THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 123/2024

In the matter between

MATRIC LUPHONDO **APPLICANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Luphondo v The State* (123/2024) [2026] ZASCA 24 (10 March 2026)

Coram: MAKGOKA, KATHREE-SETILOANE, KOEN and COPPIN JJA and DAWOOD AJA

Heard: 2 May 2025

Delivered: 10 March 2026

Summary: Practice – principle of *stare decisis* – judgments of this Court enjoy equal status irrespective of the number of judges constituting bench. However, in the event of difference of opinion between smaller bench and larger bench, the binding authority is that of the larger bench.

Superior Courts Act 10 of 2013 – s 17(2)*(f)* – application for reconsideration of refusal of leave to appeal – whether grounds for reconsideration and for granting leave to appeal established.

Criminal law and procedure – special plea in terms of s 106(1)*(h)* that prosecutor lacks title to prosecute – National Prosecution Policy Directives.

ORDER

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

1 The application for the reconsideration of the order refusing leave to appeal is dismissed.

2 Each party shall pay its own costs.

JUDGMENT

Makgoka JA (Kathree-Setiloane, Koen and Coppin JJA and Dawood AJA concurring):

[1] This is an application in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013 (the SC Act) for the reconsideration of an order of two judges of this Court refusing the applicant's application for leave to appeal. The applicant had sought leave to appeal against an order of the Gauteng Division of the High Court, Pretoria (the High Court), dismissing his additional special plea in terms of s 106(1)*(h)* of the Criminal Procedure Act 51 of 1977 (the CPA) in which he contended that the prosecutors had no title to prosecute him.

[2] The High Court subsequently declined to hear the applicant's application for leave to appeal against its order dismissing his special plea. The applicant then applied to this Court for leave to appeal. Two judges of this Court dismissed that application. The applicant successfully petitioned the President of this Court (the President) in terms of s 17(2)*(f)* of the SC Act for a reconsideration and variation of the order dismissing his application for leave to appeal. The President referred the application for oral argument in terms of s 17(2)*(d)* of the SC Act.

Factual background

[3] The applicant, Mr Matric Luphondo, is the former Acting Director of Public Prosecutions of the National Prosecution Authority, at Mpumalanga. He is currently facing seven counts of corruption and three counts of defeating or obstructing the ends of justice in the High Court alongside his co-accused, Mr Kebone Masange (Mr Masange), the former Head of Department in the Mpumalanga Provincial Administration. Their trial is adjourned pending the determination of this application.

[4] According to the State's summary of the substantial facts in the indictment, Mr Masange, was an accused in a case in which he faced a fraud charge and a charge of being an illegal immigrant in the country. It is alleged that the applicant, Mr Masange and the investigating officer in that case (who has since died) acted with a common purpose to bribe the prosecutor to help Mr Masange avoid prosecution. The State alleged, among other things, that the trio offered the prosecutor cash and other incentives. It is alleged that the applicant met the prosecutor twice, on 12 and 23 March 2023, and on the latter occasion, he allegedly offered the prosecutor 'gratification to wit a bottle of 18 year old Glenfiddich whisky to the value of R1550-00, and/or R5 000-00 in cash . . .'.

[5] At the commencement of the trial on 5 May 2023, the applicant pleaded not guilty to all charges. Evidence from the first State witness revealed that the applicant was the subject of an undercover operation in terms of s 252A of the CPA, commonly referred to as a 'trap'. The applicant challenged the admissibility of the evidence obtained during the operation. A trial-within-a-trial was held to determine the admissibility of that evidence. During the trial-within-a-trial, the applicant formed the view that his prosecution may not have been properly authorised and, concomitantly, that the prosecutors in the trial had no authority to

prosecute him. The trial-within-a-trial was halted to allow the applicant to challenge the prosecutors' title.

The special plea

[6] Consequently, on 8 June 2023, the applicant submitted a written special plea under s 106(1)*(h)* of the CPA. He argued that the prosecutors assigned to prosecute him had not obtained written authorisation or instruction from the Director of Public Prosecutions to initiate or continue the prosecution. In support of this argument, the applicant relied on the Prosecution Policy Directives, issued by the National Director of Public Prosecutions on 1 November 1999 (the Prosecution Directives).

[7] These directives were issued pursuant to s 21(1)*(a)* of the National Prosecuting Authority Act 32 of 1998 (the NPA Act), which enjoins the National Director of Public Prosecutions (NDPP) to issue policy directives in accordance with s 179(5)*(a)* and *(b)* of the Constitution, which '. . . must be observed in the prosecution process . . .'. In terms of part 8, paragraph 5, the Prosecution Directives are binding on all members of the National Prosecuting Authority unless otherwise specified.

[8] Paragraph 4 of the Prosecution Directives sets out the criteria for a prosecutor's decision to prosecute. I will address this aspect in full shortly. For now, it suffices to note that, under the Policy Directives, a written authorisation was required to prosecute the applicant because of his position as a prosecutor at the time.

[9] In response to the applicant's special plea, the State presented the oral evidence of the Director of Public Prosecutions (the DPP) for Gauteng, Mr Mzinyathi. He testified that he had authorised the prosecution of the applicant in

a directive dated 23 November 2021, issued in terms of s 75 of the CPA (the section 75 letter). The s 75 letter was signed on behalf of the Chief Clerk in the office of the DPP, Gauteng Division, Pretoria. It is addressed to the Senior Prosecutor, Pretoria, informing her that the DPP had decided to arraign the applicant and Mr Masange in the High Court on numerous charges of corruption and defeating the ends of justice. The section 75 letter instructs the prosecutor to transfer the matter from the magistrates' court to the High Court; alludes to the possible release of the applicant and Mr Masange on bail; and addresses issues of legal representation, among other matters.

[10] Among the documents attached to the section 75 letter was a document from the DPP, Gauteng, with instructions to the investigating officer on how to handle the prosecution, and outlining additional investigations to be conducted. Among these instructions, the investigating officer was to obtain a sworn statement from the applicant's supervisor, Mr Rodney de Kock, clarifying whether the applicant was on leave or on duty in Pretoria on 12, 19, and 23 March 2021.

[11] In his testimony, Mr Mzinyathi confirmed that the section 75 letter was issued on his instruction. Its purpose, he said, was to communicate his decision to prosecute the applicant and specify the charges he should face. Although he did not sign it, it was standard practice in his office for the Chief Clerk to sign the section 75 letter. He testified that it remained his directive nonetheless. During cross-examination, Mr Mzinyathi conceded that he did not read the docket. Despite that, he testified that before the section 75 letter was issued, he was briefed on the facts of the case by one of the prosecutors involved, and a Brigadier from the Directorate for Priority Crime Investigations.

[12] He testified that he thus had a verbal summary of the background and events up to that point, and he knew that: (a) the applicant was a prosecutor and a senior member of the NPA; (b) the applicant was the subject of an undercover operation under s 252A of the CPA; (c) there was an allegation of an exchange of money and a bottle of whiskey between the applicant and the prosecutor in Mr Masange's fraud and immigration case; and (d) the charges were formulated by a prosecutor and culminated in the indictment signed by one of his deputies, Mr van der Merwe, whom he had authorised in terms of s 20(5) and 20(1) read with s 24(8) of the NPA Act to institute prosecutions.

[13] The authorisation in terms of which Mr Van der Merwe signed the indictment empowered him:

'To prosecute the following in respect of all offences:

- To institute and conduct criminal proceedings on behalf of the state in all Lower Courts within the area of jurisdiction of the High Court;
- To conduct criminal prosecutions in the High Court of the said Division;
- To carry out any necessary functions incidental to instituting or conducting such criminal proceedings;
- To discontinue criminal proceedings by:
  - withdrawing charges before the accused has pleaded or
  - stopping prosecutions after plea, if the authorisation envisaged by section 6(b) of the Criminal Procedure Act, No. 51 of 1977, has been obtained; and
- To act on behalf of the State in all Courts in all appeals, reviews and other matters arising from criminal proceedings within the jurisdiction of the said High Court.'

