**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**

Case no: 935/2024

In the matter between:

**HI-Q AUTOMOTIVE (PTY) LTD** **APPELLANT**

and

**ERGA INVESTMENTS (PTY) LTD** **FIRST RESPONDENT**

**THE SHERIFF, MIDRAND** **SECOND RESPONDENT**

**Neutral citation:** *Hi-Q Automotive (Pty) Ltd v Erga Investments (Pty) Ltd and Another* (935/2024) [2026] ZASCA 31 (18 March 2026)

**Coram:** PETSE, MBHA and DLODLO AJJA

**Heard**: 22 September 2025

**Delivered**: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 18 March 2026 at 11h00.

**Summary:** Powers of appellate court – s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013 – power to dismiss appeal where decision sought will have no practical effect or result – discretion of appellate court to entertain appeal notwithstanding mootness – interests of justice warranting the hearing of the present appeal – whether application for reconsideration in terms of the proviso to s 17(2)*(f)* falls within the purview of s 18(1) – issue determined in the affirmative.

## ORDER

**On appeal from:** Gauteng Division of the High Court, Johannesburg (Beyers AJ sitting as court of first instance):

The appeal is dismissed with no order as to costs.

## JUDGMENT

**Petse et Dlodlo AJJA (Mbha AJA concurring):**

### Introduction

[1] This appeal raises a crisp and interesting question of law. It is this. Is an application in terms of the proviso to s 17(2)*(f)* of the Superior Courts Act 10 of 2013 (the Act) to the President encompassed by the provisions of s 18(1) of the Act. The Gauteng Division of the High Court, Johannesburg (the high court) per Beyers AJ, answered this question in the affirmative. Before that, in the Kwa-Zulu Natal Division, Pietermaritzburg, Moodley AJ had answered the same question in the negative. Thus, the issue for determination in this appeal is whether Beyers AJ's finding was correct or not. The appeal came before us with the leave of the high court.

[2] Accordingly, the fate of this appeal hinges on the proper interpretation of s 17(2)*(f)* and, in particular, the wording of the proviso thereto read with s 18(1) of the Act. However, there is a prior procedural hurdle that the appellant, Hi-Q Automotive (Pty) Ltd, must overcome. And, in the event that the appellant fails to overcome such hurdle, that outcome would render it unnecessary to enter into the substantive merits of the appeal. It bears mentioning at this juncture that the first respondent, Erga Investments (Pty) Ltd, has not taken part in this appeal presumably because it is no longer in occupation of the premises that were in issue in the high court. The second respondent, the Sheriff of the High Court, Midrand, too, does not feature in this appeal. Indeed, the second respondent elected to remain supine from the inception of these proceedings.

[3] At the outset it must be stated that both in his heads of argument and before us, counsel for the appellant accepted upfront that since the first respondent is no longer in occupation of the appellant's business premises the appeal is moot. Therefore, this Court must before all else decide whether it should still delve into the substantive merits of the appeal notwithstanding its mootness. We shall revert to this issue after setting out the facts.

**Background facts**

[4] In certain proceedings instituted by the appellant against the first respondent by way of urgency, Maier-Frawley J delivered a judgment on 21 February 2024. In that judgment, the learned judge ordered the cancellation of the written sub-lease agreement concluded between the appellant as sub-lessor and the first respondent as sub-lessee in respect of Shop No. 17, Waterfall Ridge Shopping Centre, Vorna Valley, Midrand (the premises) owned by the appellant. Consequent to the cancellation, the first respondent was directed to vacate the premises on or before 15 March 2024, failing which the second respondent, as the Sheriff of Midrand, was authorised to enlist the assistance of any person, including members of the South African Police Service (SAPS), to ensure compliance with the eviction order.

[5] Aggrieved by the order made by Maier-Frawley J, the first respondent sought leave to appeal, which was refused by the same court. A subsequent petition to this Court for leave to appeal was lodged on 12 June 2024. It was also dismissed by two judges of this Court on the ground that the envisaged appeal would have no reasonable prospect of success. Nor, in their opinion, was there any other compelling reason why the appeal should be heard. Undeterred, the first respondent proceeded to apply for the reconsideration of the refusal of leave to appeal on petition to this Court in terms of the proviso to s 17(2)*(f)* of the Act. For convenience, this application will hereinafter be referred to as the reconsideration application.

[6] It is noteworthy that prior to the lodging of the reconsideration application in terms of s 17(2)*(f)* of the Act, the Registrar of the high court had, on 20 June 2024, issued a warrant of ejectment against the first respondent, authorising the execution of the eviction order of Maier-Frawley J. However, the execution of the warrant was effected by the second respondent only on 4 July 2024, which was one day after the

first respondent had filed its application for reconsideration. This then prompted the first respondent to urgently approach the high court, for an interdict in terms of which it sought a stay of execution of the Maier-Frawley J order.

[7] This application served before Beyers AJ who, on 29 July 2024, granted an interdict in favour of the first respondent, the effect of which was to restore its undisturbed possession of the premises. Pursuant to the principal relief granted, the high court directed the second respondent to unlock the premises and facilitate the first respondent's access thereto. The order further stipulated that, should the second respondent fail to comply with such order within 24 hours of its issuance, the first respondent would be entitled to engage the services of a locksmith to gain entry into the leased premises and restore its lost possession. In addition, the appellant was interdicted from instituting any proceedings aimed at executing the judgment and order by Maier-Frawley J, thereby restraining it from interfering with the possession of the premises as restored to the first respondent.[1] It is necessary to pause and mention that all of this took place while the outcome of the first respondent's reconsideration application to the President was still pending.

[8] The underlying reason for the grant of the interdictory relief by Beyers AJ was the pending determination by the President of this Court in respect of the first respondent's reconsideration application under s 17(2)*(f)* of the Act, which, in the view that Beyers AJ took of the matter, had the effect of suspending the execution of the Maier-Frawley J order in terms of s 18(1) of the Act.

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[1] The order granted by the high court reads:

'1. This application be enrolled and heard as an urgent application in terms of Rule 6(12) and that the ordinary prescribed time limits, forms and services provided in the Rules be dispensed with.

2. Pending the final determination by the President of the Supreme Court of Appeal of the Applicant's application under s 17(2)(f) of the Superior Courts Act, 10 of 2013, under case number 726/24 in respect of the dismissal of the Applicant's petition for leave to appeal against the judgment of the Honourable Maier-Frawley J dated 21 February 2024 ("the judgment");

2.1 The First Respondent is ordered to restore undisturbed possession to the Applicant of the premises situated at Shop no 17, Waterfall Ridge Shopping Centre, Vorna Valley, Midrand ("the premises");

2.2 The Second Respondent is directed to unlock the premises and, in the event that the Second Respondent fails to do so within 24 hours of this Order, the Applicant may seek the services of a lock smith to unlock the premises in order for Applicant gain access thereto; and

2.3 The First Respondent is prohibited from taking fresh steps to execute the judgment.

3. The First Respondent is liable for the costs of this application.'

[9] Dissatisfied with the order of the high court reinstating the first respondent's possession of the leased premises, the appellant sought and was granted leave to appeal to this Court by Beyers AJ. Hence the present appeal before us.

**Statutory framework**

[10] Of prime importance in this appeal are the provisions of both s 17(2)*(f)*, in particular the proviso thereto, and s 18(1) of the Act. Section 17(2)*(f)*, in relevant part reads as follows:

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

[11] Section 18, which is headed 'Suspension of decision pending appeal' provides, in relevant part, as follows:

'(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) …

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

(4)*(a)* If a court orders otherwise, as contemplated in subsection (1)-

(i) the court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal.

*(b)* "Next highest court", for purposes of paragraph (a)(ii), means-

(i) a full court of that Division, if the appeal is against a decision of a single judge of the Division; or

(ii) the Supreme Court of Appeal, if the appeal is against a decision of two judges or the full court of the Division.

(5) *For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.*' (Emphasis added.)

We have put the words of the proviso to s 17(2)*(f)* and sub-section 18(5) in parenthesis for reasons that will become apparent later in this judgment.

[12] As already indicated in paragraph 7 above, after hearing argument from counsel on behalf of the protagonists, Beyers AJ, having regard to the urgency of the matter, issued an order in the terms set out in his order of 24 July 2024.[2] On 29 July 2024 the learned judge, in keeping with abiding judicial authority, provided written reasons underpinning his order. After making a reference to the facts of the case before him, the learned judge proceeded to describe the 'critical legal issue' with which he was confronted as the question 'whether section 18 of the [Superior Courts Act] suspends the operation of a decision which is the subject of an application for reconsideration under section 17(2)*(f)*' of the Act.

[13] Beyers AJ went on to answer the question he had posed in the affirmative. In this regard, he noted that previously the very question – set out in the preceding paragraph – was considered and answered by Aucamp AJ in a recent judgment reported sub-nomine *Ekurhuleni Metropolitan Municipality v Business Connexion (Pty) Ltd and Others.*[3] In *Business Connexion* the following was stated:

'It is trite that in terms of s18(1) of the Superior Court's Act, subject to subsections (2) and (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject matter of an application for leave to appeal or of an appeal is suspended pending the decision of the application or appeal.

The crisp issue presented to this court for consideration is whether s 18(1) equally applies to a request made in terms of s 17(2)*(f)*. Put differently, does a request to the President of the Supreme Court of Appeal in terms of s 17(2)*(f)* of the Act automatically suspend the operation and execution of the judgement pending the final decision of the President?

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[2] See footnote 1 above.

[3] *Ekurhuleni Metropolitan Municipality v Business Connexion (Pty) Ltd and Others* [2024] ZAGPJHC 378; 2024 (4) SA 571 (GJ) (*Business Connexion*).

On a proper interpretation of ss 17 and 18 of the Superior Court's Act, applying the principles as stated read with the authorities referred to the position seems to be that (a) s 17(2)*(f)* is part of the appeal process (b) that it is intended to keep the door of justice ajar in order to cure errors or mistakes and (c) that it serves as a means of preventing an injustice. The very same qualities that one finds in an application for leave to appeal and/or an appeal.

