



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 304/16

In the matter between:

PIETER PIETERTJIE LIESCHING

First Applicant

MALVIN NAAS SWARTZ

Second Applicant

XAVIER MALGAS

Third Applicant

and

THE STATE

Respondent

Neutral citation: *Liesching and Others v The State* [2018] ZACC 25

Coram: Zondo DCJ, Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ

Judgments: Kathree-Setiloane AJ (minority): [1] to [116]
Theron J (majority): [117] to [164]

Heard on: 24 August 2017

Decided on: 29 August 2018

Summary: Superior Courts Act 10 of 2013 — section 17(2)(f) — referral of petition for reconsideration — discretion of the President of

Supreme Court of Appeal— exceptional circumstances — duty to
provide reasons

ORDER

On appeal from the President of the Supreme Court of Appeal (in terms of section 17(2)(f) of the Superior Courts Act 10 of 2013):

1. The application for leave to appeal is dismissed.
2. There is no order as to costs.

JUDGMENT

KATHREE-SETILOANE AJ:

[1] This application concerns the question whether a post-trial recantation by a material witness in the subsequent trial of a co-accused may be an exceptional circumstance as contemplated in section 17(2)(f) of the Superior Courts Act.¹ Section 17(2)(f) confers a discretion on the President of the Supreme Court of Appeal (President), in exceptional circumstances, to refer a decision of that Court, refusing an application for leave to appeal, to the Court for reconsideration and, if necessary, variation. It provides:

“The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in 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 10 of 2013.

Litigation history

[2] This application is a sequel to *S v Liesching (Liesching I)*,² where this Court was called upon to determine whether section 17(2)(f) of the Superior Courts Act applied to convicted persons in criminal proceedings. It held that it did. The applicants in that application are the applicants in this application. They are Messrs Pieter Pietertjie Liesching (first applicant), Malvin Naas Swartz (second applicant) and Xavier Malgas (third applicant).

In the High Court

[3] The applicants were each convicted in the High Court of South Africa, Gauteng Local Division, Johannesburg on three counts: murder; unlawful possession of firearms and unlawful possession of ammunition (High Court judgment). Their convictions arose from a shooting incident that had occurred on 17 November 2011 in Reiger Park, Boksburg, during which Mr Renaldo Leeroy Booysens (the deceased) was shot dead.

[4] The key evidence against the applicants in the trial court was that of three witnesses: Mr Sherwin Arries, his brother Mr Marlin Abrahams and the deceased's uncle, Mr Gordon Swiegers. The trial court found Mr Swiegers to be an unsatisfactory witness and treated his evidence with caution. It convicted the applicants on the strength of the testimony of Mr Arries and Mr Abrahams, who identified the applicants as the occupants of the Polo from where the gunshots that killed the deceased were fired.

[5] Mr Arries testified that on the night of the incident, he was standing at the gate of his house with Mr Swiegers. His brother, Mr Abrahams, Mr Clint Campbell, whom he referred to as "Shoes", and the deceased were sitting on the pavement, in front of

² *S v Liesching* [2016] ZACC 41; 2017 (2) SACR 193 (CC); 2017 (4) BCLR 454 (CC).

the neighbouring property, smoking tobacco. A black Polo, driven by Mr Malgas, passed them very slowly. Mr Liesching sat on the front passenger seat, and Mr Swartz sat at the back with a person, whom he knew only by the nickname “Atter”. Soon after the Polo had passed them, it made a u-turn at the crossroad and came towards them. Mr Liesching fired gunshots from the Polo in the direction of Mr Abrahams, Mr Campbell and the deceased.

[6] The deceased was shot and fell to the ground. Mr Abrahams and Mr Campbell managed to run into yard of Mr Arries’ house. Mr Swartz and the other occupant (Atter) got out of the Polo. At that point, Mr Arries heard more gunshots being fired and he went into the yard. He closed the gate, and remained standing there. He did not “duck” or fall to the ground but nonchalantly walked backwards into the yard, so that he was still in a position to see “everything that happened”. Mr Swartz and Atter got back into the Polo, and Mr Liesching fired two shots into the yard.

[7] At the time of the shooting incident, two of the gangs that operated in Reiger Park were the “Serpents” and “Dogans”. There was continual conflict between the two gangs, dating back to when Mr Arries was a child. The applicants were members of the Dogans. The deceased was not a member of any gang. Nor were Messrs Arries and Abrahams. Mr Campbell was a member of the Serpents. Mr Liesching was originally a member of the Serpents, but later crossed over to the Dogans.

[8] There was bad blood between Mr Liesching and Mr Campbell as Mr Liesching had shot Mr Campbell in the neck. Mr Liesching was facing a charge of attempted murder for this shooting at the time of the deceased’s death. He had, in turn, laid a charge of attempted murder against Mr Abrahams and Mr Campbell after the deceased was killed. The laying of false charges against members of the rival gang, colloquially known as “bom sake” was commonplace between the two gangs.

[9] Mr Abrahams corroborated Mr Arries' testimony in two respects. The first was in relation to where the deceased, Mr Campbell and himself were standing when the gunshots were fired from the Polo. And the second was in relation to where Mr Liesching, Mr Swartz and Mr Malgas and a fourth person were seated inside the Polo. According to him, the Polo came from the direction of Leon Ferreira Street. It had four occupants. Mr Malgas drove the Polo very slowly. Its windows were open. Mr Liesching sat on the front passenger seat, and Mr Swartz on the back seat with a person who was unknown to Mr Abrahams. The Polo drove past them, made a u-turn and came back towards them.

[10] Mr Liesching and Mr Malgas stuck their guns out of the window of the Polo and fired shots at them. Mr Abrahams, Mr Campbell and the deceased ran up the street towards his house. Both Mr Abrahams and Mr Campbell made it into the yard, but the deceased fell while running. Mr Swiegers and Mr Arries were already in the yard, behind the gates, when Mr Abrahams and Mr Campbell came running into the yard. There was acrimony between him and Mr Liesching as well as between him and Mr Swartz because, before 17 November 2011 (the day that the deceased was murdered), Mr Liesching had fired a shot at him, and he opened an attempted murder case against Mr Liesching. Mr Liesching had, on 17 November 2011, also opened a false case of attempted murder against him. He lost his job because of the false charges that Mr Liesching laid against him.

[11] The High Court found "the evidence of the three [applicants] to be false when weighed against the evidence of Mr Arries, as well as the independently verifiable evidence of Captain Jordaan". It accordingly convicted the applicants as charged on all three counts and sentenced each of them to a term of life imprisonment. It granted the applicants leave to appeal against sentence to a Full Court of the High Court, but refused them leave on conviction. They subsequently applied to the Supreme Court of Appeal for leave to appeal against their convictions, but that application was also dismissed.

The Saimons' trial

[12] Four months after the applicants had been refused leave by the Supreme Court of Appeal, a Mr Arthur Saimons was also tried in the High Court for the murder of the deceased. The state alleged that Mr Saimons had been the fourth occupant of the Polo on the night of the deceased's murder.

[13] Mr Arries also testified for the state in the Saimons' trial. He, however, recanted the testimony that he gave in the applicants' trial. The essence of his recantation was that he had been arrested for housebreaking. The investigating officer, whom he knew only as Mr Maringa, had offered to assist him with the housebreaking charge if he falsely identified the applicants as the occupants of the Polo from where the gunshots that killed the deceased were fired.

[14] When asked by counsel for the state: "Are you angry with Maringa for being the investigating officer against you [in the housebreaking case]?" Mr Arries answered: "M'Lord, what happened is that Mr Maringa said that the statement that I have made [in the applicants' trial] will help me on this case for which I am now serving a sentence, but instead of the statement helping me, I am now convicted and sentenced for a crime that I did not commit". When asked by the State Advocate: "So tell me, in relation to this shooting, am I correct that you probably saw Zagars, Naas, Pietertjie and this other Arthur that we do not know, the Arthur that is not before court?" Mr Arries responded: "For the fourth time, I did not see anyone shoot, I ran into the yard. How many times must I tell you that?"

[15] Mr Arries testified that he had not seen the applicants in the Polo when the shooting occurred as he had run into his house. He said that he told the investigating officer that there were people in the vehicle, but he did not give him their names. He said that "it was the police who gave [them] the names of the people who were in the black Polo". He also said that Mr Abrahams and Mr Swiegers were present when Mr Maringa had induced him to falsely implicate the applicants, by placing them in the Polo on the night of the deceased's death. He said that Mr Maringa had

also induced Mr Abrahams and Mr Swiegers to do the same thing in the presence of other police officers. He denied knowing Mr Saimons or referring to him in the applicants' trial. He said that the "Arthur" whom he had referred to there, was "Arthur De Winnaar" who was always in the company of Mr Liesching.

[16] Mr Arries was declared a hostile witness. He was consequently cross-examined by both the state and the defence. As a result of Mr Arries' recantation of the testimony that he gave in the applicants' trial, Mr Saimons was discharged at the close of the state's case in terms of section 174 of the Criminal Procedure Act.³

In the Supreme Court of Appeal

[17] Some months later, the applicants' legal representative informed them of Mr Arries' recantation and Mr Saimons' resultant acquittal. Encouraged that this development could materially affect their convictions as well, the applicants made application to the President, in terms of section 17(2)(f) of the Superior Courts Act, in which they sought a referral of the decision refusing them leave to appeal to the Court for reconsideration or variation.⁴ Obtaining leave from the Supreme Court of Appeal to lead the new evidence in the High Court, prior to the hearing of the appeal on sentence by the Full Court, was fundamental to the relief sought by the applicants in the section 17(2)(f) application.

[18] The President, however, dismissed their application on the basis that a convicted person seeking to adduce further evidence, after all the recognised appeal procedures had been exhausted, had to do so under section 327(1)⁵ of the Criminal Procedure Act and not section 17(2)(f) of the Superior Courts Act. He held

³ 51 of 1977.

⁴ Where the President refers a decision refusing leave to appeal to the Court for reconsideration, she generally does so to three judges. The general practice seems to be that the reconsideration application is heard in open court.

⁵ Section 327(1) provides that a convicted person, who has exhausted all his legal appeal and review procedures, may petition the Minister of Justice to refer his matter to a court, where new evidence has come to light that may materially affect his conviction.

that in terms of section 1 of the Superior Courts Act the definition of “appeal” did not include a criminal appeal.

In the Constitutional Court – Liesching I

[19] The applicants launched an application to this Court for leave to appeal against the President’s dismissal of their section 17(2)(f) application. They contended that an interpretation of section 17(2)(f) that precluded the reconsideration of decisions refusing leave to appeal in criminal matters, where further evidence is sought to be adduced, violated their constitutional rights to a fair trial,⁶ equal protection of the law,⁷ and access to court.⁸

[20] In upholding the appeal on the basis that section 17(2)(f) applied both to criminal and civil proceedings, this Court held:

“Section 17(2)(f) does not distinguish between criminal and civil proceedings. The President may, of his or her own accord or on application, if he or she concludes that there are exceptional circumstances, which in the interests of justice warrant reconsideration, refer any previously determined petition to the Court for reconsideration.”⁹

[21] This Court overruled the conclusion of the President on the basis that section 327 is not an appeal procedure as it may only be utilised after the convicted

⁶ Section 35(3)(o) of the Constitution provides:

“Every accused person has a right to a fair trial, which includes the right of appeal to, or review by, a higher court.”

⁷ Section 9(1) of the Constitution provides:

“Everyone is equal before the law and has the right to equal protection and benefit of the law.”

⁸ Section 34 of the Constitution states:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

⁹ *Liesching I* above n 2 at para 57.

person has exhausted all recognised legal review and appeal procedures.¹⁰ It observed that although both provisions are “geared at preventing an injustice”, they apply at different stages – whereas section 17(2)(f) of the Superior Courts Act applies while the appeal process is still open, section 327(1) of the Criminal Procedure Act only does so after the appeal processes have been exhausted. It observed, in this regard, that the section 327 procedure is not “a substitute for an appeal, [but rather] a process beyond the appeal stage that is meant to be the final net in order to avoid a grave injustice”.¹¹ It therefore held:

“The interpretation, that section 17(2)(f) may be utilised by litigants in criminal or civil proceedings to adduce further evidence after a petition had been dismissed . . . preserves the applicants’ rights to equal treatment before the law, and is in conformity with the command in section 39(2) of the Constitution.”¹²

[22] This Court held that section 17(2)(f) of the Superior Courts Act enjoined the President to apply his mind to the issue of whether the further evidence sought to be adduced by the applicants was an exceptional circumstance that warranted the referral of the decision refusing leave to appeal to that Court for reconsideration or variation, in the interests of justice.¹³ But since the President had dismissed the applicants’ application without applying his mind to it, the Court set aside his decision and remitted the applicants’ section 17(2)(f) application to him for consideration.

[23] Six days later, the Acting President of the Supreme Court of Appeal (Acting President) considered the application and dismissed it. Her order dismissing the application reads:

“The condonation application and the application for leave to appeal in terms of section 17(2)(f) of the Superior Courts Act 10 of 2013 (SC Act) are dismissed for the

¹⁰ Id at para 44.

¹¹ Id at para 60.

¹² Id at para 64.

¹³ Id at para 65.

reason that no exceptional circumstances have been shown to exist for the decision refusing leave to appeal to be referred to the court for reconsideration.”

