



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

Reportable

Case no: 64/2023

In the matter between:

GEORGE HLAUDI MOTSOENENG

APPELLANT

and

SOUTH AFRICAN BROADCASTING

CORPORATION SOC LTD

FIRST RESPONDENT

SPECIAL INVESTIGATING UNIT

SECOND RESPONDENT

SOUTH AFRICAN BROADCASTING

CORPORATION PENSION FUND

THIRD RESPONDENT

Neutral citation: *George Hlaudi Motsoeneng v South African Broadcasting Corporation Soc Ltd and Others* (Case no 64/2023) [2024] ZASCA 80 (27 May 2024)

Coram: PONNAN, HUGHES and MEYER JJA and TLALETSI and MBHELE AJJA

Heard: 15 May 2024

Delivered: 27 May 2024

Summary: Application in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 – absence of exceptional circumstances – application dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Khan AJ, sitting as court of first instance):

- (a) The application for condonation is dismissed with costs.
 - (b) The applicant for condonation is ordered to pay the costs incurred by the respondents in opposing the lapsed appeal.
 - (c) In both instances (a) and (b) the costs shall include the costs of two counsel.
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JUDGMENT

Ponnan JA (Hughes and Meyer JJA and Tlaletsi and Mbhele AJJA concurring):

[1] The appellant, George Hlaudi Motsoeneng, is the former Chief Operating Officer of the first respondent, the national broadcaster, the South African Broadcasting Corporation (Soc) Ltd (SABC). By virtue of his employment with the SABC, Mr Motsoeneng became a member of the third respondent, the South African Broadcasting Corporation Pension Fund (the Fund). After the judgment of this Court in the matter of *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others*¹ (which I commend to the reader), the then SABC board came to be reconstituted, whereupon a disciplinary enquiry against Mr Motsoeneng was convened. Following the disciplinary enquiry, Mr Motsoeneng's employment was terminated on 12 June 2017, whereafter he became entitled to the payment of a withdrawal benefit from the Fund in accordance with its rules.

[2] On 24 July 2017, and shortly after the termination of Mr Motsoeneng's employment, the audit department of the SABC discovered that Mr Motsoeneng had been paid a success fee to which he allegedly was not entitled. The payment came to be made in the following circumstances: On 19 August 2016, Mr James Aguma, the

¹ *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* [2015] ZASCA 156; [2015] 4 All SA 719 (SCA); 2016 (2) SA 522 (SCA).

former Group Chief Executive Officer, made oral representations to the Governance and Nominations Committee (the GNC) of the SABC requesting their approval for the payment of a success fee to Mr Motsoeneng, ostensibly on the basis that he had raised an amount of R1,19 billion for the benefit of the SABC. The GNC approved payment and the sum of R11 508 549.12 came to be paid in two instalments on 12 and 13 September 2016.

[3] Asserting that the GNC had no authority or mandate to pay Mr Motsoeneng a success fee, the SABC addressed a letter to the Chief Executive and Principal Officer of the Fund on 20 July 2017 requesting that: (a) it withhold payment of the accumulated pension benefit due to Mr Motsoeneng, until such time as a judgment issued in the civil proceedings that it contemplated instituting against him; and, (b) in the event of a judgment issuing against Mr Motsoeneng, the Fund make a deduction from any benefit due to him in satisfaction of the judgment. The Fund refused to accede to the request, instead after first seeking and obtaining further particularity from the SABC, the Principal Officer of the Fund wrote on 28 July 2017: '[i]n order to withhold the pension benefit from Mr Motsoeneng, the Fund is obliged to request that the relevant application to interdict the Fund from paying out the benefit be served on the Fund on or before 4 August 2017'.

[4] This prompted the SABC to issue an urgent application out of the Gauteng Division of the High Court, Johannesburg on 4 August 2017. Relief was sought in two parts. Under Part A, the SABC sought an order restraining the Fund from paying out any benefit due to Mr Motsoeneng to the tune of R11 508 549.12, pending the determination of Part B. The SABC also sought a '[c]onditional declarator of unconstitutionality in respect of section 37D of the Pension Fund Act 108 of 1996'. Why the additional relief was sought was far from clear. It, however, necessitated the joinder of the Minister of Finance and the Registrar of Pension Funds, both of whom filed affidavits in opposition. In the event, the SABC subsequently chose to abandon the constitutional challenge and tendered the costs occasioned thereby in its replying affidavit.