…

In the result I find that s18 of the Superior Court's Act applies to a request made in terms of s 17(2)*(f)* of the same Act and that the execution of the underlying judgment or order is suspended pending the final determination thereof by the President of the Supreme Court of Appeal.

Notwithstanding the aforesaid findings and even if I am wrong on the applicability of s18(1) as far as and in relation to a s 17(2)*(f)* request, I would have stayed the execution pending the announcement of the President's decision. Section 173 of the Constitution provides any Superior Court with an inherent jurisdiction to regulate its own processes in the interest of justice. Section 173 provides:

"The Constitutional Court, the Supreme Court of Appeal and the High Court each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

In *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* the nature of the inherent power of the Superior Courts under section 173 is described as follows:

"The power in section 173 vests in the judiciary the authority to uphold to protect and to fulfil the judicial function of administering justice in a regular, orderly and effective manner. Said otherwise, it is the authority to prevent any possible abuse of process and to allow a Court of act effectively within its jurisdiction."

In *Mokone v Tassos Properties CC and Another* Madlanga J referred to s 173 as providing the basis for the courts mentioned in the section to regulate their own processes taking into account the interests of justice. Madlanga J invoked the Constitutional Court's inherent power and, after being satisfied that it was in the interest of justice to do so, stayed proceedings for the eviction of the applicant pending the finalisation of associated proceedings.'[4]

[14] The learned Judge proceeded to note that the underlying reasoning in *Business Conexion* was compelling and jurisprudentially sound. He further noted that he was

[4] *Business Connexion* above paras 11-12, 27 and 36-39.

bound by *Business Connexion*, unless he found it to be clearly wrong. And that far from finding *Business Connexion* to be clearly wrong, he was, on the contrary, in respectful agreement therewith. Hence the learned judge granted the interdict as already indicated in paragraph 7 above.

**Issues**

[15] Accordingly, what falls to be determined in this appeal are two issues. First, we must decide whether the interests of justice dictate that we should enter into the substantive merits of the appeal notwithstanding that the appeal is undoubtedly moot. The mootness of the appeal came about because the first respondent vacated the leased premises before the appeal was enrolled for hearing following the judicial cancellation of the sub-lease on 21 February 2024. Second, in the event we decide to entertain the appeal on its merits, we must consider whether the conclusion reached by Aucamp AJ in *Business Connexion* is jurisprudentially sound. This is particularly so having regard to the fact that in *Member of the Executive Council for Co-operative Governance and Traditional Affairs v Nquthu Municipality and Others*,[5] the court there decided the very same issue to the contrary.

[16] The second issue self-evidently entails that we must undertake an interpretive exercise and determine, in the light of the context, purpose and language employed in both s 17(2)*(f)* and s 18 of the Act, read together, which of the two diametrically opposing conclusions reached in *Business Connexion* and *Nquthu Municipality* is correct. Therefore, barring the preliminary point as set out in the preceding paragraph, it is important to emphasise at the outset what this appeal is all about. Simply put, the issue is whether there is any intersectionality between s 18(1) and the proviso to s 17(2)*(f)* of the Act. Differently couched, the crucial question is: does s 18(1) encompass or extend to applications for reconsideration of the decision made under s 17(2)*(b)* of the Act. This will be the sole issue for determination, once we decide to entertain the merits of the appeal notwithstanding mootness, nothing more. We pause to remark that before now there has been no occasion for this Court to consider and determine this issue.

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[5] *Member of the Executive Council for Co-operative Governance and Traditional Affairs v Nquthu Municipality and Others* [2020] ZAKZPHC 40; 2021 (1) SA 432 (KZP) (*Nquthu Municipality*).

**Submissions by the first respondent**

[17] Before Beyers AJ the first respondent contended that both the second respondent, the Sheriff, and the appellant acted unlawfully in proceeding with the execution of the judgment and order of Maier-Frawley J, notwithstanding the fact that they had been served with and informed of its pending reconsideration application in terms of s 17(2)*(f)* of the Act. Briefly then, the first respondent's submission was that, in the light of the pending reconsideration application, it ought to have been permitted to retain possession of the premises and to continue conducting its business operations therefrom, until the final determination of its reconsideration application.

[18] In support of its contention, the first respondent invoked s 18(1) of the Act as the statutory foundation for its case. It submitted that s 18(1) reaffirms the long-standing common-law principle that the execution of a judgment or order is automatically suspended pending the outcome of an appeal or application for leave to appeal, as the case may be. Accordingly, execution of a judgment may not proceed until a decision on the appeal or application for leave to appeal has been finally made.

[19] The first respondent further submitted that the statutorily reinforced automatic suspension of a judgment or order subject to an appeal or application for leave to appeal operates as the default legal position. Thus, any party seeking to execute a judgment or order pending appeal is required to apply to court for leave to do so. In the absence of such an application and order, contended the first respondent, the execution of the judgment of Maier-Frawley J was not only premature but also unlawful. As a result, the execution of the Maier-Frawley J order while still the subject of a reconsideration application in terms of s 17(2)*(f)* was in breach of the provisions of s 18(1). It further argued that the courts have come to recognise that reconsideration applications form part of the appeal process, and therefore fall within the purview of s 18(1) of the Act, which explicitly provides for the suspension of the operation and execution of a decision subject to an application for leave to appeal or of an appeal pending the determination of such application for leave to appeal or appeal.

[20] In the alternative, the first respondent contended that the conduct of the appellant amounted to spoliation, entitling it to the restoration of the peaceful possession and use of the premises it previously enjoyed. It submitted that the

appellant's conduct in locking the premises on 4 July 2024 unlawfully disrupted its continued business operations and constituted an unlawful deprivation of possession. It further argued that in taking unilateral steps to evict it from the leased premises, the appellant had effectively taken the law into its own hands, thereby acting unlawfully as the law firmly sets its face against anyone taking the law into their hands. It is of course trite that the law does not countenance self-help.[6]

**Submissions by the appellant**

[21] For its part, the appellant contested the argument advanced by the first respondent that an application for reconsideration in terms of s 17(2)*(f)* of the Act forms part of an appeal process as contemplated in s 18(1) and, in consequence, triggers the automatic suspension of the execution of the Maier-Frawley J order.

[22] It further contended that in this case the high court erred in upholding the first respondent's contentions and in granting the interdictory relief sought. The appellant further submitted that the judgment of Beyers AJ is flawed in that it failed to properly interpret s 18(1) of the Act, which, as the argument went, applies only in instances where an application for leave to appeal or an appeal is still pending and has not yet been finally determined. Accordingly, the appellant maintained that the reconsideration application under s 17(2)*(f)* in issue here did not, in and of itself, suspend the operation or execution of the judgment. Thus, no lawful impediment existed to preclude the second respondent, on instructions from the appellant, from executing the warrant of ejectment. We propose to address the opposing contentions of the parties later when we deal with the substantive merits of the appeal.

**Has the appeal become moot in light of the intervening developments**

[23] As already alluded to above, s 16(2)*(a)*(i) of the Act provides that an appeal may be dismissed solely on account of mootness if at the hearing the issues are of such a nature that the decision sought will have no practical effect or result. Invariably,

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[6] See, for example in this regard: *Chief Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409; 1999 (12) BCLR 1420 para 11; *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and Others* [2021] ZACC 41; 2022 (1) BCLR 118 (CC); (2022) 43 ILJ 341 (CC) para 29; *Public Servants Association obo Ubogu v Head of the Department of Health, Gauteng and Others, Head of the Department of Health, Gauteng and Another v Public Servants Association obo Ubogu* [2017] ZACC 45; 2018 (2) BCLR 184 (CC); (2018) 39 ILJ 337 (CC); [2018] 2 BLLR 107 (CC); 2018 (2) SA 365 (CC) paras 66-68.

an appellate court will ordinarily dismiss an appeal that is moot unless, of course, the interests of justice dictate that such an appeal should nevertheless be entertained. In this regard, it is necessary to mention that according to s 16(2)*(a)*(ii) of the Act the question whether the decision would have no practical effect or result should be determined without reference to any consideration of the issue of costs, save under exceptional circumstances.

[24] In that context, this Court, in *Solidariteit Helpende Hand NPC and Others v Minister of Cooperative Governance and Traditional Affairs*,[7] invoking the decision of the Constitutional Court in *Minister of Tourism and Others v Afriforum NPC and Another*,[8] held as follows:

'A case is moot between the parties which would be practically affected in one way or another by a court's decision or which would be resolved by a court's decision. A case is also moot when a court's decision would be of academic interest only.'

[25] This principle is directly applicable to the present matter. The central issue, namely, the prevention or prohibition of the eviction of the first respondent from the leased premises, has already been overtaken by intervening events, as the first respondent has since vacated the leased premises upon the termination of the sub-lease. At present, the first respondent is no longer conducting business operations at the appellant's premises. The effect of this is that the appellant no longer requires the intervention of this Court to regain possession and control of its premises.

[26] Accordingly, the dispute between the protagonists no longer presents a live controversy requiring adjudication by this Court. The matter is moot. This leads to the next issue for consideration: namely, whether this Court should nevertheless, in the exercise of its discretion, proceed to enter into the substantive merits of the dispute that served before Beyers AJ in the high court. On this score, it is as well to recall that the high court reinstated the first respondent's possession of the premises on the sole ground that the first respondent's application for reconsideration in terms of s 17(2)(*f)* fell within the purview of s 18(1) of the Act.

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[7] *Solidariteit Helpende Hand NPC and Others v Minister of Cooperative Governance and Traditional Affairs* (104/2022) [2023] ZASCA 35 (31 March 2023) (*Solidariteit*) para 19.
[8] *Minister of Tourism and Others v Afriforum NPC and Another* [2023] ZACC 7; 2023 (6) BCLR 752 (CC) para 23.