The Prosecution Directives

[14] Part 8 of the Prosecution Directives is titled *'Prosecution of certain categories of persons*.' In the relevant part, it reads:

'1. In addition to instances where statutory provisions require prior authorisation from the National Director or DPP for the institution of a prosecution, there are certain categories of persons in respect of whom prosecutors may not institute and proceed with prosecutions

without the authorisation or instruction of the DPP or a person authorised thereto in writing by the National Director or DPP (either in general terms or in any particular case or category of cases). This general rule is subject to the exceptions set out in paragraph 3 below.

2. The category of persons in respect of whom written authorisation or instruction is required, are the following:

(a) . . .

(b) . . .

(c) . . .

(d) . . .

(e) Prosecutors, magistrates and judges.

(f) . . .

3. . . .

4. . . .

5. The authorisation of the DPP is not required for the arrest and first appearance in court of the persons mentioned in the categories under paragraph 2(a) to (2)(f) above. In sensitive or high-profile matters, the DPP needs to be consulted and/or informed.

6. Where any criminal charge involving violence or dishonesty is pending or a decision regarding prosecution is taken (including a decision not to prosecute), the prosecutor should forward a written notification thereof to –

(a) . . .

(b) . . .

(c) the National Director in respect of any official or employee of the NPA; and

(d) . . .’.

[15] As a prosecutor during the relevant period, the applicant fell within the category of people whose prosecutions should be authorised by the National Director of Public Prosecutions (the National Director) or the DPP. The applicant contended that neither the section 75 letter nor Mr Van der Merwe’s signature on the indictment constituted the written authorisation required under Part 8 of the Prosecution Directives. For these reasons, the applicant contended that there was no compliance with the Prosecution Directives, and therefore, the prosecutors who conducted the prosecution in court had no title to prosecute. This, he

contended, entitled him to an acquittal on all the charges to which he had pleaded not guilty.

The judgment of the High Court

[16] On 13 June 2023, the High Court handed down a written judgment dismissing the applicant's special plea. I will revert to its reasoning for that order. The matter took an unusual route thereafter. Shortly after the judgment was handed down, counsel for the applicant requested that the matter be stood down so he could consider the judgment and whether to bring an application for leave to appeal against the order dismissing the special plea.

[17] After a brief adjournment, counsel indicated that after consultation with the applicant, he carried instructions to bring an application for leave to appeal the order. He requested that the matter be adjourned to the following day. Submissions were made as to whether an application for leave to appeal was competent at that stage. After hearing counsel for the parties, the High Court made the following ruling:

'[I] have considered the application for the matter to stand down to tomorrow for purposes of bringing an application for leave to appeal against the dismissal of the special plea. I am not persuaded that it is expedient to do so, so that application is refused.'

[18] The trial continued on 15 June 2023 with the leading of evidence in the trial-within-a trial, after which it was adjourned to 9 November 2023. In the meantime, the applicant filed an application for leave to appeal against the dismissal of the additional special plea. On 27 July 2023, the applicant's attorneys enquired from the judge's registrar when the application would be heard. On 28 July 2023, the judge's registrar responded as follows:

'Judge indicated in court that he is not going to hear the [application for] leave to appeal, which is on record, and that the position has not changed. Please refrain from sending further

correspondence in this regard. Evidence has not even finished yet and the matter is not done yet. Only after the matter has been done then leave to appeal can then be considered.'

Application for leave to appeal

[19] This response prompted the applicant to file an application for leave in this Court on 6 March 2023, to review and set aside the order dismissing the special plea. In light of this development, when the matter resumed on 9 November 2023, it was adjourned to 18 March 2024 as a provisional date pending the determination of the application for leave to appeal in this Court.

[20] I pause here to make the obvious point. Ordinarily, this Court would not consider an application for leave to appeal without an order from a lower court dismissing the application. As explained in *Pharmaceutical Society of South Africa v Minister of Health* (*Pharmaceutical Society*),[1] the court whose judgment is sought to be appealed against must first be approached for leave. If that is granted, the condition is fulfilled. If it is refused, the party wishing to appeal has a right to petition this Court for leave. There are exceptions, and this case is one of them. Many others are cited in *Pharmaceutical Society.*[2]

[21] In the present case, the letter from the judge's registrar amounted to an effective dismissal of the application for leave to appeal. Hence, two judges in this Court considered the application. On 18 January 2024, the application for leave to appeal was dismissed on the grounds that there was no reasonable prospect of success in an appeal and no compelling reason to hear it.

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[1] *Pharmaceutical Society of South Africa and Others v Minister of Health and Another; New Clicks South Africa (Pty) Limited v Tshabalala-Msimang NO and Another* [2004] ZASCA 122; 2005 (3) SA 238 (SCA); [2005] 1 All SA 326 (SCA); 2005 (6) BCLR 576 (SCA).

[2] Ibid.

Application for reconsideration

[22] On 19 February 2024, the applicant applied to the President in terms of s 17(2)*(f)* for a reconsideration of the order dismissing his application for leave to appeal by the two judges. On 19 April 2024, the President made an order: (a) referring the order dismissing the applicant's application for leave to appeal to the court for consideration and, if necessary, variation; (b) referring the application for leave to appeal for oral argument in terms of s 17(2)*(d)* of the SC Act;[3] and (c) directing the parties to be prepared, if called upon to do so, to address the court on the merits of the application.

[23] We are constituted as the court to which the President referred the application for oral argument, to consider whether the order of our two colleagues dismissing the applicant's application for leave should be reconsidered or varied. This procedure is governed by s 17(2)*(f)* of the SC Act, which is therefore our inevitable starting point.

Section 17(2)(f)

[24] At the time the applicant applied to the President for reconsideration of the dismissal of its application for leave to appeal, the section had been amended.[4] It 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*

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[3] Section 17(2)*(d)* of the SC Act reads:
'The judges considering an application referred to in paragraph (b) may dispose of the application without the hearing of oral argument, but may, if they are of the opinion that the circumstances so require, order that it be argued before them at a time and place appointed, and may, whether or not they have so ordered, grant or refuse the application or refer it to the court for consideration.'

[4] The section was amended by the Judicial Matters Amendment Act 15 of 2023, which came into operation on 3 April 2024. Before its amendment, the section read:
'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.'

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.' (Emphasis added.)

[25] The difference between the proviso pre-and post-amendment is the basis for the exercise of the President's power to refer the decision of the two judges to the court. Whereas previously it was the existence of 'exceptional circumstances', it is now whether 'a grave failure of justice' would result, or 'the administration of justice may be brought into disrepute'.[5]

[26] These two bases in the amended proviso were foreshadowed by the Constitutional Court in *S v Liesching* (*Liesching II*)[6] when it considered what could constitute 'exceptional circumstances' in the pre-amendment proviso. It pointed out that such circumstances should be 'linked to either the probability of grave individual injustice. . . or a situation where . . . the administration of justice might be brought into disrepute if no reconsideration occurs.'[7]

[27] Thus, the two bases set out in *Liesching II* received legislative imprimatur in the amended proviso. Accordingly, the probability of either of them is subsumed within the concept of 'exceptional circumstances'. Viewed this way, the amendment did not alter the nature of the President's power under s 17(2)*(f)*. The upshot is that the jurisprudence on s 17(2)*(f)* before the amendment, dealing with 'exceptional circumstances', remains relevant post the amendment.[8]

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[5] Section 17(2*)(f)* of the SC Act.
[6] *S v Liesching and Others* [2018] ZACC 25; 2019 (1) SACR 178 (CC); 2019 (4) SA 219 (CC); 2018 (11) BCLR 1349 (CC).
[7] Ibid para 138.
[8] *Tarentaal Centre Investments (Pty) Ltd and Another v Beneficio Developments (Pty) Ltd* [2025] ZASCA 38; 2025 JDR 1461 (SCA) para 4.

