

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 1256/2023

In the matter between:

GERALD NDLOVU **APPLICANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Ndlovu v The State* (1256/2023) [2026] ZASCA 147 (30 October 2026)

Coram: MOCUMIE, KEIGHTLEY, and NORMAN JJA
Mocumie JA (first judgment) [01] to [37]
Keightley JA (second judgment) [38] to [52]

Heard: 26 May 2026

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 of the judgment is deemed to be 11h00 on 30 October 2026.

Summary: Application for reconsideration and oral argument against refusal of special leave against conviction and sentence in terms of s 17(2)*(f)* read with s 17(2)(*d*) of the Superior Courts Act 10 of 2013 – whether the applicant meets the high threshold requirements for the reconsideration of the refusal of his application – trite principles of s 17(2)(*f)* re-affirmed – the safety net s 17(2)(*d)* brings to the applications in terms of

s 17(2)(*f*) – Criminal Law and Procedure – murder – Criminal Law Amendment Act 105 of 1977 – the powers of an appellate court to interfere with the sentence of a lower court are circumscribed.

ORDER

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

The order of this Court, dismissing the application for special leave to appeal, is confirmed.

JUDGMENT

Mocumie JA (Norman JA concurring):

Introduction

[1] The applicant seeks reconsideration in terms of s 17(2)(*f*) of the Superior Courts Act 10 of 2013 (the Superior Courts Act), of the refusal of his application for special leave to appeal by two judges of this Court against the order of the Gauteng Division of the High Court, Johannesburg (the full bench).

Factual background

[2] The applicant was an accused person before the Regional Court in the Regional Division of Gauteng, Johannesburg (the regional court) on a charge of murder. He was found guilty as charged and sentenced to 15 years' imprisonment. He was aggrieved by this conviction and sentence and appealed to the full bench. The full bench dismissed his appeal. The applicant thereafter sought special leave to appeal to this Court, on petition.[1] On 6 October 2021, the two colleagues seized with the application for special leave, dismissed it 'on the grounds that there [were] no special circumstances meriting a further appeal to this [C]ourt.' On 2 November 2023, the applicant approached the President of this Court, in terms of s 17(2)(*f*) of the Superior Courts Act, seeking reconsideration of the

[1] In terms of s 16(1)(*b*), read with s 17(3) of the Superior Courts Act.

order dismissing his application for special leave. On 22 July 2024, the President referred the decision refusing special leave to appeal for reconsideration by, and the application for special leave to appeal to, this Court for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act.[2]

[3] The issues that arise include whether special circumstances are present that would warrant this Court reconsidering the decision refusing the applicant's special leave to appeal. To establish whether such circumstances are present, the merits are considered.

The merits

[4] Central to the merits is the question whether the full bench erred in upholding the regional court's conclusion that the State had proven its case beyond doubt that the fatal injury which caused the death of the deceased was, as described by the pathologist who performed the post-mortem examination, Dr Luyolo Leonardo Mantanga (Dr Mantanga), a fatal cranial–cerebral blunt force trauma and a fatal blunt force abdominal trauma, resulting from the applicant delivering a blow to his head with a brick. The deceased also suffered blunt force abdominal trauma, though not fatal, for reasons explained in more detail later. The existence of the abdominal injuries, in addition to the head injuries, is an important factor in the applicant's s 17(2)(*f*) application.

[5] The regional court, in its judgment convicting the applicant of murder, concluded that:

'In addition to the head injury, the deceased also sustained a ruptured liver. How that injury was inflicted, we do not know. It was in all probability inflicted whilst the deceased was lying along the street where he had fallen down. What is clear from the evidence of Dr Mantanga and the contents of his *post-mortem* report was that the ruptured liver was also caused by the application of blunt force trauma and that that then developed into the result of a ruptured liver. It is common cause what the cause of death was, namely, the brain injury that caused internal bleeding.'

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[2] Section 17(2)(*d*) provides that:
'The judges considering an application referred to in paragraph *(b)* may dispose of the application without the hearing of oral argument, but may, if they are of the opinion that the circumstances so require, order that it be argued before them at a time and place appointed, and may, whether or not they have so ordered, grant or refuse the application or refer it to the court for consideration.' In terms of s 17(3) this is also applicable to applications for special leave to appeal under section 16 (1)(*b*). Section 17(3) provides that 'the provisions of subsection (2)(*c*) to (*f*) shall apply with the changes required by the context'.

