THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 1349/2023

In the matter between:

JAMES THOMAS EVANS **APPLICANT**

and

WESTERN PROVINCE ATHLETICS **RESPONDENT**

Neutral Citation: *James Thomas Evans v Western Province Athletics* (1349/2023) [2025] ZASCA 119 (18 August 2025)

Coram: MBATHA, KATHREE-SETILOANE and KOEN JJA and DAWOOD and MOLITSOANE AJJA

Heard: 14 May 2025

Delivered: 18 August 2025.

Summary: Reconsideration application in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013 – leave to appeal – whether the grounds advanced constitute exceptional circumstances as jurisdictional facts – if so, whether the decision of this Court dismissing the application for leave to appeal should be varied and leave to appeal be granted.

ORDER

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

The application for reconsideration is struck from the roll with no order as to costs.

JUDGMENT

Dawood AJA (Mbatha, Kathree-Setiloane and Koen JJA and Molitsoane AJA concurring)

Introduction

[1] The applicant, James Thomas Evans (Mr Evans) launched contempt of court proceedings in the Western Cape Division of the High Court, Cape Town (the high court), against Western Cape Province Athletics (WP Athletics) which dismissed the application with costs. The application for leave to appeal to the high court met the same fate. Mr Evans thereafter applied for special leave to appeal to this Court, which was refused by two justices of this Court. He then applied, in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013 (Superior Courts Act), to the President of this Court for a reconsideration of that decision, who referred the matter for reconsideration and if necessary, variation. She also referred the application for leave to appeal for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act.

Factual background

[2] This matter has a long history dating back to 2015. Mr Evans laid complaints against certain members of WP Athletics and requested it to hold disciplinary hearings against them. This was followed by arbitration proceedings which culminated in an arbitration award. That award was made by consent in terms of a settlement agreement. Clause 3 of the settlement agreement reads as follows:

'All disciplinary matters contained in this referral. . . are to be referred back to the Disciplinary Committee and shall be considered afresh in terms of the provisions of the Respondent's Constitution. . .'

[3] Mr Evans launched an application to make the arbitration award an order of court, which was granted by consent on 17 November 2021. He thereafter brought an application for WP Athletics to comply with the arbitration award. That too was made an order of court. The order granted by consent on 5 August 2022 reads as follows:

'1. The Respondent is ordered to comply with clause 3 of the arbitration award which was made an Order of Court under case number 902/17 on 17 November 2022, with compliance to commence within 30 days of service of such Order and the disciplinary processes to be completed within 90 days of service of such Order unless the Respondent applies to this Court for an extension of the date of completion (but not for commencement) on good cause shown.

2. Service of the Order in paragraph 1 on the Respondent shall take place via physical service on the Respondent's attorneys (STBB).

3. Should the Respondent fail to comply with the Order referred to in para 1 above, then the Applicant is granted leave to apply to Court on the same papers, duly supplemented, for an Order:

3.1 Holding the Respondent to be in Contempt of Court;

3.2 Imposing a fine on the Respondent of R10 000 for every completed day on which it does not comply with the Order;

3.3 Imposing a sentence of imprisonment of 30 days plus 10 days for each completed day on which the Respondent does not comply with the Order on the Respondent's Board members on whom the Order has been personally served.
3.4 Alternatively, any such sanction which the Court deems appropriate for the Respondent's refusal or neglect to comply with a Court Order.
4 That the Respondent pays the Applicant's costs as agreed or taxed.'

[4] The order was served on WP Athletics on 30 August 2022 and the first inquiry was conducted within the 30-day time period. Mr Evans, on 30 November 2022, relying on paragraph 3 of the order granted on 5 August 2022, filed a filing sheet and supplementary affidavit supplementing his papers to apply, inter alia, for an order holding WP Athletics in contempt of court for failing to hold the further disciplinary hearings within 90 day period. It later transpired that the contempt proceedings were launched upon the expiration of 90 ordinary days and not court days.

