



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 306/22

In the matter between:

ZOLANI GODLOZA

First Applicant

SIBULELE MTHETHO

Second Applicant

and

THE STATE

Respondent

Neutral citation: *Godloza and Another v S* [2025] ZACC 24

Coram: Zondo CJ, Bilchitz AJ, Dodson AJ, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Theron J and Tshiqi J

Judgments: Mhlantla J and Theron J: [1] to [110]
Dodson AJ: [111] to [200]
Majiedt J: [201] to [246]
Bilchitz AJ: [247] to [272]
Zondo CJ: [273] to [275]

Heard on: 7 March 2024

Decided on: 5 November 2025

Summary: Jurisdiction — constitutional matter — potential limitation of the right not to be deprived of freedom arbitrarily and without just cause

Jurisdiction — misapplication of the cautionary rule — section 93ter(1)(b) of the Magistrates' Court Act — section 51(1) of the Criminal Law Amendment Act — section 17(2)(f) of the Superior

Courts Act 10 of 2013 — right to equality — right to a fair trial —
right of access to courts

Leave to appeal — risk of wrongful conviction — public
confidence in the judicial system — disparate treatment

ORDER

On appeal from the Regional Court for the Eastern Cape, Mthatha:

1. Leave to appeal is granted.
2. The appeal succeeds in part and to the extent set out below.
3. The order of the Supreme Court of Appeal is set aside and substituted with the following:
 - “(a) The applicants’ petition for leave to appeal in terms of section 309C of the Criminal Procedure Act 51 of 1977 against both conviction and sentence is granted.
 - (b) The applicants are granted leave to appeal to the High Court of South Africa, Eastern Cape Local Division, Mthatha.
 - (c) If practically possible, their appeal should be considered together with that of Mr Lungisa Grifhs.”

JUDGMENT

THE COURT:

This matter has produced five judgments. The majority of the Court (Bilchitz AJ, Dodson AJ, Madlanga J, Mathopo J, Mhlantla J, Theron J and Tshiqi J) has concluded that leave to appeal should be granted. The first judgment is penned by Mhlantla J and

Theron J, with Tshiqi J and Mathopo J concurring fully with both its reasons and order, and Bilchitz AJ concurring with its order and, subject to qualifications, with its reasons. This judgment holds that a complaint of a breach of the right not to be arbitrarily deprived of one's freedom and without just cause raises a constitutional issue which engages this Court's jurisdiction, as the risk of a wrongful conviction directly affects that right. It grants leave to appeal, partially upholds the appeal, sets aside the decision of the Supreme Court of Appeal, which refused the petition for leave to appeal, and remits the matter to the High Court for a joint hearing with the other co-accused's pending appeal, if practically possible.

The second judgment is penned by Dodson AJ, with Madlanga J concurring, and it holds that an appeal lies in respect of the decision of the President of the Supreme Court of Appeal not to exercise her discretion in terms of section 17(2)(f) of the Superior Courts Act.¹ It upholds the grave injustice argument and holds that the application for reconsideration should be granted. It would have granted leave to appeal against the decision of the President of the Supreme Court of Appeal, set aside the decision of the Supreme Court of Appeal as well as the decision refusing petition for leave to appeal and remitted the matter to the Supreme Court of Appeal for reconsideration.

The third judgment is penned by Majiedt J and concludes that this Court's jurisdiction is not engaged on any of the grounds raised by the applicants since the crux of the matter centres on a misapplication of an established legal principle, namely, the cautionary rule. Thus, the third judgment holds that it would have dismissed the application for leave to appeal.

The fourth judgment written by Bilchitz AJ is a qualified concurrence with the reasons and complete concurrence with the order of the first judgment. It concurs that the violation of constitutional rights is a central founding basis for this Court to exercise jurisdiction and grant leave to appeal. It concurs in the first judgment's order, and

¹ 10 of 2013.

agrees that it remedies the rights violation identified. Lastly, in the fifth judgment Zondo CJ would have concurred in the order that Majiedt J would have made but for some and not all the reasons given by Majiedt J and for the reasons Zondo CJ gives in his judgment.

MHLANTLA J and THERON J (Mathopo J and Tshiqi J concurring):

Introduction

[1] This is an application for condonation and leave to appeal against a judgment and order of the Regional Court for the Eastern Cape Region, Mthatha, in terms of which the applicants were each convicted of murder and sentenced to 16 years' imprisonment. The first applicant is Mr Zolani Godloza, who was accused number five in the Regional Court, and the second applicant is Mr Sibulele Mthetho, who was accused number two. The applicants and another co-accused (Mr Lungisa Grifhs,² accused number three) were convicted of murder based on the evidence of a single witness.³ The applicants now seek leave to appeal and an order setting aside their conviction and sentence.

Litigation history

Regional Court

[2] The applicants and their co-accused, Mr Lungisa Grifhs, Mr Siphamandla Tayi and Mr Lwandile Jonas, were charged with murder under the provisions of section 51 of the Criminal Law Amendment Act.⁴ It was alleged that on or about 16 June 2017 at Mandela Park, Mthatha, the accused unlawfully and intentionally killed Mr Thulani Ntsikini by stabbing him with a knife, acting in common purpose in causing

² In certain instances, his name is reflected as Mlungisa Griffith.

³ Section 208 of the Criminal Procedure Act 51 of 1977 (Criminal Procedure Act) provides that "[a]n accused may be convicted of any offence on the single evidence of any competent witness".

⁴ 105 of 1997.

his death.⁵ The applicants and their co-accused were legally represented during the trial. They pleaded not guilty and proffered alibi defences.⁶

[3] The State relied mainly on the evidence of Mr Kwanele Bavu, who claimed to have been an eyewitness to the fatal stabbing of the deceased. Mr Bavu's testimony implicated the applicants and Mr Grifhs, stating that they had stabbed the deceased. During the defence case, Mr Bavu's sworn witness statement was handed in as an exhibit to demonstrate inconsistencies between it and his oral evidence.

[4] The common cause facts were as follows: The five accused were friends and were to some extent known by Mr Bavu. Earlier on the day in question, the deceased confronted one of the accused⁷ about a pair of shoes that had been taken from him. The deceased was stabbed to death at around 19h00, approximately 300 to 400 metres from Mr Godloza's home.⁸ The post-mortem report recorded the deceased's cause of death as a thoracic injury secondary to stabbing with a sharp object.⁹ All the accused were arrested by the police at Mr Godloza's home the following morning.

[5] The applicants and Mr Grifhs were convicted solely based on Mr Bavu's evidence.¹⁰ In convicting them, the Regional Court held that there was adequate lighting to enable Mr Bavu to identify the accused as the perpetrators.¹¹ The Regional Court held that Mr Bavu's evidence met the requirements set out in *Mokoena*¹² to the effect that a single witness's evidence must be clear and satisfactory in all material

⁵ *S v Godloza*, unreported judgment of the Eastern Cape Regional Court, Mthatha, Case No RCUM144/2017 (28 November 2018) (Regional Court Judgment) at 118.

⁶ *Id* at 120-1.

⁷ The erstwhile accused number four, Mr Lwandile Jonas.

⁸ Regional Court Judgment above n 5 at 131.

⁹ *Id* at 123.

¹⁰ The second state witness, Mr Sinathi Mpondo, was not present at the scene of the murder and his evidence took the matter no further.

¹¹ Regional Court Judgment above n 5 at 131.

¹² *R v Mokoena* 1932 OPD 79.

respects before it can be accepted as the sole basis of a conviction.¹³ The Regional Court held that Mr Bavu “stood his ground” even under cross-examination and did not change his version or contradict himself.¹⁴ The Regional Court accepted Mr Bavu’s evidence and convicted the applicants and Mr Grifhs of murder as charged and sentenced them to 16 years’ imprisonment.¹⁵

Applications for leave to appeal

[6] Aggrieved, the applicants together with Mr Grifhs sought leave to appeal against the conviction and sentence on the basis that the Regional Court had erred in its application of the cautionary rule when considering the evidence of the single witness. On 13 June 2019, the application was dismissed for lack of prospects of success.¹⁶

[7] The applicants and Mr Grifhs filed a petition in the High Court of South Africa, Eastern Cape, Mthatha for leave to appeal. On 9 October 2019, the High Court refused leave to appeal.

