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

**Not Reportable**
Case no: 447/2024

In the matter between:

**MARY FISHER** **FIRST APPLICANT**

**PUSO FISHER** **SECOND APPLICANT**

and

**THE SILVERBIRCH ESTATE HOMEOWNERS' ASSOCIATION (NPC) (REG NO: 2005/003035/08)** **FIRST RESPONDENT**

**JOHANNES JOCHIMUS HEYNEKE** **SECOND RESPONDENT**

**AVRIL COUNTER** **THIRD RESPONDENT**

**THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION (CIPC)** **FOURTH RESPONDENT**

**KELEBOGILE NTSANE** **FIFTH RESPONDENT**

**Neutral citation:** *Mary Fisher and Another v The Silverbirch Estate Homeowners' Association (NPC) and Others* (447/2024) [2026] ZASCA 69 (13 May 2026)

**Coram:** MOCUMIE, GOOSEN and MOLEFE JJA and CLOETE and OPPERMAN AJJA

**Heard**: 19 November 2025

**Delivered**: 13 May 2026.

**Summary:** Reconsideration application – s 17(2)*(f)* Superior Courts Act 10 of 2013 – application for reconsideration of refusal of petition for leave to appeal – Companies Act 71 of 2008 – amending the Companies and Intellectual Property Commission's records to reflect the correct status of directors – Community Schemes Ombud Service Act 9 of 2011 – jurisdiction of the Community Schemes Ombud Service – whether grounds for reconsideration and for granting leave to appeal established.

## ORDER

**On application for reconsideration**: Referral of decision to refuse leave to appeal, in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013:

1. The first and second respondents shall pay the first applicant's costs (if any) incurred as a result of their application for condonation for the late filing of their heads of argument.
2. Save as aforesaid, the application for reconsideration is struck from the roll with costs, such costs to be paid by the first applicant.

## JUDGMENT

**Cloete AJA:**

### Introduction

[1] This is an application, pursuant to s 17(2)*(f)* of the Superior Courts Act 10 of 2013 (the Superior Courts Act), for the reconsideration and, if necessary, variation of the order of two judges of this Court refusing the applicants' petition for special leave to appeal. The parties were also directed to present oral argument on the appeal, should that be required.

[2] Before dealing with the s 17(2)*(f)* application, there was an application for the condonation of the late filing of heads of argument by the first respondent, the Silverbirch Estate Homeowners' Association (SEHA) and the second respondent, Mr Johannes Jochimus Heyneke (Mr Heyneke). Upon reflection and after the

interaction between the bench and counsel for the first and second respondents, Mr Kruger, for these respondents, tendered costs on their behalf. Ms Mary Fisher, Snr (Ms Fisher, Snr), the first applicant and mother of the second applicant, Ms Puso Fisher (Ms Fisher, Jnr) withdrew her opposition to the application. Heads of argument are prepared primarily for the benefit of the Court and there was no prejudice to Ms Fisher, Snr, nor to Ms Fisher, Jnr. Condonation was accordingly granted.

[3] Reverting to the s 17(2)*(f)* application, the dispute between Ms Fisher, Snr and Ms Fisher, Jnr respectively, on the one hand, and SEHA and Mr Heyneke on the other, has a long and somewhat tortuous history. Unless otherwise indicated, SEHA and Mr Heyneke are collectively referred to as the 'respondents'. The third, fourth and fifth respondents, who are the Companies and Intellectual Property Commission (the CIPC), Ms Avril Counter (Ms Counter) and Mr Kelebogile Ntsane (Mr Ntsane) respectively, did not participate in the litigation. They are cited merely because of their interest in the matter.

[4] The dispute gained traction during 2020 when, according to the respondents, Ms Fisher, Snr took unauthorised steps to have the records of the CIPC amended to reflect herself, Ms Counter, and Mr Ntsane as directors of SEHA, and thereafter, with the assistance of Ms Fisher, Jnr, took control of the SEHA board without authorisation or through proper processes provided for under the Constitution of SEHA. This was hotly disputed by Ms Fisher, Snr and Ms Fisher, Jnr who maintained that Ms Fisher, Snr, was lawfully appointed as director (along with Ms Counter and Mr Ntsane), and that Ms Fisher, Jnr, at no stage 'held herself out' as a SEHA board member.

[5] Ancillary disputes pertained to whether Ms Fisher, Snr and Ms Fisher, Jnr, who are co-owners of a residential unit in the Silverbirch Estate (of which SEHA

is its homeowners' association) have accumulated arrear unpaid levies of an amount in excess of R1 million, whether Mr Heyneke was lawfully appointed as a board member and chairman of SEHA at the height of the dispute, and whether he caused prejudice to members of SEHA during his tenure.

[6] On 13 August 2021, Mr Heyneke, purporting to act on behalf of the respondents, launched an application in the Gauteng Division of the High Court, Pretoria (the high court) to have the names of Ms Fisher, Snr, Ms Counter and Mr Ntsane removed from the CIPC records, and substituted with those of Mr Heyneke and two others whom, it was claimed, were the lawfully appointed SEHA board members at the time. Although Ms Fisher, Jnr was cited as one of the respondents in the high court, no relief was sought against her.

[7] In addition to opposing the application on its merits and raising various technical defences, Ms Fisher, Snr and Ms Fisher, Jnr brought two interlocutory applications, one in terms of s 165(5) of the Companies Act 71 of 2008 (Companies Act),[1] and the other in terms of rule 6(15) of the Uniform Rules of Court.[2] They also launched a counter-application for what, in essence, pertained to payment, or repayment, by Mr Heyneke of certain expenses allegedly incurred, production of financial information pertaining to SEHA's management, and the retraction of an instruction by Mr Heyneke to a short-term insurance company in respect of SEHA.

[1] Section 165(5) of Companies Act 71 of 2008 deals with an application to court pursuant to a demand made to a company in terms of s 165(2), for leave to bring or continue proceedings on behalf of a company, ie. the so-called derivative action.

[2] Rule 6(15) provides: 'The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted.'

[8] The high court (per Molotsi AJ) found in favour of the respondents and made certain adverse credibility findings against Ms Fisher, Snr, who was also ordered to pay costs. Understandably, no order was made against Ms Fisher, Jnr, given that none had been sought. The high court subsequently refused Ms Fisher, Snr, leave to appeal against its order. Following an unsuccessful petition for special leave to appeal to this Court in terms of s 17(2)*(b)* of the Superior Courts Act (the petition order), Ms Fisher, Snr and Ms Fisher, Jnr succeeded in securing an audience for purposes of reconsideration in terms of s 17(2)*(f)* of the same Act. It should be noted however that Ms Fisher, Jnr was not entitled to have petitioned this Court for special leave to appeal, since no order had been made against her by the high court, and by extension there was no jurisdiction to grant her any s17(2*)(f)* relief.