[5] Mr Evans filed a further supplementary affidavit on 27 January 2023 in which he raised the issue whether 90 days were court days or ordinary days, but did not seek leave to file that further affidavit. WP Athletics thereafter filed an answering affidavit on 23 February 2023, and Mr Evans filed a replying affidavit on 3 March 2023. This was followed by WP Athletics filing a supplementary affidavit and a counter application on 3 March 2023. These were served and filed without the leave of the high court. An application for condonation was only incorporated in the counter application. Mr Evans did not file a further affidavit, choosing to wait for the court's decision on whether leave would be granted for the filing of the supplementary affidavit and the counter application by WP Athletics.

[6] The high court, inter alia, found that 90 days meant court days and that Mr Evans' filing sheet and supplementary affidavit were simply premature. It

made no findings regarding the filing of the additional affidavits. It made the following order on the merits:

'(a) [T]he application is dismissed with costs.

(b) [T]he respondent's application for the extension of the date of completion of the disciplinary processes is extended by 60 days from the date on which the parties agree to a complete schedule of the disciplinary hearings, which schedule shall include the name(s) of the presiding officers; date, place and time of hearings and the list of witnesses to be called.'

Issue for determination

[7] The issue for determination is whether Mr Evans has satisfied the requirements for reconsideration. This matter was referred for reconsideration on 5 March 2024 shortly prior to the amendment of s 17(2)*(f)* of the Superior Courts Act, which came into effect on the 3 April 2024. The jurisdictional requirement for the exercise of the President's discretion was, at that stage, the existence of exceptional circumstances.

Exceptional circumstances

[8] A number of cases provide guidance and direction on the construction of what constitutes exceptional circumstances. In *Avnit*[1], this Court held:

'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 [of referral] is likely to be exercised only when the President believes that some matter of importance has possibly been overlooked or a grave injustice will otherwise result.'[2]

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[1] *Avnit v First Rand Trading* [2014] ZASCA 132; [2014] JOL 32336 (SCA).
[2] Ibid *Avnit* para 7. See also *Rock Foundation Properties and Another v Chaitowitz* [2025] ZASCA 82 para 17.

[9] In *Liesching II*,[3] the Constitutional Court found that:

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

In summary, section 17(2)(f) is not intended to afford disappointed litigants a further attempt to procure relief that has already been refused. It is intended to enable the President to deal with a situation where otherwise injustice might result and does not afford litigants a parallel appeal process in order to pursue additional bites at the proverbial appeal cherry.'[4]

[10] In *Rugnanan v S,*[5] this Court restated the test for reconsideration in terms of s 17(2)*(f)* and adopted the view that each case must be judged on its own facts. Relying on earlier authorities, this Court set out a composite understanding of 'exceptional circumstances'. It quoted Thring J in *MV AIS Mamas Seatrans Maritime v Owners, MV AIS Mamas and Another*[6]:

'1. What is ordinarily contemplated by the words "exceptional circumstances" is something out of the ordinary and of an unusual nature; something which is expected in the sense that the general rule does not apply to it; something uncommon, rare or different . . .

2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.

3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.

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[3] *S v Liesching and Others* [2018] ZACC 25; 2019 (4) SA 219 (CC) 2018 (11) BCLR 1349 (CC); 2019 (1) SACR 178 (CC).

[4] Ibid *Liesching II* paras 138-139. See also *Tarentaal Centre Investments (Pty) Ltd v Beneficio Developments* [2025] ZASCA 38; 2025 JDR 1461 (SCA); [2025] JOL 68842 (SCA) para 4.

[5] *Rugnanan v S* [2020] ZASCA 166; 2020 JDR 2721 (SCA); [2020] JOL 49135 (SCA) (*Rugnanan*).

[6] *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and Another* 2002 (6) SA 150 (C) at 156H.

4. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.
5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a literal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.'[7]

[11] The Constitutional Court in *Cloete* reiterated that:[8]

'… in order for the President to exercise her power in terms of section 17(2)(f), there must be exceptional circumstances warranting the exercise of this power…whether there are exceptional circumstances "will depend on the facts and circumstances of each case".'

[12] In *Motsoeneng*,[9] this Court reaffirmed the test for s 17(2)*(f)* that exceptional circumstances are a *necessary prerequisite*, and absent them the application 'must fail'. This Court, quoting *Liesching II*, emphasised that s 17(2)*(f)* 'allows for a litigant to depart from this normal course [of appeal], in exceptional circumstances only', and if the circumstances are not truly exceptional 'that is the end of the matter'. This Court noted, as in *Liesching II*, that s 17(2)*(f)* is a proviso or exception to the rule of finality and has to be construed strictly. On this basis, this Court agreed with the high court that *Motsoeneng* had no reasonable prospects of success on appeal and no special grounds. Further he did not meet the higher threshold of exceptional circumstances set by s 17(2)*(f)*. Accordingly, the application failed.

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[7] *Rugnanan* para 4.
[8] *Cloete and Another v S; Sekgala v Nedbank Limited* [2019] ZACC 6; 2019 (5) BCLR 544 (CC); 2019 (4) SA 268 (CC); 2019 (2) SACR 130 (CC) para 35.
[9] *Motsoeneng v South African Broadcasting Corporation Soc Ltd and Others* [2024] ZASCA 80; 2025 (4) SA 122 (SCA) paras 12, 14, 16, 19 and 20.

[13] In *Bidvest*,[10] this Court found that there was no novel legal issue, no serious omission and no risk of injustice so grave as to disturb the objective of achieving finality in litigation. The court struck the matter from the roll.

[14] In *Lorenzi*,[11] this Court dealt extensively with the test and summarised the *Avnit* standard. This Court reiterated that s 17(2)*(f)* is not intended to give disappointed litigants another bite at the cherry. Of particular interest, *Lorenzi* summarised *Tarentaal*, and *Motsoeneng*, confirming that the 2023 amendment to s 17(2)*(f)* simply enshrines the two paradigmatic bases, ie a grave failure of justice or disrepute and did not alter the nature of the President's discretion. It reiterated the *Motsoeneng* formulation:

'If the circumstances are not truly exceptional, that is the end of the matter. The application… must fail and falls to be dismissed.'

Mr Evans' grounds for reconsideration

[15] Mr Evans' grounds for reconsideration have to be viewed through the prism of these authoritative decisions. Mr Evans raised the following grounds in his founding affidavit in the application for reconsideration as constituting exceptional circumstances:

(a) That the proceedings relating to the virtual hearing of the application for leave to appeal, were not recorded;

(b) That his right to access to court was infringed, as the additional affidavits were filed by WP Athletics without him being given an opportunity to respond;

(c) That the granting of orders, not sought by the parties, were irregular;

(d) That the rules of the court were flouted by WP Athletics, which prevented him from filing a replying affidavit; and

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[10] *Bidvest Protea Coin Security (Pty) Ltd v Mandla Wellem Mabena* [2025] ZASCA 23; 2025 (3) SA 362 (SCA) paras 22-24.

[11] *Lorenzi v The State* [2025] ZASCA 58 para 12.

(e) That WP Athletics' non-compliance with court orders and the nature of the orders granted by the high court brought the administration of justice into disrepute.

[16] Mr Evans submitted in regard to the first ground that the application for leave to appeal was heard virtually without the proceedings being recorded or the judge being visible to him. In addition, the ex-tempore judgment of the judge could not be transcribed. As a result, this led to an irregularity as no full reasons for the judgment were made available to the parties. The absence of the written judgment made it impossible for this Court to determine his application for leave to appeal. This was irregular as it fell foul of the provisions of s 31(1) and (2) of the Superior Courts Act, hence the leave to appeal judgment should be set aside and remitted to the high court to be heard afresh.