**This Court's approach in relation to mootness**

[27] Ordinarily, and in line with s 16(2)*(a)*(i) of the Act, once it has been determined that a matter is moot, that in the normal course would mark the end of a judicial inquiry. In *Mhlontlo Local Municipaity and Others v Ngcangula and Another*,[9] with reference to the Constitutional Court decision in *National Coalition of Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*,[10] the following principle was affirmed:

'A case is *moot and therefore not justiciable* if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.' (Our emphasis.)

[28] In *Police and Prisons Civil Rights Union v South Africa Correctional Services Workers' Union and Others*,[11] the Constitutional Court held that:

'This Court's jurisprudence regarding mootness is well settled. As a starting point, *this Court will not adjudicate an appeal if it no longer presents an existing or live controversy*. This is because this Court will generally refrain from giving advisory opinions on legal questions, no matter how interesting, which are academic and have no immediate practical effect or result. Courts exist to determine concrete legal disputes and their scarce resources should not be frittered away entertaining abstract propositions of law.'[12] (Our emphasis.)

[29] However, mootness is not always an automatic bar to an appeal being entertained. This is especially true in instances where the *interests of justice* necessitate that the matter be dealt with. In *Police and Prisons Civil Rights Union*, Cachalia AJ said:

'The Court may entertain an appeal, even if moot, where the interests of justice so require. *In making this determination the Court exercises a judicial discretion based upon a number of*

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[9] *Mhlontlo Local Municipaity and Others v Ngcangula and Another* [2024] ZSACA 5; [2024] 3 BLLR 239 (SCA); (2024) 45 ILJ 775 (SCA) para 17.

[10] *National Coalition of Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at fn 18.

[11] *Police and Prisons Civil Rights Union v South Africa Correctional Services Workers' Union and Others* [2018] ZACC 24; [2018] 11 BLLR 1035 (CC); 2018 (11) BCLR 1411 (CC); (2018) 39 ILJ 2646 (*Police and Prisons Civil Rights Union*).

[12] Ibid para 43. See also *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited and Others* [2020] ZACC 5; 2020 (6) BCLR 748 (CC); 2020 (4) SA 409 (CC) (*Normandien*) para 47.

*factors*. These include, but are not limited to, considering whether any order may have some practical effect, and if so its nature or importance to the parties or to others.'[13] (Our emphasis.)

[30] The factors that a court will take into account when considering how it should exercise its discretion to adjudicate an issue on appeal even if it is moot were restated in *City of Cape Town v Aurecon South Africa (Pty) Ltd*.[14] There, the Constitutional Court expressed itself thus:

'A prerequisite for the exercise of the discretion is that *any order which this Court may make will have some practical effect* either *on the parties or on others*. Other factors that may be relevant will include *the nature and extent of the practical effect* that any possible order might have, *the importance of the issue*, *its complexity and the fullness* or otherwise of the argument advanced… .'[15] (Emphasis added.)

[31] In *Solidariteit* this Court had occasion to say:

'…[C]ourts, in a number of cases, have dealt with the merits of an appeal, notwithstanding the mootness of the dispute between the parties. Those cases involved legal issues "of public importance . . . that would affect matters in the future and on which the adjudication of this court was required."'[16]

[32] As can be deduced from the passages referenced above, the overarching principle guiding appellate courts on how they should exercise their discretion as to whether they must entertain an appeal that is moot is what the interests of justice require. Finally, it is necessary to also refer to a judgment of this Court in *Minister of Justice and Correctional Services and Others v Estate Late James Stransham-Ford and Others*.[17] There, the following was stated:

'…the Constitiuitonal Court has reserved to itself a discretion, if it is in the interest of justice to do so, to consider and determine matters even though they have become moot. It is a pre-requisite for the exercise of the discretion that any order the Court may ultimately make will

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[13] *Police and Prisons Civil Rights Union* fn 11 above para 44. See also *Normandien* above paras 46 and 48.
[14] *City of Cape Town v Aurecon South Africa (Pty) Ltd* [2017] ZACC 5; 2017 (6) BCLR 730 (CC); 2017 (4) SA 223 (CC).
[15] Ibid para 54. See also *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) para 11.
[16] *Solidariteit* fn 7 above para 14. See also *Botha v Smuts and Another* [2024] ZACC 22; 2024 (12) BCLR 1477 (CC); 2025 (1) SA 581 (CC) para 43.
[17] *Minister of Justice and Correctional Services and Others v Estate Late James Stransham-Ford and Others* [2016] ZASCA 197; [2017] 1 All SA 354 (SCA); 2017 (3) BCLR 364 (SCA); 2017 (3) SA 152 (SCA) (*Stransham-Ford*).

have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument.'[18] (Citations omitted.)

[33] Moreover, that there are presently discordant judgments of the high court in relation to the issue before us is also sufficient and good a reason for this Court to entertain this appeal notwithstanding it's mootness in order to settle the jurisprudential discord. And where a matter raises a discrete legal issue of public importance, particularly one that is capable of having a prospective effect on future cases, this Court is obligated to adjudicate the issue, notwithstanding the mootness of the dispute between the parties. This principle is said to affirm the Courts' constitutional role in settling the law to promote legal certainty, even in circumstances where the controversy between the immediate parties has ceased to exist.

**Whether the matter raises a discrete legal issue of sufficient importance to warrant adjudication by this Court, notwithstanding mootness.**

[34] Against the foregoing backdrop, it is necessary to consider next whether in the context of the facts of this case it is appropriate and desirable to entertain this appeal despite its mootness. The appellant submitted that the present case raises a discrete legal issue of public importance, which bears directly on the interests of justice.

[35] It was further contended that the very circumstance that there are two discordant judgments[19] of the high court concerning the question whether an application for reconsideration to the President of this Court, governed by the proviso to s 17(2)*(f)* automatically suspends the executability of a judgment or order, as contemplated in s 18(1) of the Act imperatively calls for the determination of this appeal.

[36] In the third place, the appellant submitted that a definitive ruling by this Court on the matter would serve to clarify the legal position, thereby preventing future

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[18] Para 22.

[19] *MEC for Co-Operative Governance and Traditional Affairs, KZN v Nquthu Municipality and Others* [2020] ZAKZPHC 40; 2021 (1) SA 432 (KZP) and *Ekurhuleni Metropolitan Municipality v Business Connexion (Pty) Ltd and Others* [2024] ZAGPJHC 378; 2024 (4) SA 571 (GJ).

uncertainty and unnecessary litigation on the same issue. Furthermore, the appellant argued that such clarity would promote judicial efficiency and uphold the rule of law, particularly in cases involving the execution of judgments before appellate processes have been exhausted.

[37] In *Gcaba v Minister for Safety and Security and Others*[20] the Constitutional Court held that:

'One of the purposes of the law is to regulate and guide relations in a society…Yet the legislature, courts, legal representatives and academics often create complexity and confusion rather than clarity and guidance'.

Thus, to fulfil this legal purpose bestowed upon the courts and others, this Court is duty bound to provide clarity and guidance whenever the opportunity arises and circumstances dictate so.

[38] A similar sentiment was expressed in *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others (Beadica)*.[21] There, the Constitutional Court held that where there are conflicting or different interpretations or outlooks between two courts on a particular issue, that results in uncertainty, which has been recognised as problematic and undesirable, an appellate court would ordinarily be required in such situations to resolve the uncertainty. In such instances, the Court proceeded to hold that:

'It also presents an opportunity to resolve the perceived divergence between the approach of [those courts] by engaging in a doctrinal analysis that seeks to make the best sense of our jurisprudence on these issues and present a coherent account thereof.'[22]

[39] The Court continued:

'When interpreting jurisprudence, our courts must make the best sense of judicial reasoning across a diverse set of cases. This requires engagement with sustained lines of reasoning within a particular case and across cases, rather than the selective lifting of isolated judicial statements to support a predisposed interpretation. There will always be outlier cases, but doctrinal analysis should offer an account that is coherent and best fits our jurisprudence as a

[20] *Gcaba v Minister for Safety and Security and Others* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC); (2010) 31 ILJ 296 (CC); [2009] 12 BLLR 1145 (CC) paras 1-2.
[21] *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC).
[22] Ibid para 18.

whole. Coherence speaks not only to the avoidance of contradiction, but to an inner unity or logic in which legal reasoning corresponds to its broader aims.'[23]

[40] There are other several cases in which this Court, in particular, entertained appeals despite the fact that the issue as between the litigants themselves was found to be moot.[24] On the other hand there are cases where this Court declined to entertain the appeal because the issue between the parties had become moot.[25] Generally speaking, the reason why, in some cases, this Court entertained the appeal notwithstanding mootness while it declined to do so in others was that in the former category there was a discrete legal issue that went beyond the interests of the litigants and which would affect future cases whereas in respect of the latter category no issue of the kind was involved.[26] In the context of s 21A of the repealed Supreme Court Act,[27] which was functionally equivalent to s 16(2)*(a)*(i) of the Act, this Court explained the rationale for the appellate courts' refusal to hear appeals that are moot thus:

'The purpose and effect of s 21A has been explained in the judgment of Olivier JA in the case of Premier, *Provinsie Mpumalanga en'n Ander v Groblersdalse Stadsraad* 1998 (2) SA 1136 (SCA). As is there stated the section is a reformulation of principles previously adopted in our courts in relation to appeals involving what were called abstract, academic or hypothetical questions. The principle is one of longstanding.'[28]

[41] It is therefore beyond question that on the facts of this case there exists a discrete issue of public importance that will self-evidently affect other matters in the future which requires adjudication by this Court.

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[23] Ibid at fn 26.