**Consideration of s 17(2)*(f)* and its application to the facts**

[9] The s 17(2)*(f)* order was granted on 15 July 2024, and therefore after the amendment to that subsection on 3 April 2024.[3] Ms Fisher, Snr was required to demonstrate to this Court that, if the petition order is not varied, a grave failure of justice would otherwise result, or the administration of justice may be brought into disrepute.[4] In *Tarentaal Centre Investments (Pty) Ltd and Another v Beneficio Developments (Pty) Ltd* [5] (*Tarentaal Centre*) it was held that these two elements (or requirements) fall within the scope of what our jurisprudence, prior to the amendment, referred to as 'exceptional circumstances'. As will appear below, Ms Fisher, Snr, relied on the 'grave failure of justice' element.

[3] It was amended by s 28 of the Judicial Matters Amendment Act 15 of 2023.
[4] See, inter alia, *Groundswell Developments Africa (Pty) Ltd and Others v Brown* [2025] ZASCA 170; [2026] 1 All SA 12 (SCA); 2026 JDR 0073 (SCA) para 42.
[5] *Tarentaal Centre Investments (Pty) Ltd and Another v Beneficio Developments (Pty) Ltd* [2025] ZASCA 38; 2025 JDR 1461 (SCA) para 4 (*Tarentaal*).

[10] In *Road Accident Fund & Others v Mautla and Others*[6] (*Mautla*), after dealing extensively with the decision of the Constitutional Court in *Godloza v S*,[7] it was held that the approach in *Motsoeneng v South African Broadcasting Corporation*[8] (which was followed in *Bidvest Protea Coin Security (Pty) Ltd* [9] (*Bidvest*) remains binding on this Court.[10] It involves a two-stage enquiry. First, an applicant must demonstrate the existence of at least one of the elements or requirements. Second, only if the applicant succeeds in doing so may the Court move on to the next stage, namely a determination of whether the refusal to grant leave on petition should be reconsidered.

[11] Subsequent to *Mautla,* a three member bench of this Court in *4 Seasons Logistics CC v Kgotse*[11] (*4 Seasons*) adopted the opposite view. The substantive effect of this judgment is addressed in the judgment of my colleague, Goosen JA. I agree with his treatment of *4 Seasons.* For present purposes, *4 Seasons* held that the power to determine whether one or both of the elements in s 17(2)*(f)* resides exclusively within the discretion of the President of this Court, and not the court to which she refers the application for reconsideration. The decisions in *Matsi and Another v South African Legal Practice Council (Gauteng Province)*[12] (*Matsi*), *Lutzkie v Commissioner for the South African Revenue Service*[13] (*Lutzkie*) and *Road Accident Fund v Newnet Properties (Pty) Ltd t/as Sunshine*

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[6] *Road Accident Fund & Others v Mautla & Others* [2025] ZASCA 200; 2025 JDR 5385 (SCA) paras 12-20.
[7] *Godloza and Another v S* [2025] ZACC 24; 2025 (12) BCLR 1349 (CC); 2026 (1) SACR 113 (CC) (*Godloza*).
[8] *Motsoeneng v South African Broadcasting Corporation Soc Ltd and Others* [2024] ZASCA 80; 2025 (4) SA 122 (SCA) (*Motsoeneng*).
[99] *Bidvest Protea Security (Pty) Ltd v Mabena* [2025] ZASCA 23; 2025 (3) SA 362 (SCA) (*Bidvest*).
[10] See also *Deon Smith and Others v Sasfin Bank and Another* (507/2024) [2025] ZASCA 198 (19 December 2025). Cf *J.M.M and Another v Cara Dorothy Masureik and Others* (807/2024) [2026] ZASCA 1 (8 January 2026); *Caledon River Properties (Pty) Ltd v Special Investigating Unit and Another* [2026] ZASCA 5; 2026 JDR 0383 (SCA); *Pick 'n Pay Retailers (Pty) Ltd v Williams and Another* [2026] ZASCA 7; 2026 JDR 0508 (SCA); *4 Seasons Logistics CC v Kgotse* [2026] ZASCA 9; 2026 JDR 0646.
[11] Fn 9 supra.
[12] *Matsi and Another v South African Legal Practice Council (Gauteng Province)* [2026] ZASCA 12; 2026 JDR 0649 (SCA).
[13] *Lutzkie v Commissioner for the South African Revenue Service* [2026] ZASCA 11 (6 February 2026).

*Hospital and Another*[14](*Newnet*), by the same appeal panel, all to the same effect, were handed down shortly thereafter. In *4 Seasons* the Court's view was that its approach would put an end to the debate on how s 17(2)*(f)* should be applied.

[12] In the very recent decision of *Luphondo v S* [15] (*Luphondo*), an appeal panel of five members considered the 'horizontal' binding effect of the decision of a three-member appeal panel. After a detailed analysis, it concluded that:

'…when there is disagreement between a smaller bench and a larger one…the judgment of the smaller bench yields to the larger bench, and the latter is the binding authority in this Court. It is not about which one is the latest …[a]ccordingly, to maintain judicial coherence, I conclude that until *Motsoeneng* and *Bidvest* are authoritatively overruled by either the Constitutional Court, an equally constituted five-panel bench, or a (preferably) larger panel, they remain binding authority in this Court. Whether that should no longer be the position will be determined only when an opportunity arises for an authoritative and definitive pronouncement on the recent divergent views.'[16]

[13] In light of the judgment in *Luphondo*, the continued binding effect of *Motsoeneng* and *Bidvest*, as well as *Schoeman*, which is referred to in the separate judgments of Mocumie JA and Goosen JA, is settled. Returning to the facts before us, Ms Fisher, Snr, submitted that circumstances demonstrating that she will suffer grave injustice, as contemplated in the subsection, are the following: (a) the high court pre-empted the outcome, refused her the opportunity to procure legal representation at leave to appeal stage, and thus denied her a fair hearing; (b) it applied the law incorrectly and/or inconsistently, making it necessary for this Court to determine what she considers to be an important question of law relating to s 64 of the Companies Act;[17] (c) it misinterpreted the relevant

[14] *Road Accident Fund v Newnet Properties (Pty) Ltd t/as Sunshine Hospital and Another* [2026] ZASCA 15; 2026 JDR 0714 (SCA).
[15] *Luphondo v S* [2026] ZASCA 24 paras 38-62.
[16] Ibid paras 61-62.
[17] Section 64 deals with meeting quorum and adjournment requirements for shareholders meetings.

provisions of SEHA's memorandum and articles of association; (d) it erred in failing to refer, at least, the directorship dispute to oral evidence; (e) it erred in failing to uphold two of her technical defences, one pertaining to rule 7 of the Uniform Rules of Court[18] and the other in respect of the Community Schemes Ombud Service Act;[19] and (f) it introduced its own facts to make adverse credibility findings against her.

