challenge to the truth or correctness of the evidence in any material way. In support of this submission, counsel cited what was said by the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*³¹ in regard to the purpose of the institution of cross-examination. Finally, counsel rounded off his submissions by arguing that although Mr van Dyk's evidence was undoubtedly hearsay it was not meaningfully challenged under cross-examination in any material respect, and therefore constituted prima facie proof that the payment received by the applicant represented repayment of a shareholder's loan. And, in the absence of any countervailing evidence tendered on behalf of the respondent, the applicant had consequently discharged the onus resting on him. I shall revert to these contentions shortly.

The statutory framework

[36] The logical point of departure in the context of the facts of this case is s 82 of the Act which was the operative position when the dispute to which the current litigation is a sequel arose. Section 82, which was headed 'Burden of proof as to exemptions, deductions, abatements, disregarding or exclusions' read:

'The burden of proof that any amount is—

- (a) exempt from or not liable to any tax chargeable under this Act; or
- (b) ...
- (c) to be disregarded or excluded in terms of the Eighth Schedule,

shall be upon the person claiming such exemption, non-liability, deduction, abatement or set-off, or that such amount must be disregarded or excluded, and upon the hearing of any appeal from

³¹ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 para 61.

any decision of the Commissioner, the decision shall not be reversed or altered unless it is shown by the appellant that the decision is wrong.’

[37] It is also necessary to make reference to s 76 of the Act which, at the relevant time, provided for the imposition of additional tax in the event of default or omission.

In relevant part, s 76 read:

‘Additional tax in the event of default or omission

(1) A taxpayer shall be required to pay in addition to the tax chargeable in respect of his taxable income-

(a) ...

(b) if he omits from his return any amount which ought to have been included therein, an amount equal to twice the difference between the tax as calculated in respect of the taxable income returned by him and the tax properly chargeable in respect of his taxable income as determined after including the amount omitted;

(c) ...

(2)(a) The Commissioner may remit the additional charge imposed under subsection (1) or any part thereof as he may think fit: Provided that, unless he is of the opinion that there were extenuating circumstances, he shall not so remit if he is satisfied that any act or omission of the taxpayer referred to in paragraph (a), (b) or (c) of subsection (1) was done with intent to evade taxation.

(b) ...

(c) ...’

Assessment

[38] By way of prelude, it bears emphasising that as a general rule every case should be dealt with and decided upon its own facts. It therefore does not assist to cite authorities that provide no support for the submissions advanced. As I see it, there are serious difficulties in the applicant’s path in seeking to persuade this Court

that the Tax Court's conclusion on the facts, as endorsed by the majority of the Full Court, is unsustainable.

[39] It is necessary to observe that the fate of this application hinges on the 'evidence' tendered by Mr van Dyk in the Tax Court. I have put the word 'evidence' in parenthesis for reasons that will become apparent later. In this connection, it is fair to note that counsel for the applicant unequivocally accepted that Mr van Dyk's evidence was hearsay. This then raises the question whether the Tax Court accepted the evidence of Mr van Dyk – as contended on behalf of the applicant – and if so, whether it acted correctly in doing so. First, as already indicated in paragraph 11 above the President of the Tax Court made plain more than once that the court would not 'allow hearsay evidence to be adduced in this matter' and that Mr van Dyk should 'give evidence in relation to what he personally knows, and not what other people told him.' To compound matters for the applicant, no application was made on his behalf at any stage of the hearing to admit hearsay evidence under s 3(1)(c) of the LEAA. It is apparent that in admonishing Mr van Dyk to refrain from heedlessly tendering hearsay evidence, the President of the Tax Court had in mind the provisions of s 3(1) of the LEAA that, inter alia, provide that 'hearsay evidence shall not be admitted as evidence at...civil proceedings' unless certain requirements are met. And, as already mentioned above, the principle enunciated in *Ndhlovu*, that a party desirous of relying on hearsay evidence must request the court 'clearly and timeously to rule on its admissibility', applies with equal force to civil proceedings in keeping with the dictates of s 34 of the Constitution.