[24] *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA); [1998] 4 All SA 258 (A); *"Merak S" (Name of Ship) Sea Melody Enterprises SA v Bulktrans (Europe) Corporation* 2002 (4) SA 273 (SCA); *Land & Landbouontwikkelingsbank van Suid Afrika v Conradie* [2005] 4 All SA 509 (SCA); 2005 (4) SA 506 (SCA); *Executive Officer: Financial Services Board v Dynamic Wealth Ltd and Others* [2011] ZASCA 193; 2012 (1) SA 453 (SCA); [2012] 1 All SA 135.

[25] *Rand Water Board v Rotek Industries (Pty) Ltd* [2003] ZASCA 22; 2003 (4) SA 58 (SCA); *Clear Enterprises (Pty) Ltd v Commissioner for South African Revenue Services and Others* [2011] ZASCA 164; 83 SATC 136; *Ethekwini Municipality v South African Municipality Workers Union and Others* [2013] ZASCA 135; *Legal-Aid South Africa v Magidiwana and Others* [2014] ZASCA 141; 2015 (2) SA 568 (SCA); [2014] 4 All SA 570 (SCA).

[26] See, for example, *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* [2012] ZASCA 166; 2013 (3) SA 315 (SCA).

[27] Supreme Court Act 59 of 1959.

[28] *Coin Security Group (Pty) Ltd v SA National Union for Security Officers and Others* [2000] ZASCA 48; 2001 (2) SA 872 (SCA) para 7.

[42] Having regard to the increasing number of applications for reconsideration under the proviso to s 17(2)*(f)* of the Act that have come before this Court in recent years, there is a strong likelihood that disputes of a similar nature will continue to arise. In such circumstances, parties and lower courts will inevitably seek clarity and guidance on the legal consequences of such applications, particularly regarding whether the operation or execution of a decision that is the subject of an application in terms of the proviso to s 17(2)*(f)* is subject to the remedial device provided for in s 18(1). It is therefore both necessary and appropriate for this Court to engage with the merits of the present matter, notwithstanding its mootness, in order to provide authoritative guidance and bring finality to this recurring and unsettled legal controversy. This approach accords with the principle restated in *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited and Others* that 'mootness is not an absolute bar to the justiciability of an issue and that this Court has the discretion to entertain an appeal that is moot if the interests of justice so demand'.[29]

[43] Entertaining the present appeal, even though moot, would serve the interests of justice, promote legal certainty, and assist in the uniform application of the law across the courts of the land. Providing an answer to the question raised is of importance, not only to the parties in this matter but also on account of the fact that this Court's decision would have a prospective effect on future cases. The two divergent interpretations from the high court pertaining to the applicability or otherwise of s 18(1) of the Act to a reconsideration application, have undoubtedly caused uncertainty. There can be no doubt that to allow such an undesirable state of affairs to continue would be inimical to the rule of law. And as the Constitutional Court emphasised in *Beadica* that in such instances, there will be an opportunity for the courts confronted with such a dilemma to resolve the different interpretations by '*engaging in a doctrinal analysis that seeks to make the best sense of our jurisprudence*'.[30] Addressing this matter now will therefore not only resolve the immediate dispute but, as already mentioned, also provide clarity and authoritative guidance on a recurring legal issue, thereby promoting legal certainty and assisting

[29] *Normandien* fn 12 above para 48.
[30] *Beadica* fn 20 above para 18.

the various Divisions of the High Court and litigants alike in navigating similar disputes in the future.

**Analysis of the two conflicting cases**

[44] As indicated above, there are two divergent interpretations regarding the question whether an application for reconsideration in terms of the proviso to s 17(2)*(f)* of the Act operates to suspend the executability of a judgment or order, as contemplated in s 18(1). These discordant approaches have been articulated in two reported decisions of the high court, which merit closer examination.

[45] The first approach is reflected in the judgment of the KwaZulu-Natal Division in *Nquthu Municipality* in which Moodley AJ answered the question in the negative. He went on to hold that an application under the proviso to s 17(2)*(f)* does not form part of the appeal process and, consequently, does not trigger the automatic suspension envisaged in s 18(1) as a result of an appeal or an application for leave to appeal that is still pending.

[46] The second approach, adopted by the Gauteng Division in *Business Connexion*, where Aucamp AJ decided the issue to the contrary. The learned judge held that an application for reconsideration under the proviso to s 17(2)*(f)* does indeed form part of the appeal process and therefore has the effect of suspending the operation and execution of a decision sought to be taken on appeal as contemplated in s 18(1) of the Act. However, insofar as this Court is concerned the issue is, as already indicated above, still undetermined. Thus, it is now the task of this Court to settle the ensuing conflict.

***Nquthu Municipality decision***

[47] In *Nquthu Municipality* the applicant, the Member of the Executive Council for Co-operative Governance and Traditional Affairs, KwaZulu-Natal (the MEC), instituted review proceedings before Gorven J, seeking an order setting aside the renewal of the employment contracts of the third to fifth respondents. Gorven J upheld the application, finding that the contracts were unlawful and *ultra vires*, and accordingly set them aside.

[48] Aggrieved by Goven J's order, the respondents pursued an application for leave to appeal before the same Division, which was dismissed. Dissatisfied with the adverse outcome, they petitioned this Court for leave to appeal, which was similarly refused. This then prompted the respondents to lodge an application for reconsideration with the President of this Court in terms of the proviso to s 17(2)*(f)* of the Act.

[49] In the interim, the third to fifth respondents declined to vacate their positions notwithstanding Gorven J's order declaring their contracts unlawful. The MEC consequently approached the same Division seeking enforcement of the Gorven J order. The respondents opposed the application, contending that it was impermissible to enforce such a decision while the application pending before the President of this Court had still not been decided. In support of their contention, they relied on s 18(1) of the Act, submitting that the provision operated to suspend the order sought to be enforced by the MEC pending the outcome of the reconsideration application.

[50] In countering the respondents' contentions, counsel for the MEC argued that s 17(2)*(f)* provides that, once an application for leave to appeal is dismissed under s 17(2)*(b)*, such decision is final. It is common ground that prior to the amendment of s 17(2)*(f)* that took effect on 4 April 2024 the President was empowered to refer a reconsideration application to the court only if exceptional circumstances existed. Since the amendment, the President may do so only if a grave failure of justice would result or the administration of justice would be brought into disrepute if the decision under s 17(2)*(b)* is not referred to the court for reconsideration. It was submitted that such reconsideration did not constitute an application for leave to appeal or an appeal within the meaning of s 18(1), and therefore did not suspend the operation of the order granted by Gorven J.

[51] Conversely, counsel for the respondents persisted in his contention that the appeal process had not been finally concluded and that the order could not be enforced until the reconsideration application was determined. In rejecting the respondents' contentions, Moodley AJ held:

'[T]he refusal of a petition to the Supreme Court of Appeal for leave to appeal was a final determination of the application for leave to appeal, which refusal revived the operation and

execution of the order [sought to be] appealed against. An application for reconsideration of such refusal did not suspend the original order…'.[31]

***Business Connexion decision***

[52] On 31 January 2023, the court in *Business Connexion* declared the agreement concluded between the applicant and the first respondent valid and binding; confirmed the applicant's indebtedness in the amount of R85 479 535.26 together with interest; directed payment of that amount; and awarded costs against the applicant. The applicant's subsequent applications for leave to appeal – first to the high court and thereafter to this Court – were dismissed.

[53] On 21 November 2023, the applicant lodged an application for reconsideration with the President in terms of the proviso to s 17(2)*(f)* of the Act. On 17 January 2024 the first respondent delivered its answering affidavit. Pending the determination of the application for reconsideration, the first respondent obtained a warrant of execution and, on 30 November 2023, instructed the sheriff to attach the applicant's Absa Bank account with a view to satisfy the court's judgment in its favour and against the applicant.

[54] On 19 January 2024, shortly after filing its answering affidavit, the first respondent advised the applicant that it had instructed the sheriff to transfer the attached funds from the applicant's account into the sheriff's trust account in order to pay the available funds to the first respondent. This development prompted the applicant to approach the court by way of a notice of motion on an urgent basis seeking an order declaring that its application for reconsideration under the proviso to s 17(2)*(f)* operated to stay the operation and execution of the judgment. In the alternative, the first respondent sought an order staying the warrants of execution pending the outcome of the reconsideration application and any further appeal processes. The court upheld the applicant's contentions and granted an order that:

'The applicant's request made to the President of the Supreme Court of Appeal in terms of section 17(2)(f) of Superior Courts Act 10 of 2013 on 21 November 2023 stayed the execution

[31] *Nquthu Municipality* fn 5 above para 33.

of the judgment and order of Dlamini J pursuant to and in terms of section 18(1) of the Superior Courts Act 10 of 2013.'[32]

## Discussion

### *The first interpretation favoured in Nquthu Municipality*

[55] The first interpretation favours the proposition that an application for reconsideration of a decision under s 17(2)*(b)*, as contemplated in the proviso to s 17(2)*(f)* of the Act, does not fall within the ambit of s 18(1). The latter provision, the court opined, is designed only to suspend the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal. The court was driven to this conclusion because in its view an application in terms of the proviso to s 17(2)*(f)* cannot properly be characterised as an application for leave to appeal. Nor, as the court found, can it be regarded as forming part of the appeal process. On this construction, the court held, the suspension of the order sought to be appealed against ceased once leave to appeal was refused by the two judges of this Court, resulting in such order being revived and thus becoming, once more, operative.