[14] However, in her founding affidavit in the reconsideration application, Ms Fisher, Snr did not disclose that she (together with Ms Counter and Mr Ntsane) had already resigned as 'directors' of SEHA on 16 March 2024, which was already four days prior to the handing down of the petition order on 20 March 2024, and thus before the reconsideration application was even brought. This significant fact only emerged in her replying affidavit, which was accompanied by minutes of a homeowners' meeting of SEHA confirming this, attached as an annexure thereto.

[15] An appeal lies against the order of the high court. It seeks to set aside that order and replace it with one that provides a different determination of the underlying dispute. As already stated, we are required to decide, as a first step, whether a grave injustice would result if we do not set aside the petition order. The belated disclosure by Ms Fisher, Snr, that she had already resigned from her directorship of SEHA, even prior to the petition order being handed down, impacts directly on this issue.

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[18] Uniform Rules of Court, Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa, GN 48, *GG* 999, 12 January 1965. Rule 7 deals with power of attorney, namely authority to act.

[19] Community Schemes Ombud Service Act 9 of 2011. Section 64 deals with meeting *quora* and adjournment requirements for shareholders meetings.

[16] Section 16(2)*(a)*(i) of the Superior Courts Act provides that:

'When at the hearing of an appeal the issues are of such a nature that the decision sought to be appealed will have no practical effect or result, the appeal may be dismissed on this ground alone.'

[17] The high court's order reads as follows:

'1. The fourth respondent [CIPC] is ordered to immediately remove the names of the first, third and fifth respondents [Ms Fisher, Snr, Ms Counter and Mr Ntsane respectively] as directors of the first Applicant [SEHA] from its records.

2. The fourth respondent is ordered to immediately insert the name of the second Applicant [Mr Heyneke] as a director of the first applicant in its records.

3. The first, second and third respondents' application in terms of section 165 of the Companies Act 71 of 2008 and application in terms of Rule 6(15) of the Uniform Rules is dismissed with costs.

4. The first respondent is ordered to pay the costs of the Applicants.'

[18] Ms Fisher, Snr did not seek leave to appeal against para 3 of the above-mentioned order, nor did she challenge the high court's implicit dismissal of her counter-application. Accordingly, should the threshold requirements in s 17(2)*(f)* be met, the only orders which are the subject of the application for leave to appeal, are those contained in paras 1 and 2.[20]

[19] Both these orders relate specifically to which of the purported directors of SEHA should be reflected in the records of the CIPC. On this score, it bears emphasis that the issue before the high court was *not* about who the actual, lawfully appointed directors were, since no relief was sought by any of the parties in that regard. As a matter of law, a declaration of that nature was a necessary

[20] Section 16(2)*(a)*(ii) of the Superior Courts Act provides that: 'Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.' Ms Fisher, Snr did not suggest that, in this sense, exceptional circumstances are present.

precursor to the external manifestation of such lawful appointment(s) in the CIPC records.

[20] Thus, even if it is assumed in Ms Fisher, Snr's favour that the grounds advanced in her founding affidavit in the reconsideration application justify a conclusion that a grave injustice would result if the order refusing leave to appeal is not reconsidered, the appeal she wishes to prosecute is nonetheless hit by s16(2)*(a)*(i) for the following reasons. First, as a matter of fact, Ms Fisher, Snr resigned as a director of SEHA (as did Ms Counter and Mr Ntsane) even before the petition order was handed down. Second, flowing from this, the name of Ms Fisher, Snr cannot, as a matter of law, be reflected in the CIPC records, irrespective of the merits or otherwise of her case. It should also be mentioned that, whilst Ms Fisher, Snr claims personal reputational harm as a result of the adverse credibility findings made by the high court against her, an appeal lies against the order, and not the reasoning or findings, of a court.[21]

[21] Accordingly, if Ms Fisher, Snr were to succeed in obtaining leave to appeal before us, this Court would, in adjudicating the appeal, be entitled to dismiss it on the basis of s 16(2)*(a)*(i) alone. The existence of facts which render the subsection applicable at the appeal stage entitles a court, when considering whether to grant leave to appeal, to refuse it. I accept that despite a matter being moot, an appeal court is entitled to consider the appeal under certain circumstances. That is not the case advanced in this Court and certainly not the pleaded one, having regard to the fact that the resignation was revealed only in an annexure to the replying affidavit.

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[21] *Absa Bank Ltd v Mkhize and two similar cases* [2013] ZASCA 139; [2014] 1 All SA 1 (SCA); 2014 (5) SA 16 (SCA) para 64. See also *Neotel (Pty) Ltd v Telkom SOC Ltd and Others* (605/2016) [2017] ZASCA 47 (31 March 2017) paras 22-24.

[22] It may well be the case that if an appeal is academic and no practical legal effect would accordingly flow from an order on appeal, the requirements of s17(2)*(f)*, and thus the jurisdictional threshold, will also not be met. I have noted that in *Luphondo*, after finding that the jurisdictional threshold (under different circumstances) had not been met, the Court dismissed the application for reconsideration instead of striking it from the roll. Goosen JA deals with why he is of the view that in *Luphondo*, an order striking the application from the roll, rather than dismissing it, would have been the correct one to make. Without expressing any firm view, in the interests of finalising this judgment, I am agreeable to the order proposed by Goosen JA.

[23] I would therefore propose the following order:

1. The first and second respondents shall pay the first applicant's costs (if any) incurred as a result of their application for condonation for the late filing of their heads of argument.
2. Save as aforesaid, the application for reconsideration is struck from the roll with costs, such costs to be paid by the first applicant.

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J CLOETE

ACTING JUDGE OF APPEAL

**MOCUMIE JA (MOLEFE JA concurring)**

[24] I have read and considered the first judgment of my colleague, Cloete AJA. I agree with her summary of the facts. Thus, I will not traverse the same. However, I disagree with her exposition of the law regarding the approach this Court must adopt when dealing with an application in terms of s 17(2)*(f)* of the Superior Courts Act,[22] and the order that ought to be granted in these circumstances once the President has set it down for hearing before three or five judges of this Court for reconsideration, after two colleagues in this Court dismissed the application on petition.

[25] As the first judgment states in para 9, the core issue before this Court is whether a grave injustice would result if we do not set aside the petition order. In other words, and at a very rudimentary level, the question is whether, now that the record has been filed as directed by the President, and stepping into the shoes of the two colleagues to reconsider the high court's judgment and order refusing leave to appeal, were the two colleagues correct to have dismissed the application for leave to appeal on petition? And, if necessary, varying that order of the two colleagues in respect of what was brought before this Court on petition.

[26] This Court in *Joan Marie Muller and Another v Cara Dorothy Masureik and Others*[23] (*Muller*) delivered on 08 January 2026, after the judgment Cloete AJA references above in fn 10,[24] espouses the following on the essence of the threshold of s17(2)*(f)* in its current form, which is opportune to quote:

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

[23] *Joan Marie Muller and Another v Cara Dorothy Masureik and Others* (807/2024) [2026] ZASCA 01 (08 January 2026) para 16 (*Muller*).