[5] In support of the relief sought, it was stated on behalf of the SABC:

'10 This application is predicated on the following grounds:

10.1 the second respondent, as a former employee of the applicant was a member of the first respondent and had made contributions during the tenure of his employment;

10.2 in accordance with section 37D of the Pension Fund Act 24 of 1956 (“the Pension Fund Act”) a registered pension fund may deduct from any benefit payable to a member (the second respondent) to the employer (the applicant) for damage caused to the employer by reason of theft, dishonesty, fraud or misconduct;

10.3 in accordance with Rule 15.2 of the SABC Pension Fund Rules (“Pension Rules”), the trustees have the requisite power to withhold payment of the benefit, where the employer has instituted legal proceedings in a court of law and/or laid a criminal charge against the member, until the matter has been finally determined by a competent Court of Law or has been settled or formally withdrawn;

10.4 the applicant, through the Interim Board sanctioned an audit investigation which has revealed that the second respondent received an unlawful/unauthorized payment in the sum of R11 508 549.12 (eleven million five hundred and eight thousand five hundred and forty nine rand and twelve cents) from the applicant which was termed a ‘success fee’ by the applicant’s Board’s Governance and Nominations Committee (“G & N Committee”);

10.4.1 in this regard I annex hereto, a copy of the Final Report on the “Success Fee” . . . ;

10.5 the investigation further revealed a clear misconduct in the procedure and approval of the award made to the second respondent by the said committee;

10.6 resultantly, the applicant will seek an order directing the first respondent to withhold the payment of that the sum of R11 508 549.12 (eleven million five hundred and eight thousand five hundred and forty nine rand and twelve cents) until the review court has pronounced on the intended review application as set out in Part B of this application.

11 The applicant also approaches this court on an urgent basis acting on the strength of the first respondent’s letter urging the applicant to serve this urgent application on or before Friday, 4 August 2017. I deal with this aspect below.

12 The applicant reasonably anticipates that should the money be paid to the second respondent or alternatively to another fund, it will not be able to reclaim payment of the money unlawfully paid to him (second respondent) emanating from a decision of the G & N Committee to award or approve the 2.4% of R1,19 billion.’

[6] Somewhat surprisingly, the Fund filed several affidavits in opposition to the application. It also raised, in addition to the opposition on the merits, a range of preliminary procedural complaints. This, in circumstances where it was open to it to simply abide the decision of the court. Mr Motsoeneng chose not to file an affidavit in opposition to the relief sought under Part A. Instead, he contented himself with a notice

under rule 6(5)(d)(iii) that he would be raising various questions of law at the hearing of the matter. Part A came before Maier-Frawley AJ on 6 December 2018. On 18 January 2018, she issued an interim interdict restraining the Fund from paying out the pension fund benefit standing to the credit of Mr Motsoeneng, pending the finalisation of the matter.

[7] In reaching that conclusion, Maier-Frawley AJ held:

‘22. . . . The factual allegations which underpin the SABC’s claims remain largely if not wholly undisputed on the papers. Motsoeneng elected not to engage with the substantive allegations made by the SABC in its papers. Nor did he put up any version to the contrary.

. . .

47. The factual allegations in the founding papers *prima facie* demonstrate that Motsoeneng had accepted and retained payment of an unlawful, unauthorised and unwarranted success fee in the amount of R11 508 549.12, this, in circumstances where: (i) an investigation conducted by the SABC’s audit department revealed that the requisite Board approval had not been sought or obtained in relation to such payment, (which fact would support an inference that it had deliberately not been disclosed by any members of the SABC’s Governance and Nominations Committee (‘GNC’) to the Board); (ii) payment of the amount of R11 508 549.12 had been made in full by way of lump sum payments on 12 and 13 September 2016 in circumstances where, to the knowledge of the GNC, the SABC’s financial circumstances did not allow for a lump sum payment thereof and where the GNC had in fact resolved that payment would be made by way of instalments over a period of three years; (iii) transcripts of the GNC deliberations that preceded the taking of the decision to award Motsoeneng a success fee, evidenced that GNC members were aware that the payment to Motsoeneng was irregular; (iv) the terms of reference of the GNC included, amongst others, to ‘[p]revent any Human Capital practices that will result in unauthorised, irregular, fruitless and wasteful expenditure. . .’; (v) a paper audit trail in relation to the payment had been deliberately concealed, in conflict with established norms and values that demand open transparency in the exercise of public power; (vi) neither Motsoeneng’s service agreement nor the SABC’s governing policy documents made provision for payment to him of a success fee; (vii) the duties of Executive Directors (of which Motsoeneng was one) included, amongst others, the giving of advice on governance related matters; and (viii) the SABC had expressly relied on the provisions of section 57 of the Public Finance Management Act 1 of 1999 (‘PFMA’), the Public Protector’s report, and the final audit report (relating to the outcome of the audit investigation conducted by the SABC’s internal audit department) in support of its case.