[56] In order to address the viewpoint espoused by the first interpretation in *Nquthu Municiaplity*, a two-stage enquiry must be undertaken by this Court. The first stage is whether the proviso to s 17(2)*(f)* forms part of the appeal process or not. The answer to that question will, in turn, inform the second stage of the enquiry, namely whether s 18(1) finds application. In *Nquthu Municipality* it was held that:

'If the legislature intended that such an order would be suspended pending the outcome of the reconsideration application, one would have expected it to make provision for this in the Act.'[33]

[57] In interpreting the wording of the proviso to s 17(2)*(f)*, the minority in *Liesching and Others v S* (*Liesching II*)[34] emphasised the distinction between an application for leave to appeal under s 17(2)*(b)* and an application under s 17(2)*(f)*. It noted that '*[t]he latter is not an application for leave to appeal.* It is an application to the President for the referral of a decision of the Court, refusing leave to appeal, to the Court for reconsideration. It is another bite at the cherry for an unsuccessful litigant to have the

[32] *Business Connexion* fn 3 above para 39.
[33] *Nquthu Municipality* fn 5 above para 32.
[34] *Liesching and Others v S* [2018] ZACC 25; 2018 (11) BCLR 1349 (CC); 2019 (1) SACR 178 (CC); 2019 (4) SA 219 (CC) (*Liesching II*).

refusal of its application for leave to appeal reconsidered by the Supreme Court of Appeal on referral by the President in exceptional circumstances'.[35] (Our emphasis.)

[58] On the contrary, the majority in *Liesching II* observed that the proviso to s 17(2)*(f)* 'prescribes *a departure from the ordinary course of an appeal process'*.[36] (Our emphasis.) It proceeded to say that the provision is not intended to afford disappointed litigants a further opportunity to obtain relief already refused, but rather to enable the President to intervene where injustice might otherwise result.[37]

[59] Accordingly, the proviso to s 17(2)*(f)* operates as a safeguard, ie a procedural mechanism to prevent injustice. This interpretation was endorsed in *Cloete and Another v S; Sekgala v Nedbank Limted* (*Cloete*) in which the following was stated:[38]

'Section 17(2)(f) performs the function of a safety-net, giving the President the power to intervene, in order to cure errors or mistakes, prevent an injustice or where a failure to intervene would result in the administration of justice being brought into disrepute. In doing so, *it creates a diversion from the usual appeal process* by allowing for the reconsideration by the Court of the refusal of leave to appeal by two Judges, at the instance of the President.'[39] (Our emphasis.)

In our view the use of the phrase 'it creates a diversion from the usual appeal process' by the Constitutional Court in *Liesching II* is telling. This expression seems to us to imply that the s 17(2)*(f)* process serves as an alternative route to the normal appeal process once the proviso to s 17(2)*(f)* is invoked after the 'usual appeal process' has run its course. In *Godloza and Another v S*, the Constitutional Court affirmed the view point that the proviso to s 17(2)*(f)* is a means to prevent injustice.[40]

[60] While still on this topic it is necessary to underscore what the Constitutional Court said in *Liesching and Others v S and Another* (*Liesching I*)[41] where it held:

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[35] Ibid para 35.
[36] Ibid para 136.
[37] Ibid para 139.
[38] *Cloete and Another v S; Sekgala v Nedbank Limited* [2019] ZACC 6; 2019 (5) BCLR 544 (CC); 2019 (4) SA 268 (CC); 2019 (2) SACR 130 (CC) (*Cloete*).
[39] Ibid para 43.
[40] *Godloza and Another v S* (CCT 306/22) [2025] ZACC 24 (5 November 2025) para 128 (*Godloza*).
[41] *Liesching and Others v S and Another* [2016] ZACC 41; 2017 (4) BCLR 454 (CC); 2017 (2) SACR 193 (CC) (*Liesching I*).

'The proviso in section 17(2)*(f)* is very broad. It keeps the door of justice ajar in order to cure errors or mistakes, and for the consideration of a circumstance, which, if it was known at the time of the consideration of the petition might have yielded a different outcome…This would include new or further evidence that has come to light or that became known after the petition had been considered and determined.'[42]

[61] If the reconsideration application is dismissed by the President because in his or her view no exceptional circumstances exist, the unsuccessful litigant will have exhausted his or her appellate avenues in this Court. *Cloete*, also confirmed that:
'In the ordinary course, the President's power under section 17(2)*(f)* is merely a limited procedural power to ensure that, in truly exceptional cases, a further decision can be taken by the Supreme Court of Appeal. In essence, the power of the President is a power of referral to the Court. It does not dispose of any of the issues or portion thereof.[43]

[62] The Constitutional Court in *Liesching I*[44] reiterated that even after a s 17(2)*(f)* application is dismissed, an applicant may still approach that Court for leave to appeal and, if successful, seek to adduce further evidence.[45] This view point was also confirmed in *Godloza*, where both Majiedt J and Dodson AJ in their respective separate judgments stated that: a refusal of a reconsideration application does not bar the applicant from thereafter applying to the Constitutional Court for leave to appeal on the merits of the original high court judgment.[46]

[63] The second leg of the enquiry, and the principal issue in contention in this case, concerns the question whether s 18(1) of the Act also encompasses an application for reconsideration under the proviso to s 17(2)*(f)*. To address this question, it is necessary to pay due regard to the principles of statutory interpretation which are well settled. In *S v Toms*; *S v Bruce* this Court, while dealing with this topic, said:
'Where the language of a statute, so viewed, is clear and unambiguous effect must be given thereto, unless to do so would lead to absurdity so glaring that it could never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of

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[42] Ibid para 54.
[43] *Cloete* fn 37 above para 40.
[44] *Liesching I* fn 40 above.
[45] Ibid para 61.
[46] See: *Godloza* fn 39 above paras 164 and 237.

the Legislature, as shown by the context or by such other consideration as the Court is justified in taking into account…'[47]

[64] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[48] this Court had the following to say regarding statutory interpretation:

'The general rule is that the words used in a statute are to be given their ordinary grammatical meaning unless they lead to absurdity.'[49] It was further held that: '[C]onsideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation…The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'[50]

[65] Similarly, in *Cool Ideas 1186 CC v Hubbard and Another (Cool Ideas)*[51] the following, relating to statutory interpretation, was stated:

'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity.'[52]

It is therefore against that backdrop that we now turn to interpret s 18 of the Act. Section 18 has already been quoted in paragraph 11 above.

[66] As already mentioned, s 18(1) suspends the execution or operation of a decision that has been taken on appeal or is the subject of an application for leave to

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[47] *S v Toms; S v Bruce* 1990 (2) SA 802 (A) at 807H-I.
[48] *Natal Joint Municipal Pension Fund v Endumeni Municipal* [2012 ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*).
[49] Ibid para 17.
[50] Ibid para 18.
[51] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC).
[52] Ibid para 28.

appeal. Accordingly, as a general rule such a decision cannot be enforced for as long as the outcome of the appeal or application for leave to appeal remains pending, unless a court orders otherwise.

[67] In *Ntlemeza v Helen Suzman Foundation and Another*,[53] this Court explained the purpose of s 18(1) thus:

'The primary purpose of s 18(1) is to re-iterate the common law position in relation to the ordinary effect of appeal processes – *the suspension of the order being appealed* – not to nullify it. It was designed to protect the rights of litigants who find themselves in the position of General Ntlemeza, by ensuring, that in the ordinary course, the orders granted against them are suspended whilst they are in the process of attempting, by way of the appeal process, to have them overturned. *The suspension contemplated in s 18(1) would thus continue to operate in the event of a further application for leave to appeal* to this court and in the event of that being successful, in relation to the outcome of a decision by this court in respect of the principal order.'[54] (Our emphasis.)

***The Business Connexion interpretation***

[68] As already mentioned, the interpretation adopted in *Business Connexion* was to the contrary, namely that s 18(1) of the Act applies to reconsideration applications brought under the proviso to s 17(2)*(f)*. According to this view point, s 18(1) brings the operation and execution of a court decision that is the subject-matter of an application for reconsideration in terms of the proviso to s 17(2)*(f)* to a temporary pause. In support of this interpretation, the high court in *Business Connexion* invoked *Liesching I* and *Liesching II* as authorities for the proposition that an application under the proviso to s 17(2)*(f)* forms part of the appeal process. It further relied on *Cloete*, where the Constitutional Court stated:

'this Court in *Liesching I* [held that] the section 17(2)*(f)* procedure is part of the appeal process.'[55]

[69] It is not without significance that before the introduction of s 17(2)*(f)* the refusal of a petition by two or three judges of this Court under the statutory regime repealed

[53] *Ntlemeza v Helen Suzman Foundation and Another* [2017] ZASCA 93; [2017] 3 All SA 589 (SCA); 2017 (5) SA 402 (SCA) (*Ntlemeza*).
[54] Ibid para 28.
[55] *Cloete* fn 37 above para 33.

by the Act meant that the unsuccessful litigant had exhausted all appeal avenues in this Court. With the introduction of s 17(2)*(f)* a new statutory regime was introduced for such litigants. This was first noted by Mpati P in *Avnit v First Rand Bank Ltd*[56] as follows:

'As s 17(2)(f) is a new section vesting the President of this court with a power that the incumbent has not hitherto possessed, I think it desirable to set out the approach to be taken to such applications.'[57]

The learned President went on to explain how it came about that s 17(2)*(f)* was enacted and the remedy it is designed to provide.[58]

[70] Explaining the scope and breadth of the proviso to s 17(2)*(f)* in *Liesching I* [59] the Constitutional Court said the following:

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

The President is given a discretion, to be exercised judiciously, to decide whether there are exceptional circumstances that warrant referral of the matter to the Court for reconsideration or, if necessary, variation. The President must therefore decide whether there are exceptional circumstances. This will depend on the facts and circumstances of each case.'[60]

[71] Barely two years later, in *Liesching II*, the Constitutional Court had occasion again to explain both the import of the proviso and what the concept of 'exceptional circumstances' entailed. The Court said:

'Without being exhaustive, exceptional circumstances, in the context of section 17(2)(f), and apart from its dictionary meaning, should be linked to either the probability of grave individual injustice (per *Avnit*) or a situation where, even if grave individual injustice might not follow, the administration of justice might be brought into disrepute if no reconsideration occurs. A relevant example may be the kind of situation that occurred in Van der Walt, where "contrary

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[56] *Avnit v First Rand Bank Ltd* (20233/14) [2014] ZASCA 132 (23 September 2014).
[57] Ibid para 1.
[58] Ibid para 2.
[59] *Liesching I* fn 41 above.
[60] Ibid paras 54-55.

orders in two cases which were materially identical" were made by the Supreme Court of Appeal, and considered in this Court.