[17] Second, Mr Evans asserted the need for proceedings to be heard in open court and to be recorded is enshrined in our law. Section 31(1) of the Superior Courts Act provides that '[e]very Superior Court is a court of record' and thus must produce and preserve a reliable record of all its hearings. The recorded proceedings should be authenticated by the court's seal, which underpins the legitimacy and reproducibility of judicial decisions. This contention was raised by Mr Evans notwithstanding that s 32 provides as follows:

'Save as is otherwise provided for in this Act or any other law, all proceedings in any Superior Court must, except in so far as any such court may in special cases otherwise direct, be carried on in open court.'

[18] The Constitutional Court in *S v Mamabolo*,[12] stressed that the open-court principle is essential to maintain public confidence and accountability in the judiciary and that any limitation requires compelling justification supported by

[12] *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC); 2001 (1) SACR 686 (CC).

law. Moreover, s 34 of the Constitution guarantees access to courts and a fair public hearing. It encompasses both the right to litigate and the procedural safeguards that make that right meaningful.

[19] It is not in dispute that there was a hearing and that an ex-tempore judgment was handed down wherein leave to appeal was refused. The main judgment and order refusing leave was presented to two justices of this Court to consider whether or not to grant leave to appeal, and leave was refused.

[20] Mr Evans was not denied a hearing and an order was made albeit without a recording of the reasons. The two justices of this Court, had the application for leave to appeal before them together with Mr Evans' affidavit, main judgment and WP Athletics' response and the order refusing leave. They were able to reach a decision based on the information before them. If they had required the high court's reasons for refusing leave to appeal they would have requested them. No grave injustice occurred by the lack of a written judgment in respect of the application for leave to appeal. The failure to record argument and the absence of a judgment in the application for leave do not in the circumstances of this case amount to an exceptional circumstance warranting a re-hearing of the application.

[21] Mr Evans does not say how the absence of reasons for refusing leave to appeal would have prejudiced him or would have led to an injustice. There is no merit in his contention that this constitutes an exceptional circumstance warranting a rehearing of the application for leave to appeal. The two justices in this Court were more than able to determine whether or not the application for leave to appeal had any prospects of success based on the information before them.

[22] In relation to the second ground 'access to court', Mr Evans contends that WP Athletics served a supplementary affidavit and a counter application after he had served his replying affidavit without applying for leave to file the affidavit. Instead it merely applied for condonation. The high court ignored the irregularity, accepted the affidavits though it caused him prejudice. He argued further that this constituted a material irregularity, as he never abandoned nor waived his right to file an extra set of affidavits. Accordingly, he contends that the high court's decision violated his right to a fair hearing in terms of s 35 of the Constitution.

[23] I accept that the high court ought to have made an explicit ruling regarding the filing of the further papers. And in the event that it was inclined to permit this, then it ought to have allowed Mr Evans to file a further set of papers. However, the high court made no such ruling despite having heard argument on this aspect from both parties. The question is whether this omission led to a grave injustice.

[24] Rule 6(5)*(e)* of the Uniform Rules of Court provides, that a court may, in its discretion, permit the filing of further affidavits. The purpose of this rule is to ensure that a matter is adjudicated upon all the facts that are relevant to the issues in dispute.[13] In this regard Van Loggerenberg remarks that:

'…a party cannot take it upon himself to simply file further affidavits without first having obtained the leave of the court to do so. It has been held that where further affidavits are filed without the leave of the court, the court can regard such affidavits as *pro non scripto*. While the general rules regarding the number of sets and proper sequence of affidavits should ordinarily be observed, some flexibility must necessarily also be permitted. It is only in exceptional circumstances that a fourth set of affidavits will be received. Special circumstances may exist where something unexpected or new emerged from the applicant's replying affidavit.' [14]

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[13] *Dickinson v South African General Electric Co (Pty) Ltd* 1973 (2) SA 620 (A) at 628D.
[14] DE van Loggerenberg, Erasmus: *The Superior Court Practice* at D1 Rule 6-31. *Ndlebe v Budget Insurance Limited* [2019] ZAGPJT 320 para 7.