[40] In *Langham and Another, NNO v Milne, N O and Others*³² Caney J, relying on *Phipson*³³ said the following in relation to hearsay evidence:

‘If inadmissible evidence has been received (whether with or without objection), it is the duty of the Judge to reject it when giving judgment; and if he has not done so, it will be rejected on appeal, as it is the duty of Courts to arrive at their decisions on legal evidence only... Our Courts have held that where in an appeal it appears that inadmissible evidence has been admitted at the trial without objection, it is the duty of the Appeal Court in a civil case to re-hear the case and determine for itself on the admissible evidence whether the decision of the Court a quo was correct.’³⁴ (Citations omitted.)

[41] *Langham* was referred to with approval by the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*. The Court there said:

[I]f [evidence] was inadmissible, no regard could be had to it whether [the adversary] objected to the evidence or not.’³⁵

[42] It follows that the argument advanced on behalf of the applicant that because counsel for SARS elected to cross-examine Mr van Dyk at some length the latter’s evidence somehow metamorphosed into admissible evidence is plainly untenable. Nor is the contention that the evidence of Mr van Dyk – given its nature – had the effect of discharging the onus resting on the applicant. In this regard, it is as well to bear in mind what this Court said in *Goodrick v Commissioner for Inland Revenue*³⁶ in which it was stated that what is required of the taxpayer in order to discharge the onus is affirmative evidence that satisfies a court on a preponderance of probability

³² *Langham and Another, NNO v Milne, NO and Others* 1961 (1) SA 811 (N) (*Langham*).

³³ *Phipson on Evidence* 8th ed at 673

³⁴ *Langham* at 817 A-B.

³⁵ Fn 31 above para 105.

³⁶ *Goodrick v Commissioner for Inland Revenue* 1959 (3) SA 523 (A) (*Goodrick*). Compare: *Samril Investments (Pty) Ltd v Commissioner, South African Revenue Service* 2003 (1) SA 658 (SCA); 65 SATC 1.

that the amount is not taxable. In the context of the facts of this case, evidence of the quality described in *Goodrick* was singularly lacking. In this regard, I am constrained to observe that the contentions advanced on the applicant's behalf were indeed radical for in the final analysis they amount to this. When a litigant presents hearsay evidence to a court – which by its very nature is inadmissible – and the court relies on such evidence in reaching its conclusion such evidence must of necessity be treated as admissible. This cannot be for the reasons already articulated above.

Is the penalty imposed by the Commissioner susceptible to be set aside?

[43] Furthermore, the applicant contested the extent of the penalty imposed by the Commissioner essentially on three bases. First, it was asserted that it was not justified, and ‘that an additional tax of no more than 10 per-cent should have been imposed.’ In the second place, it was contended that accepting that SARS bore the onus to justify the extent of the penalty it imposed, SARS failed to adduce any admissible evidence to discharge the onus resting on it. In the third place, it was argued that in imposing a 90 per-cent penalty, SARS laboured under a misconception that there was a deliberate intent on the part of the applicant to omit income. In this regard, it is of course true that it was common cause between the parties on the pleadings that ‘SARS determined that there was no intention on the part of the taxpayer to evade or to omit income on his return, and *therefore could not impose a maximum of 200% additional tax.*’ [Emphasis added.]

[44] Speaking generally, the extent of the penalty that SARS could lawfully impose in the event of a taxpayer omitting from his return any amount which ought to have been included is an amount equal to twice ‘the difference between the tax as calculated in respect of the taxable income returned by him and the tax properly chargeable in respect of his taxable income as determined after including the amount

omitted.’ And, in terms of s 76(2)(a), the Commissioner may remit the additional charge imposed in circumstances where the Commissioner is of the opinion that there are extenuating circumstances. According to the evidence of Ms Moitse, the extent of additional tax chargeable in respect of the applicant ranged from 30 to 90 per-cent on the grounds that there was a combination of both extenuating and aggravating circumstances. These have already been referenced above. What emerged from the evidence of SARS’ witness was that she prepared a report in relation to the penalty for consideration by the relevant SARS committee. The recommendation served before the committee which, as the final internal arbiter on this issue, imposed a 90 per-cent penalty presumably taking into account the existence of both extenuating and aggravating factors.