[8] The applicants and Mr Grifhs filed separate applications in the Supreme Court of Appeal for special leave to appeal, and these were considered by different panels of judges appointed in terms of section 17(3) read with sections 16(1)(b) and 17(2)(c) of the Superior Courts Act.¹⁷ On 15 May 2020, Mr Grifhs was granted special leave to appeal. The judges constituting the panel are not apparent from the record.

¹³ Id at 80.

¹⁴ Regional Court judgment above n 5 at 132.

¹⁵ Id at 140 and 166.

¹⁶ *S v Godloza*, unreported judgment of the Eastern Cape Regional Court, Mthatha, Case No RCUMA144/2017 (13 June 2019).

¹⁷ Section 17(2)(c) reads:

“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.”

[9] On 13 August 2020, the application for special leave launched by the applicants was dismissed by Petse DP and Dlodlo JA on the grounds that there were no special circumstances meriting a further appeal on the merits.

[10] Pursuant to the order granting Mr Grifhs special leave, the appeal came before the Supreme Court of Appeal. The parties agreed that the Supreme Court of Appeal could dispose of the appeal without hearing oral argument. On 1 September 2021, the Supreme Court of Appeal¹⁸ handed down its judgment. The Supreme Court of Appeal did not deal with the merits of the appeal. The Court held that the appeal before it was, in fact, against a refusal of the petition by the High Court and that the only issue on appeal was whether there were reasonable prospects of success in Mr Grifhs' appeal. Mbatha JA held:

“The appellant was convicted on the evidence of a single witness, Mr Bavu. It is trite that the appellant could only have been properly convicted if the evidence of the single witness was clear and satisfactory in all material respects. The appellant contended that it was not reliable, as it was improbable and inconsistent with the admitted statement that the witness had made to the police. It suffices to say that it appears that there are substantial unexplained contradictions between Mr Bavu's oral testimony and his written statement to the police.

Accordingly, without pre-judging the merits, I find that there are reasonable prospects of success on the appeal against both conviction and sentence.”¹⁹

[11] The Supreme Court of Appeal thus upheld the appeal, set aside the order of the High Court, and substituted that order with one granting Mr Grifhs leave to appeal to the High Court against conviction and sentence in terms of section 309C of the Criminal Procedure Act.

[12] The applicants subsequently discovered that Mr Grifhs' application had been successful. Upon learning this, they lodged an application for reconsideration in terms

¹⁸ Per Mbatha JA with van der Merwe JA, Molemela JA, Carelse JA and Potterill AJA concurring.

¹⁹ *S v Grifhs* [2021] ZASCA 112 (*Grifhs*) at paras 4-5.

of section 17(2)(f) of the Superior Courts Act. In the affidavit filed in support of their section 17(2)(f) application, the applicants brought to the attention of the President of the Supreme Court of Appeal that their co-accused (Mr Grifhs), who had also been convicted of the same offence flowing from the same incident, had been granted leave to appeal by the Supreme Court of Appeal. The applicants submitted that Mr Bavu contradicted himself when he testified. However, the Regional Court had failed to apply the cautionary rule when it considered Mr Bavu's contradictory evidence and relied on that evidence to convict and sentence them.

[13] In light of the above, the applicants contended that there were exceptional circumstances that necessitated a reconsideration of their application. On 21 February 2022, Maya P dismissed the application for reconsideration on the basis that there were no exceptional circumstances.

In this Court

Preliminary issue: Mr Grifhs' appeal

[14] The applicants have now approached this Court for leave to appeal against their conviction and sentence. This Court issued directions asking whether the order of the Supreme Court of Appeal in *Grifhs* should be interpreted to grant leave to appeal to Mr Grifhs exclusively. Both the applicants and the respondents answered the question in the affirmative.²⁰

Applicants' submissions

[15] The application was served and filed on 15 March 2022, thus it was late by one day. It appears that the Registrar of this Court could not find the documents, and this led to the application being filed a second time in September 2022. The applicants

²⁰ In short, the parties state the following: (a) the text of the judgment only refers to the singular person of Mr Grifhs, and therefore it would be incorrect to apply this to the other co-accused who stood trial with him in the Regional Court; (b) the applications for leave to appeal by the accused persons were separate, emanated from two different law firms, and there was no order from the Supreme Court of Appeal that they be heard together; and (c) the Supreme Court of Appeal did not have an opportunity to be addressed on the prospects of success by the applicants in this matter.

submit that the respondent will not suffer prejudice if condonation is granted, whereas they would suffer injustice, especially in light of the nature of the rights allegedly implicated; that is, the right to freedom and security of the person, a fair trial, and equality, if condonation is not granted.

[16] On jurisdiction, the applicants submit that this matter engages the jurisdiction of this Court in that it raises both a constitutional issue and an arguable point of law of general public importance which ought to be considered by this Court. The applicants contend that the misapplication of the cautionary rule raises an arguable point of law of general public importance.

[17] The applicants submit that this matter concerns the violation of their rights to a fair trial;²¹ equal treatment before the law;²² freedom and security of the person;²³ and freedom of movement.²⁴ The applicants raise five grounds to support their argument that their rights were infringed.

[18] The first ground is that the Regional Court failed to properly apply the cautionary rule. In this regard, the applicants submit that Mr Bavu deliberately misled the Regional Court, as his oral evidence differed in material respects from his witness statement. The applicants submit that further material contradictions in Mr Bavu's version emerged during cross-examination. Further, there were also discrepancies between Mr Bavu's description of the assault relating to the number of times the deceased had been stabbed and the number of wounds depicted in the post-mortem report.

²¹ Section 35(3) of the Constitution.

²² Section 9(1) of the Constitution.

²³ Section 12(1) of the Constitution.

²⁴ Section 21 of the Constitution.

[19] In light of the contradictions raised, the applicants distinguish their case from *Lehloka*,²⁵ where an accused had been convicted on the evidence of a single witness and his appeal was dismissed. The applicants submit that in that case, there were no contradictions in the evidence of the single witness, unlike in this matter.

[20] The second ground is that there were irregularities during the trial. The applicants submit that they were not warned of the provisions of section 51(1) of the Criminal Law Amendment Act. Section 51(1) provides that “[n]otwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life”. The applicants submit that the failure by the Regional Court to explain these provisions is a violation of their right to a fair trial.

[21] The third ground, which is raised for the first time in this Court, is that the Regional Magistrate failed to explain the provisions of section 93*ter*²⁶ of the Magistrates’ Court Act²⁷ to the applicants and their co-accused at the beginning of the trial. The applicants submit that the Regional Magistrate asked their legal representative whether the defence would need assessors and did not pose the question to them. The applicants contend that the question should have been directed to them so that they, and not their attorney, could make the choice. The applicants submit that the

²⁵ *Lehloka v S* [2022] ZAWCHC 34.

²⁶ At the time of the trial, section 93*ter* provided:

“(1) The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice—

- (a) before any evidence has been led; or
- (b) in considering a community-based punishment in respect of any person who has been convicted of any offence,

summon to his assistance any one or two persons who, in his opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him as assessor or assessors: Provided that if an accused is standing trial in the court of a regional division on a charge of murder, whether together with other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors, whereupon the judicial officer may in his discretion summon one or two assessors to assist him.”

The section has since been amended by the Judicial Matters Amendment Act 15 of 2023.

²⁷ 32 of 1944.

Regional Court committed a gross irregularity in this regard, thus violating their right to a fair trial.