The present application

[24] It is against this decision that the applicants seek leave to appeal to this Court. In addition, the applicants seek, inter alia, orders—

- (a) referring the matter to the High Court to receive the transcript of Mr Arries’ evidence in the Saimons’ trial, and to hear the further evidence of Mr Arries and Mr Abrahams including any other evidence which, in the discretion of the High Court, may be relevant to the issues for determination; and
- (b) granting them leave to appeal to the Full Court of the Gauteng Local Division, Johannesburg against their convictions on 19 June 2012 under case number SS 78/2012,

Alternatively:

- (c) setting aside the order of the President of the Supreme Court of Appeal under case number 20303/2014 dismissing the application for condonation and the application, in terms of section 17(2)(f) of the Superior Courts Act for reconsideration of the decision dismissing the application for leave to appeal under Supreme Court of Appeal case number 778/2013; and
- (d) remitting the matter to the Supreme Court of Appeal to reconsider the decision dismissing the application for leave to appeal under Supreme Court of Appeal case number 778/2013.

Applicants’ submissions

[25] The applicants’ application for referral to reconsideration is founded on the new evidence of Mr Arries’ post-trial recantation of the testimony which the High Court relied upon to convict the applicants. The nub of the applicants’ case is

that the new evidence is by definition an exceptional circumstance, as contemplated in section 17(2)(f) of the Superior Courts Act, for two interrelated reasons. The first is that each of them was convicted on, among others, the charge of murder and sentenced to life imprisonment on the testimony of Mr Arries. The second is that Mr Arries subsequently recanted that testimony in the Saimons' trial, as a result of which Mr Saimons was acquitted of those exact charges. The applicants contend that had the Supreme Court of Appeal been aware of the new evidence in their application for leave to appeal, the outcome would have been different. The contention they thus advance is that the new evidence warrants the re-opening of their trial in the High Court for the purpose of recalling Mr Arries to be cross-examined on his recantation, and for this to be put to, among others, Mr Abrahams and Sergeant Chris Van Wyk, an investigating officer in their case.

[26] Concerning the veracity of the new evidence they seek to lead on remittal, the applicants contend that it is not a "mere recantation" as it was tested in cross-examination in the Saimons' trial by both the state and the defence. Moreover, they contend that the Acting President's dismissal of their section 17(2)(f) application has resulted in a grave injustice to them, as they have been denied the opportunity to use the new evidence to prove their innocence. They contend that this is a further exceptional circumstance that warranted a referral of the decision refusing them leave to appeal, in terms of section 17(2)(f) of the Superior Courts Act, to the Supreme Court of Appeal for reconsideration.

[27] Lastly, in relation to the failure of the Acting President to provide reasons for dismissing their section 17(2)(f) application, the applicants argue that she was obliged to provide "full reasons" because her decision dismissing their application could still be subject to an application for leave to appeal to this Court.

State's submissions

[28] The state did not file any affidavit in answer to the applicants' application for leave to appeal in this Court and in the section 17(2)(f) application in the

Supreme Court of Appeal. However, it informed the Court during argument that at the time that Mr Arries testified in the Saimons' trial, both he and Mr Saimons were serving their respective sentences at the same prison in Boksburg, but they were subsequently transferred to different prisons. Based on these facts, which were confirmed by counsel for the applicants at the hearing in this Court, the state argues that the possibility of collusion between Mr Saimons and Mr Arries cannot be ruled out.

[29] In addition, the state points out that the statements of Mr Arries and Mr Abrahams were taken by different police officers on different dates (by Constable Nzama on 8 November 2011 and by Constable Maringa on 29 May 2012). Hence, there was no possibility of collusion between the two witnesses. The state, furthermore, submits that the recantation evidence which the applicants seek to lead on remittal to the High Court is a fabrication and that, consequently, the appeal against the Acting President's order, dismissing the applicants' section 17(2)(f) application on the basis of the absence of exceptional circumstances, should be dismissed. Lastly, in relation to the duty to provide reasons for refusing to grant the applicants' section 17(2)(f) application, the state contends that the Acting President did in fact provide reasons for dismissing the application and nothing further was required of her.

Issues for determination

[30] The issues that arise for determination are these:

- (a) Does the new evidence constitute "exceptional circumstances" warranting that the President refer the decision of the Supreme Court of Appeal to the Court for reconsideration?
- (b) If so, will it be in the overall interests of justice that that decision be referred to the Court for reconsideration in terms of section 17(2)(f) of the Superior Courts Act?

- (c) Does the President have a duty to provide reasons when dismissing an application made under section 17(2)(f) of the Superior Courts Act?

Jurisdiction and leave to appeal

[31] This Court held in *Liesching I*:

“[E]ven after the section 17(2)(f) application is dismissed [by the President of the Supreme Court of Appeal], the applicants can still approach this court with an application for leave to appeal.”¹⁴

It also held that it had jurisdiction to deal with the application for leave to appeal, and the appeal, for amongst other reasons that the issues for determination concerned the interpretation of section 17(2)(f) of the Superior Courts Act, and the applicants’ rights to equal protection before the law, access to court, and their fair trial rights of appeal and to adduce and challenge evidence. Since the interpretation of section 17(2)(f) is also central to the issues for determination in this application, and so too are the applicants’ fair trial rights of appeal and to adduce and challenge evidence, this Court has jurisdiction in this application.

[32] The meaning to be given to the phrase “exceptional circumstances” in section 17(2)(f) of the Superior Courts Act is key to the determination of the primary issue here. That is, whether new evidence of a post-trial recantation by a witness, in the subsequent trial of a co-accused, may be an exceptional circumstance that warrants a referral for reconsideration in terms of section 17(2)(f). The issue is important and arguable. The interests of justice require that leave be granted.

Condonation

[33] The state brought an application seeking condonation for filing its heads of argument one court day late. The application is not opposed. The state has provided a

¹⁴ *Liesching I* above n 2 at para 61.

reasonable explanation for the delay. It is in the interests of justice that the delay be condoned. Condonation is granted.

Interpretation of section 17(2)(f)

[34] Section 17 of the Superior Courts Act regulates applications for leave to appeal to the Supreme Court of Appeal where leave is refused by a High Court. In terms of section 17(2) an application for leave to appeal to the Supreme Court of Appeal is referred to two judges designated by the President for consideration.¹⁵ If they disagree, these two judges and the President or a third judge designated by the President consider the application¹⁶ and the decision of the majority is the decision of the Court.¹⁷ Section 17(2)(f) promotes the principle of finality by providing that the decision to grant or refuse an application for leave to appeal is final. This is, however, subject to the proviso that the President may in exceptional circumstances, whether of her own accord or on application, refer the decision to the Court for reconsideration and, if necessary, variation.

[35] It is important to distinguish between an application for leave to appeal to the Supreme Court of Appeal in terms of section 17(2)(b) of the Superior Courts Act and an application under subsection (2)(f). The latter is not an application for leave to appeal. It is an application to the President for the referral of a decision of the Court, refusing leave to appeal, to the Court for reconsideration. It is another bite at the cherry for an unsuccessful litigant to have the refusal of its application for leave to appeal reconsidered by the Supreme Court of Appeal on referral by the President in exceptional circumstances.

[36] By the same token, the reconsideration by the Supreme Court of Appeal of a decision refusing leave to appeal is not the consideration of an appeal on the merits

¹⁵ Superior Courts Act above n 1 section 17(2)(c).

¹⁶ Id.

¹⁷ *Avnit v First Rand Trading* [2014] ZASCA 132; 2014 JDR 2014 (SCA) at para 2.

but rather a reconsideration of the decision refusing leave to appeal. The Court is required to decide whether the court below and the two judges of the Supreme Court of Appeal should have found that reasonable prospects of success existed to grant leave to appeal.¹⁸

[37] Prior to the coming into operation of section 17(2)(f), there was no further step that could be taken within the Supreme Court of Appeal after a refusal by it of leave to appeal. The next possible step was an approach to this Court. The power that section 17(2)(f) of the Superior Courts Act confers on the President is an extraordinary one to be exercised only in exceptional circumstances. Its core purpose is to prevent an injustice by curing errors or mistakes and to consider circumstances which, if known when leave to appeal was refused, would have resulted in a different outcome.¹⁹

[38] The exercise of the discretion in section 17(2)(f) is only triggered once the President finds that there are exceptional circumstances. The section involves a two-stage enquiry. The first stage is a factual enquiry. Whether there are exceptional circumstances must be established as a matter of fact. The second stage involves the exercise of a discretion. The President may, having found exceptional circumstances to be present, consider whether to refer the decision refusing leave to appeal to the Court for reconsideration. The exercise of the discretion must always be guided by what the interests of justice would require in the particular circumstances of a case.²⁰ The overall interests of justice are, therefore, the decisive feature for the exercise of the discretion in section 17(2)(f) of the Superior Courts Act. Whether it is in the interests of justice, in criminal proceedings, for the President in terms of section 17(2)(f) of the Superior Courts Act to refer a decision refusing leave to appeal

¹⁸ *Notshokovu v S* [2016] ZASCA 112; 2016 JDR 1647 (SCA).

¹⁹ *Liesching I* above n 2 at para 54.

²⁰ *Avnit* above n 17 at para 5.

for reconsideration to the Court, must be decided with reference to the facts of the particular case as well as other relevant factors.²¹ These would include the—

- (a) importance of the issues raised;
- (b) nature and gravity of the crime concerned;
- (c) nature and length of the sentence imposed;
- (d) interests of the victims against whom the crimes were committed;
- (e) interests of society; and
- (f) prospects of success.

No one factor is decisive.²²

Meaning of “exceptional circumstances”

[39] The phrase “exceptional circumstances” is not defined in the Superior Courts Act. Although guidance on the meaning of the term may be sought from case law, our courts have shown a reluctance to lay down a general rule. This is because the phrase is sufficiently flexible to be considered on a case-by-case basis,²³ since circumstances that may be regarded as “ordinary” in one case may be treated as “exceptional” in another. For instance, in *Petersen*²⁴ a Full Court of the High Court of South Africa, Western Cape Division, Cape Town (Western Cape High Court) observed in relation to an application for bail under section 60(11)(a) of the Criminal Procedure Act:

“On the meaning and interpretation of ‘exceptional circumstances’ in this context there have been wide-ranging opinions, from which it appears that it may be unwise to attempt a definition of this concept. Generally speaking ‘exceptional’ is indicative

²¹ See *S v Basson* [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC) at para 39.

²² See *Mabaso v Law Society, Northern Provinces* [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) (*Mabaso*) at para 26.

²³ *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas* 2002 (6) SA 150 (C) (*MV Ais*) at 156E-F; *S v Mohammed* 1999 (2) SACR 507 (C) at 513J-514B; *Norwich Union Life Insurance Society v Dobbs* 1912 AD 395 (*Norwich*) at 399F-H.

²⁴ *S v Petersen* 2008 (2) SACR 355 (C) at paras 55-56.

of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration. In the context of section 60(11)(a) the exceptionality of the circumstances must be such as to persuade a court that it would be in the interests of justice to order the release of the accused person. This may, of course, mean different things to different people, so that allowance should be made for certain flexibility in the judicial approach to the question. In essence the court will be exercising a value judgment in accordance with all the relevant facts and circumstances, and with reference to all applicable criteria.” (Footnote omitted.)

[40] In *MV Ais*, the Western Cape High Court distilled the following principles that emerged from a survey of case law relating to the meaning of the phrase exceptional circumstances:

- “1. What is ordinarily contemplated by the words ‘exceptional circumstances’ is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; ‘besonder’, ‘seldsaam’, ‘uitsonderlik’, or ‘in hoe mate ongewoon’.
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 on the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly.
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

liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.”²⁵

[41] In line with a strict construction of the phrase “exceptional circumstances” in section 17(2)(f) of the Superior Courts Act, Mpati P held in *Avnit*:

“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 might 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 the ilk. But the power under section 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 a grave injustice will otherwise result.”²⁶

[42] Although the inquiry into whether there are exceptional circumstances is a factual one, it must embody a legal appreciation of the phrase. This is because of the “extraordinary” nature of the discretion conferred upon the President – which she may only exercise in the circumscribed circumstances where “some matter of importance has been overlooked, or a grave injustice may result from the failure to refer the decision refusing leave to appeal for reconsideration”. To this, I would add: “where the administration of justice may be brought into disrepute” if the decision is not referred for reconsideration.

[43] An example of a scenario that could bring the administration of justice into disrepute is what occurred in *Van der Walt*,²⁷ where two “contrary orders” were made

²⁵ *MV Ais* above n 23 at 156H-157C. The Afrikaans expressions in paragraph 1 within the quotation mean: ‘particular’, ‘rare’ ‘exceptional’ or ‘highly unusual’.

²⁶ *Avnit* above n 17 at para 7.

²⁷ *Van der Walt v Metcash Trading Ltd* [2002] ZACC 4; 2002 (4) SA 317 (CC); 2002 (5) BCLR 454 (CC) (*Van der Walt*).

by two different panels of judges of the Supreme Court of Appeal where the facts in the applications for leave to appeal were “materially identical”. The contradictory orders were the granting of leave to appeal in one application and its refusal in the other. The applicant who was refused leave made application for special leave to appeal, alternatively direct access, to this Court. That application was dismissed.

[44] I cannot help but think that, had the remedy in section 17(2)(f) of the Superior Courts Act been available to the applicant in *Van der Walt* at the time, the outcome of his case would have been different. This is illustrated by the decision of the Supreme Court of Appeal in *Ntlanyeni*,²⁸ where an administrative bungle by the registrar, relating to the status of an application for leave to appeal, was found to be an exceptional circumstance that warranted referral to the Court for reconsideration. There the applicant and his two co-accused had been charged and sentenced before the High Court of South Africa, Eastern Cape Local Division, Port Elizabeth (Eastern Cape High Court).

