THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 708/2023

In the matter between:

KOBUS NEL **APPLICANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Nel v The State* (708/2023) ZASCA 89 (12 June 2025)

Coram: NICHOLLS JA and SALDULKER and DLODLO AJJA

Heard: 12 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and released to SAFLII. The date and time for hand down is deemed to be 12 June 2025 at 11h00.

Summary: Reconsideration of application for special leave to appeal – s 17(2)*(f)* of the Superior Courts Act 10 of 2013 – section not intended to afford disappointed litigants a further attempt to procure relief – absence of exceptional circumstances – application struck off the roll.

ORDER

On application for reconsideration: referred by Petse DP in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013:
The application is struck off the roll.

JUDGMENT

Saldulker AJA (Nicholls JA and Dlodlo AJA concurring):

Introduction

[1] The applicant, Mr Kobus Nel stood trial in the Specialised Commercial Crimes Court sitting in the Regional Court for the District of Gauteng, Pretoria, (the regional court), and was convicted on 12 counts of theft, after he pleaded guilty. Subsequent to his conviction, he was sentenced on 14 February 2022, as follows. On counts 1, 2 and 4 to 12, for theft, which was taken together for purposes of sentence, he was sentenced to 12 years' imprisonment. On count 3 for theft, he was sentenced to 15 years' imprisonment. The sentences imposed on counts 1, 2 and 4 to 12 were ordered to run concurrently with the sentence imposed on count 3. His effective sentence was 15 years' imprisonment.

[2] The applicant applied to the regional court for leave to appeal against the sentence that was imposed. This application was dismissed. The applicant then

petitioned the Gauteng Division of the High Court, Pretoria (the high court) for leave to appeal against the sentence. On 2 August 2022, his petition was dismissed. Thereafter, the applicant petitioned for special leave to appeal to this Court in terms of s 16(1)*(b)* of the Superior Courts Act 2013 (the Superior Courts Act), against the judgment of the high court. This petition was dismissed on 19 January 2023 on the grounds that no special circumstances existed meriting a further appeal to this Court.

[3] Aggrieved by the dismissal of his petition, the applicant applied to the President of this Court in terms of s 17(2)*(f)* of the Superior Courts Act to reconsider the application for special leave to appeal. On 29 September 2023, as per the order of Petse DP, the application for reconsideration of this Court's decision to refuse special leave was granted. Petse DP further referred the application for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act, and the parties were informed that they should be prepared to argue the merits of the appeal, if special leave is granted. This referral is now before us.

[4] As at the date of the referral by Petse DP, s 17(2)*(f)*, read as follows:

'The decision of the majority of the judges considering an application referred to in paragraph *(b)*, or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may, in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.' [1]

[1] Section 17(2)(*f*) was amended by section 28 of the Judicial Matters Amendment Act 15 of 2023 which came into effect on 3 April 2024, and reads as follows 'The decision of the majority of the judges considering an application referred to in paragraph *(b)*, or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may, in **[exceptional]** circumstances**[,]** 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.'

[5] The issue before us is whether there are any exceptional circumstances warranting a reconsideration of the decision on petition. Courts have been reluctant to lay down a general definition of what might constitute 'exceptional circumstances'. Axiomatically, the phrase exceptional circumstances must connote something extraordinary or unusual. It might include a substantive point of law or any new or further evidence that has come to light after the petition has been considered and determined, which warrants a remedy or a redress, and which, without leave, may result in a grave injustice or bring the administration of justice into disrepute. In *Cloete and Another v S and A Similar Application*, the Constitutional Court put it aptly thus:

'The proviso in s 17 (2)(*f*) performs the function of a safety-net, giving the President the power to intervene, in order to cure errors or mistakes, prevent an injustice or where a failure to intervene would result in the administration of justice being brought into disrepute.'[2]

[6] A decade ago, Mpati P, in *Avnit v First Rand Bank Ltd* (*Avnit*),[3] stated in pellucid prose that:

'Prospects of success alone do not constitute exceptional circumstances. The case must truly raise a substantial point of law, or be of great public importance or demonstrate that without leave a grave injustice may result. Such cases will be likely to be few and far between because the judges who deal with the original application will readily identify cases of that ilk. But the power under s 17(2)(*f*) is one that can be exercised even when special leave has been refused, so "exceptional circumstances" must involve more than satisfying the requirements for special leave to appeal. The power is likely to be exercised only when the President believes that some matter of importance has possibly been overlooked or grave injustice will otherwise result.'[4]

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[2] *Cloete and Another v S and a Similar application* [2019] ZACC 6; 2019 (2) SACR 130 (CC) para 43.
[3] *Avnit v First Rand Bank Ltd* [2014] ZASCA 132; 2014 JDR 2014 (SCA).
[4] Ibid paras 6 and 7. See also *S v Liesching* [2016] ZACC 41; 2017 (2) SACR 193 (CC) *(Liesching I)*; *S v Liesching and Others* [2018] ZACC 25; 2019 (4) SA 219 (CC) *(Liesching II)*; and *Motsoeneng v South African Broadcasting Corporation SOC Ltd and Others* [2024] ZASCA 80; 2024 JDR 2195 (SCA).

[7] In *Liesching II*, the Constitutional Court said that:

'. . '[S]ection 17(2*)(f)* is not intended to afford disappointed litigants a further attempt to procure relief that has already been refused. It is intended to enable the President to deal with a situation where otherwise injustice might result and does not afford litigants a parallel appeal process in order to pursue additional bites at the proverbial appeal cherry.'[5]

[8] More recently, in *Bidvest Protea Coin Security (Pty) Ltd v Mabena*,[6] this Court said that:

'. . . Rather, exceptional circumstances are referenced as an objective state of affairs that must exist as a predicate for the exercise of the power by the President. If the predicate does not exist, then this Court has no competence to engage upon a reconsideration of the decision on petition. The President's referral cannot invest this Court with jurisdiction to reconsider the decision on petition, if the jurisdictional predicate for such consideration is absent.'[7]

[9] The foregoing cases reiterate the jurisprudence that in relation to s 17(2)*(f)*, the threshold requirement of the existence of exceptional circumstances is a jurisdictional fact that has to be met first.[8] Importantly, in *Avnit*, Mpati P carefully examined the meaning of 'exceptional circumstances' and concluded that the referral to this Court follows upon the exercise of power of the President of this Court, which is 'likely to be exercised only when the President believes that some matter of importance has possibly been overlooked or grave injustice will otherwise result.'[9] Thus, the effect of the amendment to s 17(2)*(f)*, does not change the essential question before this Court.[10]

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[5] *Liesching II* para 139.
[6] *Bidvest Protea Coin Security (Pty) Ltd v Mabena* [2025] ZASCA 23; 2025 (3) SA 362 (SCA).
[7] Ibid para 15.
[8] See also *S v Lorenzi* [2025] ZASCA 58; 2025 JDR 2015 (SCA); *Ekurheleni Metropolitan Municipality v Business Connexion Pty Ltd* [2025] ZASCA 41 2025 JDR 1488 (SCA); *Tarentaal Centre Investments (Pty)Ltd v Beneficio Developments* [2025] ZASCA 38; 2025 JDR 1461 (SCA) paras 4-7, *S v Mbatha* [2020] ZASCA 102; 2020 JDR 1884 (SCA); *Manyike v S* [2017] ZASCA 96 para 3.
[9] *Avnit* para 7. See also *Liesching II* para 138.
[10] *Bidvest* para 10, fn 3.

Analysis

[10] I turn now to consider, whether the applicant has established exceptional circumstances. The counsel for the applicant, Mr Alberts accepted that they bore the onus of establishing the existence of exceptional circumstances that permit of the reconsideration of the decision on petition.