[22] The fourth ground is that the violation of their constitutional rights also emanates from the dismissal of their application for reconsideration by the President of the Supreme Court of Appeal. The applicants submit that granting Mr Grifhs leave to appeal in the Supreme Court of Appeal on the same grounds that they sought (and were refused) leave to appeal constitutes an infringement on their fair trial rights. Further, they submit that this amounts to an unfair differential treatment of their case from that of Mr Grifhs and other similar cases that came before the Supreme Court of Appeal. In this regard, the applicants refer to decisions of the Supreme Court of Appeal where applications that had been dismissed were reconsidered. In *Gwababa*,²⁸ an accused (who was the co-accused in *Malele*²⁹), was refused leave to appeal. The Supreme Court of Appeal upheld an application for reconsideration in *Malele* whereafter Mr Gwababa also applied for reconsideration and his application was granted.³⁰

[23] According to the applicants, both the Regional Court's misapplication of the cautionary rule and the decision of the Supreme Court of Appeal to grant Mr Grifhs special leave to appeal while denying them leave are exceptional circumstances which warranted a reconsideration of their application for leave to appeal. The applicants conclude that the dismissal of their application for reconsideration is a grave injustice that infringes on their rights to a fair trial, an appeal and equality before the law, as one of their co-accused had been granted leave to appeal on the same grounds as those relied upon by them.

[24] Finally, the applicants also submit that, even if they had been correctly convicted, the Regional Court further misconceived the law during sentencing and imposed a

²⁸ *Gwababa v S* [2018] ZASCA 152 at para 4.

²⁹ *Malele v S* [2017] ZASCA 173.

³⁰ *Gwababa* above n 28 at paras 11-12.

sentence that raises a sense of shock. The reasoning is that the Regional Court failed to consider their circumstances, including their chance of rehabilitation, especially since they were first-time offenders.

[25] On leave to appeal, the applicants contend that it is in the interests of justice for leave to appeal to be granted in light of the grave injustice they might suffer as evidenced by the nature of the constitutional rights implicated.

Respondent's submissions

[26] The respondent submits that the Supreme Court of Appeal's refusal to grant the applicants leave to appeal their convictions, while having granted leave to Mr Grifhs, creates an untenable scenario where there are conflicting orders. This is so because the material aspects of the State's case against Mr Grifhs are the same as those against the applicants in this matter. According to the respondent, a scenario where there are conflicting orders of the same court is a sufficiently compelling reason to grant leave. The issue of conflicting judgments in cases where the parties have different legal representatives may arise in future. As the effect will not be limited to the applicants, so argued the respondent, it is in the interests of justice for this Court to grant leave to appeal.³¹

[27] The respondent submits that there was substantial compliance with the provisions of section 93ter. Further, the respondent contends that it is clear from the record that the accused were warned about the provisions of section 51 of the Criminal Law Amendment Act.

[28] The respondent agrees that the Regional Court failed to apply the cautionary rule in accordance with section 208 of the Criminal Procedure Act as our law requires such

³¹ *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) (*Paulsen*) at paras 29-30.

evidence to be treated with caution.³² The respondent submits that the single state witness contradicted himself in material aspects. The respondent highlights that the witness was unable to identify who of the five individuals charged by the prosecution participated in the fatal stabbing of the deceased. The respondent concludes that it would be “foolhardy” to argue that the evidence of the single witness relied on by the Regional Court was satisfactory for a conviction.

[29] Regarding remedy, the respondent submits that this Court is not empowered to set aside the conviction and sentence as there is no legal provision that allows this Court to hear appeals on the merits from the Magistrates’ Court. This is so because appeals from the Magistrates’ Court must be heard by the High Court.³³ In this regard, reliance is placed on *De Klerk v S*,³⁴ where the Supreme Court of Appeal reiterated that it could not determine the merits of the appeal but should confine itself to the question whether there were reasonable prospects of success.

Issues

[30] The issues to be determined by this Court are:

- (a) Whether condonation should be granted;
- (b) Whether this Court’s jurisdiction is engaged and, if so, whether it is in the interests of justice for leave to appeal to be granted;
- (c) If leave is granted, whether there is any merit in the issues on appeal; and
- (d) The appropriate remedy, if any.

³² *S v Sauls* [1981] ZASCA 18; 1981 (3) SA 172 (A) at 180E-G. See also *S v Mahlangu* [2011] ZASCA 64; 2011 (2) SACR 164 (SCA) at para 21.

³³ *Dipholo v S* [2015] ZASCA 120. See also section 21(1)(a) of the Superior Courts Act.

³⁴ *De Klerk v S* [2023] ZASCA 2023.

*Analysis**Condonation*

[31] The application was filed 159 days late. Although this is a long period, there is a reasonable and acceptable explanation. The applicants had served and filed the application one day late. They had subsequently enquired with the Registrar if the application had been received but to no avail. In September 2022, the applicants sent their correspondent attorney to enquire with the Registrar and were advised that the application was not duly filed. While the respondent will suffer no prejudice if condonation is granted, the applicants would if condonation is not granted, especially considering the rights implicated, namely, freedom and security of the person, freedom of movement and the right to a fair trial. The respondent agrees that the applicants should be granted relief. Therefore, condonation is granted.

Jurisdiction and leave to appeal

[32] The applicants, in their notice of motion, seek leave to appeal against their conviction and sentence, and ask that this Court uphold their appeal and set aside their conviction and sentence. The respondent submits that this Court is not empowered to do so because appeals from the Magistrates' Court must first be heard by the High Court.

[33] Section 309(1)(a) of the Criminal Procedure Act states that an appeal against the Regional Court's decision lies to the High Court, with leave of the Regional Court.³⁵ In this matter, leave was sought from the Regional Court but was refused in terms of

³⁵ Section 309(1)(a) reads:

"Subject to section 84 of the Child Justice Act, 2008 (Act No. 75 of 2008), any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that if that person was sentenced to imprisonment for life by a regional court under section 51(1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302(1)(b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302(1)(a)."

section 309B of the Criminal Procedure Act. The Judge President of the High Court was then petitioned in terms of section 309C of the Criminal Procedure Act and that petition failed. The subsequent application for leave to appeal to the Supreme Court of Appeal was dismissed and, so too, was the section 17(2)(f) reconsideration application.

[34] We propose to commence with the issue of jurisdiction and deal with it under five headings, that is, (a) the alleged misapplication of the cautionary rule; (b) the alleged non-compliance with section 93*ter* of the Magistrates' Court Act; (c) whether the applicants were warned of the applicable minimum sentence;³⁶ (d) the alleged violation of the rights to equality, a fair trial and access to courts emanating from the President of the Supreme Court of Appeal's dismissal of the application for reconsideration in terms of section 17(2)(f) of the Superior Courts Act (the grave injustice argument); and (e) the right not to be deprived of freedom arbitrarily without just cause.

Misapplication of the cautionary rule

[35] The Regional Court correctly stated the principles relating to the cautionary rule. The applicants' main contention is that the Regional Court misapplied the cautionary rule when considering the evidence of the single witness. It is trite that this Court does not entertain appeals involving the mere misapplication of established legal tests.³⁷ In *Tuta*,³⁸ the applicant, who had been convicted of murder and sentenced to a term of life imprisonment, sought leave to appeal against both conviction and sentence. One of the grounds of appeal was that the trial court had misapplied the legal principles for putative

³⁶ In terms of section 51(1) of the Criminal Law Amendment Act.

³⁷ *Phoebus Apollo Aviation CC v Minister of Safety and Security* [2002] ZACC 26; 2003 (1) BCLR 14; 2003 (2) SA 34 (CC) at para 9; *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) (*Mankayi*) at para 12; *Loureiro v Imvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC); 2014 (5) BCLR 511 (CC) (*Loureiro*) at para 33; *Booyesen v Minister of Safety and Security* [2018] ZACC 18; 2018 (2) SACR 607 (CC); 2018 (6) SA 1 (CC); 2018 (9) BCLR 1029 (CC) at para 50; *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 (8) BCLR 919 (CC) (*Jiba*) at para 49; and *S v Tuta* [2022] ZACC 19; 2023 (2) BCLR 179 (CC); 2024 (1) SACR 242 (CC) (*Tuta*) at para 50.

³⁸ *Tuta* above n 37 at para 1.

private defence. During the hearing, the applicant submitted that the trial court had also failed to formulate the correct test for putative private defence and therefore applied the wrong test to the evidence.