The s 17(2)(f) jurisprudence

[28] This has given rise to disparate conclusions. The debate is this: who, between the President and the court to which the matter is referred (the referral court), is the repository of the power to determine whether exceptional circumstances exist. The issue was first triggered in *Motsoeneng v South African Broadcasting Corporation* (*Motsoeneng*),[9] where it was held that the power lies not with the President, but with the referral court. This Court held that 'the requirement of the existence of exceptional circumstances is a jurisdictional fact that had to first be met, and that, absent exceptional circumstances, the s 17(2)*(f)* application was not out of the starting stalls.'[10]

[29] *Motsoeneng* was affirmed by this Court in *Bidvest Protea Coin Security v Mabena* (*Bidvest*),[11] where it was held that the existence or otherwise of exceptional circumstances is 'a threshold question', to be determined by the referral court.[12] *Motsoeneng* and *Bidvest* were subsequently followed in several decisions of this Court.[13] However, in *Lorenzi v S* (*Lorenzi*)[14] and *Schoeman v Director of Public Prosecutions* (*Schoeman*),[15] minority judgments questioned the correctness of *Motsoeneng* and *Bidvest*. The minority judgments held that the power to determine whether exceptional circumstances exist resides with the President. Once she decides to refer the decision to the court for reconsideration, the only issue before the referral court is whether the decision of the two judges should be varied.

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[9] *Motsoeneng v South African Broadcasting Corporation SOC Ltd and Others* [2024] ZASCA 80; 2025 (4) SA 122 (SCA).
[10] Ibid para 19.
[11] *Bidvest Protea Coin Security (Pty) Ltd v Mabena* [2025] ZASCA 23; 2025 (3) SA 362 (SCA).
[12] Ibid para 17.
[13] See, for example, *Ekurhuleni Metropolitan Municipality v Business Connexion (Pty) Ltd* [2025] ZASCA 41 para 2; *Rock Foundation Properties and Another v Chaitowitz* [2025] ZASCA 82 para 14; *Mohlaloga v S* [2025] ZASCA 115; 2025 (2) SACR 445 (SCA); [2025] 4 All SA 333 (SCA) para 20.
[14] *S v Lorenzi* [2025] ZASCA 58; 2025 JDR 2015 (SCA).
[15] *Schoeman v Director of Public Prosecutions* [2025] ZASCA 124; 2025 (2) SACR 561 (SCA); [2026] 1 All SA 95 (SCA) para 88.

[30] The minority in *Schoeman* found support in a minority judgment of the Constitutional Court in its recent judgment in *S v Godloza* (*Godloza*).[16] The *Godloza* matter produced five judgments – a majority judgment and four minority judgments. One of the minority judgments considered whether an appeal lies against the President's decision.[17] The minority noted that difficulties could arise with the approach adopted by this Court in *Bidvest* and the majority in *Schoeman*. One such difficulty could arise where the President of this Court refuses to refer the decision refusing leave to a court.

[31] In such instances, the Constitutional Court minority observed, the matter will not be referred to the court, and it is not clear how the court will determine whether exceptional circumstances exist if the decision is not referred to it.[18] On these bases, the minority concluded that the power to decide whether there are exceptional circumstances is conferred upon the President, to the exclusion of the court to whom the decision is referred for reconsideration.[19]

[32] On the other hand, the majority of the Constitutional Court held that an appeal against the decision of the President of this Court generally does not engage the Constitutional Court's jurisdiction. It therefore disagreed with the minority and decided the application on different grounds without pronouncing on *Motsoeneng*, *Bidvest* or *Schoeman*.

[33] The debate as to the repository of the power to determine the presence of exceptional circumstances continued recently in this Court in a trilogy of judgments: *4 Seasons Logistics v Kgotse* (*4 Seasons*)[20] (delivered on 4 February

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[16] *S v Godloza and Another* [2025] ZACC 24; 2026 (1) SACR 113 (CC); 2026 JDR 0431 (CC).
[17] The second judgment, written by Dodson AJ, in which Madlanga J concurred.
[18] Ibid para 145.
[19] Ibid para 146.
[20] *4 Seasons Logistics CC v Kgotse* [2026] ZASCA 9.

2026); *Matsi v The South African Legal Practice Council (Gauteng Province)* (*Matsi*);[21] and *Lutzkie v Commissioner for the South African Revenue Service* (*Lutzkie*),[22] (both delivered on 6 February 2026).

[34] All three judgments were decided by the same panel of three acting judges of considerable eminence – all former permanent members of this Court, led by its former Deputy President, who authored all three judgments. In *4 Seasons*, it was concluded that *Motsoeneng*, *Bidvest* and the majority in *Schoeman* had failed to 'advert to' *Avnit v First Rand Bank Ltd* (*Avnit*)[23] 'a judgment of this Court by which they were bound unless of course *Avnit* were found to be clearly wrong.'[24] Upon embarking on an analysis and interpretation of s 17(2)*(f)*, this Court in *4 Seasons* concluded:

'[T]his 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.[25]

[35] Unsurprisingly, in *Matsi* and *Lutzkie* the Court endorsed *4 Seasons* and had this to say about *Motsoeneng*, *Bidvest*, and the majority judgments in *Lorenzi* and *Schoeman*:

'In a most recent judgment of this Court [*4 Seasons*], *Motsoeneng, 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'.[26]

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[21] *Matsi and Another v The South African Legal Practice Council (Gauteng Province)* [2026] ZASCA 12; 2026 JDR 0649 (SCA)
[22] *Lutzkie v Commissioner for the South African Revenue Service* [2026] ZASCA 11; 2026 JDR 0648
[23] *Avnit v First Rand Bank Ltd* [2014] ZASCA 132.
[24] Ibid para 48.
[25] *4 Seasons* para 61.
[26] *Matsi* para 70 and *Lutzkie* para 65.

[36] In *Matsi*, it was further stated:

'Indeed, to my mind, the approach adopted in *Motsoeneng* and re-inforced both in *Bidvest* and by the majority in *Schoeman* relative to the proper interpretation of s 17(2)*(f)* of the SC Act, is, with respect, jurisprudentially unsound.'[27]

[37] What then is the effect of the Constitutional Court's minority judgment in *Godloza* and this Court's judgment in *4 Seasons*? As regards *Godloza*, while minority judgments of the Constitutional Court carry persuasive force, we are bound by our Court's jurisprudence on s 17(2)*(f)*, as recently held in *RAF v Mautla* (*Mautla*).[28] I will revert to *4 Seasons*.

***Stare decisis* and basis for departure from earlier decisions**

[38] This Court is bound by its earlier decisions because of the principle of 'horizontal *stare decisis*'. The bench in *4 Seasons* was ordinarily bound by *Motsoeneng* and *Bidvest*. But it departed from them on the basis that they were 'clearly wrong.' The time-honoured principle is that this Court does not lightly depart from its previous views, even those expressed *obiter*.[29] Departure is warranted where the Court is satisfied that the earlier decision is 'clearly wrong'. But even if it is so satisfied, there may be reasons why it should not depart from its earlier decision. See, for example, *Harris v Minister of the Interior*.[30] Therefore, a conclusion that a judgment of this Court is 'clearly wrong' should not be lightly made.

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[27] *Matsi* para 70.
[28] *Road Accident Fund and Others v Mautla and Others* [2025] ZASCA 200 para 19.
[29] *Steenkamp v South African Broadcasting Corporation* [2001] ZASCA 110; [2002] 2 All SA 180 (A); 2002 (1) SA 625 (SCA) para 12.
[30] *Harris & Others v Minister of the Interior and Another*, 1952 (2) SA (A) 428 at 452/4 and 468/72.

[39] Almost nine decades ago, this Court in *Bloemfontein Town Council v Richter* (*Richter*)[31] said the following about when it can depart from its earlier decision:

'The ordinary rule is that this Court is bound by its own decisions and unless a decision has been arrived at on some *manifest oversight* or *misunderstanding* that is there has been something in the nature of a *palpable mistake* a subsequently constituted Court has no right to prefer its own reasoning to that of its predecessors - such preference, if allowed, would produce endless uncertainty and confusion. The maxim "*stare decisis*" should, therefore, be more rigidly applied in this, the highest Court in the land, than in all others.'[32] (Emphasis added.)[33]

[40] These enduring principles leave a very narrow scope for departure. 'Manifest oversight', 'misunderstanding', or 'a palpable mistake' must be present for this Court to depart from its earlier decision. The scope for departure should be even narrower where the disagreement turns on the interpretation of a statutory provision, in this case s 17(2)*(f)*. For, in a statutory interpretative exercise, it is seldom about which view is 'right' or 'wrong', but rather which construction best gives expression to the purpose of the provision in question. This is especially true if the earlier decision is anchored in a closely reasoned analysis for a particular view. In such instances, this Court should hesitate long before departing from its earlier decision. It is well to heed Wallis JA's caution in *Patmar v Limpopo Development Tribunal* (*Patmar*):[34]

'The test for departing from a judgment from one's own court is set high so that it is only done in few cases and then only after anxious consideration.'