[24] *Mautla* fn 6 above.

'The threshold set in s 17(2)*(f)* of the Superior Courts Act is crucial in this type of application. The section was amended on 3 April 2024, and because the application for reconsideration was lodged after that date, the amended provision governs the present case. Prior to its amendment, s 17(2)*(f)* required the President of this Court to be satisfied that "exceptional circumstances" existed before referring a matter for reconsideration. Under the amended provision, however, the threshold has been reformulated: the President may now refer the matter for reconsideration only "where a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute".[25] The standard required is thus no longer one of mere exceptionality, but of grave injustice or a threat to the integrity of the judicial process.'

[27] As is trite, the matter is then placed before a full court of this Court, which may be three or five judges, depending on the President's prerogative, to reconsider the decision of the two colleagues before whom it served first and was dismissed. The approach adopted by various panels of this Court to these applications, however, has varied over time, resulting in inconsistency.

[28] Without stretching the point unnecessarily, this Court in *4 Seasons*[26] delivered on 04 February 2026, after this matter was heard, reflected on all the recent majority judgments that held a contrary view to the approach and enquiry in these matters. It concluded as follows at paras 53 to 55:

'To my mind, a referral in terms of the proviso to s 17(2)*(f)* begins and ends with what has been classified as the second stage that "involves the question of whether the applicant has satisfied the Court that grounds exist for interfering with the petition order refusing leave to appeal".[27] As propounded in *Motsoeneng*, the court to which the President has referred the decision made under s 17(2)*(b)* effectively "steps into the shoes of the judges who made the decision" and determines whether leave to appeal should have been granted or refused, as the case may be.

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[25] *Tarentaal* op cit fn 5 para 4.
[26] *4 Seasons* fn 10 above, penned by former justice and Deputy President of this Court, now on retirement and acting in this Court, Petse AJA, with whom Mbha and Dlodlo AJJA concur. See also *Pick n Pay Retailers (Pty)Ltd v Williams and Another* (238/2024) [2026] ZASCA 7 (26 January 2026) and the minority judgment in *Godloza*, fn 7 above, paras 144-146.
[27] See, in this regard: *J.M.M and Another v Cara Dorothy Masureik and Others* [2026] ZASCA 1 para 47.

In the event the court comes to the conclusion that the decision under s 17(2)*(b)* cannot, in the context of the facts of a given case, be faulted such decision would stand. If not, the court would, for example, grant leave where leave was, in its view, erroneously refused. Thereafter, the court would ordinarily determine the merits of the appeal itself.

However, what requires to be emphasised is that if and when the President refers the decision made under s 17(2)*(b)* to the court for reconsideration in circumstances where either no exceptional circumstances existed or no grave failure of justice would otherwise result or the administration of justice would not be brought into disrepute if such decision is not reconsidered, the President's erroneous view of the matter cannot endow the court to which she or he has referred the decision for reconsideration with legal competence to revisit the referral decision of the President, an issue already determined by the President herself in whose exclusive domain, after all, the power and discretion vest. This is because, as already mentioned, what the President refers to the Court for reconsideration and, if necessary, variation is only the decision made under s 17(2)*(b)*, nothing more.

Accordingly, in my view, there is much to be said for the contrary views expressed in the minority judgments in both *Lorenzi* and *Schoeman*. *Schoeman* emphasised, just as *Lorenzi* before it had pretty much in a similar vein held, that the 'subject of the referral is the original decision [ie the decision of the two or three judges refusing or granting leave], not the President's reasons for the referral. The *Bidvest* interpretation conflates these two steps, effectively requiring the Court to perform the President's function. It is "clearly wrong" and warrants departure.'[28]

[29] It is apposite to re-quote s 17(2)*(f)* which is quoted at fn 22 in this judgment, for emphasis on what I believe *'the court'* means. The section provides: 'The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of *the court*, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may, in circumstances where a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute, whether of his or her own accord or on application filed within one month of

[28] *Schoeman v Director of Public Prosecutions* [2025] ZASCA 124; 2025 (2) SACR 561 (SCA); [2026] 1 All SA 95 (SCA) para 30 (*Schoeman*).

the decision, refer the decision to *the court* for reconsideration and, if necessary, variation.'[29](Emphasis added.)

[30] From the express terms of this provision, a referral by the President for an application thereunder is to *the court* for reconsideration. The reference to *'the court'* clearly indicates that the President of this Court has the discretion to determine the size of the bench/panel, taking into consideration one or the other factors, including the complexity of the matter or that, in her view, the application is on facts not the law and can be resolved speedily. While five is the traditional number for complex matters, a panel of three is frequently used for cases where the law is considered settled, or the issues are primarily factual. Legally, there is no hierarchy or greater judicial authority between a three-panel judgment *vis-a-vis* a five-panel judgment, as I have illustrated above. Therefore, they carry identical weight in the eyes of the law.

[31] Under South African law, the principle of *stare decisis* applies to *the court*, not to a specific panel. It follows that a judgment of this Court referenced in s 17(2)*(f)*, is of the whole Court. It is a misconception that a smaller panel of judges, three judges, weakens the precedential value of a judgment. It follows that a three-judge panel has the same precedential value as a five-judge panel for purposes of s 17(2)*(f)*. It binds all lower courts (high courts and magistrates' courts) throughout the country. In its horizontal application, it also binds panels of this Court in the future unless future panel(s) find that the previous decision was clearly wrong.

[29] Op cit fn 22.

[32] Reverting to the facts of the application before us, the application is based on the new 2013 amendment, as clearly articulated in the affidavits and accepted in para 9 above, specifically, the 'grave injustice' factor, not 'mere exceptionality'.[30] This is important to keep in mind at all times, particularly where there is no attack on the constitutionality of the section or its implementation, as is the case in almost all the applications that have come before this Court. And so too the one under discussion. This is so because the Practice Directive of this Court in this regard is clear and understood by legal practitioners and litigants across the board since *Avnit v First Rand Bank Ltd*[31] (*Avnit*).

[33] Adopting what can be called the *Avnit* approach, on the facts of this application, I agree with the first judgment that there is no justification to hold differently from the two colleagues' earlier order in dismissing the application for special leave to appeal.

[34] For the reasons crystalised in *Muller* at paras 32 to 37 in line with a plethora of precedents of this Court cited therein, an application of this nature under these circumstances (where the merits were considered and found not worth reconsideration by any court) ought not to be struck off the roll but dismissed. It is trite from time immemorial and well known in the legal parlance that 'an order striking the matter from the roll has the potential of causing legal confusion and is not helpful, as it does not end the matter.'[32] A struck-off order has dire, unintended consequences of sending litigants on a wild goose chase and coming back to court on the same facts packaged differently when, in reality, they have no ounce of prospects of success.