[45] The Tax Court, in the exercise of its own original discretion, endorsed the extent of the penalty imposed by the Commissioner, namely 90 per-cent. In considering this aspect of the case, it is as well to remember that this Court’s powers to interfere with the Tax Court’s exercise of its discretion in determining the extent of the penalty are circumscribed. As it is often said, this Court will interfere only if the Tax Court did not bring an unbiased judgment to bear on the question, or did not act for substantial reasons, or exercised its discretion capriciously or upon a wrong principle.³⁷ Accordingly, unless it can be demonstrated that a court exercising a true discretion did not exercise such discretion judicially or reached a decision that a court properly directing itself to all the relevant facts and principles could not reasonably have arrived at an appellate court will not interfere. The rationale for this principle is, as Cloete J aptly observed some 25 years ago, that a narrow discretion

³⁷ *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC). See also: *Mabaso v Law Society, Northern Provinces and Another* [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) para 20.

‘requires in essence the exercise of a value judgement and there might well be legitimate differences of opinion as to the appropriate conclusion.’³⁸ Failing that, the exercise by the Tax Court of its narrow discretion is unassailable.³⁹

[46] From its judgment, it appears that the Tax Court was of the view that on the facts the applicant and Mr van Dyk sought to conceal the true nature of the disputed amount. The Tax Court viewed such conduct as constituting tax evasion. And for this reason, the Tax Court expressed the view that a penalty of 90 per-cent was a slap on the wrist. Nevertheless, in the exercise of its own discretion, it endorsed the penalty imposed by the Commissioner despite its misgivings about the applicant’s conduct.

[47] In this case it is not in dispute that the committee took the decision to impose a 90 per-cent additional tax. The evidence of Ms Moitse that she was the SARS’ official who prepared the recommendation to the committee in relation to the extent of the penalty and that the decision of the committee was based on what counsel for the applicant before the Tax Court described as her ‘background report’ where she listed ‘certain aspects pertaining to the conduct of the taxpayer’ was common cause. She further testified that she used an internal guide with different categories which SARS uniformly applied at the relevant time to determine the gravity of the omission. And that the applicant’s case fell into the category ranging from 30 to 90 per-cent. As already indicated, in Ms Moitse’s view there were both extenuating and aggravating factors present in the applicant’s case which she explained in her evidence.

³⁸ *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another* 1999 (4) SA 799 (W) at 800E-F.

³⁹ Compare: *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) para 29.

[48] The basis upon which the evidence of Ms Moitse was impugned is that it was not supported by any document and was therefore ‘not only hearsay but speculation.’ The effect of this, counsel argued, is that there was no admissible evidence before the Tax Court to justify the imposition of the 90 per-cent penalty.

[49] Counsel’s argument is unavailing. Taking an objective and dispassionate view of Ms Moitse’s evidence, it is reasonable to infer that the committee relied on her recommendation in fixing the penalty. But in doing so, it opted to impose 90 per-cent additional penalty, this being the maximum penalty it could impose in line with the recommendation. Bearing this in mind, it is difficult to imagine that in the exercise of its discretion, the Tax Court reached a decision that any reasonable court properly directing itself to all the relevant facts, could not reasonably have reached.⁴⁰ In this regard it bears emphasising that sight should not be lost of the fact that in determining the extent of the additional tax chargeable, both the Commissioner and the Tax Court enjoyed a wide and original discretion⁴¹ bounded only by principles of rationality.

[50] In *Florence v Government of the Republic of South Africa*⁴² the Constitutional Court had occasion to explain the nature of a wide discretion as follows:

‘Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court

⁴⁰ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) para 11.

⁴¹ Compare: *Wingate-Pearse v Commissioner, South African Revenue Service* [2016] ZASCA 109; 2017 (1) SA 542 (SCA); 78 SATC 360.

⁴² *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC).

may not interfere only because it favours a different option within the range. This principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making.’⁴³

[51] This enduring principle was again reiterated by the Constitutional Court in *S v Liesching*⁴⁴ where the Court reaffirmed that interference on appeal with the exercise of a true discretion would be justified only if the discretion was exercised capriciously or without substantial reasons, or on the basis of a wrong principle or if the court did not bring an unbiased judgment to bear on the matter.

[52] Admittedly, there are certain statements in the judgment of the Tax Court that lend support to counsel’s attack upon such statements. One such statement, not borne out by SARS’ own pleadings, relates to what the Tax Court said, namely that the applicant’s ‘conduct amounts to [tax] evasion, and that under such circumstances SARS was enjoined by the relevant legislation to impose a 200 per-cent additional tax...the appellant has been treated leniently by SARS.’ This is regrettable and must be deprecated. Nevertheless, the court held, in the exercise of its wide and original discretion, that a penalty of 90 per-cent was not out of kilter. It is therefore unnecessary to examine this issue further because, in my view, the decision of the Tax Court is not such that no reasonable court, properly directing itself to all the relevant facts, could not reasonably have reached.