In summary, section 17(2)(f) 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 to deal with a situation where otherwise injustice might result and does not afford litigants a parallel appeal process in order to pursue additional bites at the proverbial appeal cherry.'[61]

[72] In his minority judgment in *Godloza*, Dodson AJ referred to what the learned author E A Kellaway says– with reference to both local and foreign jurisprudence – that:

'Where a statute is remedial of a mischief or grievance it ought to be construed liberally, so as to afford the utmost relief which the fair meaning of its language will allow'[62]

Bearing in mind that the proviso to s 17(2)*(f)* is an innovation introduced by the Act to address the shortcomings of the repealed Supreme Court Act, there can be no doubt that it is a remedial statutory provision as it accords an entitlement to a litigant whose petition has yielded an unfavourable outcome to seek redress subject to certain stringent requirements that must first be satisfied.[63]

[73] A little over two decades earlier, White J, dealing with a comparable situation, also endorsed this principle in *Manase v Minister of Safety and Security and Another*[64] and said:

'As it was the intention of the Legislature to protect the claimant's right to have his justiciable claim settled by a court of law, the provisions of s 57(5) should, in my opinion, be applied in a beneficial manner in respect of the claimant. In Steyn *Die Uitleg van Wette* 5th ed at 116 the learned author states that when an enactment was manifestly intended to benefit a person or class of persons, it must receive a beneficial interpretation in favour of those persons.'[65]

[74] We revert to *Cloete* again, albeit only with a view to highlighting a different point we seek to make. There, the Constitutional Court, in the process of considering the

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[61] *Liesching II* fn 33 above paras 138-139.
[62] E A Kellaway. 1995. *Principles of Legal Interpretation of Statutes, Contracts and Wills*. Butterworths, Durban, at 105.
[63] These requirements are:
(a) where refusal of an application for reconsideration would result in a grave failure of justice; and
(b) where such refusal would bring the administration of justice into disrepute.
[64] *Manase v Minister of Safety and Security and Another* 2003 (1) SA 567 (Ck) para 42.
[65] Ibid para 42 (at 582C-D).

question whether a decision made by the President in the context of a s 17(2)*(f)* application can appropriately be described as a decision of this Court since the President acts alone in the disposition of such applications, made the following instructive remarks:

'Seen in context, as previously held by this Court in Liesching I, the section 17(2)*(f)* procedure is part of the appeal process. It involves making a judicial determination on a defined legal issue between the litigating parties. The President's decision under section 17(2)*(f)* of the Act thus falls comfortably within the judicial function and purpose of the Supreme Court of Appeal leave to appeal process, in this instance, to be exercised by one Judge of that Court, its President.'[66]

[75] True, s 17(2)*(f)* says that the decision of the judges under s 17(2)*(b)*, following the refusal of leave to appeal by the high court, is final. But in terms of the proviso thereto, if, as in this instance, the President is of the view that such decision will result in a grave failure of justice or otherwise bring the administration of justice into disrepute, she or he can then refer the decision to the court for reconsideration to prevent such result from eventuating. In that event, the court to which the decision is referred for reconsideration would then step into the shoes of the judges who made the decision under reconsideration. Effectively, the court would then consider the application for leave to appeal afresh. Understood in this way, it is in our view not surprising that the Constitutional Court in *Liesching I* opined that the statutory dispensation in terms of the proviso is part of the appeal process. In this regard, it is as well to remember that the manifest purpose of s 18(1) of the Act, as previously mentioned, is to prevent potential irreparable prejudice that the unsuccessful party may suffer if it succeeds on appeal but the parties cannot, as a result, be restored to their respective positions before the judgment was put into operation or executed upon.

[76] Although the decision – to refuse or grant leave to appeal – made under s 17(2)*(b)* is in the ordinary course final, its finality is, however, subject to the proviso. This is so, because in the event that the President refers such decision to the court for reconsideration, and if necessary, variation it might well be varied if the court is

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[66] *Cloete* fn 37 above para 33.

satisfied that to allow it to stand would either result in grave injustice or otherwise bring the administration of justice into disrepute.[67]

[77] As this Court rightly noted in *Motsoeneng v South African Broadcasting Corporation SOC Ltd and Others*,[68] the court to which the application for reconsideration has been referred 'steps into the shoes of the Judges' whose decision is the subject of the reconsideration application. What the court must then determine is one of two things. First, whether the reconsideration application amounts to no more than a rehearsal of the arguments that have already been considered and rejected. In that event the decision will be left undisturbed, leading to the dismissal of the reconsideration application. On the other hand, if the court is of the view that to refuse the application for reconsideration would result in a denial of justice or bring the administration of justice into disrepute it will vary the decision under s 17(2)*(b)*, grant leave and thereafter determine the appeal itself.[69] Seen in this light, the reconsideration application is, in the words of Theron J in *Liesching II*, part of the appeal process. In this regard what the Constitutional Court said in *Cloete* bears repeating to underscore this point. There, the Court said:

'The President's decision under section 17(2)(f) of the Act thus falls comfortably within the judicial function and purpose of the Supreme Court of Appeal leave to appeal process, in this instance, to be exercised by one Judge of that Court, its President.'[70]

[78] Accordingly, if a reconsideration application is part of the appeal process whose object is to determine whether the judgment and order sought to be appealed against in the first place is sustainable on the peculiar facts of the case under consideration it is encompassed by the reference in s 18(1) to an application for leave to appeal for, after all, the reconsideration application's primary objective is to secure leave to appeal. Looked at from this perspective the fact that s 18(1) does not explicitly mention

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[67] There have been previous instances where the decision refusing leave to appeal was varied by the court to one granting leave to appeal and thereafter resulting in the appeal itself, being upheld. See, for example: *Schoeman v Director of Public Prosecutions* [2025] ZASCA 124; 2025 (2) SACR 561 (SCA) (*Schoeman*). *Ditlhakanyane v S* [2025] ZASCA 90; 2025 (5) SA 273 (FB); *KET Civils CC v Member of the Executive Committee: Police, Roads & Transport, Free State and Others* [2024] ZASCA 56; *Japhtha v S* [2025] ZASCA 80; 2025 (2) SACR 305 (SCA).

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

[69] Compare *Shoeman* fn 67 above.

[70] *Cloete* fn 38 above para 59.

an application for reconsideration is of no material consequence. It is in principle no different from a situation where, for example, leave to appeal is refused by the high court under s 17(2)*(a)*; and the aggrieved party petitions the Supreme Court of Appeal under s 17(2)*(d)*, which application will either succeed or fail. In the event that such application is unsuccessful, the dissatisfied party may approach the President who, if satisfied that exceptional circumstances exist, will refer the matter to the court for reconsideration of the decision under s 17(2)*(b)* and, if necessary, variation.

[79] Therefore, the proviso to s 17(2)*(f)* opens another statutorily ordained avenue to litigants who wish, on proper grounds, to pursue their quest for leave to appeal until they have exhausted their remedies in this Court. However, for the Court to vary the decision that refused leave to appeal, there must be a compelling reason to do so, like for example, if not to do so would result in a grave failure of justice or otherwise bring the administration of justice into disrepute.

[80] In sum the position is therefore as follows: (a) an unsuccessful litigant in the high court who desires to take an unfavourable judgment on appeal may apply for leave to appeal in terms of s 17(2)*(a)* either to the full court or this Court. That application would be heard by the judge or judges of the same division; (b) if such application is dismissed, the unsuccessful litigant may petition this Court in terms of s 17(2)*(b)* and the petition would be considered by two judges designated by the President, and in the event of a disagreement between the two judges, a third judge, also designated by the President, would consider the petition and the decision of the majority will then prevail as provided for in s 17(2)*(f)*. In both instances, the litigant who seeks leave to appeal must establish that there is either a reasonable prospect that the envisaged appeal would succeed or alternatively that there is some other compelling reason why the appeal should be heard; (c) if the applicant on petition suffers a similar fate to the one in the high court, the litigant concerned may invoke the proviso to s 17(2)*(f)* and seek reconsideration of the decision under s 17(2)*(b)*.

[81] Here, the discretion of the President to refer the decision under s 17(2)*(b)* to the court for reconsideration is circumscribed. The President may do so only if she or he is satisfied that a grave failure of justice would result or the administration of justice might be brought into disrepute. In invoking the remedy under the proviso, the

applicant is still pursuing its desire to procure leave to appeal. In that context, it becomes evident that the statutory regime under the proviso 'forms part of the appeal process'. And having regard to the manifest purpose of s 18(1) which, as rightly stated in *Ntlemeza*, is to 'protect the rights of litigants…by ensuring that in the ordinary course, the orders granted against them are suspended whilst they are in the process of attempting, by way of the appeal process, to have them overturned'. This, in our view, therefore impels the conclusion that the remedial right provided for in the proviso is encompassed by the reference in s 18(1) to 'an application for leave to appeal'. As the learned author E A Kellaway pertinently noted, a right-conferring remedy must be benevolently interpreted to the extent that its language permits in order to give full effect to the benefit conferred by such remedy.

[82] It is true that s 18(1) does not explicitly mention the proviso to s 17(2)*(f)*. Nor can it be said that on its clear wording it nevertheless does so by necessary implication. The appellant's case, stated in a nutshell, is that the high court erred in coming to the conclusion it did. More specifically, the contention is that the high court should rather have found that an application for reconsideration under the proviso to s 17(2)*(f)* did not have the effect of automatically suspending the operation and execution of the judgment of Maier-Frawley J. It was further submitted that s 18(1) was, on its terms, limited in its application to either an application for leave to appeal or an appeal only that is pending and not yet finally determined. Therefore, so went the argument, the high court should have declined to follow the decision in *Business Connexion* on the ground that it was clearly wrong. Instead, the high court should have followed the decision in *Nquthu Municipality* that represents the correct state of the law on the subject.