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[30] *Muller* fn 23 above.
[31] *Avnit v First Rand Bank Ltd* (20233/14) [2014] ZASCA 132 (23 September 2014).
[32] *Muller* fn 23 above.

[35] It is nevertheless apposite to address that course, striking off instead of dismissal, for the sake of doctrinal clarity, particularly in light of the apparent divergence in this Court's jurisprudence on when striking off is justified. *This* Court in *Muller*, in the majority judgment penned by Kgoele JA, aptly remarked as follows:

'As far as the proposition regarding the correct order in terms of s 17(2)*(f)* of the Superior Courts Act is concerned, sight should not be lost of the fact that the case of *Former Way Trade and Invest (Pty) Limited v Bright Idea Projects 66 (Pty) Limited* (*Former Way Trade*), is also one of the current judgments of this Court, where the order dismissing the application for leave to appeal by the two judges was confirmed. The decision was made prior to the enactment of the new Act but remains pertinent to this matter. Aggrieved by this decision, the parties approached the Constitutional Court (CC). It is noteworthy to quote the following remarks by the CC that are relevant to the issue concerning the formulation of the order:

"The Supreme Court of Appeal dismissed an application for leave to appeal. The applicant applied for the reconsideration of the order refusing leave to appeal in terms of section 17(2)*(f)* of the Superior Courts Act. This resulted in the application being referred for oral argument for reconsideration of the order. . . . The Supreme Court of Appeal held that no new franchise agreement had been concluded. As a consequence, there were no reasonable prospects of success of establishing the factual defence at the section 12B arbitration. Therefore, the order dismissing the application for leave to appeal was confirmed." (Emphasis added.)

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

absence of exceptional circumstances, the original two-judges' refusal remains binding. Where reconsideration is confirmed, the Court explicitly endorses the earlier decision, reinforcing finality and legal certainty.

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

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

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

the roll but dismissed the application. The importance of this matter is that it was decided in 2025 but after *Bidvest*, which fortifies the viewpoint. This matter also, extensively addressed the role of the President in reconsideration applications and followed the Constitutional Court's precedents.

*An order striking the matter from the roll has the potential of causing legal confusion and is not helpful, as it does not end the matter, as was said in Turner and Another v Ntintelo and Another.* In that matter, the difference between striking the matter off the roll and dismissing the matter was dealt with. When a matter is struck off the roll, it often indicates that a procedural issue caused the court to decline to hear the application, or that the court believes the matter should not have come before it in the first place. This may not necessarily preclude the parties from resolving the issue and once resolved, returning the matter to the court. As an example, in this Court, cases struck off the roll before 2025 were mainly due to no proper record, no proper appeal, and no proper application. In *Simon Lindsay Draycott v Max Hurbert and Others*, this Court struck the reconsideration under s 17(2)*(f)* of the Superior Courts Act off the roll for want of a proper application before it, and not because the threshold was not met. This matter, too, was decided in 2025 after *Bidvest*. Even though it did not pertinently address the issue of the formulation of the order(s), its peculiar facts and circumstances strengthen this view.

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

[36] The issue of costs. The general rule that the successful party is entitled to their costs applies, as the parties did not, and could not, argue otherwise.

[37] For these reasons, I would agree with the order that the application for reconsideration in terms of s 17(2)*(f)* Superior Courts Act 10 of 2013 must fail, but that it should be dismissed with costs.

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B C MOCUMIE
JUDGE OF APPEAL

**GOOSEN JA (OPPERMAN AJA concurring):**

[38] I have had the benefit of reading the judgments of my colleagues Cloete AJA (the first judgment) and Mocumie JA (the second judgment). I agree with the reasoning of the first judgment and the order proposed. I disagree with the second judgment, both in respect of its reliance upon this Court's judgment in *4 Seasons* and in its approach to the order to be made. My colleague Cloete AJA has correctly pointed out in the first judgment that the recent judgment in *Luphondo* resolves the precedent altering value of *4 Seasons.* I nevertheless write separately to address the substantive reasoning in *4 Seasons,* lest it be thought the defect lies only in the numerical composition of the appeal panel.

[39] Petse AJA (as he now is) highlighted concern in *4 Seasons*, that the different judicial opinions on the approach to s 17(2)*(f)* serve to 'keep the forensic pot boiling'. Having taken a definitive view of prior authoritative judgments, he expressed the hope that the matter had now been put to bed.[33] I would like nothing better than to consider that the substance of the controversy is finally resolved. The most recent judgment of this Court in *Luphondo* has resolved any debate about the precedential value of *4 Seasons.* What remains is the substance of the reasoning adopted in *4 Seasons.*

[40] Almost 90 years ago, Stratford JA in *Bloemfontein Town Council v Richter* described the import of the maxim *stare decisis* in these terms:

'The ordinary rule is that this Court is bound by its own decisions and unless a decision has been arrived at on some manifest oversight or misunderstanding [that is] there has been something in the nature of a palpable mistake a subsequently constituted Court has no right to prefer its own reasoning to that of its predecessors – such preference, if allowed, would produce endless uncertainty and confusion.'[34]

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[33] *4 Seasons* para 62.
[34] *Bloemfontein Town Council v Richter* 1938 AD 195 at 232.

[41] This Court[35] and the Constitutional Court[36] have consistently applied this tenet of legal policy. In *Gcaba v Minister for Safety and Security and Others*, Van der Westhuisen J, writing for a unanimous Constitutional Court, said:

'The doctrine of precedent was affirmed by this court in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC) (1997 (1) BCLR 1), where it stated:

"The sound jurisprudential basis for the policy that a court should adhere to its previous decisions unless they are shown to be clearly wrong is no less valid here than is generally the case."

In *Van der Walt v Metcash* the merit of legal certainty and the like treatment of similarly situated litigants was also emphasised. Furthermore, in *Daniels v Campbell NO and Others*, Moseneke J, in a minority judgment, reiterating the dicta in *Van der Walt*, reasoned that the doctrine of precedent, an incident of the rule of law, advances justice by ensuring certainty of law, equality, equal treatment and fairness before the law. He stated further that to that end, the doctrine imposes a general obligation on a court to follow legal rulings in previous decisions. Moseneke J acknowledged the recognised exceptions to the *stare decisis* principle, namely "where the court is satisfied that its previous decision was wrong or where the point was not argued or where the issue is in some legitimate manner distinguishable".