...

88. The allegations made in the SABC's affidavits appear to *prima facie* point to the fact that Motsoeneng unlawfully received payment of a success fee in the amount of R11 508 549.12 in circumstances where (a) he allegedly knew or ought to have known (in his role as Chief Operating Officer and in any event, as executive member of the GNC) of the irregularity by which the payment of such amount to him was tainted and to which he was therefore not legally entitled, but which he nonetheless accepted and retained, exacerbated by his failure to disclose same (until uncovered by an audit investigation) and (b) in contravention of his undisputed duties in terms of s 57 of the PFMA to ensure that the system of financial management and internal controls established for the SABC are carried out and to take effective and appropriate steps to prevent any irregular or fruitless and wasteful expenditure within his area of responsibility. His dishonesty is said to lie in knowingly and intentionally accepting a payment that was on the face of it irregular and invalid, without disclosing same (which served to unjustly enrich him) and then appropriating it to himself, thereby acting in his own self-interest and in breach of his fiduciary duty of good faith owed to the SABC under s 76(2)(a) of the Companies Act.

89. The evidence put up by the SABC is sufficient to *prima facie* point to Motsoeneng's intentional misappropriation of public funds – the SABC's allegations support the inference that Motsoeneng knowingly acted in his own self-interest in appropriating to himself, for his own use, public funds entrusted to his care as public functionary, to which he was not legally entitled, which caused the SABC to suffer loss. Bearing in mind that the SABC is a major public entity in terms of Schedule 2 of the PFMA and that it is funded through the public purse, it is enjoined to recover the losses it suffered from Motsoeneng as a result of his unlawful conduct. It is also constitutionally enjoined to do so. And it is in the interests of the public and for the SABC to do so.'

[8] On 29 June 2020, and after the grant of the interim interdict, the second respondent, the Special Investigating Unit (the SIU), sought and obtained leave to intervene in the application.² The involvement of the SIU arose as a result of investigations conducted by it into the affairs of the SABC. This, following a referral on 1 September 2017 by the President of the Republic of South Africa of allegations of impropriety in connection with the affairs of the SABC to the SIU for investigation in

² The Special Investigating Unit is an Organ of State established by Proclamation No. R.118 of 2001 (Government Gazette No 22531 dated 31 July 2001) issued pursuant to the provisions of s 2(1)(a) of the Special Investigating Unit and Special Tribunals Act 74 of 1996.

accordance with the terms of reference set out in Proclamation No. R29 of 2017.³ According to the SIU, after having conducted the authorised investigations, it was satisfied that it had sufficient grounds to institute proceedings against Mr Motsoeneng, as it was empowered to do by virtue of ss 4(1)(c) and 5(5) of the Special Investigating Unit and Special Tribunals Act 74 of 1996. It thus joined in the application and made common cause with the SABC's self-review.

[9] Ms Mariette Amanda Dreyer, a Chief Forensic Investigator at the SIU, who deposed to the supporting affidavit on its behalf, had this to say:

'18 At the outset, I refer to the affidavit deposed to by Mr Vusumuzi Goodman Moses Mavuso ("Mavuso") . . . Mavuso was a Non-Executive Director at the SABC from 25 September 2013 to 13 October 2016. During his tenure at the Board of the SABC, he also served as a member of various Board Committees including Human Resource and Remunerations Committee specifically during 2016.