[36] Unterhalter AJ, writing for the majority, held:

“The incorrect application by the trial court of a well-established legal defence raises neither a constitutional issue, nor an arguable point of law. If the trial court made no error of law in formulating the test for putative private defence, then the misapplication of the correct test to the evidence before the trial court is not a matter that engages our jurisdiction.”³⁹

[37] The majority went on to consider the question whether the trial court had made an error of law in formulating the test for putative private defence and held:

“An error of this kind, if left uncorrected, would render the applicant’s trial unfair. It would also condemn the applicant to suffer a conviction and sentence of great consequence. . . . In these circumstances, a constitutional issue arises that engages our jurisdiction.”⁴⁰

[38] It follows that the mere allegation of an infringement of the right to a fair trial is insufficient. In *Tuta*, there was something more – whether the trial court had made an error of law in formulating the test for putative private defence. Similarly, in *Villa Crop*,⁴¹ the issue concerned the adoption of an incorrect legal standard. This Court held:

“The adoption of an incorrect legal standard to decide an application to amend is to make an error of law. It is not a misapplication of law because the decision does not proceed from a correct legal premise to an incorrect conclusion as a result of a failure

³⁹ Id at para 50.

⁴⁰ Id at para 53.

⁴¹ *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH* [2022] ZACC 42; 2023 (4) BCLR 461 (CC); 2024 (1) SA 331 (CC).

properly to apply the law to the relevant facts. And it is an error of law of no small consequence.”⁴²

[39] This case, unlike *Villa Crop*, concerns an allegation of the misapplication of an established legal test. The applicants do not challenge the Regional Court’s formulation of the cautionary rule but the misapplication of this established legal test. Therefore, the misapplication of the cautionary rule does not engage this Court’s jurisdiction.

[40] Suffice to say that in the event that the applicants are granted leave to appeal to another court, the issue whether the cautionary rule was applied in a manner that is consistent with sections 12(1)(a) and 35(3) of the Constitution, will be fully explored by that court and it is not desirable for this Court to express an opinion in this regard.

[41] It is worth mentioning that the Supreme Court of Appeal noted that “there are substantial unexplained contradictions” in the evidence of the single witness.⁴³ It was contended that it is, in part, this failure on the part of the trial court to consider “the substantial unexplained contradictions”, that results in the possible risk of a wrongful conviction and implicates the applicants’ right not to be deprived of their freedom arbitrarily or without just cause. This too, is a matter best left for determination by the court seized with this appeal, in the event that leave to appeal is granted.

Section 93ter(1)(b) argument

[42] Section 93ter(1)(b), as it read at the time, required a judicial officer to be assisted by two assessors, where an accused was standing trial in the Regional Court on a charge of murder, unless the accused requested that the trial proceeds without assessors. The argument that the Regional Court failed to properly explain the provisions of section 93ter to the applicants was raised for the first time in this Court. This Court has repeatedly stated that it is reluctant to sit as a court of first and last instance in a matter.

⁴² Id at para 65.

⁴³ *Grifths* above n 19 at paras 4-5.

Ordinarily, this Court benefits from the views of other courts. As a result, it will only sit as a court of first and last instance in exceptional circumstances.⁴⁴

[43] In *Holomisa*, Froneman J held that an important consideration is that the constitutional issue should be raised in the papers from the outset.⁴⁵ However, the lack of early pleading may not be an insuperable bar where the issue is simple and straightforward – the test is that of potential prejudice.⁴⁶ In *Mkontwana*, this Court clarified that:

“[T]he importance of the issue or the existence of conflicting judgments on an issue in a case do not, without more, constitute exceptional circumstances and justify this Court being a court of first and last instance.”⁴⁷

[44] In the present case, the applicants allege that the Magistrate’s failure to explain the provisions of section 93ter and to afford them the opportunity personally to decide on foregoing the appointment of assessors gives rise to an infringement of their right to a fair trial, whilst the respondent submits that there was substantial compliance. While the alleged infringement of the right to a fair trial is an important issue, it is not in the interests of justice for this Court to decide this point as a court of first and last instance. This Court would benefit from the views of the lower courts.⁴⁸ In any event, counsel for the applicants, in response to a question during the hearing, indicated that this

⁴⁴ *Holomisa v Holomisa* [2018] ZACC 40; 2019 (2) BCLR 247 (CC) (*Holomisa*) at para 25. See also *Mkontwana v Nelson Mandela Metropolitan Municipality* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) (*Mkontwana*) at para 11; *Women’s Legal Centre Trust v President of the Republic of South Africa* [2009] ZACC 20; 2009 (6) SA 94 (CC) at para 27; and *Minister of Police v Premier of the Western Cape* [2013] ZACC 33; 2013 (12) BCLR 1405 (CC); 2014 (1) SA 1 (CC) at para 20.

⁴⁵ *Holomisa* above n 44 at para 25.

⁴⁶ *Id* at para 26.

⁴⁷ *Mkontwana* above n 44 at para 11. See also *A M v H M* [2020] ZACC 9; 2020 (8) BCLR 903 (CC) at para 38, where this Court relied on *Mkontwana* to conclude that it is not in the interests of justice to grant leave to appeal. Although the applicant raised an interpretive issue which engages this Court’s jurisdiction, this was a new issue that was raised when approaching this Court on appeal. This Court held that it would have benefitted from the views of the High Court and Supreme Court of Appeal where the issues had not yet been ventilated.

⁴⁸ The Supreme Court of Appeal’s judgments in *Gaiya v S* [2016] ZASCA 65; 2016 (2) SACR 165 (SCA) and *Director of Public Prosecutions, KwaZulu-Natal v Pillay* [2023] ZASCA 105; 2023 (2) SACR 254 (SCA); [2023] 3 All SA 613 (SCA) resolved much of the dispute regarding what is required for compliance with section 93ter.

argument had been abandoned. Therefore, that should be the end of the matter on this ground.

Minimum sentence legislation for murder

[45] Section 51(1) of the Criminal Law Amendment Act provides for the imposition of a minimum sentence of life imprisonment for serious offences, including murder committed under certain circumstances. The right to a fair trial, in turn, requires that a court inform an accused person of the minimum sentence applicable. The applicants contend that they were not informed of the applicability of a minimum sentence. Importantly, in response to a question during the hearing, counsel for the applicants indicated that this argument had been abandoned. Therefore, nothing more shall be said about this argument.

The grave injustice argument

(a) Access to courts and equality

[46] Section 17(2)(f) of the Superior Courts Act confers a discretion on the President of the Supreme Court of Appeal, in exceptional circumstances, to refer a refusal of an application for leave to appeal pursuant to section 17(2)(b) back to the Supreme Court of Appeal for reconsideration and, if necessary, variation. The applicants aver that this Court's jurisdiction is engaged in that the dismissal of their application for reconsideration constitutes a grave injustice as it infringes their rights to a fair trial, access to courts and equality.

[47] It must be borne in mind that the heading under which the applicants argue this point is "[r]ight to a fair trial and bias"; however, there is nothing to support the argument on bias. Therefore, the applicants' main submission is that their rights to a fair trial and equality are violated by the President's dismissal of the application for reconsideration, especially in light of the fact that Mr Grifhs was granted leave, and that reconsideration was granted in other similar cases like *Malele* and *Gwababa*. The applicants contend that the right to a fair trial embraces the notion of substantive

fairness, and all courts hearing criminal trials and appeals are required to give content to a notion of basic fairness and justice.

[48] The applicants correctly quote what the President of the Supreme Court of Appeal said in *Gwababa*, that she was enjoined to decide that case on its own merits and determine whether the applicant demonstrated exceptional circumstances that warrant a reconsideration. In both *Malele* and *Gwababa*, the Supreme Court of Appeal emphasised that the fact that a co-accused was granted leave by the same court was no basis, without more, for the court to grant them leave or reconsideration.⁴⁹ However, the applicants proceed on an incorrect footing to say “the granting (of leave) of the same accused on the same grounds as the applicant, constitutes what *is exceptional circumstances* for the Judge President to reconsider the matter and refer it to other Judges”. There had to be more, and the President held that there was not. Hence, she found no exceptional circumstances and dismissed their application. Similarly, the fact that in *Malele* and *Gwababa* the applications for reconsideration were granted cannot be exceptional circumstances warranting reconsideration in the applicants’ case. The President was enjoined to deal with the applicants’ application on its merits in the same sense that she had dealt with *Gwababa* on its own merits.