Therefore, precedents must be respected in order to ensure legal certainty and equality before the law. This is essential for the rule of law. Law cannot "rule" unless it is reasonably predictable. A highest court of appeal - and this court in particular - has to be especially cautious as far as adherence to or deviation from its own previous decisions is concerned. It is the upper guardian of the letter, spirit and values of the Constitution. The Constitution is the supreme law and has had a major impact on the entire South African legal order - as it was intended to do. But it is young; so is the legislation following from it. *As a jurisprudence develops, understanding may increase and interpretations may change. At the same time though, a single source of consistent, authoritative and binding decisions is essential for the development of a stable constitutional jurisprudence and for the effective protection of fundamental rights. This court must not easily and without coherent and compelling reason deviate from its own previous decisions, or be seen to have done so*. One exceptional instance where this principle

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[35] See *First Rand Bank Limited v Kona and Another* [2015] ZASCA 11; 2015(5) SA 237 (SCA); *Patmar Exploration (Pty) Ltd and Others v Limpopo Development Tribunal and Others* 2018 (4) SA 107 (SCA).

[36] *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* [2010] ZACC 19; 2011 (4) SA 42 (CC).

may be invoked is when this court's earlier decisions have given rise to controversy or uncertainty, leading to conflicting decisions in the lower courts.'[37]
(Emphasis added and footnotes omitted.)

[42] The assertion that a prior judgment is 'clearly wrong' is a conclusion of law. The mere assertion, however, does not establish the conclusion. It must be supported by sound reasoning which permits future courts, and litigants, to understand the basis upon which it is found that the prior authority was palpably wrong and, therefore, no longer sound authority. This means that the overruling judgment must demonstrably comply with the strictures imposed by the doctrine of precedent. Those strictures do not permit the subsequent court to ignore the binding effect of the prior judgment unless the conditions for non-adherence are established. These conditions must be stated in the overruling judgment so that the inherent value of the doctrine is affirmed.

[43] The doctrine of precedent is an instance of the rule of law. For law to rule, as observed in *Gcaba*, *coherent and compelling reasons must be advanced* for non-adherence to the prior authority. It is not open to a subsequent court to prefer a different outcome or approach, or to act upon its doubts about the prior authority. It is obliged to follow that authority unless it can coherently and compellingly demonstrate that the prior authority is wrong.

[44] In this case, apart from the fact that it is a judgment of a three-member panel, *4 Seasons* does not meet this exacting standard. In order to appreciate this deficit, we must understand what the three judgments it purports to overrule, in fact, determined.

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[37] *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) para 60 – 62.

[45] I begin with *Bidvest.* The court identified the issue that confronted it and framed it in the following terms:[38]

'Does s 17(2)*(f)*, and the referral made to us by the President, require us simply to reconsider the decision on petition, or does it also require us first to decide whether there are exceptional circumstances that warrant the reconsideration of the decision on petition, and only if we so find, then to reconsider the decision on petition?'

[46] The court, as it was required to do, considered the judgment of *Motsoeneng* in which a unanimous court held that the existence of 'exceptional circumstances'[39] is a jurisdictional fact that must be established to permit reconsideration of a prior order refusing leave to appeal. The court then examined the text of s 17(2)*(f)* to obtain guidance on the process for adjudicating such a matter.

[47] Crucially, *Bidvest* found that the section admits of two conflicting interpretations. It held that the text provides some support for an approach that places the President in the position of the repository of the power to determine whether exceptional circumstances exist. On this approach, the President alone would determine the jurisdictional facts and would then exercise her discretion to refer the application for reconsideration to the court. It also found that the text supported a different construction, namely one that left the final determination of whether exceptional circumstances existed to the court hearing the reconsideration application.

[48] This is a critical finding. It amounts to this: s 17(2)*(f)* is ambiguous as to what the court hearing the reconsideration application must determine. It is upon

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[38] *Bidvest* para 8.

[39] I shall, for the sake of brevity, use the term 'exceptional circumstances' to refer to the threshold requirement provided in s 17(2)(*f*). I do so mindful of the fact that the section has been amended to require that circumstances that may result in a grave failure of justice or which might bring the administration of justice into disrepute should exist.

this basis that *Bidvest* undertook the interpretation exercise required to give meaning to the provision. It decided the interpretation issue. It did so authoritatively as the unanimous judgment of this Court. And it did so in circumstances where this Court had not previously decided how the section should be interpreted so as to guide its application in the adjudication of a reconsideration application. It drew upon prior judgments, notably *Motsoeneng* and *Avnit*, and on judgments of the Constitutional Court, in particular *Liesching II*, to provide a comprehensive and consonant interpretation. None of these prior judgments had undertaken the exercise that was undertaken in *Bidvest.*

[49] It is important to note that *4 Seasons* does not address itself to this fundamental finding. It does not assert that *Bidvest* was palpably wrong to find that section 17(2)*(f)* is in fact ambiguous and that it is not capable of the construction which it advanced. The reason that assertion is not made is to be found in the fact that the 'controversy' hinges upon divergent approaches to interpretation. *4 Seasons* acknowledges that this is the 'source' of controversy when it references the idea of the forensic pot, which is kept on the boil.

[50] When *Schoeman* was decided, the dispute over interpretation was front and centre in the debate. In order to appreciate the deficit in *4 Seasons*, it is necessary to record that Matojane JA, who wrote the minority judgment in *Schoeman*, squarely articulated the view that the language of s 17(2)*(f)* was not ambiguous and that it could not sustain the approach favoured by *Bidvest.* The learned judge pointed to authorities which, in his view, *Bidvest* had not applied properly or at all. He provided a fully reasoned riposte to *Bidvest's* favoured interpretation. Thus, the *Schoeman* court had to confront the proposition that *Bidvest* was palpably wrong and ought not to be followed. It did so. The majority rejected the contention. They provided a comprehensive response to each challenge posed by

the minority. They found that *Bidvest* was not wrongly decided and affirmed the interpretation and application of the section set out in *Bidvest*.

[51] The fact that *Bidvest* and the majority judgment in *Schoeman* were penned by the same judge is entirely immaterial. It does not diminish the import and effect of the judgment. *Schoeman* stands as an authoritative determination that *Bidvest* was not wrongly decided. The importance of this should not be underestimated. It means, in simple terms, that the controversy regarding the proper interpretation of *Bidvest* has been considered by this Court and has already been authoritatively decided.