19 Mavuso confirms in his affidavit and with specific reference to section 14.3 of the Board Charter dated 26 April 2010 . . . and Table 15 of the Delegation of Authority Framework of 26 April 2016 . . . that there was no approved commission and/or success fee policy applicable to Executive Directors such as Motsoeneng during his (Mavuso) tenure at the SABC. He confirms that any new policy would have had to be approved by the Board but that in this case, no such policy was ever approved by the Board during his tenure.

20 What is fatal to any opposition to this application is what Mavuso states in paragraphs 21.1 to 21.7 of his affidavit. He states that in the Board meeting of 19 August 2016, a proposal was made by Professor Tshidzumba to reward SABC employees for doing their job such as negotiating contracts. Mavuso objected to this, contending that the SABC performance management systems were sufficient to reward staff. This objection was upheld by the Board, meaning the proposal by Tshidzumba was not approved. He attaches the attendance register, the Board minutes and the Board meeting transcript of 19 August 2016 as annexures . . . There are three factors to be distilled from his affidavit and these annexures. First, these annexures show that the members of the GNC who had earlier on the same day took a resolution approving the Commission Policy of the SABC to include success fee to Executive Directors and specifically to pay Motsoeneng success fee were present in that meeting but did not disclose their resolution or their intention to pay Motsoeneng success fee to the Board. They had a fiduciary duty to disclose to the Board. Second, even after rejection of

³ Proclamation No. R.29 of 2017 published in Government Gazette No 41086, 1 September 2017.

Tshidzumba's proposal in this meeting, the GNC members failed to halt the payment of the success fee to Motsoeneng.

21 Third, Motsoeneng himself was part of this Board meeting. He was aware that the GNC had earlier discussed payment of the success fee to him but did not disclose this to the Board when he had a fiduciary duty as an Executive Director to do so. Not only did he not disclose but went on to receive payment of the success fee when he ought to have rejected this payment. His conduct and/or omissions in this regard was clearly fraudulent or at the very least dishonest.

22 Motsoeneng's contract of employment is attached to Mavuso's affidavit . . . I ask that its contents be incorporated herein. It regulated Motsoeneng's terms of employment. Clause 9 records the duties of the Executive. Clause 12.2 makes provision for performance bonuses. Clause 12.2.1 provides that annual performance bonuses are not guaranteed and may be granted at the sole and absolute discretion of the Board which will take into account, without limitation, the performance of the SABC and that of the COO measured against the key performance indicators and/or areas set out in the performance agreement. Mavuso confirms that no Performance Agreement was concluded between the SABC and Motsoeneng. Other than this bonus, the contract does not make any other provision for other rewards such as a success fee.'

[10] Part B of the relief sought came before Khan AJ on 26 May 2021. On 15 December 2021, the learned judge issued the following order:

'1. The decision by the SABC on 19 August 2016, through its Governance and Nominations Committee, to award Motsoeneng a success fee and paying him R11 508 549.12, is declared invalid and set aside.

2. Motsoeneng is ordered to repay to the SABC, the amount of R11 508 549.12 paid to him as a success fee with interest [*a tempore morae*] per annum calculated from 13 September 2016 to date of payment, within 7 (seven) days from the date of service of this order.

3. The Pension Fund is to pay to the SABC an amount of R11 508 549.12 from the pension proceeds that have accumulated to the benefit of Mr H R Motsoeneng, in favour of the SABC, alternatively to pay the full pension proceeds of Mr H R Motsoeneng, in the event that they do not equal R11 508 549.12, in the event that the Second Respondent fails to pay within 7 (seven) days from date of service of this order.

4. Ordering the Second Respondent to pay the costs of this application, which costs will include the reserved costs in respect of Part A and the costs of 2 Counsel where employed.

5. Ordering the First and Second Applicants to pay the Respondents costs in respect of the costs of the abandonment of the wasteful and irregular expenditure claim.’

[11] On 15 July 2022, Khan AJ dismissed Mr Motsoeneng’s application for leave to appeal. He thereafter petitioned this Court for leave to appeal on 15 August 2022. The two judges who considered the petition dismissed it on 19 January 2023. Like Khan AJ, they also took the view that the envisaged appeal lacked reasonable prospects of success and that there was no other compelling reason why the appeal should be heard, as contemplated by s 17(1) of the Superior Courts Act 10 of 2013 (the Act). Mr Motsoeneng then applied in terms of s 17(2)(f) of the Act to the President of this Court for the reconsideration of the refusal of his petition. Petse AP referred the decision dismissing Mr Motsoeneng’s application for leave to appeal to the Court for reconsideration and directed the parties to be prepared, if called upon to do so, to address the court on the merits of the appeal.