[45] The Eastern Cape High Court refused their application for leave to appeal. Each of them subsequently made a separate application to the Supreme Court of Appeal. The applicant’s co-accused were granted leave to appeal, but the applicant was not. He was refused leave almost two years later in September 2014. The delay was caused by the mistaken belief of the registrar that the applicant had already been granted leave to appeal in 2012. He was, consequently, advised in 2012 that leave was granted to the Eastern Cape High Court. In mid-2015 he was advised of the error, and seven days later he brought an application, in terms of section 17(2)(f) of the Superior Courts Act, for the decision refusing leave to be reconsidered or varied by the Court. This was a full ten months after leave to appeal was refused by two judges of the Supreme Court of Appeal.

²⁸ *Ntlanyeni v S* [2016] ZASCA 3; 2016 (1) SACR 581 (SCA).

[46] The President found the circumstances to be exceptional and referred the matter to the Court for reconsideration. On reconsideration, the Court condoned the delay, holding that the President has *mero motu* authority under section 17(2)(f) to refer a decision for reconsideration, and that this authority is not time-bound.²⁹ It, accordingly, concluded that the President was correct in referring the decision refusing leave for reconsideration, both because of the prospects of success on the merits and the mishandling of the case by the Court.

[47] In *S v Malele; S v Ngobeni*,³⁰ Mr Malele and eight others (the applicants) faced murder charges. One of the accused was found not guilty and discharged, and the others were found guilty and sentenced to 15 years' imprisonment. On 3 May 2016, their joint application for leave to the Supreme Court of Appeal was dismissed. It so happened, that one of their co-accused, Mr Bonginkosi Mdluli, made a separate application to the Supreme Court of Appeal for leave to appeal. On 24 May 2016, he was granted leave to the Full Court of the High Court of South Africa, Gauteng Division, Pretoria against his conviction and sentence. On discovering this, the applicants made separate applications to the President, in terms of section 17(2)(f) of the Superior Courts Act, for the decision refusing them leave to appeal to be reconsidered by the Court.

[48] It was argued on the applicants' behalf that the facts on which Mr Mdluli's application for special leave was granted were identical to those on which their applications for leave were founded, and that was a compelling reason for the decision refusing them leave to appeal to be referred to the Court for reconsideration. However, Mpati AP, adopted the view that the mere fact that Mr Mdluli had successfully applied for leave to appeal "does not necessarily mean that the applicants should, without more, also be granted leave to appeal".³¹ Having differentiated Mr

²⁹ Id at para 6.

³⁰ *S v Malele; S v Ngobeni* [2016] ZASCA 115.

³¹ Id at para 11.

Mdluli's conduct from that of the applicant,³² Mpati AP concluded that Mr Mdluli's application for leave to appeal was a neutral factor and not an exceptional circumstance for purposes of section 17(2)(f) of the Superior Courts Act.³³

[49] He did, however, have grave doubts in relation to the trial court's application of the doctrine of common purpose,³⁴ and its conclusion that "the applicants' form of intent (*mens rea*) was *dolus eventualis*".³⁵ He took the view that on a correct application of these principles, another court might reach a different conclusion.³⁶ He accordingly concluded that "a grave injustice may otherwise result" if he did not refer the decision dismissing the applicants' application for leave to appeal to the court for reconsideration, and that a grave injustice "in itself constitutes exceptional circumstances enabling [him], *mero motu*, to refer the decision to the court for reconsideration".³⁷

[50] In *Gwababa*,³⁸ the applicant was also one of the co-accused in *Malele*, whose application for leave to appeal had been dismissed. His situation was similar to that of the co-accused in respect of whom Mpati AP ordered a reconsideration in *Malele*. He subsequently made an application, in terms of section 17(2)(f) of the Superior Courts Act, for the President to refer the dismissal of his application for leave to appeal to the Court for reconsideration. Maya AP stated that she was "enjoined to determine his application on its own merits and consider if the applicant has established exceptional circumstances warranting the reconsideration and, if necessary, variation of the order

³² Having examined the judgment of the trial court, Mpati AP found that it had failed to differentiate between Mr Mdluli's conduct and that of the applicants. He said Mr Mdluli, unlike the applicants, had taken steps to prevent further injuries to the deceased. At para 11, he found no merit in the applicants' submission that Mr Mdluli was granted leave to appeal on the same facts as their applications because Mr Mdluli, unlike them, had taken steps to prevent further injuries to the deceased.

³³ Id at para 11.

³⁴ Id at para 8.

³⁵ Id at para 9.

³⁶ Id at paras 8 and 9.

³⁷ Id at para 12.

³⁸ *S v Gwababa* [2016] ZASCA 200; 2016 JDR 2291 (SCA).

refusing him special leave”.³⁹ For the same reasons as set out by Mpati AP in *Malele*, Maya AP held that a failure to refer the matter to the Court for reconsideration would result in a grave injustice which constitutes an exceptional circumstance enabling her to refer the decision to the Court for reconsideration.⁴⁰

[51] What then is the meaning that should be ascribed to the phrase “exceptional circumstances” in section 17(2)(f) of the Superior Courts Act? Construed strictly, I consider the words “rare”, “extraordinary”, “unique”, “novel”, “atypical”, “unprecedented”, and “markedly unusual” to more fittingly exemplify the meaning of the phrase contemplated by section 17(2)(f) of the Superior Courts Act. What we must remain mindful of though, is that what is exceptional must be determined on the merits of each case.⁴¹ It is a factual inquiry.

[52] The court must look at substance, not form.⁴² It must consider all relevant factors and determine whether “individually or cumulatively” they constitute exceptional circumstances.⁴³ An “ordinary circumstance that is present to an exceptional degree” may also constitute an exceptional circumstance.⁴⁴ So too may the conflation of a number of unusual circumstances. The exceptionality of the circumstance must be of such nature so as to persuade the President that it would be in the interests of justice to refer the decision refusing leave to appeal to the Court for reconsideration.

³⁹ Id at para 5.

⁴⁰ Id at para 15.

⁴¹ See *R v Kgolane* 1959 (4) SA 483 (A) for an example of the application of this inquiry.

⁴² *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat* [1999] ZACC 8; 1999 (4) SA 623 (CC); 1999 (7) BCLR 771(CC) (*Dlamini*) at para 76.

⁴³ *S v Bruintjies* [2003] ZASCA 4; 2003 (2) SACR 575 (SCA) at para 6.

⁴⁴ *Dlamini* above n 42 at para 76.

Duty to provide reasons

[53] The Acting President dismissed the applicants' section 17(2)(f) application on the grounds that there were no exceptional circumstances shown to be present for the exercise of her discretion to refer the refusal of the applicants' application for leave to appeal to the Court for reconsideration. The state contends that the order makes clear the Acting President's reasons; so no more could be expected of her. Related to this, is the argument that since exceptional circumstances are a jurisdictional fact for the exercise of the discretion in section 17(2)(f) of the Superior Courts Act, then the reasons for dismissing the application must surely be the absence of exceptional circumstances. A further argument advanced against providing reasons, is that since section 17 of the Superior Courts Act does not impose a duty on the Supreme Court of Appeal to provide reasons when dismissing an application for leave to appeal, the President should not be obliged to provide reasons when dismissing an application in terms of subsection (2) thereof.

[54] Where do courts derive their general duty to provide reasons from, and what is the purpose of doing so? In *Mphahlele*⁴⁵ this Court held:

“There is no express constitutional provision which requires Judges to furnish reasons for their decisions. Nonetheless, in terms of section 1 of the Constitution, the rule of law is one of the founding values of our democratic state, and the Judiciary is bound by it. The rule of law undoubtedly requires Judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar

⁴⁵ *Mphahlele v First National Bank of SA Ltd* [1999] ZACC 1; 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC) at para 12.

matters. It may well be, too, that where a decision is subject to appeal it would be a violation of the constitutional right of access to courts if reasons for such a decision were to be withheld by a judicial officer.” (Footnotes omitted.)

[55] On this reasoning, all court decisions that are subject to appeal must be accompanied by reasons, and the failure to do so may constitute a violation of the litigants’ rights of access to court.⁴⁶ However, *Mphahlele*⁴⁷ carved out an exception in terms of which the Supreme Court of Appeal was not obliged to provide reasons when refusing an application for leave to appeal because:

“The refusal of leave to appeal by the Supreme Court of Appeal is not appealable to any other Court. The failure to furnish reasons for a decision made under section 21 of the Supreme Court Act cannot prejudice the unsuccessful litigant in taking the matter further. Except in constitutional matters, the end of the litigation road has been reached. Moreover, a litigant who is refused leave to appeal will already have been informed by the court of first instance, and in some cases also by a Court of appeal, of the reasons for the adverse order. To ensure that adequate attention is given to an application for leave to appeal by the Supreme Court of Appeal, section 21 of the Supreme Court Act provides that at least two Judges of that Court must consider the reasons of the lower court. The litigant will, expressly or by clear implication, be informed by their decision that there is no prospect of successfully challenging that order on appeal.”⁴⁸ (Footnotes omitted.)

The *Mphahlele* exception seemed to exclude “constitutional matters” from its scope.

⁴⁶ Section 34 of the Constitution provides:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum.”

⁴⁷ *Mphahlele* above n 45. Orders of the Supreme Court of Appeal refusing leave to appeal inform the litigant that when leave to appeal is refused by its judges, they do so because they agree with the judgment of the court of first instance (or the full court), and that there is no prospect of challenging the order on appeal.

⁴⁸ *Id* at para 14.

[56] In *Greenfields Drilling*,⁴⁹ the applicants applied to this Court for direct access to challenge the constitutionality of the practice of the Supreme Court of Appeal not to give reasons when refusing leave to appeal. The application was premised on the claim that this practice hamstrung the applicant in making an application to this Court for leave to appeal against the order of the Supreme Court of Appeal's refusal of leave to appeal against a High Court judgment. Reaffirming *Mphahlele*, this Court held that the "practice" in issue was subject to the qualification that "the position might well be different if a constitutional matter is involved, and the Supreme Court of Appeal is not the court of final instance".⁵⁰ This Court, however, sidestepped determining whether the Supreme Court of Appeal was obliged to furnish reasons when it refused leave to appeal in a case in which a "constitutional issue" arose.⁵¹

[57] Three years later, with the coming into force of the Seventeenth Amendment Act of the Constitution of South Africa,⁵² a number of changes were made to the structure of the South African judicial system. The changes which this Act effected to the Constitution, included the expansion of the jurisdiction of the Constitutional Court from "constitutional matters" only to "any other matter" where this Court granted leave to appeal on the grounds that the matter raised an arguable point of law of general public importance, which needed to be considered by it.⁵³

⁴⁹ *Greenfields Drilling CC v Registrar of the Supreme Court of Appeal* [2010] ZACC 15; 2010 JDR 1014 (CC); 2010 (11) BCLR 1113 (CC).

⁵⁰ Id at para 1.

⁵¹ Id at para 4.

⁵² The Constitution Seventeenth Amendment Act of 2012 came into force simultaneously with the Superior Courts Act, on 23 August 2013 which implemented a major rationalisation and restructuring of the judicial system.

⁵³ Section 167(3) of the Constitution provides:

"The Constitutional Court—

- (a) is the highest court of the Republic; and
- (b) may decide—
 - (i) constitutional matters; and
 - (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and

[58] The Supreme Court of Appeal is consequently no longer a court of final instance on “non-constitutional” matters.⁵⁴ This Court is thus the court of final instance on both constitutional and non-constitutional matters. Section 167(3)(c) of the Constitution empowers it to make the final decision in relation to whether a matter is within its jurisdiction in terms of section 167(3)(b) of the Constitution. Does this mean that the Supreme Court of Appeal is obliged to provide reasons when it refuses leave to appeal in all matters – constitutional and non-constitutional?

[59] This Court held in *Mabaso* that when the Supreme Court of Appeal refuses leave to appeal without reasons, any subsequent application for leave to appeal to this Court lies against the decision of the High Court and not against the decision of the Supreme Court of Appeal.⁵⁵ This means that where reasons have been provided by the High Court, there will be no duty on the Supreme Court of Appeal to provide reasons for refusing leave to appeal in both constitutional and non-constitutional matters. This is because the party seeking leave to appeal to this Court against that decision, will have the benefit of the written reasons of the High Court. It will, therefore, neither be prejudiced nor “hamstrung” in making an application to this Court for leave to appeal.

[60] However, where the Supreme Court of Appeal decides a matter as a court of first instance then reasons should ideally be provided. An example of such a matter would be an application in terms of section 17(2)(f) of the Superior Courts Act, the dismissal of which is appealable to this Court. Where it is clear on the face of the matter that it engages the jurisdiction of this Court in terms of section 167(3)(b) of the Constitution, the President would be required to provide reasons in support of the dismissal of the application. Not only will this enable an unsuccessful party to make

(c) makes the final decision whether a matter is within its jurisdiction.”

⁵⁴ *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); [2015] JOL 33026 (CC) at para 13.

⁵⁵ *Mabaso* above n 22 at para 18.

an “informed decision” on whether to appeal against the decision and the grounds on which to do so, but as the test for exceptional circumstances is fact based, it will also assist this Court in determining whether the order of the President is correct or not. Importantly, in this regard, in some cases a singular fact may meet the test of exceptionality, and in others it may be a host of facts viewed cumulatively.

[61] It is, however, conceivable that not all decisions made in terms of section 17(2)(f) of the Superior Courts Act will engage the jurisdiction of this Court. In matters where no constitutional issue is discernible, and they do not raise an arguable point of law of general public importance nor demonstrate that without leave a grave injustice may result, providing reasons for refusing the application may be dispensed with.