[83] Counsel for the appellant further submitted that 'the essence of the power of the President is a power of referral' to the court. Proceeding from this premise, counsel contended that the finality of the decision under s 17(2)*(b)* is therefore not disturbed once an application is brought to the President', but can only be disturbed 'if and when the Judges on reconsideration rescind and vary their order dismissing the leave application'. Counsel sought to draw a distinction between an application for leave to appeal under s 17(2)*(b)* on the one hand and an application for reconsideration in terms of the proviso to s 17(2)*(f)* on the other. In elaboration, counsel argued that the

latter application is 'not an application for leave to appeal'. Rather, so the argument went, it 'is an application to the President for the referral of a decision of the Judges refusing leave to appeal' to the court for reconsideration. Therefore, continued the argument, it is only when the court that is empowered, in circumscribed circumstances, to vary the decision refusing leave to appeal under s 17(2)*(b)* and granting leave to appeal would the operation or enforcement of the judgment sought to be appealed be suspended. For this proposition, counsel called into aid *Liesching II*.[71]

[84] In our view the central premise upon which the various contentions advanced on behalf of the appellant was predicated is unsound for several reasons. First, it entirely overlooks the fact that even in relation to an application for leave to appeal the operation and execution of a decision is suspended merely upon the lodgement of an application for leave to appeal or a notice of appeal and not when leave has been granted or the appeal itself determined. This is what s 18(5) of the Act itself decrees. There seems to us to be no legally tenable reason or principle why this should not apply to an application for reconsideration of the decision under s 17(2)*(b)*. Second, and more importantly, to contend that the finality of a decision taken under s 17(2)*(b)* is not disturbed unless and if such decision is varied by the court is, on the principles of statutory interpretation, not sustainable. This is so because the finality of such decision is subject to the proviso that empowers the President 'in exceptional circumstances' either on application or of her own accord to refer the decision to the court for reconsideration. When this happens, and upon reconsideration, the court seized with the reconsideration application is in turn empowered to vary the decision by, for example, granting leave to appeal in instances where leave to appeal had previously been refused under s 17(2)*(b)*. Once it is accepted that the statutory dispensation catered for in terms of the proviso to s 17(2)*(f)* is, as the Constitutional Court acknowledged,[72] part of the appeal process the notion that s 18(1) does not encompass applications for reconsideration will be dispelled.

[85] It is trite that when a court engages in an interpretative process it must do so 'having regard to the context provided by reading the particular provision or provisions

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[71] *Liesching II* fn 33 above para 46.
[72] See *Liesching I* and *Liesching II* and later *Cloete* in which this position was reaffirmed.

in the light of the document as a whole…' and the purpose to which the provision or provisions are directed, paying due regard to the language of the provision under consideration. In the context of an application for leave to appeal which is dealt with in s 17 of the Act, it is significant that even though in terms of s 17(2)*(f)* the decision made under s 17(2)*(b)* is ordinarily final, its finality is subject to the strictures of the proviso thereto if and when either unsuccessful litigants themselves or the President herself, of her own accord, invokes the proviso and refers the s 17(2)*(b)* decision to the court for reconsideration notwithstanding its finality in the ordinary course.

[86] Thus, it should be accepted that an application for reconsideration of a decision under s 17(2)*(b)* brought in terms of the proviso to s 17(2)*(f)* is part of the appeal process in the sense that it is after all and ultimately equally aimed at obtaining leave to appeal against an unfavourable judgment or order similarly to applications for leave to appeal brought under either paragraph *(a)* or *(b)* of s 17(2). Therefore, the conspicuous absence of a reference to an application for reconsideration in s 18(1) does not necessarily assume significance. The remedy afforded to an unsuccessful litigant under s 17(2)*(b)* who seeks relief from the Court as a matter of last resort is still one aimed at securing a variation of the decision of the two (or three) judges who refused leave to appeal under s 17(2)*(b)*. Therefore, in principle this is no different from a situation where a litigant who is dissatisfied with an adverse decision made under s 17(2)*(a)* would, as a result of such adverse decision, approach this Court on petition in terms of s 17(2)*(b)*.

[87] As already mentioned, in *Nquthu Municipality*, Moodley AJ came to a different conclusion to that reached in *Business Connexion* in which Aucamp AJ had decided to the contrary. The *ratio decidendi* in *Nquthu Municipality* was expressed in the following terms:

'It follows from what has been stated above in *Liesching*, the proviso in s 17 (2) (f) is a deviation from the ordinary appeal process. Ordinarily under section 18 (1) subject to sub-sections (2) and (3), and unless the court, under exceptional circumstances, orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal. Sub-section (2) does not suspend the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment which is the subject matter of an application for leave

to appeal or of an appeal unless the court, under exceptional circumstances, orders otherwise. Importantly, section 18 does not deal with what effect an application against the refusal of a petition to the Supreme Court of Appeal will have on an order granted by a lower court which order was the subject matter of the petition. If the Legislature intended that such an order would be suspended pending the outcome of the reconsideration application, one would have expected it to make provision for this in the Act. It did not do so. In my view and based on the observations referred to above in *Liesching* the refusal of the petition was a final determination of the application for leave to appeal against the order granted by Gorven J which refusal revived the operation and execution of his order. I am fortified in this view when one considers the wording of section 17 (2) (f) contextually within the framework of the Act and the ordinary grammatical meaning of the word final. The Merriam Webster dictionary defines the word "final" as: "not to be altered or undone"; "of or relating to a concluding court action or proceeding"; "coming at the end: being the last in a series, process, or progress".
Accordingly, I am of the view that the refusal of the petition to the Supreme Court of Appeal brought the appeal process to an end and the application for reconsideration of such refusal does not suspend the order granted by Gorven J.'[73]

[88] The learned judge proceeded to refer to s 18(1) of the Act which he believed reinforced his underlying reasoning and stated the following:
'*Another point which I believe is supportive of the view which I take in this matter is that under section 18 (1) the operation and execution of an order would be suspended only if the court orders otherwise. In other words, the order would not be suspended merely on the bringing of an application to suspend such order. In order to attain the suspension of the order there has to be an order from the court.* Similarly with respect to the proviso in s 17 (2) (f), an application for a reconsideration of the refusal of a petition against the order granted would of itself not suspend the operation of the order. The President would have to rule on the matter and until such ruling is made and even if the proviso to s 17 (2) (f) (a) contemplated a suspension of the order (which for reasons mentioned above, I do not think it does), the order would not be suspended until a favourable decision to the applicant is pronounced on the reconsideration of the petition.'[74] (Our emphasis.)

[89] At first blush there appears to be force in this reasoning. However, upon close scrutiny it seems to us that there are fundamental considerations which tend to detract from the apparent force of the learned judge's reasoning. As will have been seen from

[73] *Nquthu Municipality* fn 5 above para 32.
[74] Ibid para 33.

the passage quoted from the *Nquthu Municipality* judgment in paragraph 87 above in which the learned judge held that 'under section 18(1) the operation and execution of an order would be suspended *only if the court orders otherwise'*. (Our emphasis) However, this statement by the learned judge is, with respect, not borne out by the language of s 18(1) which explicitly says the opposite. In our view, there are only two situations in which the court may in terms of s 18(1) 'under exceptional circumstances' order otherwise. First, the court would do so 'if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order, whereas the other party 'will not suffer irreparable harm if the court so orders'.[75] In the second place, as provided for in s 18(2) of the Act, interlocutory orders not having the effect of a final judgment, 'which [are] the subject of an application for leave to appeal' are not automatically suspended pending the decision of such an application or appeal. As decreed by s 18(2) itself, the operation and execution of interlocutory orders of the kind identified is not automatically suspended following either the lodgement of an application for leave to appeal or of an appeal save where the Court orders otherwise.

[90] Further, it was stated that *'the order would not be suspended merely on the bringing of an application to suspend such order. In order to attain the suspension of the order there has to be an order from the court'.* Based on his understanding of how s 18(1) must be construed, the learned judge proceeded to state that on the same basis the proviso to s 17(2)*(f)* must then mean that 'an application for a reconsideration of the refusal of a petition against the order granted would *of itself not suspend the operation of the order*', this being a reference to the decision made under s 17(2)*(b)*. (Our emphasis.) The inevitable consequence of this, so said the learned judge, was that the s 17(2)*(b)* unfavourable decision, in this instance, would not be suspended *'until a favourable decision to the applicant is pronounced on the reconsideration of the petition'*.

[91] What s 18(1) does, on the contrary, is to expressly provide that 'the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal unless

[75] See s 18(3) of the Act.

the court under exceptional circumstances orders otherwise subject to subsections (2) and (3) of s 18. Read contextually and purposively, as s 18(1) must be, and paying due regard to its wording, the court would only order otherwise if, for example, the successful litigant in the high court has sought to enforce the judgment of the court notwithstanding the lodgement of an application for leave to appeal or of an appeal. Thus, the default position is that by simple operation of the law 'the operation and execution' of a decision of the high court is, in the ordinary course, temporarily halted for as long as there is a process underway to have such decision overturned.

[92] However, in the event that the successful party in the high court seeks to enforce the judgment notwithstanding the appeal process, the court may, in terms of s 18(3), deviate from the default position and order otherwise albeit only under exceptional circumstances. It is only in relation to interlocutory orders that do 'not have the effect of a final judgment' whose operation and execution is not suspended pending the decision of an application for leave to appeal or of an appeal unless, again, the high court in exceptional circumstances orders otherwise which finds no application in this case.