[6] To consider this question, it is necessary to set out the facts in some detail. On 11 November 2017, the applicant went to the deceased's residence, which the deceased occupied with several others without the true owner's permission or authorisation. This is commonly known in South Africa as property hijacking.[3] The owner, through a property rental company, Sirius Property, issued eviction notices to comply with South African eviction laws before having them evicted.[4] At the time, the applicant was a property manager with Sirius Property.

[7] The applicant went to the premises occupied by the deceased and others, on the instructions of Mr Wayne Lee, the owner of Sirius Property, to serve eviction notices on all who were in arrears on their rental payments. A person named Dan assisted the applicant in executing his duties. Dan came along with five other men. According to the applicant, he requested these men's assistance because on a previous occasion when he served eviction letters on the occupiers, he was met with aggression. Upon arrival at the property, these five men went inside the premises and served the notices per instructions. The applicant testified that he remained outside the premises, drinking beer from the boot of his car. Hardly an hour after their arrival, a fracas ensued inside the house. The five men came running out and fled in different directions. The applicant maintained that the deceased came staggering out of the premises and fell to the ground. He denied ever assaulting the deceased.

[8] The state's case was based on two eyewitnesses. They testified that the applicant assaulted the deceased by hitting him on the head with a brick. One of the occupants of the house in issue, named Kevin, stated that he found the deceased lying on the road and the applicant standing at his car. According to the medical evidence of Dr Mantanga, the cause of death was 'due to unnatural causes, namely, *cranial-abdominal blunt force injuries*.' The pathologist was then cross-examined. This is what followed in the exchange between him and Ms Meyer for the applicant:

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[3] Property hijacking is used colloquially when criminal syndicates forcibly occupy a vacant or unguarded home, strip it of valuables and sublet it to unsuspecting tenants or rent it out.

[4] PIE provides that before an occupant can be evicted from a property, they must be given notice, and the process must be managed under a court order.

‘Ms Meyer: Doctor, I just want to know, as the state has indicated the evidence is that the deceased was hit in the face with a brick and as he was walking away he fell to the ground. What I want to know is, is that fall sufficient to cause, sufficient to warrant it as a possible cause for the laceration of the liver, or would it suggest that there had to be external factors applied like a physical assault to cause the laceration of the liver as well and the other abdominal injuries you observed.

. . .

Dr Mantanga: The liver is a solid organ and so it is particularly vulnerable to blunt force trauma being applied to it externally. Now only a moderate amount of force is necessary to actually cause laceration of the liver, the liver as well as the spleen as well as the kidneys, you have to strike the body in the right anatomical area to actually cause lacerating injuries to the organs.

. . .

[W]e have to remember that there is subdural haemorrhage Here in other words there is bleeding into the subdural space. What that means is that the head was accelerated and decelerated at a rapid rate to such a degree that the brain, because remember the brain sits inside the skull and there is the potential space of cerebrospinal fluid in between. [S]o the brain was accelerated out of synchrony with the skull itself such that the interconnecting vein snapped, that is what caused a subdural haemorrhage. Now that degree of force is usually generated by car accidents, so that tells you the amount of force that was required to actually cause this injury.

. . .

This means the skull moved so violently it actually impacted the brain and caused bruising of the brain itself. Now that takes a tremendous amount of force. So, to answer the question, yes, a severe amount of force would have been, that brick would have had to be flung or accelerated to a significant amount of force.’

[9] Dr Mantanga also testified that as a pathologist:

‘[W]hen you are examining injuries, you have to make a distinction between potentially fatal injuries and potentially survivable injuries. Now in this instance, I identified two potentially fatal injuries. That is the blunt force trauma one, I identified two potentially fatal injuries, that is the blunt force trauma to the head with cortico cerebral trauma and that is the blunt force trauma to the abdomen with laceration of the liver.

…

So, the head injury was fatal, and it was non-survivable.

Now, if we examine the abdominal injury. . . This injury was potentially survivable. . . So, if I am looking at the two injuries, I would say the head injury [was] fatal, non-survivable, abdominal injury [was] potentially fatal but potentially survivable.' (Emphasis added.)

The applicant's grounds

[10] The applicant in his reconsideration application contends that the cause of death remains uncertain. More specifically, the applicant contends that the conclusion that the assault with a brick was the cause of the deceased's death is uncertain. He further contends that the State led no further evidence to clear this uncertainty. He alleges that the regional court did not address the uncertainty around whether the assault with the brick was the cause of death at all and just accepted the State's submission. And although the full bench noted the inadequacy, it did not properly interrogate it. He alleges that both courts 'failed to account for the fatal injuries sustained by the deceased.' Therefore, the State did not prove its case beyond reasonable doubt. The applicant also criticises the full bench for raising the principle of common purpose, which the State never relied upon at trial. This, according to the applicant, constitutes exceptional circumstances and demonstrates that he would suffer a grave injustice as contemplated in s 17(2)(*f*), if the decision to refuse special leave to appeal was not subjected to reconsideration.