Application for reconsideration

⁴³ Ibid para 113.

⁴⁴ *S v Liesching and Others* [2018] ZACC 25; 2018 (11) BCLR 1349 (CC); 2019 (1) SACR 178 (CC); 2019 (4) SA 219 (CC).

[53] As indicated at the outset,⁴⁵ what serves before us is an application for reconsideration of the order of 5 October 2023 granted by two judges of this Court refusing the applicant’s application for special leave to appeal the judgment of the Full 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.’

[54] Although the referral order was granted on 4 April 2024 following an application made some months earlier,⁴⁶ it was common cause between the parties that it is the pre-amendment version⁴⁷ 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.’

[55] It is significant that s 17(2)(f) explicitly states that ‘the decision of the majority of the judges considering an application referred to in paragraph (b),⁴⁸ ...to grant or

⁴⁵ See para 1 above.

⁴⁶ The application in terms of s 17(2)(f) was delivered on 13 November 2023.

⁴⁷ 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.’

⁴⁸ Paragraph (b) of s 17(2) reads:

refuse the application *shall be final*: Provided ...’ Nevertheless, as the Constitutional Court aptly observed:

‘The proviso on 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 were 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.’⁴⁹

[56] 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 it was not intended to afford litigants a further attempt at procuring relief that has already been refused. 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.⁵⁰

[57] Apropos the phrase ‘exceptional circumstances’ this Court in *Avnit v First Rand Bank Ltd*⁵¹ 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

‘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 the Supreme Court of Appeal may vary any order as to costs made by the judge or judges concerned in refusing leave.’

⁴⁹ See, in this regard: *Liesching and Others v S* [2016] ZACC 41; 2017 (4) BCLR 454 (CC); 2017 (2) SACR 193 (CC) (*Liesching I*) para 54.

⁵⁰ See in this regard: *Liesching and Others v S* [2018] ZACC 25; 2018 (11) BCLR 1349 (CC); 2019 (1) SACR 178 (CC); 2019 (4) SA 219 (CC) para s 138-139 (*Liesching II*).

⁵¹ *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 (*Avnit*).

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.’⁵²

[58] This theme was elaborated upon again by this Court in *Motsoeneng v South African Broadcasting Corporation SOC Ltd and Others*⁵³ where the following was stated: ‘[t]he 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 s (2)(f) must fail and falls to be dismissed.’⁵⁴ In *Motsoeneng* it was accepted by the parties that an applicant in a reconsideration application referred to court by the President is required to satisfy the court seized with the reconsideration application that exceptional circumstances existed that warranted the exercise 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 has 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).

[59] In *Bidvest Protea Coin Security (Pty) Ltd v Mabena*,⁵⁵ 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. Save for two dissenting voices, the decisions in

⁵² Ibid para 6.

⁵³ *Motsoeneng v South African Broadcasting Corporation SOC Ltd and Others* [2024] ZASCA 80; 2025 (4) SA 122 (SCA) (*Motsoeneng*).

⁵⁴ Ibid para 19.

⁵⁵ *Bidvest Protea Coin Security (Pty) Ltd v Mabena* [2025] ZASCA 23; 2025 (3) SA 362 (SCA) (*Bidvest*).

Motsoeneng and *Bidvest* have been consistently reaffirmed in subsequent cases,⁵⁶ recently in *Rock Foundation Properties and Another v Chaitowitz*.⁵⁷

[60] The first dissenting voice came from Coppin JA in *Lorenzi* whose view was that it was not incumbent upon an applicant in a reconsideration application to establish that exceptional circumstances exist as a jurisdictional fact. 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 court for reconsideration of the decision of the two judges 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.

[61] 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 court ‘for reconsideration is not itself up for reconsideration, or review...’

⁵⁶ *Spar Group Limited 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 JDR 1340 (SCA); [2025] ZASCA 25; *Lorenzi v S* 2025 JDR 2015 (SCA); [2025] ZASCA 58 (*Lorenzi*); *Ekurhuleni Metropolitan Municipality v Business Connexion (Pty) Ltd* [2025] ZASCA 41; *Tarentaal Centre Investments (Pty) Ltd v Beneficio Developments (Pty) Ltd* 2025 JDR 1461 (SCA); [2025] ZASCA 38; *Nel v S* 2025 JDR 2552 (SCA); [2025] ZASCA 89; *Japhtha v S* [2025] ZASCA 80; 2025 (2) SACR 305 (SCA).