[93] What falls to be decided by this Court in this appeal is, as alluded to above, whether an application for reconsideration brought in terms of the proviso to s 17(2)*(f)* falls within the purview of s 18(1) in the light of the discordant decisions of the Gauteng Division of the High Court on the one hand and that of the Kwa-Zulu Natal Division on the other. As rightly noted by this Court in *Ntlemeza,* s 18(1) suspends, but does not nullify, the operation and execution of a judgment or order being appealed. This is the default position. The rationale for this statutory provision is 'to protect the rights of litigants…by ensuring that, in the ordinary course, the orders granted against them are suspended whilst they are in the process of attempting, by way of the appeal process, to have them overturned'.

[94] The proviso to s 17(2)*(f)* of the Act creates a special statutory dispensation in terms whereof, for example, unsuccessful litigants whose applications for leave to appeal on petition to this Court under s 17(2)*(b)* have been dismissed to approach the President to 'throw them a lifeline' in their quest to secure leave to appeal. This, the President may do only if he or she is satisfied that exceptional circumstances exist, in

which event the President would refer the decision of the two (or three) Judges of this Court under s 17(2)*(b)* – which is ordinarily final – to the Court for reconsideration and, if necessary, variation. But, if on the other hand the President finds that no exceptional circumstances exist such an outcome would signify the 'end of the road' for an unsuccessful litigant on available appeal avenues in this Court. Put differently, unsuccessful litigants will accordingly have exhausted their appeal avenues to have the judgment and order sought to be appealed against overturned.

[95] However, as already mentioned, once the President is satisfied that a proper case has been made out under the proviso in s 17(2)*(f)* she would refer the decision refusing (or granting) leave to appeal to the court for reconsideration. Such a favourable decision would then reopen the court's door to a dissatisfied litigant to pursue his or her or its desire to have another proverbial third bite at the cherry. On this score what *Liesching I*[76] tells us bears repeating. There, the Constitutional Court made the following instructive remarks:

'The proviso in section 17(2)*(f)* is broad. It keeps the door of justice ajar in order to cure errors or mistakes and for the consideration of a circumstance, which, if it 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.[77]

[96] Once the application for reconsideration reaches the court to which the decision has been referred, the members of the bench concerned will 'step into the shoes of the two (or three) Judges' who made the decision subject to reconsideration by the Court. It would then be open to the Court, if it is satisfied on reconsideration of the decision, that there would be a reasonable prospect of success in the envisaged appeal or there is some other compelling reason why an appeal should be heard, to vary the order refusing leave, by granting leave. Thereafter, the court would enter into the substantive merits of the appeal and determine the appeal itself. If the appeal succeeds, as has happened in several cases in the past, the judgment appealed against would be overturned.

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[76] *Liesching I* fn 40 above.
[77] Ibid para 54.

[97] We have, in paragraph 67 above, already dealt with what the manifest purpose that s 18(1) is designed to serve. This then begs the following question. If the remedial statutory dispensation created in terms of the proviso in s 17(2)*(f)* does not provide for an additional avenue in the appeal process, would such a construction of the proviso not result in the very prejudice that s 18(1) is designed to prevent, ie operation and execution of the judgment and order that is subsequently reversed on appeal. And this situation would be exacerbated in circumstances where the successful party on appeal can no longer be put back to its position prior to execution purely because the initial successful litigant was allowed to execute the judgment or order in circumstances where its reversal remained a possibility – because there was a pending application for reconsideration under the proviso in s 17(2)*(f)* – should this ultimately be the outcome of the reconsideration application.

[98] In the light of the foregoing reasons we are driven to conclude that although an application for reconsideration in terms of the proviso to s 17(2)*(f)* is not explicitly mentioned in s 18(1) of the Act, such application is nevertheless, on a contextual and purposive interpretation of s 18(1) read with the proviso to s 17(2)*(f)* – and for reasons articulated above – also encompassed by s 18(1) because, after all, it is an integral part of the appeal process. Accordingly, we are impelled to conclude that the view expressed in *Business Connexion* and followed by Bester AJ in the high court in this case should prevail, and not the contrary one expressed by Moodley AJ in *Nquthu Municipality*. Thus, to the extent that the latter decision held that s 18(1) finds no application to an application for the reconsideration of the decision made under s 17(2)*(b)* in terms of the proviso in s 17(2)*(f)*, it is wrong and, in the result, it is overruled.

**Conclusion**

[99] It is to be noted that a decision of two judges (or three) made under paragraph *(b)* is susceptible to reconsideration in terms of the proviso in s 17(2)*(f)*. In contrast, in circumstances where two judges designated by the President to consider a petition under s 17(2)*(b)* are of the opinion that circumstances so require, they may refer the petition to the court for consideration in terms of s 17(2)*(d)*. In that event, the court ‘may thereupon grant or refuse’ such application. It is significant to note that a petition referred to the court for consideration under s 17(2)*(d)* is, once adjudicated by the court, not subject to reconsideration in terms of the proviso. The obvious consequence

of this distinction is that an outcome of an application for leave to appeal considered and refused by the court under s 17(2)*(d)* will spell the end of the road for an unsuccessful litigant in this Court. The proviso in s 17(2)*(f)* would find no application. But not so, if the application is, for example, instead refused by two judges (or three judges, as the case may be) to whom such application was assigned by the President. In the latter situation, the unsuccessful litigant is thrown a useful lifeline in terms of the proviso in s 17(2)*(f)* to pursue its quest for leave to appeal.

[100] Significantly, at a practical level an application brought in terms of the proviso is to all intents and purposes still an application for leave to appeal, albeit that it would be incumbent on an applicant for reconsideration to satisfy the stringent requirements stipulated by the proviso. As was noted in *Liesching I*[78] one of the ways of meeting the threshold would be to establish, for example, that there is 'a circumstance, which if it were known at the time of the consideration of the petition, might have yielded a different result'. This would include 'new or further evidence that has come to light or become known after the petition had been considered and determined'. And, as *Cloete* decrees, when the President exercises the power under the proviso to s 17(2)*(f)* and refers a decision taken under s 17(2)*(b)* to the court for reconsideration, she does so in order for 'a further decision [to] be taken by [the Court] upon reconsideration. That further decision might also result in the decision under s 17(2)*(b)* being varied'. This means that if such a decision was, for example, a refusal of the petition as in this instance, a variation thereof would result in leave to appeal being granted.

[101] Accordingly, the proviso in s 17(2)*(f)* is a statutorily ordained mechanism in terms of which the decision made under s 17(2)*(b)* may be reconsidered either at the instance of a litigant dissatisfied with such decision or the President of his or her own accord. However, it bears emphasising that this remedial device avails only in circumstances where a grave failure of justice would otherwise result or the administration of justice would be brought into disrepute if the s 17(2)*(b)* decision is not reconsidered. Seen in this light, it follows from the general tenor of s 17 itself that if leave to appeal is refused under s 17(2)*(a)* the unsuccessful litigant may pursue its quest for leave to appeal under s 17(2)*(b)* by petitioning this Court. If that process does

[78] *Liesching I* fn 41 above para 54.

not yield a favourable outcome, the litigant may, as a last resort, invoke the proviso in s 17(2)*(f)* provided, of course, that such litigant meets the stringent requirements stipulated in the proviso itself and therefore secure a reconsideration of the s 17(2)*(b)* decision. And, if the court finds that this is warranted, it would vary the decision made in terms of s 17(2)*(b)*.

[102] We are fortified in this view by the very fact that the proviso itself explicitly empowers the President to 'refer the decision to the court for reconsideration and, if necessary, variation'. And in the context of s 17(2)*(f)* the decision concerned is the one referred to in paragraph *(b)* which pertains to an application for leave to appeal previously refused by the high court under s 17(2)*(a)* of the Act. This therefore means that s 17(2) of the Act contemplates three successive steps that a litigant seeking to have an unfavourable decision overturned, by way of the appeal process, may alternatively first invoke paragraph *(a)* or, if this does not yield the desired result, paragraph *(b)* and, failing this, the proviso in s 17(2)*(f)*, all of which may successively be pursued in order to secure a favourable outcome in the appeal process.

[103] That the legislature did not mention the proviso located in s 17(2)*(f)* in s 18(2) is not something we consider curious. This is because although s 18(1) does not explicitly refer to an application for reconsideration, it would have put matters beyond doubt, had it done so. However, that no such reference has been made in s 18(1) does not detract from our reasoning that having regard to the overall framework of the Act and the overarching scheme of s 17 in particular, read holistically, contextually and purposefully, an application for reconsideration, which is after all still in pursuit of a litigant's quest to have the s 17(2)*(b)* decision reconsidered and, if necessary, varied, too, falls within the purview of s 18(1) of the Act.

[104] In our view, the conclusion to which we have come has by no means been winkled from contextual crevices in the text of s 17 of the Act. Nor have we, in frontally confronting the conundrum created by s 18(1), prematurely seized an 'exhilarating

opportunity of anticipating a [principle] which may [still] be in the womb of time, but whose birth is distant'.[79]

**Costs**

[105] Before making the order, it remains to say something about the question of costs. As indicated above, the first respondent did not participate in the appeal presumably because it had already vacated the leased premises when its sub-lease was terminated. Moreover, the appellant itself did not seek costs against the first respondent in the event of the appeal succeeding. However, the conclusion to which we have arrived is that the appeal falls to be dismissed, which is not what the appellant had hoped for. Since the first respondent elected to remain supine and did not participate in the appeal it can safely be assumed that it has not incurred any costs relative to the appeal. Thus, no costs order shall be made.

**Order**

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

The appeal is dismissed with no order as to costs.

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X M PETSE

ACTING JUDGE OF APPEAL

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D V DLODLO

ACTING JUDGE OF APPEAL

[79] See, in this regard, the remarks of Learned Hand J in *Spector Motor Service, Inc. v. Walsh*, 139 F.2d 809 (2d Cir. 1944) at 823.

**Appearances:**

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| For the Appellant: | J J Nepgen SC with J Beckett and M Erasmus |
| Instructed by: | Padgens Inc., Gqeberha |
| | Honey Attorneys, Bloemfontein |
| For the respondent: | None |
| Instructed by: | None |

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