[11] The applicant also raised the issue of *novus actus interveniens*.[5] He contends that considering that the deceased had other serious injuries, e.g. his liver was ruptured, the deceased may have been assaulted before or as he lay in the street, which created a *novus actus interveniens*.

The State's grounds

[12] The State contends that the applicant is merely regurgitating the same complaints which have already been considered and dismissed by the full bench. It concedes that it did not rely on common purpose before the regional Court. The full bench should not have included this in its judgment. However, the State avers that this makes no difference

[5] *Novus actus interveniens* is a Latin legal term, which literally translates to 'new intervening act.' It describes an independent event or action that occurs after a defendant's wrongful conduct, breaking the chain of causation. Because the new act becomes the actual cause of the harm, it can relieve the original wrongdoer of legal liability.

because it had not relied on common purpose, nor was the applicant's conviction dependent on an application of that principle. For the conviction, it relied solely on the evidence it presented, supported by medical evidence. The general principles of criminal law applied by both courts have been applied in courts over the years. They remain applicable. According to the State, neither court deviated from them, and the full bench clarified what the regional court did not address.

[13] Counsel for the State submitted that the State relied on evidence aliunde of the key witnesses to support the medical evidence, and vice versa; therefore, it was not necessary to lead further evidence or clarify anything else on this issue. She contended that the excerpts from the record highlighted above, regarding the cause of the fatal injury, were clear. Dr Mantanga was cross-examined, and he did not deviate from that evidence. What is clear is that once he had clarified the issue of the injuries, i.e., distinguished the fatal and non-fatal injuries, no further questions were posed.

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

[14] Section 17(2)(*f*) provides:

'The decision of the majority of the judges considering an application [for leave to appeal], 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'. (Emphasis added.)

[15] Section 17(2)(*f*) of the Superior Courts Act was amended by s 28 of the Judicial Matters Amendment Act 15 of 2023. Before the amendment, s 17(2)*(f)* read:

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

[16] As already indicated, the applicant approached the President with his reconsideration application on 2 November 2023 and the President referred the application to the Court on 22 July 2024. The amendment came into operation on 3 April 2024, materially altering the threshold for reconsideration of a refusal of special leave to appeal. Whereas the previous formulation empowered the President of the Supreme Court of Appeal to refer a petition for reconsideration where 'exceptional circumstances' existed, the amended provision requires consideration of whether 'a grave failure of justice' would otherwise result or whether 'the administration of justice may be brought into disrepute.' Before the 3 April 2024 amendment of s 17(2)(*f*), an applicant had to show the existence of 'exceptional circumstances.' This applicant approached the President four months before the amendment came into operation and therefore falls under the previous dispensation.

[17] The jurisprudence of this Court on the approach to matters referred for reconsideration by the President in terms of s 17(2)(*f*) is well established. In *Road Accident Fund v Lewis*,[6] this Court reaffirmed the jurisprudence of this Court in applications of this nature that the standard of 'exceptional circumstances' still finds application. Under the circumstances, the applicant must demonstrate to the Court that, looking at all the facts holistically, there are exceptionally high prospects that this Court can find otherwise than what the two judges (on petition) did. And even find him not guilty, contrary to what the full bench and regional court found. However, as the Constitutional Court stated in *S v Liesching* (*Liesching II*),[7] the narrow and circumscribed procedure under s 17(2)(*f*), is not intended to afford a disappointed litigant a further bite at the proverbial appeal cherry or a further opportunity to procure relief that has already been refused. This remains applicable post the 2024 amendment. With this in mind, I turn to the facts of this application to apply s 17(2)(*f*).

[6] *Road Accident Fund v Lewis* [2025] ZASCA 174; [2026] 1 All SA 70 (SCA); 2026 (3) SA 490 (SCA) para 24.
[7] *S v Liesching and Others* [2018] ZACC 25; 2018 (11) BCLR 1349 (CC); 2019 (1) SACR 178 (CC) para 139.

Analysis

[18] To meet the threshold requirement for reconsideration of his application for special leave to appeal, the applicant cannot simply restate the original grounds of appeal rejected by the full bench. Counsel for the applicant accepted that to satisfy his onus under s 17(2)*(f)*, the applicant would have to establish an extremely strong case that the full bench erred on the grounds that neither it nor the regional court dealt properly with the element of causation. The applicant relies heavily on the unexplained abdominal injuries suffered by the deceased.