[41] The narrow basis for departure explains the dearth of cases in which this Court has overruled its earlier decision. One of the few cases in which it did, is

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[31] *Bloemfontein Town Council v Richter* 1938 AD 195 at 232.
[32] Ibid at 232. This is long before the advent of the democratic era, during which the Constitutional Court became the apex court.
[33] Ibid at 232.
[34] *Patmar Explorations (Pty) Ltd and Others v Limpopo Development Tribunal and Others* [2018] ZASCA 19; 2018 (4) SA 107 (SCA) para 8.

Dormell Properties v Renasa (*Dormell*).[35] There, the majority had departed from the long-established and settled authority of this Court enunciated in *Loomcraft v Nedbank* (*Loomcraft*)[36] regarding the autonomy principle on demand guarantees and letters of credit. This had resulted in uncertainty and a somewhat confused position regarding demand guarantees. Subsequent cases, such as *First Rand Bank v Brera Investments*[37] and *Guardrisk v Kentz* (*Guardrisk*),[38] preferred the minority's reasoning in *Dormell*.

[42] In *Guardrisk*, this Court criticised the majority in *Dormell*. It referred to its reasoning as 'flawed' and having 'misconstrued the import of the [authority] it had relied on, and its relevance to the facts' of the case.[39] In *Coface v East London Own Haven* (*Coface*)[40] this Court endorsed *Guardrisk*'s criticism of the *Dormell* majority. In addition, it noted that the majority had relied on an 'English doctrine of consideration, [which] is not part of our law of contract.'[41] For all these reasons, *Coface* considered *Dormell* to be 'clearly wrong' and accordingly overruled it.

The status of the judgments of this Court

[43] Section 13 of the SC Act is titled: '***Manner of arriving at decisions by Supreme Court of Appeal*'.** Section 13(1) provides that proceedings of this Court must ordinarily be presided over by five judges, subject to the proviso that the President may: (a) direct that an appeal in a criminal or civil matter be heard before a court consisting of three judges (s 13(1)(*a*)); or (b) given its importance,

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[35] *Dormell Properties 282 CC v Renasa Insurance Co Ltd and Others* [2010] ZASCA 137; 2011 (1) SA 70 (SCA); [2011] 1 All SA 557 (SCA).
[36] *Loomcraft Fabrics CC v Nedbank Ltd and Another* [1995] ZASCA 127; 1996 (1) SA 812 (SCA); [1996] 1 All SA 51 (A); 1996 (1) SA 812 (A).
[37] *First Rand Bank Ltd v Brera Investments CC* [2013] ZASCA 25; 2013 (5) SA 556 (SCA).
[38] *Guardrisk Insurance Company Ltdv Kentz (Pty) Ltd* [2013] ZASCA 182; [2014] 1 All SA 307 (SCA).
[39] Op cit fn 63 para 26.
[40] *Coface South Africa Insurance Co Ltd v East London Own Haven t/a Own Haven Housing Association* [2013] ZASCA 202; [2014] 1 All SA 536 (SCA); 2014 (2) SA 382 (SCA).
[41] Ibid para 25.

direct that an appeal be heard by a larger number of judges, as she may determine (s 13(1)*(b)*). In terms of s 13(2)*(a)*, the judgment of the majority of the judges presiding at proceedings before this Court shall be the judgment of the court.

[44] The effect of these provisions is that the judgment of any properly constituted bench of this Court is binding authority. It is immaterial whether the bench comprised three, five or more judges. Thus, a unanimous judgment of three judges carries the same authority as that of five or more judges. Where there is no unanimity, the majority of the bench is the authority. Thus, in a three-panel bench, the majority judgment of two is the authority, whereas in a five-panel bench, the majority judgment of three or four is the authority. As Greenberg explained in *Fellner v Minister of the Interior* (*Fellner*):[42]

'[A] decision by a Court consisting of three members (even if it is not unanimous) is as binding as a unanimous decision of a Bench of five. It seems clear that the authority of a decision rests on the status of the Court and not on a counting of heads.'

To this, Hahlo and Khan[43]add:

'[N]or, indeed, would the unanimous holding of a bench of eleven, . . . have any greater authority; or the decision of a large bench specially constituted, after a direction by the Chief Justice, that a matter should, because of its importance, cease being heard before the court originally sei[z]ed of it. . .'.

Which judgment is the binding authority in the event of disagreement?

[45] The principle espoused above refers to the status of a judgment of this Court. A judgment of this Court, whether unanimous or by a majority, enjoys the same status and authority, irrespective of the number of judges on the panel. But

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[42] *Fellner v Minister of the Interior* 1954 (4) SA 523 (A) at 538D.

[43] H R Hahlo & E Kahn The South African Legal System and its Background 2ed (2nd Impression) (Juta Cape Town 1973) 246-247.

a different issue arises when there is a divergence of opinion between a smaller bench and a larger one. *4 Seasons*, being a unanimous judgment of a three-panel bench, would ordinarily be a binding authority, just as would a judgment of a five-panel or larger bench. However, it holds a divergent view from that held in the five-panel benches in *Motsoeneng* and *Bidvest.*

[46] The question that arises is which of them commands the binding authority in this Court. Did the panel in *4 Seasons* have the authority to overrule *Motsoeneng* and *Bidvest*? Despite diligent research, I have not found any case in this Court in which a three-panel bench overruled a five-panel bench. Neither have I found any in the comparative jurisdictions surveyed below, namely, Namibia, Zimbabwe, Botswana, Canada and the United Kingdom.

Comparative analysis

Southern Africa

[47] The Supreme Court of Namibia, with which we share a historical jurisprudential heritage, has on several occasions overruled its earlier decisions. But on each such occasion, the earlier decision of a five-panel bench was overruled by an equally constituted bench.[44] The Zimbabwean Supreme Court in *Magaya v Magaya*,[45] a bench of five judges, overruled its previous decisions in *Chihowa v Mangwende*[46] and *Katekwe v Muchabaiwa*.[47] Both the overruled decisions were rendered by three-judge benches. The Court of Appeal of Botswana in *Attorney General v Motshidiemang*[48] upheld a lower court's decision to decriminalise consensual same-sex sexual acts, and in the process,

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[44] See, for example, *S v Likanyi* [2017] NASC 10, which overruled *S v Mushwena and Others* [2004] NR 276 (SC).
[45] *Magaya v Magaya* 1999 (1) ZLR 100 (S).
[46] *Chihowa v Mangwende* 1987 (1) ZLR 228 (SC).
[47] *Katekwe v Muchabaiwa* 1984 (2) ZLR 112 (S); *See also Murisa N O v Murisa* 1992 (1) ZLR 167 (S).
[48] *Attorney General v Motshidiemang (Lesbians, Gays and Bisexuals of Botswana as Amicus Curiae* [2021] BWCA 67; [2021] 2 BLR 320 (CA).

overruled its earlier decision in *Kanane v State*.[49] Both decisions were made by five-member panels.

Canada

[48] The Supreme Court of Canada has also overruled its own decisions on several occasions, but only when the bench was enlarged or equally constituted as in the earlier decision, or when the earlier decision was split.[50] In one of its most significant decisions, in *Carter v Canada* (*Attorney General*) (*Carter*),[51] the court overruled its earlier decision in *Rodriguez v British Columbia* (*Attorney General*) (*Rodriguez*).[52] By a five-to-four majority, *Rodriguez* had placed an absolute prohibition on physician-assisted suicide. In *Carter*, a unanimous nine-panel bench concluded that such a prohibition constituted a violation of s 7 of the Canadian Charter of Rights and Freedoms (the Charter). The court in *Carter* reasoned that it was appropriate to revisit its previous decision in light of changes in social facts and constitutional jurisprudence that had occurred since *Rodriguez* was handed down.