[12] After the record had been filed in the matter, the appeal lapsed for failure on the part of Mr Motsoeneng to prosecute it by timeously filing his heads of argument. Thus, the initial question that is before us is whether the default by him should be condoned and the appeal revived. Factors which usually weigh with this Court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent’s interest in the finality of the judgment of the court below, the convenience of this Court and the avoidance of unnecessary delay in the administration of justice.⁴ Here, the delay is not excessive – the heads were late by some eight days as a result of a miscalculation of the *dies* on the part of Mr Motsoeneng’s attorney. The application for condonation was filed within a week of the attorney becoming aware of the necessity for one. I am also willing to assume in Motsoeneng’s favour that the matter is of substantial importance to him and accept in his favour that there has been no or minimal inconvenience to the Court. However, on the merits, which must be weighed against the other factors and to which I presently turn, one cannot be as charitable to Mr Motsoeneng. On that score, the scales are tipped firmly against condoning the default and reviving the appeal, thereby entitling us to refuse the indulgence of condonation.

⁴ *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2013] ZASCA 5; [2013] 2 All SA 251 (SCA) para 11.

[13] Section 17(2) of the Act provides:

'(a) 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.

(b) 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.

(c) 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.

(d) 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.

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

(f) 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.'

[14] It is important to distinguish between an application for leave to appeal and an application under subsection (2)(f). The latter is an application to the President for the referral to the Court for reconsideration of the considered decision of the two judges refusing leave to appeal. The necessary prerequisite for the exercise of the President's discretion is the existence of 'exceptional circumstances'. If the circumstances are not truly exceptional, that is the end of the matter. The application under subsection 2(f) must fail and falls to be dismissed. If, however, exceptional circumstances are found to be present, it would not follow, without more, that the decision refusing leave to appeal must be referred to the court for reconsideration. The President may, in the

exercise of her discretion, nonetheless decline to do so. If the President refers the decision of the two judges for reconsideration, the court effectively steps into the shoes of the two judges. Upon reconsideration, it may grant or refuse the application and, if the former, vary the order of the two judges dismissing the application to one granting leave either to this Court or the relevant high court.⁵

[15] In this regard, it is important to recognise that we are concerned with a proviso, the purpose of which is ordinarily to take out of the purview of the provision something that would otherwise be a part of it. This was emphasised in *National Director of Public Prosecutions, KwaZulu-Natal v Ramdass* in these terms:

‘Furthermore, it is a basic rule of interpretation of statutes that a proviso must be read and considered in relation to the principal matter to which it is a proviso. It is not a separate and independent enactment and the words of the proviso are dependent on the principal enacting words, to which they are attached as a proviso. The words of the proviso cannot be read as divorced from their context. In *Mphosi v Central Board for Co-operative Insurance Ltd* 1974 (4) SA 633 (A) at 645B-F, the following was stated:

‘This argument altogether overlooks the true function and effect of a proviso. According to Craies, *Statute Law*, 7th ed., at p. 218 –

"the effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it; and such proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect".⁶

[16] In its consideration of s 17(2)(f), the Constitutional Court pointed out in *Liesching and Others v S (Liesching II)*:

‘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.

⁵ See by way of example *Ntlanyeni v S* [2016] ZASCA 3; 2016 (1) SACR 581 (SCA) and *Mathekola v State* [2017] ZASCA 100.

⁶ *Director of Public Prosecutions, KwaZulu-Natal v Ramdass* [2019] ZASCA 23, 2019 (2) SACR 1 (SCA) para 14.