[62] As already held, the current application for leave to appeal engages the jurisdiction of this Court as the issues for determination involve the interpretation of section 17(2)(f) of the Superior Courts Act as well as the applicants’ fair trial rights of appeal and to adduce and challenge evidence. The President was, therefore, obliged to provide reasons for dismissing the applicants’ section 17(2)(f) application. The duty to do so is enhanced in a matter such as this one, where the referral for reconsideration is sought on the basis of new evidence that came to light only after leave to appeal to the Supreme Court of Appeal had been refused. Significantly, in this regard, the evidence of Mr Arries’ recantation had never been before a trial court and if it was to be rejected, then reasons ought to have been given.

[63] The duty to provide full reasons was moreover pressing in this matter because the President’s refusal to allow the reconsideration infringed upon the fair trial rights of the applicants. Principally for these reasons, I find that the President erred in failing to provide reasons for dismissing the applicants’ section 17(2)(f) application.

Application to adduce new evidence

[64] As indicated, the exercise of the President's discretion to decide whether or not to refer a decision refusing leave to appeal must be preceded by an enquiry into the presence of exceptional circumstances. The onus is on the applicant to show that exceptional circumstances are present warranting a referral for reconsideration. Once exceptional circumstances are found to be present, then the exercise of the President's discretion must be guided by what the interests of justice require. Central, though not decisive, to that enquiry is whether there is a reasonable prospect of leave being granted on reconsideration by the Supreme Court of Appeal.

[65] However, in an application such as this one, where the primary objective of referring the decision refusing leave to appeal for reconsideration is to obtain leave of the Supreme Court of Appeal (sitting in reconsideration) to lead new evidence in the trial court, the applicant would in addition need to satisfy the President, on proper grounds, that there is a reasonable prospect that its application to adduce new evidence will succeed.⁵⁶ In other words, there must be a realistic prospect of its application to adduce new evidence succeeding as well.⁵⁷

[66] The Supreme Court of Appeal sitting in reconsideration of a decision refusing leave to appeal that was referred to it, in terms of section 17(2)(f) of the Superior Courts Act, has jurisdiction in terms of that subsection to consider an application, brought in terms of section 316(5)(a)⁵⁸ of the Criminal Procedure Act, to

⁵⁶ *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) at para 3; *Greenwood v S* [2015] ZASCA 56; 2015 JDR 0629 (SCA) at para 3.

⁵⁷ *Greenwood* above at paras 3-4.

⁵⁸ Section 316(5) of the Criminal Procedure Act provides:

- “(a) An application for leave to appeal under subsection (1) may be accompanied by an application to adduce further evidence (hereafter in this section referred to as an application for further evidence) relating to the prospective appeal.
- (b) An application for further evidence must be supported by an affidavit stating that-
 - (i) further evidence which would presumably be accepted as true, is available;
 - (ii) if accepted the evidence could reasonably lead to a different verdict or sentence;
 - and

adduce further evidence.⁵⁹ In terms of section 316(13)(d) of the Criminal Procedure Act, the Supreme Court of Appeal may grant or refuse the application, and if the application is granted it may, before deciding the application for leave to appeal, remit the matter to the High Court concerned in order that further evidence may be received in accordance with section 316(5)(c).⁶⁰

[67] It is established law that it is in the interests of finality that once issues of fact have been adjudicated upon by a court, the power to remit a matter to a trial court to hear new or further evidence should be exercised sparingly and only when there are special or exceptional circumstances.⁶¹ This principle was confirmed in *Liesching I* when this Court stated:

“Our courts have always been reluctant to reopen trials in order to receive further evidence. The reopening of a case is ordered only if the requirements for reopening have been met. This is so because—

‘[i]t is clearly not in the interests of the administration of justice that issues of fact once, judicially investigated and pronounced upon, should lightly be re-opened and amplified. And there is always the possibility, such is human frailty, that an accused, having seen where the shoe pinches, might tend to shape evidence to meet the difficulty.’^{62,63}

(iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial.

(c) The court granting an application for further evidence must-

- (i) receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court; and
- (ii) record its findings or views with regard to that evidence, including the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness.”

⁵⁹ *Liesching I* above n 2 para 49.

⁶⁰ See above n 58 for section 316(5)(c) of the Criminal Procedure Act.

⁶¹ *S v Wilmot* [2002] ZASCA 42; 2002 (2) SACR 145 (SCA) at para 31.

⁶² *S v De Jager* 1965 (2) SA 616 (A); 2 All SA 290 (A) at 613A-B.

⁶³ *Liesching I* above n 2 at para 50.

[68] The possibility of fabrication of the testimony after conviction, and the possibility that witnesses may be induced to retract or recant testimony already given are valid concerns, which generally weigh against the exercise of the power of remittal.⁶⁴ The mere fact that the witness has since recanted the testimony which he gave at the trial will not normally warrant the re-opening of a finalised trial.⁶⁵ It is therefore only in exceptional circumstances – and only if certain basic requirements are met – that a court will set aside a conviction and re-open a trial to enable further evidence to be led. These requirements, which are conveniently summarised in *S v De Jager* are:

- “(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.
- (b) There should be a prima facie likelihood of the truth of the evidence.
- (c) The evidence should be materially relevant to the outcome of the trial.”⁶⁶

[69] An applicant seeking a remittal to the trial court for the consideration of new evidence, after the facts have been judicially pronounced upon, bears the onus to demonstrate that the new evidence sought to be adduced satisfies the *De Jager* requirements. Although a failure to meet any one of these requirements will generally result in the dismissal of the application to adduce further evidence, the court in the exercise of its overall discretion may, nevertheless, in exceptional circumstances, grant the application for remittal to the trial court to receive that evidence.⁶⁷

⁶⁴ *Nkomo v S* [2014] ZASCA 186; 2014 JDR 2506 (SCA) at para18.

⁶⁵ *S v Zondi* 1968 (2) SA 653 A at 655E-G.

⁶⁶ *De Jager* above n 62 at 613C-D.

⁶⁷ Id at 613E. See *S v Njaba* 1966 (3) SA 140 (A). See also *S v Nkala* 1964 (1) SA 493 AD; [1964] 2 All SA 116 (A) where the appellant had been granted leave to appeal in order to afford him an opportunity to bring an application for further evidence to be heard. His defence had been an alibi but he did not, at the trial, call the several witnesses who could have supported him in his defence. His explanation for not doing so was that he was nervous when his counsel spoke to him and he distrusted him as he felt that he was not guilty and thus did not appreciate the necessity or desirability of producing any evidence other than his own. Of the two eye witnesses who testified against him, one was mentally unstable and the other had committed perjury at the

[70] For instance, in an appeal against a conviction of murder, accompanied by an application to lead further evidence, the Appellate Division in *Njaba* held that there were exceptional circumstances entitling it to grant the application to lead further evidence, even though it considered the appellant's explanation not to be sufficiently reasonable.⁶⁸ Here the accused was in prison at the time of the commission of the offence. The accused had given no evidence and only brought this fact to light when asked, after conviction, why the sentence of death should not be imposed.⁶⁹ The Appellate Division considered this to be an exceptional circumstance that warranted the re-opening of the trial to hear further evidence.⁷⁰

[71] Though mindful of the policy considerations of finality and certainty in criminal proceedings that underlie the requirements for adducing further evidence on remittal, this Court emphasised the need to balance those considerations against other equally meritorious considerations for the attainment of a just outcome, when it said this in *Liesching I*:

“Finality, however, is not absolute. It may happen that Judges, because of human fallibility, make mistakes or that circumstances change after a petition has been refused by the Supreme Court of Appeal. There is a tension between finality and certainty on the one hand, and justice on the other. Finality should therefore always be balanced against correcting errors or providing for meritorious changed circumstances in order to ensure a just outcome. Although appeal courts should exercise the power to receive further evidence sparingly and in exceptional circumstances, they should always remember that finality should not be allowed to swamp all other considerations. As Kirby J put it:

preparatory examination. In the circumstances, the Court accepted his reason and granted his application for further evidence.

⁶⁸ *Njaba* above n 67 at 143D-F and 144H.

⁶⁹ *Id* at 141H.

⁷⁰ *Id* at 144H.

‘Just as in the law, we can love truth, like all other good things, unwisely; pursue it too keenly; and be willing to pay for it too high a price, so we can love finality too much.’”⁷¹ (Footnotes omitted.)

Prospects of success in the application to adduce new evidence

[72] In order to satisfy the President, on proper grounds, that there is a reasonable prospect that their application to adduce new evidence will succeed, the applicants are required to demonstrate that the new evidence meets the requirements of the *De Jager* test for the re-opening of the trial in the High Court to lead that evidence, and that there are exceptional circumstances for doing so.

[73] In relation to the first requirement, it would seem that the applicants have provided a reasonably sufficient explanation, based on allegations which may be true, why the evidence which they seek leave to adduce on the re-opening of the trial, was not led at their trial in the High Court. It is common cause that the new evidence did not exist at the time of the applicants’ trial. Mr Saimons’ trial was conducted nearly two years after their trial. By this time their application to the Supreme Court of Appeal for leave to appeal against conviction had already been dismissed. The new evidence only came to the attention of the applicants’ legal representative approximately six months after their application for leave to appeal was refused by the Supreme Court of Appeal. Taking this into consideration, I would think that there is a realistic prospect that the applicants will succeed in meeting this requirement in the application to adduce new evidence before the Supreme Court of Appeal.

[74] In relation to the “prima facie likelihood of the truth of the evidence”, there remains uncertainty on the “required degree of likelihood” that must be shown by an applicant for the evidence to be accepted as true.⁷² In *Van Heerden*, which preceded

⁷¹ *Liesching I* above n 2 at para 53.

⁷² Du Toit et al *Commentary on the Criminal Procedure Act* (Juta, 2015) 31-19.

De Jager, the standard that the court endorsed was that laid down in *Ladd v Marshall*⁷³ where that court held that “the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible”.⁷⁴

[75] Almost two decades later, in *S v Lehnberg*,⁷⁵ the court held that “[n]ot only must further evidence be available but it must be shown that it is evidence which ‘would presumably be accepted as true’”. This, the court took to mean, “no more than that there should be a *prima facie* likelihood of the truth of the evidence”. A few years later in *R v Loubscher*⁷⁶ the court required that “the evidence might be accepted as true”. That was understood to mean that the documentary evidence sought to be adduced must be *prima facie* true.

[76] The varying approaches adopted by our courts since that period are chronicled in *S v Naidoo*⁷⁷ as follows:

“In a recent Appellate Division decision – *Loomcraft Fabrics CC v Nedbank Ltd* 1996 (1) SA 812 (A) – Scott AJA (as he then was) drew attention to the slightly different formulation by Vivier JA in *Staatspresident en 'n Ander v Lefuo* 1990 (2) SA 679 (A). Vivier JA had rendered ‘*prima facie* likelihood’ as ‘moet dit waarskynlik die uitslag van die saak kan verander’. Scott AJA went on to say at 825C:

‘The apparent difference between the second requirement in Holmes JA’s formulation [*De Jager*] and the third requirement in that of Vivier JA is of no real consequence. (The other two are essentially the same.) Whether there is a *prima facie* likelihood of the evidence being the truth or whether it is probable that the evidence will result

⁷³ [1954] 3 All ER 745.

⁷⁴ *R v Van Heerden* 1956 (1) SA 366 (A); [1956] 1 All SA 254 (A) at 372B-G.

⁷⁵ 1976 (1) SA 214 (CPD) at 216H.

⁷⁶ 1979 (3) SA 47 (A); [1979] 4 All SA 248 (A) at 49A.

⁷⁷ *S v Naidoo* 1998 (2) SACR 458 (C).

in the outcome being changed amounts in effect to the same enquiry. If there is no *prima facie* likelihood of the evidence being the truth it must follow that it is improbable that the evidence will cause the result to be altered.’

In a later decision – *S v H* 1998 (1) SACR 260 (SCA) at 263 – Smallberger JA said that:

‘Although the “prima facie likelihood” test has been regularly applied, there remains some uncertainty as to its precise juristic connotation. Does it require some degree of probability that the evidence in question will be accepted as true, or will a reasonable possibility of the evidence being so suffice? . . .

In the *Loomcraft Fabrics* case . . . it was said that whether there is a *prima facie* likelihood of the evidence being the truth or whether it is probable that the evidence will result in the outcome being changed . . . amounts in effect to the same enquiry. The view I take of the present matter makes it unnecessary for me to decide whether the *prima facie* likelihood test requires some degree of probability, or merely a reasonable possibility, for it to be satisfied.’

Smallberger JA referred to the decision of Marais AJ (as he then was) in *S v Steyn* 1981 (4) SA 385 (C), in coming to this view. In Steyn’s case it was pointed out that if Holmes JA had literally intended to mean that a *prima facie* likelihood (or probability) of the truth of the evidence was required, then this would have meant that the Appeal Court had ignored one of its previous decisions. The reason for this was that in 1952 the Appeal Court held in *Diale v R* 1953 (1) PH H12 (A) that:

‘It seems to me that before this Court would be justified in exercising its right to remit the case for further evidence, it must, at the least, be satisfied that there is a reasonable prospect that the appellant will be able to establish the facts which he proposes to prove.’

After dealing with other authority Marais AJ observed (at 391F),

‘Maar presies wat hierdie woorde (prima facie likelihood) behels, is, sover ek kon vasstel, nog nie verduidelik nie.’