[25] Rule 6(5)*(e)* affords a court the discretion to allow further affidavits in exceptional circumstances. In *Kasiyamhuru v Minister of Home Affairs and Others*[15], the court held as follows:

'Only in exceptional circumstances would a fourth set of affidavits be received. As there was no indication why the information included in the fourth set of affidavits could not have been included by the respondents in the answering affidavits, as it should have been, there was no reason in the circumstances to receive the further affidavits.' In *Standard Bank of SA Ltd v Sewpersadh and Another* it was held that:[16]

'The applicant is simply not allowed in law to take it upon himself [to] file an additional affidavit and put same on record without even serving the other party with the said affidavit.'

[26] I am of the view that the high court's omission in this case did not give rise to the risk of an injustice that is so grave as to constitute an exceptional circumstance warranting a reconsideration by this Court. The outcome was not affected by the high court's failure to rule on the admissibility of these further papers. However, its failure to do so is to be discouraged.

[27] Third, Mr Evans submitted that the high court granted an order not sought by either of the parties. Whilst this may be so, it is important to bear in mind that this matter has a history, and the high court attempted to speed up its resolution by making an order setting out time periods for the individual disciplinary hearings. These hearings were held, but due to the recusal of the chairperson their outcomes were never communicated to the parties. The order made by the high court satisfied the doctrine of effectiveness. As I see it, this ground does not constitute an exceptional circumstance that resulted in a grave injustice.

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[15] *Kasiyamhuru v Minister of Home Affairs and Others* 1999 (1) SA 643 (W) at 644E.

[16] *Standard Bank of SA Ltd v Sewpersadh and Another* 2005 (4) SA 148 (C) para 12. This judgment was referred to with approval by this Court in *Hano Trading CC v J R 209 Investments (Pty) Ltd* [2012] ZASCA 127; 2013 (1) SA 161 (SCA); [2013] 1 All SA 142 (SCA) para 13.

[28] Fourth, Mr Evans raised the point that WP Athletics flouted the rules of this Court pertaining to an application for leave to appeal by impermissibly dealing with the merits of the matter and failing to give him time to file a replying affidavit. It is not in issue whether WP Athletics dealt with the merits of the matter or he failed to file a reply. The application for leave to appeal would have been considered on what was served before this Court. This point does not constitute an exceptional circumstance as contemplated in s 17(2)*(f)* of the Superior Court's Act. There was no injustice caused to Mr Evans.

[29] Insofar as the prospects of success are relevant to the determination of whether there are exceptional circumstances, I point out that the application for contempt of court was launched prematurely by Mr Evans. According to the definition of court day in Rule 1 of the Uniform Rules of Court, a court day 'means a day that is not a public holiday, Saturday or Sunday and only court days shall be included in the computation of any time expressed in days prescribed by these rules or *fixed by any order of court'.* (Emphasis added.) As a result, the time period for the court order which Mr Evans argues that WP Athletics is supposedly in contempt of, was premature as the date for compliance with the court order had not yet expired when he launched the contempt proceedings. The application was launched within 90 calendar days and not court dates. The application accordingly fell to be dismissed on the basis of the wrong computation of time only, either in the high court or in the leave to appeal application sought in this Court.

[30] Mr Evans' contention regarding non-compliance with court orders does not constitute an exceptional circumstance on these facts. It does not result in a grave injustice or bring the administration of justice into disrepute.

[31] For all these reasons, the application for reconsideration falls to be struck from the roll. Having regard to the history of this matter, I am of the view that there should be no order as to costs.

[32] I make the following order:

The application for reconsideration is struck from the roll with no order as to costs.

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F B A DAWOOD
ACTING JUDGE OF APPEAL

Appearances

For the appellant:	J T Evans (in person)
For the respondent:	C M Rogers
Instructed by:	Chennells Albertyn Attorneys, Cape Town
	Honey Attorneys, Bloemfontein.