United Kingdom

[49] In the United Kingdom, the Supreme Court's authority to depart from precedent stems from the Practice Statement of the Justices of the Appellate Committee of the House of Lords (the forerunner of the Supreme Court), issued on 26 July 1966. The Justices recognised the importance of precedent. Nevertheless, they recognised that too rigid adherence to precedent may lead to injustice in a particular case and unduly restrict the proper development of the

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[49] *Kanane v State* [2003] (2) BLR 67 (CA).
[50] See, for example, *Minister of Indian Affairs and Northern Development v Ranville* [1982] 2 SCR 518 overruled the majority in *Commonwealth of Puerto Rico v Hernandez* [1975] 1 SCR 228 (which was a *Hernandez* (a 5-4 split decision); *R v Chaulk* [1990] 3 SCR 1303 overruled *Schwartz v The Queen* [1977] 1 SCR 673.
[51] *Carter v Canada* (*Attorney General*) [2015] SCC 5, [2015] 1 SCR 331.
[52] *Rodriguez v British Columbia* (*Attorney General*) [1993] SCR 519.

law. They then reserved for the Court the right to depart from a previous decision when the interests of justice so dictate.

[50] Paragraph 3.3.1 of the United Kingdom Supreme Court Practice Direction 3 requires a party seeking permission to appeal to state whether they ask the Supreme Court 'to depart from one of its own decisions or from one made by the House of Lords.' Once it is stated that this is the case, a larger panel than the one that decided the earlier case is convened, in anticipation of a possible overruling of the earlier decision.[53] In *Fellner*, Centlivres CJ confirmed this practice in his observation that:

'[I]n cases where the correctness of one of its previous decisions is doubted a full Court of the Judges of Appeal is assembled. I believe that a similar practice is adopted in some Provincial Divisions in South Africa in both civil and criminal cases where a full Court of three or more Judges is assembled when a previous decision of one or two Judges is in doubt.'[54]

[51] As in other jurisdictions, when the UK Supreme Court overruled its own decisions, it was either by an equally constituted bench or by an enlarged bench.[55] The exception seems to be when the decision being sought to be overturned was split, in which event a smaller bench was constituted.[56]

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[53] See Lord Andrew Burrows' speech at the 2024 Lord Burrows Toulson Memorial Lecture titled 'Precedent and Overruling in the UK Supreme Court'.

[54] *Fellner* at 531H-532A.

[55] *R (on the application of Barkas) v North Yorkshire County Council* [2014] UKSC 31; [2015] AC 195 (five-panel), overruled *R (on the application of Beresford) v Sunderland CC* [2003] UKHL 60; [2004] 1 AC 889 (five-panel); *Montgomery v Lanarkshire H Bd* [2015] UKSC 11; [2015] AC 1430 (nine-panel) overruled *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871 (five-panel); *R v Jogee* [2016] UKSC 8; [2017] AC 387 (five-panel), overruled *R v Powell* [2008] UKHL 45; [2009] 1 AC 129 (five panel); *Murphy v Brentwood District Council* (seven-panel) overruled *Anns v Merton* (five-panel); *Peninsula Securities Ltd Dunnes Stores* [2020] UKSC 36, 2021 AC 1014 (five-panel) overruled *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 (five-panel); *In re McQuillan* [2021 UKSC55; [2022] AC 1063 (seven-panel) overruled *In re Finucane* [2019] UKSC 7 (five-panel).

[56] See, for example, *Smith v Ministry of Defence* [2013] UKSC 41; [2014] AC 52 (seven-panel) overruled *R (Catherine Smith) v Secretary of State for Defence* [2010] UKSC 29; [2011] 1 AC 1 ((six/three split).

[52] In *Rock Advertising Limited v MWB Business Exchange Centres Limited*,[57] the court considered whether an agreement whose sole effect is to vary a contract to pay money by substituting an obligation to pay less money, or the same money later, is supported by consideration. The Court noted 'arguable points of distinction' in cases which had yielded conflicting outcomes on the issue. However, it considered it undesirable to resolve the issue in that case, rather leaving it to a larger panel. Writing for the Court, Lord Sumption explained:

'[A] differently constituted Court of Appeal made these points in *In re Selectmove Ltd* [1995] 1 WLR 474, and declined to follow *Williams v Roffey*. The reality is that any decision on this point is likely to involve a re-examination of the decision in *Foakes v Beer*. It is probably ripe for re-examination. <u>*But if it is to be overruled or its effect substantially modified, it should be before an enlarged panel of the court*</u> . . .'.[58] (Emphasis added.)

Discussion

[53] The upshot of the authorities referred to above is this: where an appellate court overrules its earlier decision, it does so by an equally constituted panel or a larger one. This is for a good reason: to maintain coherence in jurisprudence. Thus, to the extent that the *4 Seasons* bench considered itself authorised to overrule decisions of larger benches in *Motsoeneng* and *Bidvest*, it broke new ground, with far-reaching and perhaps unintended consequences.

[54] Consider this example. An 11-panel bench, specially constituted by the President in terms of s 13(1)*(b)*, delivers a landmark judgment that clarifies an important area of the law which had given rise to conflicting judgments in this Court. On the reasoning of *4 Seasons*, a subsequent three-judge bench considering a similar issue is authorised to overrule the judgment of the earlier 11-panel bench on the basis that it is 'clearly wrong'. Needless to say, that would be absurd. It

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[57] *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] 4 All ER 21; [2019] AC 119.
[58] Ibid para 18.

would be worse if the three-panel bench were split, with a two-judge majority constituting the judgment of the Court, effectively overruling the earlier unanimous 11-panel bench decision.

[55] The principle that a smaller bench has no authority to overrule a larger bench was emphasised in two recent judgments of this Court, namely, *Lekeka v S* (*Lekeka*),[59] and *Lorenzi*. Both were three-panel benches that considered s 17(2)*(f)*. Reflecting on the effect of *Godloza*, this Court in *Lekeka* observed that 'as a panel of three judges of this Court, we remain bound by the *Motsoeneng* and *Bidvest* judgments of this Court.'[60]

[56] As mentioned, *Lorenzi* is the first judgment to produce a dissenting judgment holding that *Motsoeneng* and *Bidvest* were wrongly decided. The author of that dissenting judgment, Coppin JA, is part of the present panel. In his dissenting judgment, he recognised the principle that a smaller panel lacks the authority to overrule a larger panel, when he correctly observed:

'While I do not consider that conclusion [in *Motsoeneng* and *Bidvest*] of the legal position to be correct, I do accept that this Court, because of its composition, is bound thereto by virtue of the doctrine of *stare decisis*.'[61]

Coppin JA's view that *Motsoeneng* and *Bidvest* were wrongly decided remains unchanged. However, he recognises the binding nature and precedential authority of the five-panel benches in those cases.

[57] In *In the Matter of an Application by Rosaleen Dalton for Judicial Review*,[62] writing for a unanimous Court, Lord Reed, the President of the UK

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[59] *Lekeka v S* [2025] ZASCA 182.
[60] Ibid para 17.
[61] *Lorenzi* para 26.
[62] *In the Matter of an Application by Rosaleen Dalton for Judicial Review* [2023] UKSC 36; [2023] 3 WLR 671 para 47.

Supreme Court, sounded the following caution about an appellate court easily departing from its own decisions:

> 'The court will not overrule a previous decision simply because the justices would decide the case differently today. . . This principle is vitally important to the operation and reputation of a court which does not sit *en banc*, and whose composition consequently varies from one case to another. In such circumstances, the principle is essential to counter the risk that the outcome of cases might otherwise depend, or at least might appear to depend, on who happened to be sitting . . . .[I]f a tenable view taken by a majority in the first appeal could be overruled by a majority preferring another tenable view in a second appeal, then the original tenable view could be restored by a majority preferring it in a third appeal, and finality of decision would be utterly lost.'