In *Ntlemeza*, the requirement of exceptional circumstances is viewed as a “controlling measure”. 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.⁷

[17] It has long been accepted that it is ‘undesirable to attempt to lay down any general rule’ in respect of ‘exceptional circumstances’ and that each case must be considered upon its own facts.⁸ In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas and another*, Thring J summarised the approach to be followed. He said that ‘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’.⁹

[18] In *Avnit v First Rand Trading*, Mpati P stated that ‘the overall interests of justice will be the determinative feature’ for the exercise of the President’s discretion under s 17(2)(f), adding:

‘In the context of s 17(2)(f) the President will need to be satisfied that the circumstances are truly exceptional before referring the considered view of two judges of this court to the court for reconsideration. I emphasise that the section 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 of this Court to deal with a situation where otherwise injustice might result. An application that merely rehearses the arguments that have already been made, considered and rejected will not succeed, unless it is strongly arguable that justice will be denied unless the possibility of an appeal can be pursued. A case such as *Van der Walt*¹⁰ may, but not

⁷ *Liesching and Others v S* [2018] ZACC 25; 2018 (11) BCLR 1349 (CC); 2019 (1) SACR 178 (CC); 2019 (4) SA 219 (CC) paras 136-137.

⁸ *Norwich Union Life Insurance Society v Dobbs* 1912 AD 395 at 399.

⁹ *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and another* 2002 (6) SA 150 (C) at 156H-J.

¹⁰ 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 Kgate. Subsequent events showed that the error lay in the grant of leave to appeal to Mr Kgate. (See *Van der Walt v Metcash Trading Ltd* [2002] ZACC 4; 2002 ([2002] ZACC 4; 4) SA 317 (CC); 2002 (5) BCLR 454 (CC) and *Kgate v Metcash Trading Ltd* 2004 (6) SA 410 (T).

necessarily will, warrant the exercise of the power. In such a case the President may hold the view that the grant of leave to appeal in the other case was inappropriate.

A useful guide is provided by the established jurisprudence of this court in regard to the grant of special leave to appeal. 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.¹¹

[19] Regrettably, the parties misconceived the true nature of the enquiry. In the heads of argument filed on behalf of both, the sole focus was wrongly on the correctness of the judgment of Khan AJ, and whether or not there were reasonable prospects of success in the contemplated appeal against that judgment. Counsel appeared not to appreciate that the requirement of the existence of exceptional circumstances is a jurisdictional fact that had to first be met, and that absent exceptional circumstances, the s 17(2)(f) application was not out of the starting stalls. At the Bar, counsel sought to rehash the arguments that had already been advanced before the high court and before the two judges of this Court, who dismissed the application for leave to appeal. But those contentions had been considered and found to be wanting in a detailed judgment of the high court. In dismissing the petition, the two judges of this Court had self-evidently taken the view that there were no reasonable prospects of an appeal against that judgment succeeding. As Innes ACJ made plain in *Norwich Union Life Insurance Society v Dobbs*:

' . . . 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.'¹²

¹¹ *Avnit v First Rand Bank Ltd* (20233/14) [2014] ZASCA 132 (23 September 2014) paras 6-7.

¹² *Norwich* fn 7 above at 399.

[20] An independent perusal of the record reveals that neither the conclusion reached by Khan AJ, nor that of the two judges of this Court, can be faulted. As Lewis JA, in dealing with the test for the grant of special leave to appeal, observed in

Stu Davidson v Eastern Cape Motors:

'There is no legal question to be determined. There is no factual dispute that requires reconsideration. There is no reason why an appellate court should determine any matter arising from the first appeal further. Again, it is trite that where there has been no manifest denial of justice, no important issue of law to be determined, and the matter is not of special significance to the parties, and certainly not of any importance to the public generally, special leave should not be granted.'¹³

That holds true for this matter as well. Given that there are no reasonable prospects of success in the contemplated appeal, much less special circumstances, the application hardly meets the higher 'exceptional circumstances' threshold set by s 17(2)(f). It must accordingly fail.

[21] In the result:

- (a) The application for condonation is dismissed with costs.
- (b) The applicant for condonation is ordered to pay the costs incurred by the respondents in opposing the lapsed appeal.
- (c) In both instances (a) and (b) the costs shall include the costs of two counsel.

V M PONNAN
JUDGE OF APPEAL

¹³ *Stu Davidson and Sons (Pty) Ltd v Eastern Cape Motors (Pty) Ltd* [2018] ZASCA 26 para 19.

Appearances

For the appellant: T Masuku SC, K Mathipa and T Ngubeni

Instructed by: Bokwa Law Inc., Pretoria
Bokwa Attorneys, Bloemfontein

For the first & second respondents: J Motepe SC and B Lukhele

Instructed by: Werksmans Attorneys, Johannesburg
Honey Attorneys, Bloemfontein