In *S v H*, as I have pointed out, the matter was again left open.”⁷⁸

⁷⁸ Id at 460H-461F.

The court in *S v Naidoo* ultimately applied the test laid down in *Diale v R* –“whether there is a reasonable prospect that the appellant will be able to establish the facts which he proposes”.⁷⁹

[77] More recently, the Supreme Court of Appeal, in a series of cases including *S v Wilmot*⁸⁰ and *Nkomo v S*,⁸¹ applied the “reasonable possibility standard” in determining whether the further evidence satisfied the prima facie likelihood of the truth requirement. In *Nkomo* the complainant had testified in the trial court that the appellant had raped her. He was convicted of rape and sentenced to 15 years imprisonment. The complainant thereafter wrote a letter in which she recanted the testimony she had given in the trial court. She handed the letter to a police officer at the local police station, who then informed the appellant of it. On appeal, the Supreme Court of Appeal set aside the conviction and sentence, and remitted the matter to the trial court for the hearing of the further evidence. As relating to the prima facie likelihood of the truth of the contents of the complainant’s letter, it stated that it was satisfied that there was a reasonable possibility of the contents of the letter being true because:

“[H]aving regard to the contents of the complainant’s letter, the manner in which it was written, how it came into the possession of the appellant and the prima facie likelihood of the truth of its contents, I am of the view that there are exceptional circumstances which justify the re-opening of the case and the leading of the evidence.”⁸²

[78] The “reasonable possibility standard” is the standard currently applied by the Supreme Court of Appeal in deciding whether the second requirement of the *De Jager*

⁷⁹ Id at 461F-G.

⁸⁰ Above n 61 at para 39.

⁸¹ *Nkomo* above n 64 at para 26. Compare *Mulula v S* [2014] ZASCA 103.

⁸² Id at paras 26-27.

test for the re-opening of a trial to lead new evidence is met. I consider this standard to be the correct one, as—

“an accused cannot be expected to satisfy the court that the new evidence will probably be accepted – not even where the onus of proof rests upon the accused. It would be unrealistic and unfair to expect an accused to show that the fresh evidence will probably be accepted, since it would seldom be possible to persuade a court that evidence in an affidavit which had not been subject to cross-examination will probably be preferred to viva voce evidence which had been led at the trial. All that is required is a reasonable possibility that the evidence will be accepted as true.”⁸³

[79] The President’s remit, in so far as the application to adduce the new evidence is concerned, would be to satisfy herself that there is a reasonable prospect that the applicants will succeed in demonstrating to the Court, sitting in reconsideration of the application for leave to appeal, that the new evidence will meet the three *De Jager* requirements for the re-opening of the trial, and that there are exceptional circumstances for doing so. The onus on the applicant to show the presence of exceptional circumstances in the application to adduce new evidence will generally overlap with the overall onus to show those circumstances in section 17(2)(f) of the Superior Courts Act.

[80] Do the applicants have a reasonable prospect of meeting these two latter *De Jager* requirements? During argument, counsel for the state urged this Court toward a finding that because Mr Arries is a self-confessed liar, his evidence in the Saimons’ trial cannot be accepted as credible. In support for this contention he relied on *Van Heerden* where the Appellate Division held:

“I can see no reason why the court should accept at their face value affidavits made by persons who allege therein that they gave perjured evidence at the trial. In this context I may refer to the case of *Ladd v Marshall*, 1954 (3) A.E.R. 745. In that case

⁸³ Du Toit above n 72 31-19.

an application was made on appeal for leave to call a witness who stated on affidavit that she had given false evidence at the trial of the case because she was afraid of her husband and other members of the family. At p. 748 Denning, LJ, set forth the principles to be applied in an application for a new trial when fresh evidence is sought to be introduced. The third principle he stated as follows:

‘The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.’

Continuing the learned Lord Justice said:

‘We have to apply those principles to the case where a witness comes and says: “I told a lie but nevertheless I now want to tell the truth”. It seems to me that the fresh evidence of such a person will not as a rule satisfy the third condition. A confessed liar cannot usually be accepted as credible. To justify the reception of the fresh evidence, some good reason must be shown why a lie was told in the first instance, and good ground given for thinking the witness will tell the truth on the second occasion. If it were proved that the witness had been bribed or coerced into telling a lie at the trial, and was now anxious to tell the truth, that would, I think, be a ground for a new trial, and it would be necessary to resort to an action to set aside the judgment on the ground of fraud.’ . . .

To accept at their face value affidavits made by material witnesses who allege therein that they knowingly gave false evidence at the trial would leave the door wide open to corruption and fraud. It is not in the interests of the proper administration of justice that further evidence should be allowed on appeal or that there should be a re-trial for the purpose of hearing that further evidence, when the only further evidence is that contained in affidavit made after trial and conviction by persons who recanted the evidence they gave at the trial. To allow such further evidence would encourage unscrupulous persons to exert by means of threats, bribery or otherwise undue pressure on witnesses to recant the evidence. In a matter such as this the Court must be extremely careful not to do anything which may lead to serious abuses in the administration of justice.”⁸⁴

⁸⁴ Id above n 74 at 372B-H.

[81] Accordingly, the Court in *Van Heerden* concluded that it is not in the interests of the proper administration of justice that further evidence should be allowed on appeal, or that there should be a retrial for the purpose of hearing that further evidence, when the only further evidence is that contained in affidavits made after trial and conviction, by persons who recanted the evidence they gave at the trial, and there is no fresh evidence *aliunde* (from a different place) to decide whether to admit affidavit evidence of the two witnesses.⁸⁵

[82] *Van Heerden* is distinguishable from the present case because the further evidence sought to be adduced does not involve a mere recantation by way of an affidavit. The further evidence sought to be adduced here is that of a witness who, in a subsequent trial of a co-accused, recanted the testimony that the trial court relied on to convict the accused. As a result of recanting his testimony in the Saimons' trial, the state declared Mr Arries a hostile witness and cross-examined him. The essence of Mr Arries' recantation was that he did not see who killed the deceased because he had run away when the shooting started. He said that he was induced into testifying against the applicants by an investigator, whom he knew only by the name of Mr Maringa, in exchange for assisting him on his housebreaking charge.

[83] Despite the assertion that the investigating officer in the applicants' trial was a Mr Nzama and not Mr Maringa, the state failed to call either of them to refute the allegations that Mr Arries made against Mr Maringa in the Saimons' trial. So, at the close of the state's case there was evidence from neither Mr Nzama nor Mr Maringa to explain which of them had taken Mr Arries' statement, whether there was any truth to the allegation that Mr Maringa had induced Mr Arries, in exchange for assisting him with his housebreaking charge, to falsely identify the applicants as having murdered the deceased, and the steps, if any, that were taken, at the time, to ensure that no false evidence was given at the trial. Nor did the state file an affidavit in this

⁸⁵ Id above n 74 at 374C-E.

application, or in the section 17(2)(f) application denying the allegations made by Mr Arries in recanting his earlier evidence.

[84] This notwithstanding, the state argued, at the hearing, that the investigating officers and other police officials had no special relationship with Mr Arries and Mr Abrahams, which could have caused them to induce either one or both of them to secure the conviction of the applicants. To accept this submission without more, in my view, will be tantamount to engaging in conjecture, which our courts have repeatedly cautioned against in the absence of supporting evidence.⁸⁶

[85] I am also mindful of the concern raised, that because Mr Saimons was serving his sentence in the same prison as Mr Arries, at the time of his recantation in the Saimons' trial, that makes for the pungent possibility that Mr Arries was "got to" in the prison network. Although this would generally weigh against the exercise of the power of remittal, without a factual basis (save for being in the same prison) to support the suspicion that Mr Arries was induced by Mr Saimons to recant his testimony, and without providing the applicants with an opportunity to respond to these allegations, the Court would simply be engaging in conjecture.

[86] On the state's version, Mr Nzama was the lead investigator in both the applicants' trial and the Saimons' trial. It can be safely assumed that he would have been aware that Mr Arries would be called to testify in the latter trial as well, and would have taken the necessary precautions to ensure against the risk of Mr Arries being induced to recant by Mr Saimons. One would therefore have expected Mr Nzama to state on affidavit, that despite the steps taken to ensure against the risk of this happening, Mr Arries was nonetheless "got to" by Mr Saimons.

⁸⁶ *Caswell v Powell Duffryn Association Collieries Ltd* [1939] All ER 722 at 733; *S v Essack* 1974 (1) SA 1 (A) at 16C-D.

[87] In the absence of any countervailing evidence from the state in the Saimons' trial, Mr Arries' evidence stood uncontroverted and it formed the basis of Mr Saimons' section 174 discharge in that trial. Thus, in the circumstances where the state was supine and took no steps to refute Mr Arries' recantation evidence, it is inappropriate for the state to insist that the recantation be confirmed by an independent third person, as was required in *Van Heerden*.

[88] As already indicated, *Van Heerden* is in any event distinguishable from this matter. There, the state opposed the application for leave to call further evidence on appeal, and filed an affidavit deposed to by the accomplice denying the allegations made against him by his wife and the third witness. The state also filed affidavits deposed to by the detectives setting out, at great length, the steps taken to ensure that no false evidence would be given at the trial.⁸⁷

[89] At the close of the state's case in the Saimons' trial, only Mr Arries and Sergeant Chris Van Wyk, the investigating officer, had testified. The transcript of Sergeant Van Wyk's testimony, in the Saimons' trial, is not before this Court. The transcript of Mr Arries' evidence in that trial, however, reveals that the defence had put to Mr Arries, in cross-examination, the following aspect of Sergeant Van Wyk's testimony from the day before:

“Do you know Sergeant Van Wyk? —Yes, I do know Mr Van Wyk.

Mr Van Wyk came to court yesterday and testified that he is the one who attended the scene of crime in November 2011 and he informed the court that he interviewed some few young guys, young gentlemen who were at the scene at that particular day and those gentlemen told him that when the shooting started they all ran away.

Were you present at that stage? — I was one of, I was part of the people that ran away but I did not see Mr Van Wyk that day. I only spoke to Mr Maringa the next day. At that time I was still working.”

⁸⁷ See above n 74 at 359E-F. See also *Zondi* above n 65 at 654F-H.

Mr Arries responded by stating that he did not see Sergeant Van Wyk on the day of the incident, but he was “one of the people who ran away when the shooting started”. Crucially, on this aspect, Sergeant Van Wyk’s version that was put to Mr Arries by the defence lends support to Mr Arries’ recanted testimony that neither he nor Mr Abrahams, nor Mr Swiegers had seen who killed the deceased as they had run away when the shooting started.

[90] The state closed its case against Mr Saimons without calling Constable Nzama, Sergeant Maringa, Mr Abrahams and Sergeant Van Wyk. The testimony of these individuals was vital for the state to secure the conviction of Mr Saimons. This omission, coupled with its failure to file an affidavit in this Court and in the Supreme Court of Appeal, denying that Mr Maringa induced Messrs Arries, Abrahams and Swiegers to give false evidence against the applicants, suggests that there may be more than meets the eye in relation to the state’s failure to call them to testify in the Saimons’ trial.

[91] For these reasons, I believe that there is a reasonable prospect of the Supreme Court of Appeal finding that there is a reasonable possibility of Mr Arries’ recantation being true.

[92] However, before taking a decision to admit further evidence of a witness’ recantation, the court in an application to adduce further evidence of a witness’ recantation, would have to also be satisfied that the evidence given at the trial was false and that the conviction was obtained on false evidence.⁸⁸

[93] In its assessment of the evidence of the three witnesses, the High Court found Mr Arries to be a credible witness. It held that Mr Arries’ contradictions were not material, and were largely corroborated by Mr Abrahams and Mr Swiegers in that—

⁸⁸ *Van Heerden* above n 74 at 369G-H.

“all three witnesses describe seeing a black or dark blue Polo; all of them agreed that it was [Mr Malgas] who was the driver and that [Mr Liesching] was in the passenger seat. [Mr Swartz] was a passenger in the back seat of the Polo.”

It noted that Mr Arries made a good impression as a witness; he didn’t hide anything and conceded when he made mistakes. And though there were contradictions in Messrs Arries’ and Abrahams’ evidence, they did not affect Mr Arries’ credibility as a witness. The High Court also found Mr Abrahams to be a credible witness.

[94] This Court held in *Makate*⁸⁹ that appeal courts are generally reluctant to interfere with factual findings made by trial courts, more particularly if the factual findings depended upon the credibility of the witnesses who testified at the trial.⁹⁰ It, however, cautioned that:

“[E]ven in the appeal the deference afforded to a trial court’s credibility findings must not be overstated. If it emerges from the record that the trial court misdirected itself on the facts or that it came to a wrong conclusion, the appellate court is duty bound to overrule factual findings of the trial court so as to do justice to the case. In *Bernert* this Court affirmed:

‘What must be stressed here, is the point that has been repeatedly made. The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule. . . . It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts, and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it.’”⁹¹

⁸⁹ *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at paras 37 and 40 (*Makate*).

⁹⁰ See *R v Dhlumayo* 1948 (2) SA 677 (A); [1948] 2 All SA 566 (A) and the authorities referred to therein.

⁹¹ *Makate* above n 89 at para 40 referring to *Bernert v Absa Bank Ltd* [2010] ZACC 28; 2011 (3) SA 92 (CC); 2011 (4) BCLR 329 (CC) at para 106.