[19] It is quite correct, as the applicant submitted, that in the regional court the prosecution did not emphasise the cause of the deceased's death as per the postmortem report as a significant factor. The regional court caused consternation when it found that:
'[i]n addition to the head injury, the deceased also sustained a ruptured liver. How that injury was inflicted, who inflicted it, we do not know. It was in all probability inflicted whilst the deceased was lying along the street where he had fallen down.'
No evidence supported the regional court's conclusion. However, critically, there was certainty over what caused the death of the deceased, which was not the rupture of the liver. Dr Mantanga's evidence was very clear that it was the brain injury that was the cause of death. The regional court found that '[i]t is common cause what the cause of death was, namely, the brain injury that caused internal bleeding.'

[20] The full bench, having considered all the evidence, was satisfied that the State had proved this aspect of the case. It held:
'The evidence by the two witnesses was that the appellant inflicted a single assault with a brick on the deceased's head from close proximity. It was not disputed that after the brick assault on the deceased, Ms Mabasa left the scene to buy airtime. It is not clear on record what transpired. I disagree with the trial court's finding that the abdominal injury and the laceration of the liver was, in all probability, inflicted while the deceased was lying along the street where he had fallen down. There was no basis for the trial court's conclusion. Nevertheless, I find that the conclusion does not take the matter further. On the evidence, the abdominal injury was survivable, and the head injury was the cause of the death. Ms Kalikahn (for the state) relies on the head injury to support the conviction. . . I accept that the head injury was the final cause of the deceased's death and that the appellant inflicted the fatal injury.'

[21] In *S v Phallo* (*Phallo*),[8] the following was articulated on the threshold of proof beyond reasonable doubt:

'[T]here is no obligation on the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.'

[22] *Phallo*, with reference to *R v Mlambo,*[9] makes the trite point that the State is not obliged to close all avenues of the evidence presented to prove its case beyond reasonable doubt. The post-mortem report was admitted with the consent of the parties. The applicant avers that the regional court and the full bench committed a clear misdirection, amounting to a grave risk of injustice, in accepting that the single blow with the brick, inflicted by the applicant, could have caused the head injury that led to the deceased's death. He refers to the evidence of Dr Mantanga, who described the impact needed to cause the fatal cranial subdural haemorrhage as resembling injuries suffered from a motor vehicle collision, when the brain moves forward and back in the skull.

[23] As can be seen from the evidence, the description was given in the context of Dr Mantanga explaining the difference between the fatal and non-fatal injuries that the deceased sustained. It clarified the post-mortem report, which was admitted by consent between the parties, to help all parties, especially the court, understand and appreciate the medical terminology and evidence in ordinary parlance. It dispelled any misconceptions beyond what the medical report conveyed.

[24] Importantly, Dr Mantanga's evidence did not exclude the possibility that a single, forceful strike to the head by a brick could have caused the injury. On the evidence, therefore, the applicant fails to establish any misdirection by the regional court or the full bench in this respect, let alone a misdirection so clear as to satisfy the threshold requirement of s 17(2)(*f*). In any event, the applicant's averments are, in substance, no

[8] *Sv Phallo and others* 1999 (2) SACR 558 (SCA) para 10, quoting from the classic decision of Malan JA in *R v Mlambo* 1957 (4) SA 727 (A) at 738A-C.
[9] Ibid.

different than those advanced previously. In effect, they amount to the argument that on the evidence before the court the State failed to prove this aspect of the case against the applicant beyond reasonable doubt. The application is a rehash of what was already argued and determined before both the regional court and the full bench. The applicant cannot be heard complaining about this evidence so late and beyond what the full bench already found.

[25] The issue of *novus interveniens* is now considered. The ineluctable conclusion that must be drawn on the facts presented, confirmed by medical evidence, without any speculation, is that the blow to the deceased's head/ face was the sole cause of his death. According to the eyewitnesses, the applicant delivered that blow. The applicant attempted to suggest that, considering that the deceased had other serious injuries, e.g., his liver was ruptured, the deceased may have been assaulted before or as he lay in the street, which created a *novus actus interveniens*[10]. This is far-fetched. It is also highly improbable that the deceased could have been assaulted further by his own community, which then turned on the applicant as well.

[26] What remains is the issue of common purpose. The State correctly conceded that in the end it did not rely on common purpose, although it had referred to it in the summary of the facts when the charge was put to the applicant. This is not a case of common purpose and does not need to detain us. So too the discrepancies on which the applicant attempted to rely as material misdirection on the part of the regional court. Both courts properly considered and analysed the discrepancies.