[11] Regrettably, before us, counsel for the applicant, sought to contend that the following factors, namely, the previous convictions; the time spent in custody; the absence or presence of remorse by the applicant; the health challenges facing the applicant; the proportionality of the sentence individually and cumulatively amounted to exceptional circumstances that warranted a reconsideration and possible variation of this Court's order. However, all of these contentions have already been considered and rejected by other judicial fora in this matter. In a detailed judgment by the regional court on sentence, substantial and compelling circumstances were considered and rejected. In the high court leave to appeal was sought and refused. In this Court two judges dismissed the application for leave to appeal.

[12] The sole focus of Mr Alberts' contentions was to rehash the arguments on sentencing that had already been advanced before the regional court, the high court and the two judges who dismissed the application for special leave to appeal in this Court.[11] In doing so, he misconceived the true nature of the enquiry. He did not appreciate that the requirement of the existence of exceptional circumstances is a

[11] *Du Preez N O v Member of Executive Council for Health & Social Development of the Eastern Cape Province* [2024] ZASCA 147; 2024 JDR 4693 (SCA) paras 29 and 42.

jurisdictional fact that had to be met first, and that absent exceptional circumstances, the application must fail.

[13] The well-reasoned and detailed judgment of the regional court magistrate cannot be faulted. The applicant was convicted of 12 counts of theft of money to the value of about R3.9 million. He lured various complainants with a business plan and a capital venture agreement, promising them repayment, with interest, on their investments, within a short period of time. The moneys that were entrusted to the applicant were misappropriated for his own personal use.

[14] Significantly, the applicant already had previous convictions for theft, when he committed the first four counts of theft in 2008 and 2009. In 1993, he was convicted on three counts of fraud, and sentenced to a suspended sentence, and a further three years of correctional supervision in terms of s 276(1)*(h)* of the Criminal Procedure Act 51 of 1977. The court also ordered compensation to be paid. In May 2010, he committed fraud, for which he was sentenced to a fine of R1 500 or two years' imprisonment in 2013. In the matter before us he was charged in 2016 with the first four counts of theft, and pleaded not guilty. The trial lasted four years and the presiding officer then passed away. Whilst he was on bail, in respect of this trial, the applicant committed a further eight counts of theft, counts 5 to 12. Thus when the trial began de novo, the applicant faced 12 counts of theft. The State elected to prosecute the applicant for the initial four counts as well as the eight new counts.

[15] The picture that emerges of the applicant is that of a fraudster who has a propensity to commit white-collar crimes. It is clear that he did not take responsibility for any of his past criminal conduct. He deceived investors with promises of easy money over a period of twelve years unabated. Of material

relevance is that whilst he was on bail, between 2016 and 2020, the applicant committed eight more counts of theft. He was clearly unremorseful and brazen.

[16] Mr Alberts contended that the sentences imposed on the applicant warranted interference on the grounds of proportionality, and that taking into account comparable cases where lighter sentences were imposed for stealing much more, the applicant had suffered a grave injustice. In my view this submission has no merit. Mr Alberts appears to ignore the fact the applicant had previous convictions even before this trial began, which cannot be disregarded. These are serious aggravating factors.

[17] The regional court found no substantial and compelling circumstances justifying a departure from the prescribed minimum sentence of 15 years on count 3. Mr Alberts contended that the regional court misdirected itself in imposing the minimum sentence. He submitted that the 2013 previous conviction was committed in 2010, whilst the offence on count 3 had already been committed between January and June 2009, prior to the previous conviction, which justified an intervention with the sentence on count 3. The conviction on count 3 alone amounted to more than R1 million, and was subject to the minimum sentencing provisions prescribed in s 51(2)*(a)* of the Criminal Law Amendment Act 105 of 1997, of 15 years' imprisonment. According to these provisions a first offender, who has been convicted of an offence referred to in Part II of Schedule 2,[12] is to be sentenced to 15 years' imprisonment, a second offender to 20 years' imprisonment and a third offender to 25 years' imprisonment, unless there are substantial and compelling

[12] The relevant offences referred to in Part II Schedule 2 are '. . . fraud . . . [and] theft . . .
(a) involving amounts of more than R500 000,00;
(b) involving amounts of more than R100 000,00, if it is proved that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy'.

circumstances to justify a lesser sentence. Even though the applicant was not a first offender, he was treated as such by the regional court for the purposes of the minimum sentencing provisions.