[95] The credibility findings of the High Court are open to question as there appear to be material contradictions between Mr Arries' oral evidence and his police statement, and between his oral evidence and that of Mr Abrahams and Mr Swiegers. All three of them appear to have contradicted each other in relation to the following fundamental issues in the applicants' trial:

- (a) Whether all four applicants were occupants of the motor vehicle from where the shots that killed the deceased were fired.
- (b) Whether "Atter" and Mr Swart had stepped out of the motor vehicle and fired gunshots at the deceased, while he lay on the pavement.
- (c) Was Mr Liesching the only occupant of the motor vehicle who fired gunshots at the deceased from inside the motor vehicle, or did Mr Malgas do so as well?
- (d) Did "Atter" and Mr Swartz step out of the car and fire gunshots at the deceased as well? Or was it "Atter" and Mr Malgas or "Atter" alone who did so? Or could it have been Mr Liesching and Mr Swartz?
- (e) Did Mr Abrahams know "Atter" and should he have been able to identify "Atter" as the fourth occupant of the motor vehicle?
- (f) Did Mr Liesching fire shots into the yard where Mr Arries was standing as the motor vehicle drove away from the scene?
- (g) Were Mr Arries and Mr Swiegers already in the yard when Mr Abrahams and Mr Campbell ran in?

[96] Two witnesses seldom give identical accounts of the same incident, so not all errors or contradictions between their evidence will affect their credibility.⁹² However, where there are numerous material contradictions in their evidence, that would unquestionably affect their credibility. Although all three witnesses were purportedly

⁹² *Sithole v S* [2006] ZASCA 173; 2006 JDR 0739 (SCA) at para 7. See also *S v Safatsa* 1988 (1) SA 868 (A); [1988] 4 All SA 239 (A) at 890F-G; and *S v Bruiners* 1998 (2) SACR 432 (SE) at 439E-F.

at the scene of the deceased's murder, their testimony on what occurred appears to be contradictory in material respects. In the circumstances, I am of the view that there is a realistic prospect of the Supreme Court of Appeal concluding that the contradictions had materially impacted upon the truthfulness of the evidence of both Mr Arries and Mr Abrahams.

[97] Mr Arries testified in the Saimons' trial that he did not see who was in the car and who shot the deceased, because when the shooting started he ran into the yard and to the back of their house, where he could not see what was happening in the front. In comparison to Mr Arries' testimony in the applicants' trial, his testimony in the Saimons' trial appears to be plausible and consistent with Sergeant Van Wyk's testimony, which the defence had put to Mr Arries in cross-examination. I am, therefore, of the view that there is a reasonable prospect that the Supreme Court of Appeal may find that there is a reasonable possibility that Mr Arries' recanted testimony is *prima facie* true.

[98] In addition to contradicting Mr Arries' evidence in material respects, Mr Abrahams' evidence appears to be implausible in numerous other respects. This includes his evidence relating to, his failure to provide a statement to the police immediately after the deceased's murder and, his belief that he, and not the deceased, was the real target. In the light of this, I am of the view that there is a reasonable prospect that the testimony which Mr Abrahams gave against the applicants in the High Court may be rendered unreliable in further cross-examination by the defence on remittal to the High Court. Thus, whatever the outcome of any future cross-examination on the veracity of Mr Abrahams' version, it would seem that his evidence as a single witness would not be sufficient to sustain a conviction against the applicants.

[99] Accordingly, I am of the view that there is a reasonable prospect of the Supreme Court of Appeal finding on reconsideration, that it is probable that the new evidence will result in a materially different outcome of the applicants' trial in the

High Court— as the new evidence has a direct bearing on the truthfulness of both Mr Abrahams and Mr Arries’ testimonies, which were instrumental in sustaining the applicants’ convictions.

Were there exceptional circumstances?

[100] Prior to the new evidence of Mr Arries’ recantation coming to the attention of the applicants, the Supreme Court of Appeal had already dismissed their application for leave to appeal on conviction. That this evidence exists, and may ultimately show that the applicants’ convictions and sentence of imprisonment for life was based on the evidence of a state witness who committed perjury (and may have been encouraged to do so by members of the South African Police Service acting in breach of their constitutional duties) would, in my view, constitute an exceptional circumstance as contemplated in section 17(2)(f) of the Superior Courts Act.

[101] The objective of section 17(2) is to provide a “safety net” to prevent a grave injustice. The discovery of reliable evidence, which may have a bearing on the innocence of a convicted person serving life imprisonment would, to my mind, be one of the most compelling motivations for the President to exercise her discretion, under section 17(2)(f) of the Superior Courts Act, in favour of referring a decision refusing leave to appeal to the Court for reconsideration. More especially where, as in this case, Mr Saimons, a co-accused, was acquitted, subsequent to Mr Arries’ recantation, of the very same charges for which the applicants were convicted and are serving a sentence of life imprisonment. And there is no other legal avenue save through the section 17(2)(f) process to ensure that the decision refusing the applicants leave to appeal is reconsidered in the light of the new evidence.

[102] The failure to refer such a decision for reconsideration will surely result in a grave injustice to the applicants as they will be barred from placing this evidence before the Supreme Court of Appeal in reconsideration of their application for leave to appeal on conviction, in circumstances where that Court could not have known of the new evidence when it refused the applicants’ application for leave to appeal. Without

a reconsideration of their application for leave to appeal in light of the new evidence, the applicants' fair trial rights of appeal and, to challenge and adduce evidence will be violated, as they will be precluded from the opportunity of adducing the new evidence and challenging the evidence previously led by the state.

[103] There are, in my view, exceptional circumstances arising from the new evidence of Mr Arries' recantation which, if ultimately found to be true by the High Court on re-opening of the applicants' trial to receive such evidence, could result in a material change to its outcome. These circumstances, in my view, warrant a referral of the decision, refusing leave to appeal to the Supreme Court of Appeal for reconsideration – as a means of preventing an injustice. New evidence that has a reasonable prospect of meeting the *De Jager* test for the re-opening of a trial and that only comes to light after leave to appeal is refused by the Supreme Court of Appeal would, by its very nature, constitute an exceptional circumstance as required by section 17(2)(f) of the Superior Courts Act.

[104] In the circumstances, I find that the President committed a misdirection in law and fact by dismissing the condonation application (as there was none before her) and the applicants' section 17(2)(f) application on the basis that no exceptional circumstances were present. This justifies interference with the order made.

Relief

[105] A finding that exceptional circumstances are present is a pre-condition for the exercise of the President's discretion under section 17(2)(f) of the Superior Courts Act. The President did not exercise her discretion as she dismissed the applicants' section 17(2)(f) application for the absence of exceptional circumstances.

[106] In the light of the misdirection, what should the appropriate order be?

[107] The applicants submit that in view of the failure of the President to grant them the relief sought on two occasions, it would be appropriate for this Court to remit the matter to the High Court to receive and hear the new evidence. The relief sought is not competent because it seeks to bypass the Supreme Court of Appeal, which refused the applicants' application for leave to appeal and would, pursuant to a referral in terms of section 17(2)(f), be required to reconsider it.

[108] In the normal course, where the President has not exercised her discretion, the appropriate relief would be to remit the section 17(2)(f) application to her for the exercise of her discretion in the light of the exceptional circumstances present. This is the relief that this Court ordered in *Liesching I*.⁹³ But taking into account the numerous delays in finalising the applicants' section 17(2)(f) application, would that be just and equitable? The answer is simply, no.

[109] Should the applicants' application to adduce new evidence on reconsideration by the Supreme Court of Appeal succeed, the trial in the High Court would be re-opened for the applicants to test the veracity of the new evidence, by recalling Mr Arries, Mr Abrahams and Sergeant Van Wyk.

[110] The applicants' trial in the High Court was finalised more than five years ago in 2012. The applicants' initial section 17(2)(f) application was dismissed by the President over three years ago, in December 2014. They then came on appeal to this Court. The appeal was upheld and the application was remitted to the President for reconsideration on 15 November 2016. More than a year has elapsed from the President's dismissal of that application to the finalisation of the present application.

⁹³ *Liesching I* above n 2 at paras 65-6.

[111] In terms of section 172(1)(b) of the Constitution, this Court “may make any order that is just and equitable”.⁹⁴ This power is sufficiently wide and flexible to allow the Court to substitute its decision for that of the President under section 17(2)(f) of the Superior Courts Act, if it is just and equitable to do so. Taking into consideration the delay from the date of finalisation of the trial to the current application, and that the President had twice dismissed the applicants’ section 17(2)(f) application, I consider it just and equitable in the exercise of our wide remedial powers, under section 172(1)(b) of the Constitution, to substitute our decision for that of the President, under section 17(2)(f) of the Superior Courts Act, to refer the decision refusing leave to appeal to the Supreme Court of Appeal for reconsideration.

[112] Exceptional circumstances are present. A referral of the decision refusing the applicants leave to appeal for reconsideration is warranted. But, is it in the interests of justice to do so? The relevant factors for consideration in that assessment are these:

- (a) the prospects of success of the applicants’ application to adduce new evidence before the Supreme Court of Appeal as part of its reconsideration of their application for leave to appeal;
- (b) the denial of the applicants’ fair trial rights of appeal and to challenge and adduce evidence;
- (c) the dictates of fairness; and
- (d) the public interest in having all evidence bearing on the applicants’ innocence and guilt placed before the Supreme Court of Appeal, in reconsideration of the application for leave to appeal, as a means of preventing an injustice to the applicants as well as to the state.

⁹⁴ See *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) at para 96.

[113] Guided by these considerations, I consider it to be in the overall interests of justice for this Court to refer the decision of the Supreme Court of Appeal, refusing the applicants leave to appeal, back to it for reconsideration.

[114] It is important to bear in mind that success in this appeal does not guarantee the applicants an acquittal. It only guarantees that the Supreme Court of Appeal will reconsider its refusal of the applicants' application for leave to appeal against the High Court's order of conviction and sentence. Whether the applicants' trial is re-opened for the High Court to receive and hear the new evidence will depend on whether the Supreme Court of Appeal is satisfied that this evidence meets the *De Jager* test.

[115] For these reasons, the appeal should succeed.

Order

[116] In the result, I would have made the following order:

1. Leave to appeal is granted.
2. Condonation is granted for the late filing of the respondent's written submissions.
3. The appeal is upheld.
4. The order made by the President of the Supreme Court of Appeal is set aside.
5. The decision of the Supreme Court of Appeal dated 6 November 2013 (SCA case number 778/2013) dismissing the applicants' application for leave to appeal is referred to that Court for reconsideration and, if necessary, variation in terms of section 17(2)(f) of the Superior Courts Act 10 of 2013.
6. This judgment is to be brought to the attention of the President of the Supreme Court of Appeal in order for her to issue directions to the

applicants on the lodging of the relevant applications with the Registrar of that Court.

THERON J (Zondo DCJ, Cameron J, Froneman J, Jafta J, Kollapen AJ, Madlanga J, Mhlantla J and Zondi AJ concurring):

Introduction

[117] I have read the judgment of Kathree-Setiloane AJ (the first judgment). I cannot agree with the reasoning and conclusion in the first judgment.

[118] This is essentially an application for leave to appeal against an order made by the President pursuant to section 17(2)(f) of the Superior Courts Act. This section confers a discretion on the President to refer a refusal of an application for leave to appeal to the Supreme Court of Appeal for reconsideration, and, if necessary, variation, in circumstances where an applicant has been denied leave to appeal by the Supreme Court of Appeal on petition pursuant to the provisions of section 17(2)(b). The President concluded that no exceptional circumstances were shown to exist as envisaged in that section.

[119] Briefly stated, the first judgment holds that: (a) the new evidence constitutes an exceptional circumstance as contemplated in section 17(2)(f); (b) the failure to refer the matter for reconsideration will result in a grave injustice to the applicants; and (c) it is just and equitable for this Court to substitute its decision for that of the President and to refer the decision refusing leave to appeal to the Supreme Court of Appeal for reconsideration. This judgment finds that the new evidence does not constitute an exceptional circumstance and that the application for leave to appeal should be dismissed.

Issues

[120] In this Court the applicants principally seek an order referring the matter back to the High Court to receive additional evidence of, among others, Mr Arries and granting the applicants leave to appeal to the Full Court of the High Court against their convictions. In the alternative, the applicants seek an order setting aside the decision of the President (dated 21 November 2016) dismissing their application in terms of section 17(2)(f) and referring the matter back to the Supreme Court of Appeal for reconsideration.

[121] The applicants argue that the President misdirected herself in concluding that they had failed to establish that exceptional circumstances existed. The applicants contend that evidence exists to show that their convictions and sentences of life imprisonment were based on the testimony of a witness who committed perjury, allegedly on the encouragement of certain members of the police. This, the applicants argue, constitutes exceptional circumstances.

[122] The respondent opposes the application and asserts that not all new evidence will constitute exceptional circumstances and it is not in the interests of the proper administration of justice to lightly re-open and amplify settled issues of fact. The respondent further argues that the recantation does not constitute exceptional circumstances and it would not, in any event, materially affect the outcome as the applicants' convictions were also on the evidence of another witness, Mr Marlin Abrahams.

Jurisdiction and leave to appeal

[123] The applicants must show that the matter is a constitutional matter⁹⁵ or that it raises an arguable point of law of general public importance,⁹⁶ in order for this Court's

⁹⁵ Section 167(3)(b)(i) of the Constitution.

⁹⁶ Section 167(3)(b)(ii) of the Constitution.

jurisdiction to be engaged. In addition, they must demonstrate that it is in the interests of justice for leave to appeal to be granted.