[27] The finding of the regional court, as endorsed by the full bench, that the assault by the applicant on the deceased was the cause of his death, is unassailable. The approach to assessing evidence that the applicant proposes undermines the reasoning process

[10] *Novus actus interveniens* is a Latin legal term which literally translates to 'new intervening act.' It describes an independent event or action which occurs after a defendant's wrongful conduct, breaking the chain of causation. Because the new act becomes the actual cause of the harm, it can relieve the original wrongdoer of legal liability.

that must be followed in a criminal trial. This Court explained in *S v Chabalala* (*Chabalala*)[11] that the correct approach to a criminal trial is:

'[T]o weigh up all the elements which point towards the guilt of the accused against those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities, and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.'

The applicant implicitly contends for a piecemeal approach to the evidence, with some aspects viewed in isolation from the whole body of evidence. This is erroneous, and contrary to the well-established approach described in *Chabalala*.

[28] In the end, an analysis of the facts of the matter as traversed above indicates that the applicant has simply rehashed the merits of the case and repeated the previous complaints, all of which were considered and dismissed.[12] The results in the regional court, which were confirmed by the full bench, are in line with established authorities. They do not deviate from the trite general principles of criminal law applied by our courts.

[29] For these reasons, I conclude that the applicant has not met the threshold for reconsideration under s 17(2)(*f*) of the Superior Courts Act. He has not shown that the two judges of this Court wrongly refused special leave to appeal on the conviction of murder. Accordingly, this Court has no basis to interfere with its prior decision on petition, which must stand. The application for reconsideration of the application for special leave to appeal against the conviction must therefore fail.

[30] In conclusion, the issue of sentence remains. The applicant submits that the regional court did not convict him of murder committed with common purpose with others. The State conceded that the applicant could not be found guilty of murder committed with common purpose. The full bench correctly found in favour of the applicant on this point. The applicant submits that 'should this Court find the conviction of murder should stand;

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[11] *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.

[12] It is worth noting that all this could not have been brought to our attention, as when the two colleagues initially dealt with the petition, they did not have all the information. It also demonstrates the safety net s 17(2)(*d*) brings to these applications.

the commission of the offense was not premeditated.' The evidence showed that his actions would have been spontaneous, indicating the absence of direct intention to murder. He submits further that at most, a finding of *dolus eventualis* would be justified as there were other injuries the deceased sustained which could have led to his death if not treated properly.

[31] Furthermore, as the evidence indicated, the attack on the deceased was from one blow and therefore not a sustained attack. The applicant avers that the deceased's death was more accidental. The applicant also sustained life-threatening injuries he suffered at the hands of the deceased's friends or those who took revenge on his behalf, in typical retributive mob justice. He was hospitalized for over four months. He argues that these factors reduce his moral blameworthiness. Taken cumulatively, they are substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence of 15 years' imprisonment imposed by the regional court and confirmed by the full bench, as provided for in terms of s 51(2) of the Criminal Law Amendment Act 105 of 1997. He submits that a non-custodial sentence would be appropriate.

[32] In its judgment, the full bench acknowledged that the prescribed minimum sentence was 15 years' imprisonment unless substantial and compelling circumstances existed which would justify a deviation from the prescribed sentence. It noted that all these factors were not unusual, extraordinary, remarkable, peculiar, or something different. The full bench further held that the applicant failed to place any mitigating factors before the court that qualify as substantial and compelling. It took into account the seriousness of the offence committed. Consequently, dismissed the appeal against the sentence as well.

[33] Both the regional court and the full bench addressed this issue extensively. The regional court noted the applicant's personal circumstances and juxtaposed them against the aggravating circumstances present. It also remarked sternly that 'the prevalence of offences involving violence is a great concern to the courts as well as the community. We are living in a violent society. It appears as if it [has become] part of our DNA.' And concluded that the applicant's personal circumstances and mitigating factors enumerated did not qualify as substantial and compelling circumstances. Therefore, no deviation from

the prescribed sentence was justifiable. It made no reference to common purpose or any other intent based on the evidence led. The full bench found no misdirection by the regional court in this regard and confirmed the sentence, cognisant of all the factors and/ or circumstances enumerated by both the State and the defense on behalf of the applicant.