[49] Importantly, it is clear from *Metcash*⁵⁰ that the rights to a fair trial and equality do not guarantee that the application for reconsideration will be granted just because Mr Grifhs was granted leave, or just because the applications for reconsideration in *Malele* and *Gwababa* were granted.

[50] In *Metcash*, Mr Van der Walt, Mr Kgatle and others were involved with several close corporations which were in a franchise agreement with Metcash. Mr Van der Walt and Mr Kgatle had signed the franchise agreements as sureties on behalf of their respective close corporations.⁵¹ Each close corporation defaulted and as

⁴⁹ *Malele* above n 29 at para 10 and *Gwababa* above n 28 at para 5.

⁵⁰ *Van der Walt v Metcash Trading Ltd* [2002] ZACC 4; 2002 (4) SA 317 (CC); 2002 (5) BCLR 454 (CC).

⁵¹ *Id* at paras 2 and 10.

a result, Metcash instituted proceedings against them and the other close corporations. To save costs, all parties agreed that the result of the proceedings relating to Mr Kgatle's close corporation in the Johannesburg High Court would bind all the other six close corporations in Johannesburg and the result of the proceedings in respect of Mr Van der Walt's close corporation in the Pretoria High Court would bind the other five close corporations in Pretoria. The Judges in each of the two High Courts were made aware of the agreement. The matters came before the High Courts by way of summary judgment proceedings. The outcome in both Mr Van der Walt and Mr Kgatle's cases was that they were ordered to furnish security, failing which, judgment would be entered against them. They failed to provide the necessary security and after the hearing, the courts upheld Metcash's claims and issued orders against Mr Kgatle and Mr Van der Walt, respectively.⁵²

[51] Mr Van der Walt and Mr Kgatle applied for leave to appeal. Both High Courts refused to grant leave to appeal and the two separately petitioned the Supreme Court of Appeal for leave to appeal.⁵³ In Mr Van der Walt's petition, leave to appeal was refused and in Mr Kgatle's, it was granted. Mr Van der Walt approached this Court and submitted that the decision that resulted in a different outcome in his petition (a) was irrational, arbitrary and in conflict with the rule of law; and (b) violated his right to equality before the law, to equal protection and benefit of the law and access to the courts.⁵⁴ Although recognising that differing outcomes are unfortunate, the majority in this Court indicated that the question was whether this amounted to a violation of the applicant's rights.⁵⁵

[52] Regarding the challenge based on irrationality, arbitrariness and the rule of law, the majority explained that each application was considered by a panel of the Supreme Court of Appeal. Furthermore, neither petitioner alerted the Supreme Court

⁵² Id at para 4.

⁵³ Id at para 6.

⁵⁴ Id at para 1.

⁵⁵ Id at para 9.

of Appeal to the existence of the other application.⁵⁶ There was also nothing in the record to suggest that each application was not properly considered, or that each panel did not act in good faith in considering whether there were reasonable prospects of success on appeal. This test, like all discretionary tests, permits reasonable differences of opinion on the same facts, and there was no suggestion that this test was unconstitutional.⁵⁷

[53] In the current case, the applicants' complaint is that the difference in outcomes between them and Mr Grifhs gave rise to a grave injustice on the basis of unequal treatment. They have also pleaded that their incarceration constitutes an infringement of their right not to be deprived of freedom arbitrarily and without just cause. They aver that the right to freedom was infringed as the Regional Court failed to apply the cautionary rule regarding the evidence of a single witness.

[54] Coming to the equality challenge in *Metcash*, this Court held that the different outcomes for applications brought on the same facts do not give rise to unconstitutionality even if the decision in Mr Van der Walt's matter was incorrect.⁵⁸ Nothing in the right to equality guarantees equality of outcome in litigation based on materially identical facts and circumstances. Rather, Mr Van der Walt and Mr Kgatle were accorded the same right and the different treatment arose from the outcome of exercising that right.⁵⁹

[55] The same can be said in the present case. The applicants and Mr Grifhs were accorded the same right and the differing treatment emanates from the outcome of exercising that right. Similarly, the applicants were accorded the same right as the applicants in *Malele* and *Gwababa*; the difference in the outcome results from the exercise of judicial discretion by the President of the Supreme Court of Appeal, which

⁵⁶ Id at para 12.

⁵⁷ Id at para 11.

⁵⁸ Id at para 12.

⁵⁹ Id at paras 15-18.

is inherent in the court system.⁶⁰ The applicants do not argue that the President exercised the judicial discretion injudiciously. Consequently, no reliance can be placed on the equality argument to establish this Court's jurisdiction.

[56] In concluding that there was no violation of Mr Van der Walt's right of access to courts, this Court in *Metcash* held that section 21(3)(a) of the Supreme Court Act⁶¹ provides for litigants disputing the correctness of orders made by the High Court to apply for leave to appeal to the Supreme Court of Appeal whose decision is final.⁶² Once Mr Van der Walt applied for leave to appeal, access to courts was accorded to him.⁶³ Without a suggestion that the Judges who dealt with his application acted irregularly, the different outcome in his application, even if it is wrong and the outcome in Mr Kgatle's application is correct, is not a violation of the right of access to courts.⁶⁴ With reference to *Lane and Fey NNO*,⁶⁵ this Court then said that section 34 of the Constitution does not protect litigants from wrong decisions; assuming it did, it would be the fairness and not the correctness of the court proceedings to which the litigants would be entitled.⁶⁶

[57] In the present case, the applicants contend that the dismissal of their application for reconsideration violates their right to appeal. In light of the principles set out in *Metcash*, this argument must fail. Once the applicants applied for leave to appeal and, after that, for reconsideration, their right to appeal was complied with. The outcome on

⁶⁰ Id at para 17.

⁶¹ 59 of 1959, which was repealed by section 55(1) of the Superior Courts Act. Section 21(3)(a) provided for petitions for leave to appeal to be addressed to the Chief Justice, which were decided in terms of section 21(3)(b) by panels of two judges, or three in the case of a difference of opinion, similarly to section 17(2)(c) of the Superior Courts Act.

⁶² *Metcash* above n 50 at para 8.

⁶³ Id at para 14.

⁶⁴ Id.

⁶⁵ *Lane and Fey NNO v Dabelstein* [2001] ZACC 14; 2001 (2) SA 1187 (CC); 2001 (4) BCLR 312 (CC) at para 4. The same point was made by this Court in *S v Rens* [1995] ZACC 15; 1996 (1) SA 1218 (CC); 1996 (2) BCLR 155 (CC) at para 29 in respect of criminal appeals, and in *Besserglik v Minister of Trade, Industry and Tourism* [1996] ZACC 8; 1996 (4) SA 331 (CC); 1996 (6) BCLR 745 (CC) at para 11, with regard to civil appeals.

⁶⁶ *Metcash* above n 50 at para 14.

its own is no violation of the right to appeal, irrespective of the outcome in Mr Grifhs' application or in *Malele* and *Gwababa*. Further, the applicants can still apply for leave to appeal in this Court, as they have done, but they would have to do so on grounds that engage this Court's jurisdiction.

[58] Finally, the applicants' submission on fairness mainly rests on the fact that Mr Grifhs was granted leave to appeal and the application for reconsideration was granted in *Malele* and *Gwababa*, but not in their case. This argument cannot be sustained, because the alleged unfairness emanates from an exercise of judicial discretion in which different outcomes are inherent.⁶⁷ In light of *Metcash*, the argument concerning the right of access to courts and unequal treatment cannot be sustained. There is no basis for the applicants' contention that the dismissal of their application for reconsideration constituted a grave injustice. This Court is bound by the precedent and principles established in *Metcash* in respect of the equality argument. What remains for consideration is the argument that the applicants' right to a fair trial and to freedom and security were infringed and we proceed to deal with that issue.