[52] In *Robin Consolidated Industries Ltd v Commissioner for Inland Revenue,* Schutz JA explained the application of the doctrine of *stare decisis* in the context of decisions interpreting a statutory provision, as follows:

'Having concluded that the decision in the two cases is clearly right, it is unnecessary to deal with the consequences had there been an opposite conclusion. However, I should state again that for good reason this Court is reluctant to depart from its own decisions (*Harris and Others v Minister of the Interior and Another* 1952 (2) SA 428 (A) at 454A) and that once the meaning of the words of a section in an Act of Parliament have been authoritatively determined by this Court, that meaning must be given to them, even by this Court, unless it is clear to it that it has erred (*Collett v Priest* 1931 AD 290 at 297).[40]

[53] I have already pointed to the fact that, in *4 Seasons* the *Bidvest* finding of ambiguity is not pertinently attacked. One also looks in vain for a systematic engagement with the reasoning of the majority in *Schoeman.* It is important to emphasise here that the majority judgment in *Schoeman* deals with each of the contentions which were advanced to suggest that *Bidvest* was wrongly decided. What we find in *4 Seasons* is a repetition of the reasoning presented in the

[40] *Robin Consolidated Industries Ltd v Commissioner for Inland Revenue* 1997 (3) SA 654 (SCA) at 666F-G.

minority judgment in *Schoeman*. It proceeds on the premise that the section is unambiguous. It asserts that if the meaning ascribed by *Bidvest* was intended, the legislature would have said so explicitly, and, finally, it identifies an apparent conflict with prevailing authority, suggesting that the *Bidvest* interpretation frustrates the purpose of the section.[41] These are all assertions articulated by the minority[42] which were rejected by the majority in *Schoeman*.[43] The repetition of these, in *4 Seasons*, does not establish that the prior authority is 'palpably wrong'.

[54] The majority in *Schoeman* makes this very point, where it holds:

'This Court has thus provided an authoritative interpretation of s 17(2)*(f)* in *Motsoeneng* and *Bidvest.* In order to depart from these decisions, it does not suffice for the first judgment to reason as to why its interpretation is correct, nor to explain why its interpretation is to be preferred. It will also not satisfy the threshold for departure if it provides reasons as to why the existing authorities provide a less persuasive account of what s 17(2)*(f)* means. For these authorities to be clearly wrong, the first judgment would have to show that the interpretation favoured in *Motsoeneng* and *Bidvest* is so aberrant that it cannot count as a possible meaning because it cannot be derived from a conscientious application of the principles of interpretation.'[44]

[55] The court in *4 Seasons* says the following:

'At the risk of stating the obvious, it bears mentioning that the question whether or not exceptional circumstances exist in the context of a s 17(2)*(f)* application for reconsideration is the exclusive preserve of the President. It therefore goes without saying that once the President, in the exercise of her discretion, decides to refer the decision under s 17(2)*(b)* to the court for reconsideration this will be the sole judicial task that the Court will be called upon to perform, i.e., only to decide whether the two or three judges correctly refused or granted leave to appeal, as the case may be.'[45]

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[41] *4 Seasons* paras 46 – 50.
[42] *Schoeman* paras 8, 13 – 15, 20 – 21, 26 – 27, 33 – 34.
[43] *Schoeman* paras 58, 61 – 66, 68, 71, 73, 77 – 81.
[44] *Schoeman* para 82.
[45] *4 Seasons* para 56.

[56] The statement is clear enough. However, what follows is difficult to reconcile with the court's favoured interpretation of the section. It held:

'Accordingly, what is demanded by the fact of a referral to the court made by the President pursuant to s 17(2)*(f)* is the reconsideration of the decision of the two judges who refused leave to appeal. Put differently, the Court must, without more ado, step into the shoes of the two judges, consider the application for leave to appeal on its merits. Indeed, on a proper reading of the wording of the proviso to s 17(2)*(f)* it is beyond question that what is referred to the court by the President – upon her being satisfied that exceptional circumstances exist – is, as borne out by the scheme of s 17(2)*(f)* read holistically, the 'decision of the majority of the judges [who considered and disposed of the] application referred to in paragraph *(b)*,…,to grant or refuse the application…'and nothing more. Significantly, in the language employed in the proviso itself such decision is referred to the court specifically for the court to reconsider it and, if necessary, vary it.[46]

[57] The court then goes on to hold that:

'Reverting to the merits of the present referral, the critical question remains: *are there any compelling and substantial factors in this case indicative of the existence of exceptional circumstances or a probability of the administration of justice being brought into disrepute or a grave failure of justice ensuing if the decision of the two judges of this Court refusing leave to appeal is not varied?* If the answer to this question is in the negative, such an outcome would render it unnecessary to consider the substantive merits of the envisaged appeal. *In the view I take of the matter, and after anxious consideration, no exceptional circumstances of the nature required are discernible despite what I earlier described as procedural missteps and judicial ineptitude. That being so, it follows that the application for reconsideration of the decision refusing leave to appeal becomes stillborn and must therefore fail.*'[47]
(Emphasis added.)

[58] This statement is, in my respectful view, plainly illogical. If it is the sole prerogative of the President to decide whether 'exceptional circumstances' exist and, upon so deciding, to refer the application for referral to the court, then it must

[46] *4 Seasons* para 58.
[47] *Ibid* para 62.

follow, from the mere fact of the referral, that ‘exceptional circumstances’ exist. This will already have been determined by the President, and the court may not (upon the interpretation favoured by *4 Seasons*) second-guess the President. Upon what basis, then, can the court enter into an enquiry as to whether exceptional circumstances exist which warrant a variation of the original decision? The court’s task, according to its own reasoning, is merely to reconsider whether the original decision is right or wrong, and if wrong, to vary it. If that is so, exceptional circumstances play no role at all.

[59] The reasoning is flawed in its practical application. The President, in referring a reconsideration application, provides no reasons for the referral, nor is she required to do so. She exercises the discretion conferred upon her by the section. In practical terms, this means that the court hearing the application does not know what exceptional circumstances the President found to exist. At best, the court has before it the competing assertions in the application for reconsideration. If, as *4 Seasons* suggests, the test for reconsideration is the existence of exceptional circumstances, then the court must decide what those are. But that risks second-guessing the President, who has already decided this question. Assuming that this exercise does not itself fall foul of the *4 Seasons* interpretation, how can a finding that there are no such ‘exceptional circumstances’ not raise doubts about the court’s jurisdiction to enter the reconsideration exercise? And upon what basis can the court adjudicate the reconsideration application (even if to dismiss it) if it does not in fact have the jurisdiction to do so?

[60] It makes no sense to contend that s 17(2)*(f)* precludes enquiry whether, as a matter of fact, exceptional circumstances exist but nevertheless requires the court to apply exceptional circumstances as a test to decide whether to vary the

original decision. This approach, in any event, is directly at odds with the minority views expressed in *Lorenzi* [48] and *Schoeman*.[49]

[61] The court can only step into the shoes of the judges who made the decision under reconsideration, if the threshold is met. When it does so it looks afresh at the application for leave to appeal and decides whether leave to appeal should be granted. To make that decision, it does not apply a more stringent test, namely the 'exceptional circumstances' contemplated by s 17(2)*(f)*, it applies the test for leave to appeal contemplated by section 17(1)(*a*). What differs is that it does so upon the basis that facts or circumstances were found to exist which permit reconsideration of a decision that would otherwise be final and binding.