[34] It is trite that the powers of an appellate court to interfere with the sentence of a lower court are circumscribed. The trial court has a discretion to determine an appropriate sentence in a criminal trial. However, interference on appeal is warranted where there is a material misdirection or when the disparity between the sentence of the trial court and what the sentence which the appellate court would have imposed, had it been the trial court, is so marked that it can properly be described as disturbingly inappropriate.[13]

[35] Having considered that the full bench took into account all the factors, particularly that the murder was not committed with common purpose with others, this murder falls squarely within the provisions of s 51(2). Once more, the applicant has simply regurgitated what he already placed before both courts, which was duly considered and determined, albeit not in his favour. There are no exceptional circumstances which justify any interference with the sentence imposed, on appeal.

[36] On the above conclusion, it follows that the applicant has exhausted all avenues in the matter before this Court. The view expressed and reasons advanced in *JM v Masureik* (*JM*),[14] for not striking an application of this nature off the roll as the dissenting judgment proposes, remain valid. *JM* reminds us 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 because 'properly made decisions remain binding unless invalidated or modified.'[15] Importantly, the Constitutional Court

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[13] *Director of Public Prosecutions v Mngoma* [2009] ZASCA 170 SCA; 2010(1)SACR 427 (SCA) para 11, confirming the test set out in *S v Malgas* 2001 (1) SACR 469 (SCA); 2001 (2) SA 1222; [2001] 3 All SA 220) at 478D-G.

[14] *JM and Another v Masureik and Others* [2026] ZASCA 1; 2026 (4) SA 367 (SCA) paras 29 – 32. Kgoele JA wrote the majority judgment, with whom Hughes JA and Bloem AJA concurred. Keithley JA wrote the minority judgment, with whom Opperman AJA concurred.

[15] *JM* fn 14 para 37.

endorsed this order in *Former Way Trade and Invest Pty Ltd v Bright Idea Projects 66 Pty* (*Former Way*),[16] where it referred to the order of this Court without altering its formulation: '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 Constitutional Court was of the view that the formulation was incorrect or unsuitable, it would have commented on or amended the finding of this Court. It did not. Therefore, on the same basis as above, the proposed order which follows hereafter will bring finality to the matter for all parties.

Order

[37] For these reasons, the following order issues.

The order of this Court dismissing the application for special leave to appeal is confirmed.

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B C MOCUMIE

JUDGE OF APPEAL

[16] *Former Way Trade and Invest Pty Ltd v Bright Idea Projects 66 Pty Ltd* [2021] ZACC 33; 2021 JDR 2223 (CC); 2021 (12) BCLR 1388 (CC) para 22, confirming *Former Way Trade and Invest Pty Ltd v Bright Idea Projects 66 Pty Ltd* [2021] ZASCA 175; 2021 JDR 3365 (SCA). In this Court the order was formulated as follows, para 41: 'In the result: 1. The order of this court dismissing the application for leave to appeal is confirmed. . . '. The Constitutional Court refused leave to appeal in *Former Way*.

Keightley JA

[38] I agree with the conclusion reached in the first judgment that the applicant fails to meet the threshold requirement under s 17(2)(*f*) for the reconsideration of the refusal of his application for special leave to appeal. There are two aspects of the first judgment in respect of which I, respectfully, take a different view. The first aspect involves the first judgment's description of the test for relief under s 17(2)(*f*) following the amendment of that section by s 28 of the Judicial Matters Amendment Act 15 of 2023 (the 2023 amendment). The second aspect involves what I believe to be the correct order that should be made in cases where this Court concludes that an applicant under s 17(2)(f) has not met the threshold requirement.

[39] I preface my views on these issues by restating the current binding jurisprudence of this Court in respect of applications under s 17(2)(*f*). The applicant must first meet the threshold requirement of establishing that this Court has jurisdiction to reconsider the refusal of special leave. This involves the question whether the applicant has established the existence of 'exceptional circumstances' (in the form of 'a grave failure of justice' or the possibility of the administration of justice being brought into disrepute) in the absence of a reconsideration of the refusal of the application for special leave to appeal. If the applicant establishes the existence of exceptional circumstances, this Court will have the necessary jurisdiction to reconsider the refusal. In that case, the inquiry shifts to whether the two judges who refused the application for special leave erred in finding that there were no special circumstances warranting an appeal.

[40] While a reconsideration application under s 17(2)(*f*) conceptually involves this two-stage inquiry, the two stages may be closely intertwined. This is so in cases where the applicant asserts that the errors committed by the high court, which led to the application for leave or special leave to this Court, are such that a grave injustice will arise if the refusal of leave by two judges under s 17(2)(*b*) or s 17(2)(3) is not subject to reconsideration by a larger panel of judges of the Court. In these cases, it is inevitable that the inquiry into the threshold question will involve a consideration of the facts of the case and the merits of the decision sought to be appealed against. It is important, however, to bear in mind that there are fundamental legal differences in how each of the

two stages of the overall inquiry are framed and how they must be approached by both litigants and the Court.