(b) *Right to a fair trial*

[59] The applicants have alleged, inter alia, that their constitutional rights to a fair trial and to freedom and security of the person have been infringed by the trial court. In a long line of cases, this Court has held that a breach of the right to a fair trial is a constitutional issue.

[60] In *Dzukuda*,⁶⁸ this Court described the right to a fair trial in the following manner:

“At the heart of the right to a fair criminal trial and what infuses its purpose, is for justice to be done and also to be seen to be done. But the concept of justice itself is a broad and protean concept. In considering what, for purposes of this case, lies at the heart of a fair trial in the field of criminal justice, one should bear in mind that dignity,

⁶⁷ Id at para 17.

⁶⁸ *S v Dzukuda*; *S v Tshilo* [2000] ZACC 16; 2000 (4) SA 1078; 2000 (11) BCLR 1252 (CC).

freedom and equality are the foundational values of our Constitution. An important aim of the right to a fair criminal trial is to ensure adequately that innocent people are not wrongly convicted, because of the adverse effects which a wrong conviction has on the liberty, and dignity (and possibly other) interests of the accused.”⁶⁹

[61] This Court buttressed this reasoning in *Steyn*,⁷⁰ where it held that:

“In its narrower sense, the object of the right to a fair trial contained in section 35(3) is to ‘minimise the risk of wrong convictions’ and inappropriate sentences and the ‘consequent failure of justice’. This object pervades all stages of a trial until the last word has been said on appeal.”⁷¹

[62] The right to a fair trial is “broader than the list of specific rights set out in paragraphs (a) to (j)”⁷² of section 35(3) and “[i]t embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force”.⁷³ The Constitution mandates the courts, when hearing criminal trials or criminal appeals to give content to “notions of basic fairness and justice”.⁷⁴

[63] The purpose of section 35(3), read holistically, is to minimise the risk of wrong convictions and the failure of justice.⁷⁵ In *Jaipal*, this Court stressed that —

“the basic requirement that a trial must be fair is central to any civilised criminal justice system. It is essential in a society which recognises the rights to human dignity and to

⁶⁹ Id at para 11.

⁷⁰ *S v Steyn* [2000] ZACC 24; 2001 (1) SA 1146 (CC); 2001 (1) BCLR 52 (CC).

⁷¹ Id at para 13.

⁷² *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) (*Zuma*) at para 16. See also *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1997 (12) BCLR 1675; 1998 (2) SA 38 (CC) at para 22; *S v Jaipal* [2005] ZACC 1; 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC) at paras 27-8; *S v Van der Walt* [2020] ZACC 19; 2020 (2) SACR 371 (CC); 2020 (11) BCLR 1337 (CC) (*Van der Walt*) at para 23; and *Dzukuda* above n 68 at para 9.

⁷³ *Zuma* above n 72 at para 16.

⁷⁴ *Van der Walt* above n 72 at para 15.

⁷⁵ *S v Twala* [1999] ZACC 18; 2000 (1) SA 879 (CC); 2000 (1) BCLR 106 (CC) at para 9.

the freedom and security of the person, and is based on values such as the advancement of human rights and freedoms, the rule of law, democracy and openness.”⁷⁶

This Court went on to expand on the importance of this right:

“The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.”⁷⁷

[64] The applicants allege that the decision of the trial Magistrate was not judicious based on the failure to invoke the provisions of section 93*ter*. This rendered the proceedings unfair, and given the grave consequences, this failure violated the applicants’ constitutional rights to a fair trial. The alleged breach of the applicants’ right to a fair trial raises a constitutional issue engaging our jurisdiction.

The right not to be deprived of freedom arbitrarily and without just cause

[65] A complaint of a breach of the right not to be deprived of one’s freedom arbitrarily and without just cause also raises a constitutional issue. The protection of the physical integrity of every person lies at the core of section 12(1)(a) of the Constitution.⁷⁸ This right is widely recognised in international law⁷⁹ and is confirmed in South African jurisprudence to “[find] its place alongside prohibitions of ‘detention

⁷⁶ *Jaipal* above n 72 at para 26. See also sections 1 and 7(1) of the Constitution.

⁷⁷ *Jaipal* above n 72 at para 29.

⁷⁸ *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (*Ferreira*) at para 170. The analysis in *Ferreira* is conducted in relation to section 11(1) of the Interim Constitution, which is mirrored in section 12(1) of the Final Constitution.

⁷⁹ *Id* at para 170, as outlined by Chaskalson P:

“The American Declaration of the Rights and Duties of Man, the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the African Charter on Human and Peoples’ Rights, all use the phrase ‘liberty and security of the person’ in a context which shows that it relates to detention or other physical constraints.”

without trial’, and of ‘torture’ and ‘cruel, inhuman or degrading treatment or punishment’”.⁸⁰

[66] In *Bernstein*,⁸¹ the two interlinked constitutional aspects of freedom were described.⁸² Firstly, the right protects against abuse of procedure resulting in unfair or unlawful deprivations of physical freedom. Secondly, which speaks to the heart of this case, the substantive aspect of the test is: “even when fair and lawful procedures have been followed, *the deprivation of freedom will not be constitutional, because the grounds upon which freedom has been curtailed are unacceptable*”.⁸³ O’Regan J went on to delineate the meaning and scope of “freedom” and concluded that the right will not render all legitimate government interventions or criminal prohibitions to be offending this right. Rather, “[o]nly when it can be shown that freedom has been limited in a manner hostile to the values of our Constitution will a breach of section [12(1)(a)] be established”.⁸⁴

[67] *De Lange*,⁸⁵ building on the formulation outlined in *Bernstein*, established the test for the substantive component of the right in section 12(1)(a) into a two-pronged one. It was confirmed that section 12(1)(a) protects against the arbitrary deprivation of freedom or the deprivation of freedom without just cause.⁸⁶ To survive the challenge of arbitrary deprivation, there must be a rational connection between the deprivation and a determinable purpose. As a secondary safeguard, even if the deprivation withstands the test of arbitrariness, it must not be without just cause.⁸⁷ This Court was

⁸⁰ *Id.*

⁸¹ *Bernstein v Bester N.O.* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 145.

⁸² The analysis in *Bernstein* is conducted in relation to section 11(1) of the Interim Constitution, which is mirrored in section 12(1) of the Final Constitution.

⁸³ Emphasis added. This two-pronged approach was confirmed in the minority judgment of O’Regan J in *S v Coetzee* [1997] ZACC 2; 1997 (3) SA 527 (CC); 1997 (4) BCLR 437 (CC) (*Coetzee*) at para 159 and was adopted by the majority in *De Lange v Smuts N.O.* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) (*De Lange*) at paras 17-18.

⁸⁴ *Bernstein* above n 81 at para 151.

⁸⁵ *De Lange* above n 83 at para 17.

⁸⁶ *Id.* at paras 22-3.

⁸⁷ *Id.* at para 23.

reluctant to provide a comprehensive definition of “just cause”. It held that “just cause” must be understood with reference to the Constitution’s underlying values.⁸⁸

[68] Langa CJ, writing for a unanimous court in *Zealand*,⁸⁹ found that the question whether a person’s detention was consistent with the right to freedom and security of the person in section 12(1)(a) of the Constitution is a constitutional matter.⁹⁰ In that case, this Court disagreed with the majority decision of the Supreme Court of Appeal that the applicant’s detention was justified by the series of Magistrates’ orders remanding him in custody. The applicant had remained in detention in the maximum-security block despite his successful appeal to be transferred to the medium security awaiting-trial section of the prison.⁹¹ The majority of the Supreme Court of Appeal held that “[t]o detain someone contrary to his or her status does not . . . affect the lawfulness of the detention, which arises from the court order and not from the place or manner of detention.”⁹² Langa CJ put the matter thus:

“This reasoning ignores the substantive protection afforded by the right not to be deprived of freedom arbitrarily or without just cause contained in section 12(1)(a) of the Constitution. That right requires not only that every encroachment on physical freedom be carried out in a procedurally fair manner, but also that it be substantively justified by acceptable reasons. The mere fact that a series of Magistrates issued orders remanding the applicant in detention is not sufficient to establish that the detention was not ‘arbitrary or without just cause’. To the contrary, for the reasons I advanced above, it is my view that the detention was manifestly both arbitrary and without just cause.”⁹³
(Footnotes omitted.)