[58] I find these observations particularly resonant for our Court. Uncertainty would reign were a differently constituted bench to subsequently conclude that *4 Seasons* itself was 'clearly wrong', overrule it, and thereby restore *Motsoeneng* and *Bidvest*, only for a subsequent bench to restore *4 Seasons*. There would be no single binding authority. Subsequent benches would, in each instance, elect which of the previous decisions to follow. This would result in 'intolerable legal uncertainty', to borrow from Brand JA in *Potgieter v Potgieter*,[63] albeit in a different context. Thus, a further proliferation of disparate judgments on s 17(2)*(f)* would not redound to the image of this Court. This is why it is of utmost importance that a deviation from a judgment of this Court should only be made after anxious reflection. Judicial restraint, as cautioned in *Richter* and *Patmar*, is called for.

[59] That restraint is evident in *Guardrisk*, where this Court, despite its severe criticism of the majority in *Dormell*, decided against overruling it. This is even though, as a five-panel bench, it had the authority to do so. Perhaps the three-panel bench in *4 Seasons* should have exercised the same restraint, and limited itself to explaining why the interpretation of s 17(2)*(f)* in *Motsoeneng* and *Bidvest*

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[63] *Potgieter v Potgieter NO* [2011] ZASCA 181; 2012 (1) 637 (SCA) para 34.

is problematic, rather than 'overruling' the judgments. If those judgments were wrongly decided, the decision to overrule them can only be that of the Constitutional Court or a panel of five or more judges in this Court.

[60] I must emphasise that we are here not concerned with the correctness or otherwise of any of the divergent views expressed, on the one hand, in *Motsoeneng*, *Bidvest*, the majority judgment in *Schoeman*, and in the minority judgments in *Lorenzi, Schoeman* and the unanimous judgment in *4 Seasons*, on the other. It is about the jurisprudential comity, hierarchy and coherence of this Court.

[61] I therefore summarise the position as follows: the judgments of this Court hold the same status and authority, regardless of the number of judges on the bench. However, when there is a disagreement between a smaller bench and a larger one, the 'counting of heads', referred to in *Fellner*, is important. The judgment of the smaller bench yields to the larger bench, and the latter is the binding authority in this Court. It is not about which one is the latest. That is the position about *4 Seasons* in relation to *Motsoeneng* and *Bidvest*.

[62] Accordingly, to maintain jurisprudential coherence, I conclude that until *Motsoeneng* and *Bidvest* are authoritatively overruled by either the Constitutional Court, an equally constituted five-panel bench, or a (preferably) larger panel, they remain binding authority in this Court. Whether that should no longer be the position will be determined only when an opportunity arises for an authoritative and definitive pronouncement on the recent divergent views.

Are there exceptional circumstances?

[63] On the footing that *Motsoeneng* and *Bidvest* remain binding authority until authoritatively overruled, I turn to the 'threshold question': whether exceptional

circumstances exist to justify the reconsideration or variation of the order refusing leave to appeal. I do so with particular focus on the likelihood of a grave failure of justice or of the administration of justice being brought into disrepute should there be no reconsideration. For it is only in the event of such a likelihood that this Court can consider whether leave to appeal should have been granted.

[64] When considering the likelihood of either, the focus turns to the judgment sought to be appealed against – its reasoning and conclusions. That likelihood must be manifest in the judgment. If there is not a reasonable prospect that the judgment is wrong, then such a likelihood is not established. The issue before the High Court turned on: (a) the interpretation of Part 8 of the Policy Directive; (b) whether the section 75 letter constituted the required authorisation; and (c) the weight to be accorded to Mr Mzinyathi's testimony.

[65] As to interpretation, the High Court construed the provision to mean that written authorisation is required only when the National Director or the DPP delegates the decision to a prosecutor, and not when he or she makes the decision. This is how the High Court explained it:

'[P]art 8 of the directives set out the oversight that the NDPP or the DPP must exercise over prosecutors – it does not impose the same obligations upon them. It is not required that the DPP must authorise the institution of a prosecution in writing when the decision to do so is taken by him.'

[66] About the section 75 letter, the High Court held that it did not constitute a written authorisation to institute criminal proceedings. It was merely a procedural mechanism for conveying the DPP's decision to transfer the applicant's case from the lower court to the High Court. As regards the indictment signed by Mr Van der Merwe, the High Court held that although the signature on the indictment

authorising the conduct of the prosecution was properly authorised, it did not constitute authorisation; rather, it was something that follows authorisation.

[67] Regarding Mr Mzinyathi's evidence, the High Court found that he was aware of the applicant's prosecution and that the section 75 letter authorised its continuation. According to the High Court, this constituted substantial compliance with Part 8 of the Policy Directive. For this conclusion, the court relied on *Allpay v South African Social Security Agency*.[64]

[68] The applicant had also contended that, because Mr Mzinyathi did not read the record, his decision was irrational. The premise of this submission was that Mr Mzinyathi could not guarantee that the statements in the docket were in harmony with what had been conveyed to him. As the applicant's main argument was that there was no authorisation, this would have been raised in the alternative. The High Court summarily rejected this contention. It held that 'the most reasonable inference to be drawn was that what was conveyed to Mr Mzinyathi was in harmony with the contents of the docket'. Accordingly, it concluded that the decision to institute criminal proceedings against the applicant was properly taken, and dismissed the special plea.

[69] In this Court, the applicant contended that the High Court made several errors in its judgment. I must immediately make it clear that this is not sufficient to warrant a reconsideration of the two judges' order refusing leave to appeal. The applicant must demonstrate exceptional circumstances, such that, if that order is not reconsidered, there is a likelihood of grave injustice or the administration of justice being brought into disrepute.

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[64] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC).

[70] In other words, the alleged errors must be of such gravity as to be likely to result in either of the two scenarios. Thus, the issue in this application is not the correctness of the High Court's order. That issue has been determined by the order of the two judges refusing leave. In terms of s 17(2)*(f)*, that order is final, subject to the proviso granting the President the power to refer the order for reconsideration.

[71] The issue in this application is whether, if that order is not reconsidered, there is a likelihood of a grave failure of justice or of bringing the administration of justice into disrepute. Thus, the applicant faces a formidable hurdle in establishing that the alleged errors were so gross as to make either outcome likely.

[72] These requirements set an exceptionally high bar, consistent with our superior courts' approach to the issue. Below, I consider cases in which the order refusing leave to appeal was reconsidered in this Court, and those in which the Constitutional Court did the same. In this Court, I consider three cases in which orders of two judges refusing leave to appeal were reconsidered: *Mathekola v S* (*Mathekola*),[65] *KET v MEC* (*KET*)[66] and *Mautla.* Although there is no equivalent of the s 17(2)*(f)* provision in the Constitutional Court, that Court has reconsidered orders refusing leave to appeal, including its own. I examine *Molaudzi v S*[67] and *Godloza* to illustrate the point. In conclusion, I consider the Canadian position, before turning to the errors the applicant contends were committed by the High Court.

[73] *Mathekola* concerned the different treatment of similarly situated applicants. The applicant's former co-accused was granted leave to appeal to the

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[65] *Mathekola v S* [2017] ZASCA 100; 2017 JDR 1414 (SCA).
[66] *KET Civils CC v MEC Police, Roads & Transport, Free State and Others* [2024] ZASCA 56; 2024 JDR 1667 (SCA).
[67] *Molaudzi v S* [2015] ZACC 20; 2015 (8) BCLR 904 (CC); 2015 (2) SACR 341 (CC).

High Court by two judges of this Court. The applicant's petition, considered by a different panel of judges from that which granted the co-accused's petition, was dismissed. In the meantime, the co-accused's subsequent appeal in the High Court was upheld. Upon learning of this, the applicant applied to the President of this Court for a reconsideration of the refusal of his petition. This Court concluded that special circumstances were present because the refusal of leave to appeal in the circumstances would be unjust.

[74] *KET* was about incompetent orders issued by the High Court. The judges who considered the petition were not made aware of the circumstances in which the orders were made. This only became known after they had dismissed the petition. This Court held that had the two judges been aware of all the facts when they considered the petition, they would most likely have granted leave to appeal. Consequently, it concluded that the applicant for reconsideration had succeeded in showing the existence of exceptional circumstances justifying this Court's reconsideration and variation of the order refusing leave to appeal.