[41] This case falls within the category discussed above. As the first judgment notes, the applicant avers that, among other problems, the high court committed such a clear misdirection in concluding that the evidence established that his conduct caused the complainant's death, that this constitutes exceptional circumstances justifying a reconsideration of this Court's order refusing special leave to appeal. Put differently, he contends that the regional court, and subsequently the full bench, were so wrong that a grave injustice will result if he is not given the opportunity to subject to reconsideration, by a full panel of judges of this Court, the dismissal of his application for special leave to appeal by two judges.

[42] The first judgment applies the test as formulated prior to the 2023 amendment to s 17(2)(*f*), based on the date upon which the application for relief under that section was instituted. I take no issue with this. However, in explaining the change introduced by the amendment, the first judgment states that it introduced a materially different test to that under the previous formulation. For reasons that appear below, this is contrary to the jurisprudence of this Court, which holds that in substance, there is no change in the test to be applied, despite the change of wording effected in the 2023 amendment.[17]

[43] It is important to consider the background to the evolution of the proviso in s 17(2)(*f*) and its relationship with other provisions governing the grant of leave to appeal by this Court.

[44] The Court may grant 'ordinary' leave to appeal on application under s 17(2)(*b*) where the high court, sitting as a court of first instance, refuses leave to appeal. This type of application, often commonly, albeit it inaccurately, referred to as a 'petition', is heard

[17] See for example the recent case of *FirstRand Limited and Another v National Bank of Abu Dhabi PJSC (Pty) Limited* [2026] ZASCA 98; [2026] 3 All SA 485 (SCA) para 82, where this Court held, with reference to *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 para 6, that '[i]t must be borne in mind that exceptional circumstances *entail* the likelihood of a grave injustice or the administration of justice being brought into disrepute.' Emphasis added.

by two judges of this Court under s 17(2)(*c*). The two judges may, without hearing oral submissions, refuse the application for leave to appeal or grant leave to appeal. They may also direct that oral argument be heard by the Court on whether leave should be granted.[18] If leave is granted, the Court will direct that the appeal be heard either by this Court or an appeal panel of the high court. In respect of applications for leave to appeal to this Court under s 17(2)(*b*), the test as to whether leave should be granted is that outlined in s 17(1), the key factors being whether there are reasonable prospects of success, or some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.[19] This is the same test that is applied when leave to appeal is sought from the high court.

[45] In addition to its power to grant what I have referred to as 'ordinary' leave to appeal under s 17, this Court also has the power to grant special leave to appeal under s 16(1)(*b*). Importantly, special leave applies to matters in which the high court sat as a court of appeal, either on a decision made by a magistrate's court, or a decision at first instance by a single judge.[20] In those cases, leave to appeal is sought directly from this Court. The test for special leave is higher than that required for the grant of 'ordinary' leave to appeal. It requires more than reasonable prospects of success. Special circumstances must be established. These may include that the appeal raises a specific point of law, or that the prospects of success are so strong that refusing leave could result in a denial of justice, or that the matter is significant to the public or the parties.[21] An application for special leave to appeal to this Court under s 16(1)(*b*) follows the same 'petition' procedure as that in respect of an application for 'ordinary' leave to appeal described above: generally, it is determined by two judges in chambers. If special leave to appeal is granted, the appeal will be heard by this Court.[22]

[46] Section 17(2)(*f*) applies in respect of applications to this Court for both 'ordinary' leave to appeal under s 17(1)(*b*) and special leave to appeal under s 16(1)(*b*). It provides

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[18] Section 17(2)(*d*).
[19] Section 17(1)(*a*).
[20] Section 16(1)(*b*).
[21] *Road Accident Fund & Others v Mautla and Others* [2025] ZASCA 200; 2026 (4) SA 408 (SCA) para 22, and the cases cited therein.
[22] Sections 17(2)(*b*)-(*f*).

that the decision of the majority of the judges deciding an application for leave to appeal to this Court, or, where the application is referred for oral argument to the Court, the decision of the Court on the application, shall be final. Section 17(2)(*f*) introduced the proviso which is central to both judgments in this matter.