[124] In *Liesching I* this Court held that it had jurisdiction because the issue there concerned the interpretation of legislation and section 39(2) of the Constitution, which necessitated an interpretation that promoted the spirit, purport and objects of the Bill of Rights.⁹⁷ It also held that the matter raised an arguable point of law of general public importance which ought to be considered.⁹⁸ This matter is not on the same footing. What is at issue is whether this Court has jurisdiction to determine an appeal against a decision by the President, in terms of section 17(2)(f) of the Superior Courts Act that no exceptional circumstances were shown to exist, as envisaged in that section, to warrant a referral of a refusal of an application for leave to appeal to the Supreme Court of Appeal for reconsideration.

[125] The parties in this matter assumed that this Court has jurisdiction to entertain an appeal against the President's decision under section 17(2)(f) and the matter proceeded on this basis. This may be considered an "inadvertent legal concession" on an issue of law that is unsettled.⁹⁹ There is no doubt that the nature and justiciability of such an appeal requires detailed legal argument and thought. The issue is complex and it was not raised on the papers or ventilated at the hearing.

⁹⁷ *Liesching I* above n 2 at para 21.

⁹⁸ *Id* at para 22.

⁹⁹ See *Cape Town City v Aurecon SA (Pty) Ltd* [2017] ZACC 5; 2017 (4) SA 223 (CC); 2017 (6) BCLR 730 (CC) (*Aurecon*) at para 34 where it was stated:

"An interesting question arose during the hearing: Is an administrator's right to review its own decision sourced in PAJA or the broader principle of legality? The position in our law on this question is presently uncertain. Despite this, both the City and Aurecon were quite content to pursue the matter within the confines of PAJA. The litigants expressly relied upon PAJA in the High Court, the Supreme Court of Appeal and before this Court. In effect, this may be termed an 'inadvertent legal concession'. Several of this Court's decisions have held that it is trite that a court is never bound by a legal concession if it considers the concession to be wrong in law. However, I am of the view that this case presents a certain nuance that militates against venturing into a judicial inquisition. The main reason is that it cannot be said for certain that the litigants' reliance on PAJA is 'wrong in law' because the law on the issue has not been settled." (Footnotes omitted.)

[126] Such a conundrum presented itself in *Aurecon* where this Court cautioned that it is undesirable to consider important legal questions without the benefit of legal argument from the litigants.¹⁰⁰ Mbha AJ, writing for the court added:

“The benefit of full argument is indispensable in the decision-making process. I am therefore of the view that the issue ought to be left open until the opportunity properly presents itself. For now, determining the matter within the strictures of PAJA, without deciding whether the litigants’ reliance on it is appropriate, is the way in which this judgment proceeds.”¹⁰¹ (Footnotes omitted.)

[127] This Court is in a similar position to the Court in *Aurecon*. Though it is similarly tempting to attempt to settle the legal question, it would be inappropriate to do so without the benefit of full legal argument from the litigants. Consequently, this judgment proceeds on the assumption that this Court has jurisdiction over an appeal to determine the meaning of “exceptional circumstances” in section 17(2)(f). On that assumption, I now proceed to deal with the meaning of that phrase and then set out why, in my view, it is not in the interests of justice to grant leave to appeal.

The meaning of exceptional circumstances in the context of section 17(2)(f)

[128] Section 17(2)(b) of the Superior Courts Act¹⁰² prescribes the procedure to apply for leave to appeal to the Supreme Court of Appeal where the High Court has refused to grant leave to appeal against a decision by the High Court pursuant to subsection (2)(a).¹⁰³ An applicant must file an appeal with the Registrar of the Supreme Court of

¹⁰⁰ Id at para 35.

¹⁰¹ Id at para 36.

¹⁰² Section 17(2)(b) of the Superior Courts Act states:

“If leave to appeal in terms of paragraph (a) is refused, it may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after such refusal, or such longer period as may on good cause be allowed, and the Supreme Court of Appeal may vary any order as to costs made by the judge or judges concerned in refusing leave.”

¹⁰³ Section 17(2)(a) of the Superior Courts Act states:

Appeal. The application is referred to two Judges for consideration. If they disagree, the President may appoint a third Judge and the decision of the majority is the decision of the Court.¹⁰⁴

[129] The application may be disposed of without the hearing of oral evidence. The Judges may refuse or grant the application or, they may refer it to the Court for consideration.¹⁰⁵ If the application is referred to the Court, it may either refuse or grant the application.¹⁰⁶ Subsection (2)(f) provides that the decision to grant or refuse an application is final, provided that the President may in exceptional circumstances, whether of 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.

[130] The words “exceptional circumstances” have not been defined in the Superior Courts Act. Courts are enjoined to construe statutes consistently with the Constitution insofar as the language of the statute permits.¹⁰⁷ Words in a statute must be read in their entire context and given their ordinary grammatical meaning consistent with the purpose of the statute.¹⁰⁸ It is also important to note that, in conducting this

“Leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, by any other judge or judges of the same court or Division.”

¹⁰⁴ Section 17(2)(c) of the Superior Courts Act states:

“An application referred to in paragraph (b) must be considered by two judges of the Supreme Court of Appeal designated by the President of the Supreme Court of Appeal and, in the case of a difference of opinion, also by the President of the Supreme Court of Appeal or any other judge of the Supreme Court of Appeal likewise designated.”

¹⁰⁵ Section 17(2)(d) of the Superior Courts Act states:

“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.”

¹⁰⁶ Section 17(2)(e) of the Superior Courts Act states:

“Where an application has been referred to the court in terms of paragraph (d), the court may thereupon grant or refuse it.”

¹⁰⁷ *Lieshing 1* above n 2 at para 30.

¹⁰⁸ *Id* at para 30.

interpretative exercise, all statutes must be interpreted through the prism of and in order to promote the spirit, purport and object of the Bill of Rights.¹⁰⁹

[131] The dictionary definition of “exceptional” must be the starting point of the enquiry. The Oxford English Dictionary defines exceptional as “of the nature of or forming an exception; out of the ordinary course, unusual, special”.¹¹⁰

[132] The meaning of the phrase “exceptional circumstances” has been considered by the courts on numerous occasions. The courts have been reluctant to lay down a general definition as each case is to be considered on its own facts.¹¹¹ It has been held that it is neither desirable nor possible to lay down a precise rule or definition as to what constitutes exceptional circumstances.¹¹² The meaning and interpretation given by the courts to the phrase has been wide ranging.¹¹³ Circumstances which may be regarded as “ordinary” in one matter may be considered “exceptional” in another.¹¹⁴ Ultimately, it is the function of the presiding officers to determine whether, on a case by case basis, the circumstances can be found to be exceptional.

[133] In *MV Ais Mamas*, Thring J undertook a detailed analysis of the meaning of this phrase with reference to decided cases and concluded that what emerges from the case law, among others, is that what is typically contemplated by the words

¹⁰⁹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 72.

¹¹⁰ Simpson and Weiner (eds) *The Oxford English Dictionary* 2 ed (Clarendon Press, Oxford 1997) vol 5 at 498-9.

¹¹¹ See *Petersen* above n 24 at para 55 and *MV Ais* above n 23 at 155H.

¹¹² See *MV Ais* id at 156E-F. See also *Dlamini* above n 42 at para 75 where this Court said that “one can hardly expect the lawgiver to circumscribe that which is inherently incapable of delineation” (in the context of bail where the argument was raised that the term “exceptional circumstances” was so vague that an applicant for bail does not know what has to be established).

Section 60(11)(a) of the Criminal Procedure Act, provides that an applicant (accused) must in certain circumstances, satisfy the court that exceptional circumstances exist, which warrant her release on bail, in the interests of justice.

¹¹³ *Petersen* above n 24 at para 55.

¹¹⁴ See *S v Mohammed* 1999 (2) SACR 507 (C) at 513-4 and *Dlamini* above n 42 at para 76. In *Petersen* above n 24 also in the context of a bail application, the Court held that generally “exceptional” is indicative of something unusual, extraordinary, remarkable, peculiar or simply different.

“exceptional circumstances” is something out of the ordinary, markedly unusual, rare or different, and to which the general rule does not apply.¹¹⁵ In *Avnit*, the Supreme Court of Appeal concluded that the “overall interests of justice will be the determinative feature” for the exercise of the President’s discretion.¹¹⁶

[134] In *Liesching I*, this Court carefully scrutinised the meaning of section 17(2)(f) and concluded that the proviso in that section is very broad,¹¹⁷ and that:

“It keeps the door of justice ajar in order to cure errors or mistakes and for the consideration of a circumstance, which, if it were known at the time of the consideration of the petition might have yielded a different outcome. It is therefore a means of preventing an injustice. This would include new or further evidence that has come to light or became known after the petition had been considered and determined.”¹¹⁸

[135] Although there is no case law dealing directly with the purpose of the exceptional circumstances requirement under section 17(2)(f), there is case law dealing with the requirement in respect of the Superior Courts Act. In *Ntlemenza*¹¹⁹ the Supreme Court of Appeal considered the purpose of section 18(1) of the Superior Courts Act and the requirement that there be exceptional circumstances in order to enforce an order pending the outcome of an appeal, stating:

“The primary purpose of section 18(1) is to re-iterate the common law position in relation to the ordinary effect of appeal processes – the suspension of the order being appealed, not to nullify it. It was designed to protect the rights of litigants who find themselves in the position of General Ntlemenza, by ensuring that, in the ordinary course, the orders granted against them are suspended while they are in the process of attempting, by way of the appeal process, to have them overturned. . . . Section 18(1)

¹¹⁵ *MV Ais* above n 23 at 156H-J.

¹¹⁶ *Avnit* above n 17 at paras 4-5.

¹¹⁷ *Liesching I* above n 2 at para 54.

¹¹⁸ *Id.*

¹¹⁹ *Ntlemenza v Helen Suzman Foundation* [2017] ZASCA 93; 2017 (5) SA 402 (SCA) (*Ntlemenza*).

also sets the basis for when the power to depart from the default position comes into play, namely, exceptional circumstances which must be read in conjunction with the further requirements set by section 18(3).”¹²⁰

[136] As with section 18(1), section 17(2)(f) prescribes a departure from the ordinary course of an appeal process. Under section 17, in the ordinary course, the decision of two or more Judges refusing leave to appeal is final. However, section 17(2)(f) allows for a litigant to depart from this normal course, in exceptional circumstances only, and apply to the President for reconsideration of the refusal of leave to appeal.

[137] In *Ntlemeza*, the requirement of exceptional circumstances is viewed as a “controlling measure”.¹²¹ In terms of section 17(2)(f), the President has a discretion to deviate from the normal course of appeal proceedings – such discretion can only be exercised in exceptional circumstances. The requirement of the existence of exceptional circumstances before the President can exercise her discretion is a jurisdictional fact which may operate as a controlling or limiting factor.

[138] 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

¹²⁰ Id at para 28. This view of the requirement of exceptional circumstances is similarly articulated in *Norwich* above n 23 at 399:

“[T]he language of the clause shows that the exceptional circumstances must arise out of, or be incidental to, the particular action; *there was no intention to exempt whole classes of cases from the operation of the general rule*. Moreover, *when a statute directs that a fixed rule shall only be departed from under exceptional circumstances*, the Court, one would think, *will best give effect to the intention of the Legislature by taking a strict rather than a liberal view of applications for exemption*, and by carefully examining any special circumstances relied upon.” (Emphasis added.)

¹²¹ *Ntlemeza* id at para 35 reads:

“Section 18(1) entitles a court to order otherwise ‘under exceptional circumstances’. Section 18(3) provides a further controlling measure, namely, a party seeking an order in terms of section 18(1) is required ‘in addition’, to prove on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.”

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.¹²²

[139] 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.

Interests of justice

[140] The President exercises a discretion in deciding whether a matter should be referred for reconsideration. The scope of an appeal court’s ability and willingness to interfere with the decision of a lower court¹²³ is determined by the kind of discretion the lower court is exercising.¹²⁴ If it is a true discretion, interference is justified only if the discretion was not exercised judicially; if it was exercised capriciously or upon a wrong principle; if the decision maker did not bring an unbiased judgment to bear on the question; or did not act for substantial reasons.¹²⁵

[141] In my view the discretionary powers conferred on the President in section 17(2)(f) is a discretion in the “true” sense, as discussed by Khampepe J in *Trencon*:

¹²² See *Van der Walt* above n 27 where two Judges of the Supreme Court of Appeal dismissed Mr Van der Walt’s application for leave to appeal. A day later two other Judges granted an application in an identical matter brought by Mr Kgatle. Subsequent events show that the error lay in the grant of leave to appeal to Mr Kgatle. See *Kgatle v Metcash Trading Ltd* 2004 (6) SA 410 (T).

¹²³ This is on the assumption that the decision made by the President is a decision in the strict sense of a decision made by a Court and against which an appeal may lie.

¹²⁴ See *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (*Trencon*). See also *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council* [1999] JOL 5381 (W) (*Bookworks*).

¹²⁵ *Trencon* id at paras 85 and 88.

“A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this Court in many instances, including matters of costs, damages and in the award of a remedy in terms of section 35 of the Restitution of Land Rights Act. It is ‘true’ in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible.”¹²⁶

[142] Where a lower court exercises a discretion in the true sense, an appellate court should be slow to substitute its “discretion” for that of the lower court.¹²⁷ In *Trencon*, Khampepe J cautioned that in such an instance, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that it has good grounds to do so.¹²⁸

[143] In the approach I take to this matter, the President has not yet exercised her discretion. However, and having regard to the nature of the President’s discretion, it would be required that an applicant demonstrates why, even if this Court has jurisdiction over a section 17(2)(f) appeal, it would be in the interests of justice for this Court to entertain such an appeal. Where there is no discernible basis for interfering with the exercise of the President’s discretion, it would not be in the interests of justice to grant leave to appeal, especially given that section 17(2)(f) is not intended to afford litigants a further attempt to procure relief that has already been refused.