[75] In *Mautla*, the two judges who considered the application for leave to appeal applied the wrong test in dismissing it. They applied a higher test, namely the test for special leave to appeal under s 16(1)*(b)* of the SC Act, which requires special circumstances in addition to reasonable prospects of success. This was due to an erroneous view that, because the application was against a Full Court order, the applicant needed special leave. The two judges failed to appreciate that the Full Court had sat as a court of first instance. For that reason, they ought to have considered the application under s 17(1) of the SC Act for 'regular' leave, where the test is less stringent, requiring only reasonable prospects of success or another compelling reason why the appeal should be heard. Furthermore, in a

related application involving similar issues, a separate panel of the Full Court had granted leave to appeal to this Court.[68]

[76] In *Molaudzi* the Constitutional Court reconsidered its earlier order dismissing an application for leave to appeal. The applicant and his co-accused were sentenced to life imprisonment in the High Court. The applicant and some of the co-accused's applications for leave to appeal were unsuccessful in the High Court, this Court, and the Constitutional Court. Subsequently, two of the applicant's co-accused applied to the Constitutional Court for leave to appeal, arguing that extra-curial statements against them by a co-accused should not have been admitted. The Constitutional Court granted them leave to appeal on the basis that the issue raised a constitutional matter that engaged its jurisdiction. The Court overturned their convictions and ordered their immediate release.

[77] The applicant subsequently brought another application for leave to appeal to the Constitutional Court, advancing the same arguments as his co-accused. He maintained that the case was not *res judicata* because the second application raised new constitutional arguments that had not been before the Court. The Court held that the applicant's second application was *res judicata* because it had already rendered a final judgment on the merits of the case. However, the Court found that where significant or manifest injustice would result if a final order stood, the doctrine ought to be relaxed to permit it to revisit its past decisions in accordance with its inherent powers and constitutional mandate to develop the common law. The Court emphasised that this requires rare and exceptional circumstances in which there is no alternative effective remedy.

[68] *Legal Practitioners Indemnity Insurance Fund NPC and Others v Road Accident Fund and Others* [2024] ZAGPPHC 294; 2024 (4) SA 594 (GP). That appeal was heard in this Court on 17 February 2026.

[78] The Court found that the applicant's conviction, like that of his co-accused, was based primarily on extra-curial admissions by his co-accused, which the Court had earlier found inadmissible. The Court held that it would be a grave injustice if the applicant were not afforded the same relief as his co-accused, given that he was similarly situated and had failed to raise the same constitutional arguments in his first application, which may have been due to his lack of legal representation. Accordingly, the Court found these to be exceptional circumstances and held that it was in the interests of justice to fashion an appropriate remedy. In the result, the appellant's convictions and sentences were set aside, and the Court ordered his immediate release from prison.

[79] In *Godloza*, similar to *Mathekola*, the co-accused were treated differently. The Court reconsidered an order of the President of this Court to dismiss an application in terms of s 17(2)*(f)* under the following circumstances. The applicants and their co-accused were convicted of murder and sentenced to 16 years' imprisonment in a regional court. The applicants' and a co-accused's applications for leave to appeal were unsuccessful in the regional court and the High Court. Aggrieved, they filed separate applications in this Court for special leave to appeal, which were considered by different panels of judges. The co-accused's application was referred for oral hearing in terms of s 17(2)*(d)*. The co-accused's application was later successful, and he was granted leave to appeal to the High Court. However, the panel which considered the applicants' application for special leave dismissed it. On learning of the co-accused's successful application, the applicants applied to the President for reconsideration in terms of s 17(2)*(f)*, relying on the co-accused's successful application. That application was dismissed.

[80] The applicants sought leave to appeal to the Constitutional Court. Among the grounds they relied on was that granting the co-accused leave to appeal while

denying their application would violate their fair-trial rights and constitute unfair differential treatment. The majority found that the applicants were convicted of murder on the same factual basis as the co-accused. Refusing to redress the applicants' harm would risk denying justice and constitute disparate treatment. The majority concluded that there was no effective alternative remedy and that there were reasonable prospects of success in the matter, as evidenced, among other things, by this Court's judgment granting the co-accused leave to appeal. Because a pending appeal concerned the co-accused, the majority held that it would be most appropriate and expedient to hear these appeals together. Consequently, the Court granted the applicants leave to appeal to the High Court.

[81] In Canada, the courts have considered the requirement of 'bringing the administration of justice into disrepute' in the context of s 24(2) of the Charter. The section requires the exclusion of evidence obtained in a manner that violates the Charter rights if admitting it would 'bring the administration of justice into disrepute'.

[82] In *R v Anthony-Cook* (*Anthony-Cook*)[69] the Canada Supreme Court referenced with approval the test enunciated in *R v Druken*[70] and *R v BO2*.[71] In the latter case, it was explained that the term 'bring the administration of justice into disrepute' denotes a far higher standard than a mere difference of opinion. The high bar set by the requirement was illustrated by equating it with '*a breakdown in the proper functioning of the . . . justice system*.'[72] To determine that a court decision has such an effect, it must be one that 'causes an *informed*

[69] *R v Anthony-Cook* 2016 SCC 43; [2016] 2 SCR 204 para 3 and 5.
[70] *R v Druken* 2006 NLCA 67 para 29.
[71] *R v BO2* 2010 NLCA 19 para 56. Both judgments were written by Justice Malcolm Rowe while still a member of the Supreme Court of Newfoundland and Labrador, before he was elevated to the Canadian Supreme Court.
[72] Ibid para 42.

and reasonable public to believe that our system of justice is collapsing.'[73] (Emphasis added.)

[83] It is clear that in all the above cases, exceptional circumstances abounded. Had reconsideration not occurred in any of them, the administration of justice would have fallen into disrepute. It is with this mind that I turn to the applicant's submissions about the errors in the judgment of the High Court.

[84] One of the errors, on which the applicant placed much store, was the High Court's finding that there was no challenge to the authority of the two prosecutors who conducted the criminal trial. This was indeed an error by the High Court. At the heart of the additional special plea was the absence of authorisation to prosecute the applicant. Therefore, the prosecutors who conducted the prosecution in court lacked authority to do so.

[85] The High Court conflated the appointment of Mr Roux, as an external prosecutor, with his title to prosecute. A prosecutor is appointed in terms of s 16 of the NPA Act and exercises his or her powers, duties and functions in terms of s 25 of the NPA Act. Section 38(1) of the NPA Act authorises the National Director, in consultation with the Minister, to engage persons external to the NPA to perform services in specific cases. The lead prosecutor in the applicant's criminal case, Mr Roux, was appointed under that provision specifically for the applicant's case. That appointment was not challenged. Thus, the High Court erred in this regard.

[86] However, this error has no bearing on the issue under consideration, namely, the likelihood of a grave injustice or the administration of justice being

[73] Ibid para 33.

brought into disrepute. The mere fact that a court has made an error is ordinarily not, in itself, a ground for reversing a lower court's judgment, less so when seeking to establish the presence of grave injustice or the administration of justice being brought into disrepute. This is because an appeal lies against the lower court's substantive order, not the reasons for judgment.[74] Thus, whether or not a court of appeal agrees with a lower court's reasoning would be of no consequence if the result would remain the same.[75]

[87] The applicant also complained that the High Court made an error in finding that Part 8 of the Policy Directive had been complied with merely on the basis that: Mr Mzinyathi: (a) had knowledge of the prosecution instituted against the applicant; (b) was only obliged to exercise oversight over prosecutors; and (c) was not required to authorise the institution of a prosecution in writing as the decision to prosecute was made by himself.

[88] Even if one were to disagree with its interpretation, I discern no grave injustice that would constitute exceptional circumstances. The applicant's complaints fall far short of the higher standard required to bring the administration of justice into disrepute. They amount to no more than a 'mere difference of opinion', given that the court engaged in interpretative analysis of Part 8 of the Policy Directive and reached the construction it deemed reasonable.

[89] The applicant also complained that the High Court was wrong to find that, by virtue of the authorisation granted to Mr Van der Merwe, the latter was authorised to sign the indictment. The applicant submitted that the signing of the indictment was irrelevant because it did not constitute a written authorisation to the prosecutors to prosecute him. The applicant is correct in this submission. The

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[74] *ABSA Bank Ltd v Mkhize and Two Similar Cases* [2013] ZASCA 139; 2014 (5) SA 16 (SCA) para 64.
[75] *Western Johannesburg Rent Board and Another v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355.

signing of the indictment is a distinct process from the authorisation envisaged in s 1 of Part 8 of the Prosecution Directives.