[47] The proviso created the possibility of a reconsideration of what previously, under the Supreme Court Act 59 of 1959, had been the final decision by this Court to grant or refuse an application for leave to appeal. In the Superior Courts Act, which repealed the Supreme Court Act and introduced the proviso, the proviso originally read: '… Provided that the President of the Supreme Court of Appeal may, *in exceptional circumstances*, whether of his or her own accord or on application, …. refer the decision to the court for reconsideration and, if necessary, variation.' (Emphasis added.) The italicised wording is the only respect in which the original proviso differed from its current iteration, which is cited in full in the first judgment. As that judgment explains, the test now, effected by the 2023 amendment, is formulated as: 'in circumstances where a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute.

[48] Regrettably, the first judgment misstates the correct legal position by opining that the 2023 amendment 'materially altered the threshold for reconsideration of a refusal of special leave to appeal'. This Court found, in *Tarentaal Centre Investments (Pty) Ltd v Beneficio Developments*,[23] that the original phrase 'exceptional circumstances' encompasses the new jurisdictional factors of 'a grave failure of justice' and the administration of justice being brought 'into disrepute'. Thus, there is no material change to the inquiry and the earlier jurisprudence on s 17(2)*(f)* before the amendment holds good for the amended provision. This was confirmed in *Mautla*.[24] In other words, the test as amended simply codifies how the 'exceptional circumstances' test has been interpreted by the courts. It is a clarification and confirmation of the test, as previously interpreted.

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[23] *Tarentaal Centre Investments (Pty) Ltd and Another v Beneficio Developments (Pty) Ltd* [2025] ZASCA 38; 2025 JDR 1461 (SCA) para 4.
[24] Above fn 21 para 13.

[49] What this means is that the substance of the test remains the same: 'exceptional circumstances' will exist, for purposes of applications made prior to the 2023 amendment, in cases where to refuse the application might result in a grave failure of justice, or placing the administration of justice at risk. The test of 'exceptional circumstances', in s 17(2)(*f*)'s original formulation, is not whether 'there are exceptionally high prospects that this Court can find otherwise than what the two judges (on petition) did', as stated in the first judgment. This exposition of the test ignores the well-established jurisprudence of what 'exceptional circumstances' mean. It also confuses the jurisdictional requirement in a s 17(2)(*f*) inquiry, with the merits of the appeal itself.

[50] I accordingly disagree with the first judgment insofar as it suggests that the amended formulation of the proviso in s 17(2)(*f*) involves a materially different test to satisfy the threshold question than existed prior to the 2023 amendment.

[51] The second aspect of the first judgment with which I disagree is in its formulation of the order. As indicated, I concur that the applicant has failed to establish that there would be a grave injustice if the door is closed to a reconsideration of the refusal of his application for special leave to appeal. As such, there are no 'exceptional circumstances' in this case to satisfy the threshold question, which is a jurisdictional requirement. If the jurisdictional requirement is not satisfied, the Court has no power to enter upon a reconsideration of the decision to refuse leave or special leave refusal. Consequently, the matter is not properly before the Court for want of jurisdiction. In those circumstances, I believe, the appropriate order is to strike the matter from the roll.

[52] I elaborated on my position on this issue in my minority judgment in *JM & Another v CDM & Another* (*JM*).[25] In my view, the fact that the Constitutional Court rejected an application for leave to appeal in *Former Way* and granted an order confirming the order of the majority of this Court does not materially alter the position. There is no indication from the order of the Constitutional Court that it was required, or that it did, give any

[25] *JM & Another v Masureik & Others* [2026] ZASCA 1; [2026] 1 All SA 259 (SCA); 2026 (4) SA 367 (SCA) (*JM*, also above fn 14) paras 40-45.

consideration to the correct form of the order. That it was silent on the issue cannot mean that it endorsed one view as opposed to another. I reiterate the views I expressed in *JM*. The facts of the present matter do not support a different approach to that I adopted in *JM*. Although it was necessary to consider the merits of the appeal, this was only for purposes of determining whether the threshold requirement had been established. As I explain in *JM*, the striking of an application for reconsideration for want of jurisdiction is as final in effect as a dismissal of the application. It does not permit a second bite at the cherry: if the Court has no jurisdiction, it cannot subsequently acquire it in the same matter. The majority judgment in *JM* finds that the formulation of the order is a matter for the discretion of this Court. Consequently, it is open to me to retain my minority view on the issue, to record my dissent and to propose that paragraph 1 of the order of this Court should read: ‘The application is struck from the roll’.

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R M KEIGHTLEY

JUDGE OF APPEAL

Appearances

For the applicant:	EA Guarneri
Instructed by:	Johannesburg Justice Centre, Johannesburg
	Bloemfontein Justice Centre, Bloemfontein
For the respondent:	A Deoraj
Instructed by:	Director of Public Prosecutions, Johannesburg
	Director of Public Prosecutions, Bloemfontein.