⁵⁷ *Rock Foundation Properties and Another v Chaitowitz* (1038/2023) [2025] ZASCA 82 (9 June 2025).

[62] Hot on the heels of *Lorenzi* was the second dissenting voice of Matojane JA in *Schoeman v Director of Public Prosecutions*.⁵⁸ 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 application for reconsideration referred to it 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 met, in the President's view, that is the end of the enquiry. The court itself must thereafter proceed to determine whether variation of the decision refusing leave is warranted.

[63] 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.' After making reference to decisions of our courts in relation to the doctrine of *stare decisis*⁵⁹ he concluded that *Bidvest* was clearly wrong. And that had he commanded a majority, he would therefore have overruled *Bidvest*.

[64] 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*.⁶⁰ The Court said the following:

⁵⁸ *Schoeman v Director of Public Prosecutions* [2025] ZASCA 124; 2025 (2) SACR 561 (SCA) (*Schoeman*).

⁵⁹ Literally means 'stand by previous decisions' ie precedent.

⁶⁰ *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).

‘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.’⁶¹

[65] In a most recent judgment⁶² of this Court, *Moetsoeneng, Bidvest, Lorenzi and Schoeman* were overruled to the extent that those decisions adopted the so-called ‘jurisdictional fact interpretation’ that had the effect of contradicting what the Constitutional Court said in *Liesching I* and *Liesching II* concerning the proper interpretation of the proviso to s 17(2)(f) of the SC Act. It is therefore unnecessary for present purposes to traverse the same ground in this judgment. Suffice it to reiterate that in all instances where the President refers a decision refusing or granting leave to appeal to the court for reconsideration such a court is simply required to place itself in the shoes of the judges who made the decision under s 17(2)(b) and determine whether such decision is legally sustainable or not – cognisant that the President – in whom the discretion to determine the existence or absence of exceptional circumstances vests – has already made that determination. Hence the matter is before the Court. However, if on the one hand the court should find that leave was correctly refused it will dismiss the reconsideration application. The effect of the dismissal of the reconsideration application would be that the decision of the two judges who either refused or granted leave to appeal would remain intact. On the other hand, if in the opinion of the court leave to appeal should

⁶¹ Ibid para 28.

⁶² *4 Seasons Logistics CC v Kgotse* [2026] ZASCA 09 delivered on 04 February 2026.

have been granted, the court would grant leave and, in the ordinary course, then enter into the substantive merits of the appeal as contemplated in the referral order and determine the fate of the appeal itself. However, if leave to appeal was sought against a decision of a magistrates' court, the court would instead grant leave to the relevant Division of the High Court.⁶³

[66] Reverting to this application, 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 and the substantive merits of the appeal considered. In the view I take of the matter no such factors are discernible. That being so, it follows that there is no basis to interfere with the decision refusing leave to appeal reached by the two judges of this Court on 5 October 2023. And, even on the current benevolent formulation of s 17(2)(f), I dare say, dismissing this application would not result in a grave failure of justice. Nor would the administration of justice thereby be brought into disrepute.⁶⁴ Thus, this application falls to be dismissed. Costs will, as a general rule in matters of this kind, follow the result.

Order

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

The application for reconsideration referred to the court, of the decision made on 5 October 2023 refusing the applicant's application for special leave, in terms of the

⁶³ Compare: *S v Khoasasa* 2003 (1) SACR 123 (SCA); [2002] 4 All SA 635 (SCA) para 19; *S v Matshona* [2008] ZASCA 58; 2013 (2) SACR 12 (SCA) para 5-7.

⁶⁴ See, for example, *Rock Foundation Properties and Another v Chaitowitz* (1038/2023) [2025] ZASCA 82 (9 June 2025) para 17.

proviso to s 17(2)(f) of the Superior Courts Act 10 of 2013 is dismissed with costs, including costs of two counsel.

X M PETSE
ACTING JUDGE OF APPEAL

Appearances

For the applicant:

N G D Maritz SC

Instructed by:

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For the respondent:

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Instructed by:

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