⁸⁸ Id at para 31.

⁸⁹ *Zealand v Minister for Justice and Constitutional Development* [2008] ZACC 3; 2008 (4) SA 458 (CC); 2008 (6) BCLR 601 (CC).

⁹⁰ Id at para 22.

⁹¹ Id at para 5.

⁹² *Minister of Justice and Constitutional Development v Zealand* [2007] ZASCA 92; 2007 (2) SACR 401 (SCA).

⁹³ *Zealand* above n 89 at para 43.

[69] In *Zealand*, Langa CJ painstakingly emphasised the importance of section 12 of the Constitution. He confirmed that in our constitutional jurisprudence, the right not to be deprived of freedom arbitrarily or without just cause affords both substantive and procedural protection against such deprivations. He referred with approval to the following remarks made by O'Regan J in *Coetzee*:

“[There are] two different aspects of freedom: the first is concerned particularly with the reasons for which the state may deprive someone of freedom [the substantive component]; and the second is concerned with the manner whereby a person is deprived of freedom [the procedural component]. . . . [O]ur Constitution recognises that both aspects are important in a democracy: the state may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives its citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair.”⁹⁴

[70] In *De Klerk*,⁹⁵ this Court held that it had jurisdiction over whether an arrest was lawful since the “issue as to whether the applicant’s detention was consistent with the principle of legality and his right to freedom and security of the person in section 12(1) of the Constitution is a constitutional matter.”⁹⁶

[71] This Court’s jurisdiction, as discussed above, demonstrates that a potential infringement or limitation of the right in section 12(1)(a) raises a constitutional issue. The failure of the Supreme Court of Appeal to consider the circumstances of the applicants against that of their co-accused may well constitute a potential infringement or limitation of their right to freedom and security of the person.

⁹⁴ Id at para 33. This test was first formulated in *Bernstein* above n 81.

⁹⁵ *De Klerk v Minister of Police* [2019] ZACC 32; 2019 (12) BCLR 1425 (CC); 2021 (4) SA 585 (CC).

⁹⁶ Id at para 11.

Application of these principles to this matter

[72] In *Boesak*,⁹⁷ the Court held that the application of a legal rule may constitute a constitutional matter if such application is “inconsistent with some right or principle of the Constitution”.⁹⁸

[73] This Court, and any other court, has the duty to ensure that a legal rule is not applied in a manner that violates constitutional rights or that is inconsistent with the Constitution.⁹⁹ This duty is imposed by the Constitution itself.¹⁰⁰ One of the founding values in section 1(c) of the Constitution is the supremacy of the Constitution and the rule of law.¹⁰¹ There is no doubt that Courts must uphold the rule of law. Section 2 affirms the supremacy of the Constitution as the supreme law of the country. Any law or legal rule that is applied in a manner that is inconsistent with the Constitution, is applied in violation of the principle of constitutional supremacy.

[74] Section 2 also declares that conduct that is inconsistent with the Constitution is invalid. In terms of section 8(1), the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all other organs of state. All judicial officers take an oath to administer justice “in accordance with the Constitution”.¹⁰² It follows that if the conduct of a court results in a breach of the Constitution, this Court not only has the power, but duty to intervene.¹⁰³

⁹⁷ *S v Boesak* [2000] ZACC 25; 2001 (1) BCLR 36 (CC); 2001 (1) SA 912 (CC).

⁹⁸ *Id* at para 15.

⁹⁹ *Jacobs v S* [2019] ZACC 4; 2019 (5) BCLR 562 (CC) at para 58. See also *A M v H M* above n 47 at para 25 where a constitutional issue arose when the Court was called upon to determine whether an agreement was in line with public policy as infused with our constitutional values. Further, in *Phumelela Gaming and Leisure Ltd v Andre Grundlingh* [2006] ZACC 6; 2006 (8) BCLR 883 (CC); 2007 (6) SA 350 (CC), this Court held that an order must promote the object, spirit and purport of the Constitution.

¹⁰⁰ Section 8(1) and section 172(1) of the Constitution.

¹⁰¹ Section 1(c) of the Constitution.

¹⁰² The oath for Magistrates is found in section 9(2)(a) of the Magistrates’ Courts Act. The oath for Judges is found in section 6 of Schedule 2 of the Constitution.

¹⁰³ *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 68.

[75] This Court must give effect to the substantive protection afforded to the applicants by the right not to be deprived of their freedom arbitrarily or without just cause.¹⁰⁴ Where the State has conceded that it would be “foolhardy” for it to support the conviction of the applicants, this Court cannot ignore the potential infringement of the applicants’ right not to be deprived of their freedom arbitrarily or without just cause. This Court is called upon to give effect to the fundamental and founding constitutional value of freedom.

[76] The possible risk of a wrongful conviction directly impacts the right of the applicants not to be deprived of their freedom arbitrarily. In *De Lange*, this Court said the following about arbitrary deprivation of freedom:

“The substantive and the procedural aspects of the protection of freedom are different, serve different purposes and have to be satisfied conjunctively. The substantive aspect ensures that a deprivation of liberty cannot take place without satisfactory or adequate reasons for doing so. In the first place it may not occur ‘arbitrarily’; there must in other words be a rational connection between the deprivation and some objectively determinable purpose. If such rational connection does not exist, the substantive aspect of the protection of freedom has by that fact alone been denied. But even if such rational connection exists, it is by itself insufficient; the purpose, reason or ‘cause’ for the deprivation must be a ‘just’ one.”¹⁰⁵

[77] Legitimacy and confidence in a legal system demands that an effective remedy be provided in situations where the interests of justice cry out for one. There can be no legitimacy in a legal system where wrongful convictions, which would result in substantial hardship or injustice, are allowed to stand on the basis that the Court’s hands are tied. As was said in *Molaudzi*,¹⁰⁶ in a different context, “[t]o perpetuate an error is no virtue but to correct it is a compulsion of judicial conscience”.¹⁰⁷

¹⁰⁴ *Zealand* above n 89 at para 44.

¹⁰⁵ *De Lange* above n 83 at para 23.

¹⁰⁶ *S v Molaudzi* [2015] ZACC 20; 2015 (2) SACR 341 (CC); 2015 (8) BCLR 904 (CC).

¹⁰⁷ *Id* at para 30 citing with approval from the Indian Supreme Court in *MS Ahlawat v State of Haryana* 1999 Supp (4) SCR 160.

[78] For these reasons, we find that this is a constitutional matter.

International law

[79] When interpreting the Bill of Rights, a court is required, in terms of section 39(1) of the Constitution¹⁰⁸ to consider international law and it may have regard to foreign law.

[80] The relationship between the right to a fair trial and wrongful convictions raises several legal considerations in international and domestic law. The fundamental principle, as articulated in Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR),¹⁰⁹ establishes that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”. The proposition that courts may intervene to protect against violations of one’s freedom and security of the person is well-supported by international law.

[81] Article 8 of the Universal Declaration of Human Rights establishes that: “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted [to them] by the constitution or by law”.¹¹⁰ That framework supports that courts should and must intervene in cases where a fundamental right, such as South Africa’s right to freedom and security, is violated.

[82] There is further support in Article 14(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Convention states

¹⁰⁸ Section 39(1) of the Constitution provides:

“When interpreting the Bill of Rights, a court, tribunal or forum—

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.”

¹⁰⁹ International Covenant on Civil and Political Rights, 16 December 1966.