[144] But even if, somehow, it is appropriate to go further, there is nothing to show that there are exceptional circumstances present in this case.

¹²⁶ Id at para 85.

¹²⁷ *Birkett v James* [1978] AC 297 (HL) at 317D-G, cited with approval in *Bookworks* above n 125 at 807A-G.

¹²⁸ *Trencon* above n 125 at para 88.

[145] The relief sought by the applicants, on appeal to the Supreme Court of Appeal, is that their convictions and sentences be set aside and the case sent back to the High Court for the hearing of further evidence. The President, in considering whether or not there are exceptional circumstances, would no doubt have had regard to the likelihood of such relief being granted. It is trite that such relief will only be granted in exceptional circumstances. Holmes JA stated the rationale for this succinctly in *De Jager*:

“It is clearly not in the interests of the administration of justice that issues of fact, once judicially investigated and pronounced upon, should lightly be re-opened and amplified. And there is always the possibility, such is human frailty, that an accused, having seen where the shoe pinches, might tend to shape evidence to meet the difficulty.”¹²⁹

[146] He summarised the three requirements that need to be met before such an application can succeed:

- “(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.
- (b) There should be a prima facie likelihood of the truth of the evidence.
- (c) The evidence should be materially relevant to the outcome of the trial.”¹³⁰

Ordinarily, non-fulfilment of any one of these requirements would be fatal to the application.¹³¹ Both the applicants and the state accepted that this was the appropriate test for re-opening a criminal trial.

¹²⁹ *De Jager* above n 62 at 613A-B.

¹³⁰ *Id* at 613C-D.

¹³¹ *Id* at 613E.

[147] There is a line of Supreme Court of Appeal cases cautioning against the admission of recanted evidence.¹³² In *Nkomo* the Supreme Court of Appeal observed that:

“[O]nce issues of fact have been judicially investigated and pronounced upon, the power to remit a matter to a trial court to hear new or further evidence, should be exercised sparingly and only when there are special or exceptional circumstances. The reason for this is the possibility of fabrication of testimony after conviction and the possibility that witnesses may be induced to retract or recant evidence already given by them.”¹³³

[148] The first requirement is that there must be an explanation, based on allegations that may be true, why the evidence was not led at the trial.¹³⁴ The explanation why the evidence was not led at the trial is to the effect that the applicants only became aware of the allegation that Mr Arries was coerced by the investigating team to give false evidence against the applicants in return for certain favours from certain members of the police service when he recanted after their trial had been concluded. The founding affidavit, deposed to by the first applicant, and confirmed by the second and third applicants reads:

“In Arthur’s trial, [Mr Arries] testified that he had been arrested for housebreaking. He further testified that the investigating officer, whom he knew as Maringa, had offered to help him with this housebreaking case; if he testified that he had seen my co-applicants and I, as being the occupants of the Polo motor vehicle on the night of the incident. In particular [Mr Arries] testified as follows:

‘These are the names that we, my friend and I who made statements, these are the names that we received from the detective. The detective said we must say these are the people that we saw in the car.’

¹³² *Tofa v S* [2015] ZASCA 26; *Karrim v S* [2011] ZASCA 230; *S v Hanuman* [1997] ZASCA 108, 1998 (1) SACR 260 (SCA); *R v Baartman* 1960 (3) SA 535 (A); *R v Van Heerden* 1956 (1) SA 366 (A).

¹³³ *Nkomo* above n 64 at para 18.

¹³⁴ *Van Heerden* above n 74 at 371F-H; *R v Foley* 1926 TPD 168 at 171.

...

Arthur's trial was conducted nearly two years after ours; and this evidence was not known to us or our legal representative at the time when the matter was first heard by the Trial Court, or when we petitioned the Supreme Court of Appeal for the first time. In the result our explanation for the failure to adduce the evidence at the initial trial must be conclusive." (Footnotes omitted.)

[149] The first requirement may usually be satisfied by showing that the further evidence only came to light after the trial.¹³⁵ The present matter is peculiar in the sense that the "new evidence" is the evidence of a self-confessed perjurer. Mr Arries, on his own version, deliberately gave false evidence at the applicants' trial. In such an instance, if it is proved that the applicants were not aware that Mr Arries was coerced into telling a lie at the trial until the trial was over, this requirement would, in my view, be satisfied.

[150] In the view I take of the matter, the quality of Mr Arries' recantation is gravely suspect. First, it is a recantation without more. He simply said – at the subsequent Saimons' trial – that he had earlier not been speaking the truth. There is *no externally verifiable signifier* of whether he was being truthful at the second trial.

[151] This does not mean that a recantation cannot, by itself, constitute exceptional circumstances. It simply means that it will not always suffice. Generally, more will be required – specifically, some external, verifying indicator or circumstance showing that the original evidence was suspect, and that the subsequent recantation is more plausible. In this matter, Mr Arries offered a mere repudiation of his previous testimony. While his testimony in the trial which saw the applicants convicted was detailed, his recantation was essentially a bare denial of having witnessed the shooting: "For the fourth time, I did not see anyone shoot, I ran into the yard. How many times must I tell you that?"

¹³⁵ *Van Heerden* id.

[152] Second, counsel for the state submitted during the oral hearing that Mr Arries was, at the time of the Saimons’ trial, serving his sentence in the Boksburg prison where Mr Saimons was also lodged while awaiting trial. Counsel for the applicants accepted this fact. It gives rise to a pungent possibility that Mr Arries was “got to” through the jail network. Centlivres CJ in *Van Heerden* cautions, “[t]o allow such further evidence would encourage unscrupulous persons to exert by means of threats, bribery or otherwise undue pressure on witnesses to recant their evidence”.¹³⁶ Mr Arries’ recantation reeks of all this.

[153] Third, the issue which could defeat a finding of exceptional circumstances is the fact that Mr Arries’ testimony was corroborated – in materially important respects – by the equally detailed testimony of Mr Abrahams and this testimony was not recanted. Mr Abrahams corroborated Mr Arries materially with regard to the shooting incident and, in particular, with regard to the identity of the applicants as the persons who shot and killed the deceased. The High Court judgment carefully analysed the complexities of the evidence presented.¹³⁷

¹³⁶ Id at 372-3.

¹³⁷ Relevant extracts from the High Court judgment at paras 14-5 and 17 read:

“In analysing the evidence of Sherwin Arries, I have taken into consideration the discrepancies between his statement to the police and his evidence-in-chief. This case is about identity. This court must be satisfied that the witness had an ample opportunity to observe the happenings and that further he is not making a false charge against the accused.

...

Sherwin Arries was not seeing the occupants of the Polo for the first time. He knows accused 1. Accused 1 and his late brother Quentin Alexander once belonged to the Serpents gang. Accused 1 has now crossed over and joined the Dogans. He knows accused 1 for more than ten years. Accused 1 used to now and then sleep at his place when he and his late brother were friends.

As regards accused 2, he knows him very well also. Sherwin and accused 2’s brother are friends. He always saw accused 2 when he went visiting accused 2’s brother. He also knows accused 3 well, as he had seen him in Reigerpark. He knows him for more than 5 years. The Polo drove slowly past him with all the windows open, that is how he saw accused 3. He even drew the attention of Clint and Marlin to the occupants of the vehicle.

Marlin and Clint confirmed who they saw in the motor vehicle as it drove past. Criticism against Sherwin is that he did not in his statement made to the police mention having seen accused number 2. Secondly in the police statement he said Atter is the one who jumped out of the car and shot at the deceased, this was after accused 1 had also shot the deceased. In court he said it was accused 2 and Atter who shot at the deceased.

[154] The recantation appears to present a free ride that seems to me of almost no value at present. This becomes more evident when regard is had to certain aspects of Mr Arries' evidence in the Saimons' trial. Before he was declared a hostile witness, his opening evidence in chief reads:

"What happened on the 17th of November 2011 at around 20:30 in the evening? – I cannot remember, it was a long time ago.

About the shooting of Renaldo Booysens – I remember he was shot a few years ago.

And you witnessed the incident, is that correct? – I did see, yes.

Yes, tell us, tell the court – I have just told this court that I cannot remember what happened that day.

...

It was in May 2012 when you testified against the others – Yes, I know that I testified, but it was a long time ago. I cannot remember what I said in my testimony before court as I have said before this court I cannot remember." (Emphasis added.)

[155] In a similar vein he later said:

I do not find the contradictions to be material as to warrant the dismissal of the evidence of Sherwin which he gave in court under oath. He was to a large extent corroborated by the other two witnesses as to what he saw. For example all three witnesses describe seeing a black or dark blue Polo, all of them agreed that it was accused 3 who was the driver and that accused 1 sat in the front passenger seat. That accused 2 was a passenger in the back seat of the Polo.

...

Mr Arries was certain that he saw accused 1 first firing shots through the window of the moving motor vehicle and thereafter accused 2 and Atter jumped out of the car and continued shooting at the deceased. There was nothing obscuring the witness from seeing the persons who shot at the deceased and I accept his evidence.

This court observed him throughout the days when he testified. He gave a good impression as a witness. He did not hide anything and conceded where he had made mistakes. For example in answer to a question by the state about the discrepancies in his statement to the police he answered: 'Everybody makes mistakes'.

He told the court that Clint (Shoes) is a gang member of the Serpents and that he has tattoos. He said accused 1 does have tattoos that show that he was a member of the Serpents. It was put to the witness Sherwin that he hates accused 1 for having left the Serpents gang to go and join the Dogans. He denied that and said he is not a gang member and he does not care to which gang he belongs for he has no interest in it."

“What did you say in your testimony in court against Pietertjie, Naas and Zagars?
[The applicants.] – Now you are asking something else now, I cannot remember what
I said that day.”

[156] This is not indicative of a witness who recognises that he previously gave false testimony and wishes to “come clean” and tell the court the truth. He repeatedly says that he cannot remember the events of the day the shooting occurred. It does not inspire confidence or a belief that he “will tell the truth on the second occasion”.¹³⁸ Nor does it demonstrate that he was “anxious to tell the truth”.¹³⁹

[157] Mr Arries did, however, subsequently manage to recall some details of the events of that fateful day. Though it may have been a proverbial slip of the tongue, it is a slip that casts doubt on the veracity of his recantation.

“So are you telling this court that the Arthur you saw shooting at the deceased is not this one? – M’Lord, the Arthur that I was talking about to the police was the other Arthur, not this man before court. I do not know this man.”

and

“When I testified about Arthur who alighted from the car who shot the deceased, I was talking about Arthur that I know who stays in Reiger Park and he is all the time in the company of Pietertjie.”

[158] It may be a challenge to reconcile Mr Arries’ evidence in the preceding paragraph with his testimony that he did not see the occupants of the vehicle and could not “tell who was shooting because [he] was running into the yard”.

¹³⁸ *Van Heerden* above n 174 at 372E.

¹³⁹ *Id.*

[159] Centlivres CJ in *Van Heerden* noted that a self-confessed liar, who says he previously told a lie but now wishes to tell the truth, would not usually be accepted as credible.¹⁴⁰ He added:

“To justify the reception of the fresh evidence some good reason must be shown why a lie was told in the first instance, *and a good ground given for thinking the witness will tell the truth on the second occasion.*”¹⁴¹ (Emphasis added.)

[160] This Court must be careful not to deal with and pronounce on issues that should be properly considered, if ultimately an order of reconsideration is granted, by the High Court or Supreme Court of Appeal. I refer here specifically to the issue whether the applicants have met the requirements set out in *De Jager* for re-opening a criminal trial. Obviously, this Court, like the President, can and should, in determining the merits of the application, consider whether there is a reasonable likelihood that the applicants can meet such requirements. It is not for this Court to determine whether the test for the admission of new evidence has been met. Similarly, that issue was not before the President.

[161] In my view, and for the reasons already given, I doubt whether the applicants would be able to establish that there is a *prima facie* likelihood of the truth of the evidence and that the evidence is materially relevant to the outcome of the trial. This was, in all probability, also the view of the President. On the narrow point before us, my conclusion is that Mr Arries’ simple about-turn, without any externally verifiable signifier, does not constitute exceptional circumstances conferring a discretion on the President as envisaged in section 17(2)(f). The President was correct in finding that no exceptional circumstances existed. No grave injustice would result if leave to appeal is refused. For these reasons, it would not be in the interests of justice to grant leave to appeal.

¹⁴⁰ Id at 372D.

¹⁴¹ Id at 372D-E.

[162] It follows, in light of the view I take regarding the existence of exceptional circumstances, that it is not necessary to make a determination whether the matter should be remitted to the President and whether she is obliged to give reasons for her decision. In respect of the latter, there is no more she could have said. In any event, it may be incumbent on this Court, before it directs that the President give reasons for her decision, to ascertain whether that is practically possible.

Conclusion

[163] In the event that a decision under section 17(2)(f) is appealable, there are no exceptional circumstances in this matter which trigger the discretion of the President in terms of section 17(2)(f). The President correctly dismissed the application on the basis that “no exceptional circumstances have been shown to exist”.

Order

[164] The following order is made:

1. The application for leave to appeal is dismissed.
2. There is no order as to costs.

For the Applicants:

H L Alberts and E Guarneri instructed
by Legal Aid South Africa, Pretoria
Justice Centre

For the Respondent:

S J Khumalo instructed by the Director
of Public Prosecutions, Johannesburg