[90] As mentioned, the judge held the view that any appeal against the dismissal of the additional special plea should be deferred until the trial was finalised. Despite this view, the judge should have heard the application. He could not simply decline to hear it, as evident from his registrar's letter, even though appeals in indeterminate proceedings are generally discouraged.

[91] In *Wahlhaus v Additional Magistrate, Johannesburg* (*Wahlhaus*),[76] this Court enunciated the following principles in this regard: by virtue of its inherent power to restrain illegalities in the lower courts, appellate courts may, in a proper case, grant relief - by way of review, interdict, or mandamus - against the decision of a lower court given before conviction. This power must be exercised sparingly, depending on the circumstances of a given case. The court will intervene only in rare cases where grave injustice might otherwise result or where justice might not be attained by other means. In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available.

[92] In addition to these general principles, Ogilvie Thompson JA made this trenchant observation:[77]

'[T]he prejudice, inherent in an accused's being obliged to proceed to trial, and possible conviction, in a magistrate's court before he is accorded an opportunity of testing in the Supreme Court the correctness of the magistrate's decision overruling a preliminary, and *perhaps fundamental, contention raised by the accused*, does not per se necessarily justify the Supreme Court in granting relief before conviction . . .'. (Emphasis added.)

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[76] *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (A) at 119H-120C.
[77] Ibid at 120C-D.

[93] *Wahlhaus* was subsequently affirmed and applied in *Ismail v Additional Magistrate, Wynberg*.[78] The principle in these cases was recently affirmed by this Court and the Constitutional Court, respectively, in *Mathebula v S* (*Mathebula*)[79] and *DPP, Johannesburg v Schultz; DPP, Bloemfontein v Cholota* (*Cholota*).[80] Both cases concerned applications to halt criminal prosecutions. Although decided in different contexts, these cases share with the present application the ultimate aim of halting criminal prosecutions. The principles distilled from the cases are therefore instructive.

[94] *Mathebula* concerned an application for a permanent stay of a criminal prosecution. This Court, drawing on *Sanderson v Attorney-General Eastern Cape* (*Sanderson*),[81] and *Wild and Another v Hoffert N O*,[82] held that an applicant for permanent stay must, in the main, prove trial-related prejudice. Absent such prejudice, an applicant would have to establish extraordinary circumstances to halt the prosecution.[83]

[95] In *Cholota*, the applicant's extradition from the United States of America was found irregular and unlawful because the outgoing extradition request was not made by a member of the National Executive, but by the DPP, who lacked the power to make such a request. Despite the unlawfulness of her extradition, the Constitutional Court held that this did not divest the trial court of its criminal jurisdiction.

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[78] *Ismail and Others v Additional Magistrate, Wynberg and Another* 1963 (1) SA 1 (A) at 5G-6A.
[79] *S and Another v Mathebula* [2025] ZASCA 189.
[80] *Director of Public Prosecutions, Johannesburg and Others v Schultz and Others; Director of Public Prosecutions, Bloemfontein v Cholota* [2026] ZACC 3.
[81] *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1997 (12) BCLR 1675 (CC); 1998 (2) SA 38 (CC); 1998 (1) SACR 227 (CC).
[82] *Wild and Another v Hoffert N O and Others* [1998] ZACC 5; 1998 (3) SA 695 (CC); 1998 (6) BCLR 656 (CC); 1998 (2) SACR 1 (CC) para 9 and 11.
[83] *Mathebula* para 17.

[96] The Constitutional Court drew an important distinction between two categories of State conduct when considering applications to halt proceedings. The first category concerns cases in which the criminal prosecution is preceded and tainted by illegal and egregious State conduct. The second concerns cases where unlawfulness or irregularity arises from a bona fide error in the process. Criminal proceedings will be halted only in the former category because it would amount to 'an affront to the public conscience' or 'would be contrary to the public interest in the integrity of the criminal justice system'[84] for a criminal trial to proceed in such circumstances. The Court emphasised the need to strike an appropriate balance between upholding the rule of law and combating impunity.[85]

[97] In the present matter, the lack of written authorisation specifically for the applicant's prosecutions had nothing to do with illegality or any objectionable conduct by the State. From his testimony, Mr Mzinyathi bona fide, but erroneously, believed that the section 75 letter sufficed to comply with Part 8 of the Prosecution Directives. This conduct falls into the second category and, therefore, does not constitute a ground for halting the applicant's criminal proceedings.

[98] That there was no compliance with the strictures of the Prosecution Directives in the sense that there was no written authorisation for the prosecution of the applicant, is not the end of the enquiry. The question is whether it was fatal that it had not been complied with. In *Maharaj v Rampersad*,[86] this Court laid down the following test in such instances:

'This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is, and what, according to the injunction, it ought to be. It is quite conceivable that a Court might hold that, even though the position as it is [is] not identical with

[84] Ibid para 138.
[85] Ibid.
[86] *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A) at 646C-E.

what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been compliance with the object sought to be achieved by the injunction and the question of whether this object has been achieved, are of importance.'

[99] In this case, Part 8 of the Prosecution Directives is clear and should not give rise to any controversy about its meaning or purpose. It has four features. First, it recognises that there are instances where the law requires prior authorisation from the National Director.[87] Second, it provides that, in addition to such instances, certain categories of persons should not be prosecuted without the written authorisation of the National Director.

[100] Third, it identifies these categories. One of them includes prosecutors, magistrates, and judges. Fourth, it makes it clear that authorisation is not required for the arrest and first appearance in court of persons in the relevant categories. The purpose of the Prosecution Directives is self-evident: to prevent the prosecution of certain categories of persons without the knowledge of the National Director.

[101] Mr Mzinyathi's testimony makes it clear that he was aware that the applicant was a prosecutor and, therefore, that the Prosecution Directives had to be complied with. Importantly, he approved the prosecution, thereby fulfilling the purpose of section 1 of Part 8 of the Prosecution Directives.

[102] In light of the High Court's overall judgment, a reasonable and informed member of the public, aware of all relevant facts, would be unlikely to believe that our justice system would be brought into disrepute if the applicant's trial continues. In fact, such concerns are more likely to arise among reasonable

[87] See, for example, s 27 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 and s 2(4) of the Prevention of Corruption Act 121 of 1998.

members of the public if the trial is halted without the applicant facing the serious charges against him, including seven counts of corruption – a scourge that corrodes the fabric of our society. The applicant's trial must therefore proceed.

Conclusion

[103] In all the circumstances, the applicant's application does not meet the required threshold under s 17(2)*(f)*. There are no exceptional circumstances which would result in a likelihood of a grave failure of justice or the administration of justice being brought into disrepute if the order dismissing leave to appeal is not reconsidered. Consequently, this Court lacks the jurisdiction to reconsider the two judges' order refusing leave to appeal.

Costs

[104] The general approach in matters of this nature is that costs do not necessarily follow the result. The rationale was explained in *Sanderson*:[88]

> '[O]rdinarily the dismissal of a claim such as this in the High Court should not carry an adverse costs order. It is not a suit between private individuals; it relates directly to criminal proceedings, which are instituted by the State and in which cost orders are not competent; and the cause of action is that the State allegedly breached an accused's constitutional right to a fair trial…'.

[105] Here, the applicant raised an important issue that goes to the heart of a fair trial: being prosecuted by those properly authorised to do so. Although his application was dismissed, it was not frivolous. For that reason, he should not be mulcted in costs.

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[88] *Sanderson* para 44.

Order

[106] The following order is made:

1 The application for the reconsideration of the order refusing leave to appeal is dismissed.

2 Each party shall pay its own costs.

T MAKGOKA

JUDGE OF APPEAL

Appearances:

For applicant:	D F Dörfling SC
Instructed by:	Gerhard Nel & Snyman Inc., Benoni Moroka Attorneys, Bloemfontein
For respondent:	B Roux SC (with V Tshabalala)
Instructed by:	Director Public Prosecutions, Pretoria Director Public Prosecutions, Bloemfontein.