[18] It is trite that the imposition of a sentence in a criminal matter is primarily a matter for the discretion of the trial court. A court of appeal will not lightly interfere with the exercise of that discretion. In my view, the sentences imposed are just, salutary and appropriate. The applicant has suffered no grave injustice with regard to the sentences imposed on him, nor are they disproportionate to the crimes committed by the applicant. The sentences were ordered to run concurrently, thus mitigating the severity of the sentences.

[19] Much has been made of the health challenges that the applicant faces in prison, which are not being properly managed in the prison hospital. It is not disputed that he suffers from a serious diabetic condition. In this regard, counsel for the respondent averred that the applicant did not appear to care about his health and did not take his condition seriously even when he had been released on bail. The regional court has already rejected the applicant's chronic illness as a compelling and substantial circumstance. In my view, the illness of the applicant is a neutral factor in his case, and not to be regarded as exceptional.

[20] Insofar as the time spent in custody, for approximately thirteen months, is concerned, the applicant contends that it is equivalent to double time served. This factor was rejected as a substantial and compelling circumstance by the regional court. This period is not an exceptionally long time, and was also caused by the applicant's own fault as he was arrested for committing similar offences whilst he was released on bail. In any event, the notion that time spent in custody awaiting

trial amounts to double time has been rejected by this Court in numerous decisions. As stated in *Radebe and Another v S (Radebe)*[13] this Court said that:

'. . .[T]here should be no rule of thumb in respect of the calculation of the weight to be given to the period spent by an accused awaiting trial. . . A mechanical formula to determine the extent to which the proposed sentence should be reduced, by reason of the period of detention prior to conviction, is unhelpful. . .'[14]

[21] Furthermore, the applicant's offer to repay R500 000 is no indication of real penitence. In the twelve years that the applicant committed these offences the complainants were not compensated. There is no genuine contrition on the part of the applicant. The applicant showed no real insight into his actions, and their consequences.

Conclusion

[22] All the mitigating factors enumerated by Mr Alberts have already been considered and rejected by the regional court, the high court and the two judges of this Court who considered the petition. They have now been regurgitated before us in the guise of exceptional circumstances. No new arguments have been raised before us, which, if known at the time of the petition, might have resulted in a different outcome. There is no grave injustice, nor will the administration of justice fall into disrepute if this Court were to refuse special leave to appeal. In *Avnit*, this Court stated that an application 'that merely rehearses the arguments that have already been made, considered and rejected will not succeed'.[15]

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[13] *Radebe and Another v S* [2013] ZASCA 31; 2013 (2) SACR 165 (SCA). See also *Director of Public Prosecutions, North Gauteng: Pretoria v Gcwala and Others* [2014] ZASCA 44; 2014 (2) SACR 337 (SCA) paras 26-30 and *S v Ludidi and Others* [2024] ZASCA 162; 2025 (1) SACR 225 (SCA) para 12.
[14] *Radebe* para 13.
[15] *Avnit* para 6.

[23] I am satisfied that no exceptional circumstances exist to merit a further appeal or a variation of the decision to refuse the applicant's application for special leave to appeal. Section 17(2)*(f)* requires that this Court must decide whether exceptional circumstances exist. If they do not, as I find, then the jurisdictional fact that permits a reconsideration of the decision on petition has not been established. Accordingly, this application must fail. As a result, the application must be struck off the roll.

[24] In the result, the following order is made:

The application is struck off the roll.

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H K SALDULKER

ACTING JUDGE OF APPEAL

APPEARANCES

For the applicant:	H Alberts with M G Botha
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	SMO Seobe Inc., Bloemfontein
For the respondent:	W J Van Zyl
Instructed by:	Director of Public Prosecutions, Pretoria
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