[62] The fact that exceptional circumstances do exist does not *ipso facto* (without more) mean that the decision to refuse leave to appeal must be varied. It will only be varied if the test for granting leave to appeal is met. It may well be, as is demonstrated in *4 Seasons*, that facts which are exceptional, such as the procedural missteps that occurred and the failure by the judge to produce a reasoned judgment, warrant reconsideration of the refusal of leave to appeal, but do not alter the prospects of success on appeal. In such an event, the application for reconsideration fails not because there are no exceptional circumstances but because the prospects of success do not support an order granting leave to appeal. But that was not the line of reasoning that *4 Seasons* adopted, wrongly, in my view.

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[48] *Lorenzi v S* (1171/2023) [2025] ZASCA 58 (13 May 2025) para 33 where Coppin JA said: 'It is necessary for this Court to look at all the facts, including the circumstances that prompted the referral, and to determine whether, taking all of those into account, the two judges of this Court, who refused the applicant leave, did so rightly or wrongly, or whether it is necessary to vary their decision or order. This Court is not deciding whether to refer that order to someone else for reconsideration and therefore does not need to be satisfied that there are 'exceptional circumstances' present. Their existence does not imply that leave to appeal ought to be, or ought to have been, granted. The test is still as postulated in s 17(1)*(a)* of the Act, namely, whether: (i) there is a reasonable prospect of success on appeal, or (ii) there is some other compelling reason why leave to appeal should be granted.'

[49] *Schoeman* para 21 where Matojane JA said: 'When a panel subsequently re-examines whether exceptional circumstances exist, it effectively renders the President's prior determination meaningless.'

[63] The substantive reasoning adopted in *4 Seasons* cannot be sustained. The contention that the *Motsoeneng*, *Bidvest*, and *Schoeman* judgments are palpably wrong and should be overruled does not meet the required threshold.

[64] I turn now to the appropriate order to be made in this matter. As indicated, I agree with the first judgment's assessment of the case made out by Mrs Fisher Snr and its findings on those facts. It is important to emphasise that Mrs Fischer Snr sought to persuade this Court that a grave injustice would arise if the order refusing her leave to appeal was not reconsidered upon several grounds concerning the merits of her envisaged appeal.[50] The first judgment correctly finds that s 16(2)(*a*)(*i*) would apply because the order which would be sought on appeal can have no practical legal effect in light of Mrs Fischer Snr's now disclosed resignation as a director. The first judgment correctly states the envisaged appeal would be susceptible to dismissal upon this ground alone.

[65] In this case, the operation of s 16(2)(*a*)(*i*) precludes a finding that substantive merits-based grounds for reconsideration can meet the threshold requirements of s 17(2)(*f*). Where an order which may be granted on appeal can have no practical legal effect (and there is no other consideration which warrants the appeal being heard despite that section), the merits of the grounds of appeal are essentially irrelevant. It follows from this that the jurisdictional threshold for reconsideration is not met. This Court therefore does not have the jurisdiction to reconsider the order refusing the application for leave to appeal.

[66] The second judgment proposes that the application for reconsideration be dismissed. The second judgment calls in aid the reasoning of the majority in *Muller*. As I read *Muller*, it does not suggest that an order striking an application

[50] See para 13 of the first judgment above where these are spelt out in detail.

for reconsideration for lack of jurisdiction is not a competent order. Instead, it favours dismissal as being the correct order because it is consistent with orders previously granted in similar matters and because it promotes 'finality' in matters such as this. Neither consideration presents a coherent and consistent appreciation of the consequences of finding that the jurisdictional threshold requirements for reconsideration are not met.

[67] This Court's judgment in *Former Way Trade & Invest (Pty) Ltd v Bright Idea Projects 66 (Pty) Ltd (Former Way)*, upon which *Muller* relies provides no support for the idea that in the absence of jurisdiction, the correct course is to dismiss the application (or, in the language of the order actually granted in that case), to confirm the order refusing leave to appeal. *Former Way* did not address whether the jurisdictional threshold was satisfied. The court proceeded on the assumption that it had jurisdiction and it decided the application for leave to appeal. In any event, *Former Way* was decided several years before *Motsoeneng*. The latter case represents an important development in this Court's approach to deciding applications under s 17(2)(*f*).

[68] The contention, in *Muller*, that an order dismissing the application favours 'finality', also does not assist. Whether an order brings about finality will, in each instance, depend upon the facts of the case and the reasons advanced for the order. An order striking an application from the roll because the court lacks the jurisdiction to adjudicate the application is plainly final in effect. It is not a mere dilatory order that allows the parties to return to the court at some later date. The court's decision that it lacks jurisdiction obviously precludes the parties from seeking to re-enrol the matter.

[69] When an order is made striking a matter from the roll, the court does not decide the substantive question that the parties wish to have adjudicated, because

it cannot reach that issue. If the reason for striking the matter is a procedural defect, re-enrolment might be possible once the defect is corrected. When an application is dismissed, the dismissal pertains to the issue that the parties have brought before the court for adjudication. The order indicates that the substantive issue or issues have been considered and decided. If this were not the case, an order of dismissal would not have the hallmark of finality for which *Muller* contends.

[70] In applications for reconsideration under s 17(2)(*f*), the initial question for the court is whether the exceptionality requirements, the jurisdictional threshold, are satisfied. Only if these are fulfilled may the court consider whether the order denying leave to appeal, is correct.

[71] If the jurisdictional threshold is not met, the court does not, indeed cannot, reach the substance of the reconsideration application. It is for this reason that the proper order in such cases is to strike the application from the roll *because the character of such order does not involve a merits determination.*

[72] I have set out above my opinion regarding the errors in the approach favoured by *4 Seasons.* Similar errors arise if a clear distinction is not maintained between the several component parts of matters enrolled for reconsideration.[51] In *Luphondo*, which settled the issue of the precedent-setting value of *4 Seasons*, it was unequivocally found that the jurisdictional threshold for reconsideration had not been met. The application was, however, dismissed. The judgment does not

[51] It is this 'hybrid' character to which reference was made in *4 Seasons.* It involves the recognition that, when a reconsideration application is heard by the court, there are, for reasons of practicality and convenience, three distinct applications before the court: the reconsideration application, the underlying application for leave to appeal, and the appeal itself. The court has before it the entire record and usually hears argument on all aspects of the matter. It then adjudicates the matter in accordance with the sequential relationship of the separate components. The sequential line of reasoning is reflected in the orders that are made. The orders in *Schoeman* present a clear example of this adjudication process.

set out its reasons for doing so. For the reasons I have set out above, I consider that the proper order, in line with the prevailing authority on s 17(2)(*f*), is to strike the application for want of jurisdiction.

[73] I therefore concur in the order proposed in the first judgment.

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G G GOOSEN
JUDGE OF APPEAL

**Appearances**

| | |
|---|---|
| For the first appellant: | In person |
| For the first and second respondents: | A Kruger |
| Instructed by: | Maybery Attorneys Inc, Pretoria |
| | Honey Attorneys, Bloemfontein. |