¹¹⁰ Article 8 of the Universal Declaration of Human Rights, 10 December 1948.

that in cases of torture, a State Party “shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible”.¹¹¹ It therefore puts the onus on the state parties to ensure that redress is possible within their own legal systems. These agreements, therefore, support that states must provide redress for harm and is antagonistic to the argument that a violation of fundamental rights could go unaddressed on the basis of domestic jurisdiction when state parties to international treaties and conventions have a duty to abide by such international agreements.

[83] The European Convention on Human Rights (ECHR) provides a right to liberty and security under Article 5, similar to that of South Africa’s Constitution. There is relevant guidance on its application in the European Court of Human Rights (ECtHR) Guide on Article 5 of the ECHR.¹¹² It emphasises the positive obligations with respect to deprivation of liberty. It provides: “[t]he responsibility of a State is engaged if it acquiesces in a person’s loss of liberty by private individuals or fails to put an end to the situation”.¹¹³ The Guide relies on several cases from the ECtHR as support.¹¹⁴

[84] The ECHR also provides for the right to an effective remedy when one suffers human rights violations. Article 13 states: “[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”.¹¹⁵ Article 13 has been interpreted by the ECtHR to establish a duty

¹¹¹ Article 14(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984.

¹¹² Guide on Article 5 of the ECHR, 31 August 2024.

¹¹³ Id at para 22.

¹¹⁴ Id. The Guide relies on *Riera Blume and Others v Spain*, no 37680/97, ECtHR 1999 which finds a violation where the applicants were detained, held in solitary rooms for three days, and underwent “deprogramming” by a psychologist without being informed of their legal rights; *Rantsev v Cyprus and Russia*, no 25965/04, §§ 319-21, ECHR 2010 which finds the court was required to examine the applicant’s case where she was detained by private individuals and Russia claimed it lacked jurisdiction; *Medova v Russia*, no 25385/04 §§ 123-25, ECtHR 2009 which holds Russia breached the ECHR by failing to protect a citizen from abduction by a non-state agent.

¹¹⁵ Article 13 of the ECHR, 4 November 1950.

not only to determine whether courts reached a correct result, but whether proceedings as a whole were fair.

[85] In *Kudła*,¹¹⁶ the ECtHR held that the remedy required by Article 13 must be effective in law, but also in practice.¹¹⁷ The remedy available need not necessarily be a judicial remedy, but if it is not, then scrutiny is necessary to determine the effectiveness of the remedy holistically.¹¹⁸

[86] In terms of jurisdiction under the effective remedy doctrine, the ECtHR in *Z v United Kingdom*¹¹⁹ explained that a domestic remedy under Article 13 must address the substance of an arguable complaint, be capable of providing appropriate relief and be effective in both practice and law.¹²⁰

[87] Finally, there is also support in regional human rights instruments, including the Inter-American Convention on Human Rights (IACHR) and the African Charter on Human and People's Rights.¹²¹ The IACHR enshrines the right to judicial protection in Article 25.¹²² It establishes that everyone has the right to effective recourse by a competent court or tribunal against acts that violate fundamental rights recognised by the Constitution of the state concerned. Under that framework, it follows that the court must hear matters of fundamental rights rather than dismissing on procedural grounds.

[88] The scope of a court's jurisdiction in respect of fundamental rights violations, particularly those involving liberty and human dignity, is an established element of

¹¹⁶ *Kudła v Poland*, no 30210/96, ECtHR 2000.

¹¹⁷ *Id* at para 157.

¹¹⁸ *Id*.

¹¹⁹ *Z v United Kingdom*, no 29392/95, § 108, ECtHR 2000.

¹²⁰ *Id* at para 108.

¹²¹ Articles 6 and 7 of the African Charter on Human and Peoples' Rights, 27 June 1981, provide liberty and security rights, as well as the right to a fair trial similar to those guaranteed by the South African Constitution, though they are qualified by the caveat that liberty and freedom may be impinged upon "for reasons and conditions previously laid down by law".

¹²² Article 25 of the Inter-American Convention on Human Rights, 22 November 1969.

constitutional systems. This jurisdictional authority is embedded in constitutional frameworks across various legal systems and has been reinforced through judicial decisions that contribute to contemporary constitutional law.¹²³

[89] There is also support across jurisdictions that courts hold the power to hear constitutional issues — namely those involving the violation of a fundamental right. Article III, Section 2 of the United States Constitution establishes that the Supreme Court has appellate jurisdiction over nearly all matters involving a constitutional question or issue of law. However, parties must usually petition the Supreme Court for their case to be heard. Canada has a similar framework. The Supreme Court of Canada may hear an issue of law, or a mixed issue of law and fact, if it is an issue of public importance and national significance.¹²⁴ As in the United States, parties must seek leave to appeal to the Supreme Court of Canada, save for select circumstances in which an automatic appeal is granted.¹²⁵ In India, however, the Supreme Court is vested with extensive original jurisdiction to address alleged violations of fundamental rights.¹²⁶ An aggrieved party may petition the Indian Supreme Court directly in the case of a fundamental rights violation.¹²⁷

[90] Furthermore, international jurisprudence favours the right to appeal a conviction and sentence. For instance, Article 14(5) of the ICCPR guarantees that “[e]veryone convicted of a crime shall have the right to have [their] conviction and sentence reviewed by a higher tribunal according to law”.¹²⁸ Moreover, in the United States,

¹²³ See Fourteenth Amendment to the United States Constitution; section 7 of the Canadian Charter of Rights and Freedoms; Article 32 of the Indian Constitution which explicitly provides for the Supreme Court’s power to enforce fundamental rights. See also *Cooper v Aaron* 358 US 1 (1958) at 16-18; *Minister of Health v Treatment Action Campaign* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) at paras 101-5.

¹²⁴ Section 40 of the Canadian Supreme Court Act RSC 1985 c S-26.

¹²⁵ *Id* at sections 40 and 43.

¹²⁶ Article 32 of the Constitution of India.

¹²⁷ *Id*.

¹²⁸ Article 14(1) of the ICCPR.

parties have the ability to appeal if there was an error or misapplication of the law.¹²⁹ In circumstances where a criminal defendant believes their constitutional rights have been violated, thus resulting in an unlawful detention, they may also file a writ of *habeas corpus* (judicial writ) to seek review by a higher court.¹³⁰ Canada also allows criminal defendants to seek leave to appeal “on any ground that involves a question of law” that is not purely a factual matter.¹³¹

[91] To sum up, courts have a clear mandate over cases involving violations of liberty rights. This jurisdiction is rooted in constitutional principles, international law obligations, and the doctrine of effective remedy.¹³² Courts not only have the authority but also the obligation to intervene where fundamental rights, particularly those concerning liberty and human dignity, have been infringed. This principle has been established through international treaties and foreign constitutions, as well as developed through foreign case law. It is essential in a just and equitable society that courts are empowered to hear matters that implicate the fundamental right to freedom and security, as recognised throughout international and foreign jurisdictions. Therefore, international law and foreign law support the finding of jurisdiction in this matter.

Leave to appeal

[92] The interests of justice are central in this Court’s decision to grant leave to appeal.¹³³ According to section 167(6) of the Constitution, this Court has the discretion to grant leave to appeal if it is in the interests of justice to do so. In determining whether it is in the interests of justice to grant leave to appeal, each case must be considered in

¹²⁹ Rule 60(b) of United States Federal Rules of Civil Procedure; see also *Brown v Allen* 344 US 443 (1953) at 464.

¹³⁰ Article 1, section 9 of the United States Constitution.

¹³¹ Section 839(1) of the Canadian Criminal Code RSC 1985 c C-46.

¹³² Article 13 of the European Convention establishes the right to an effective remedy. In *Kudla*, the Court held that the remedy required by Article 13 must be “effective” in practice as well as in law, particularly in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities.

¹³³ *Paulsen* above n 31 at para 29.

light of its own facts and circumstances.¹³⁴ The relevant factors that this Court must have regard to in this matter include: the importance of the constitutional issues raised, the nature of the crime concerned, the rights of the applicants as entrenched in sections 12(1)(a) and 35(3) of the Constitution, prospects of success, and the public interest in a determination of the constitutional issues raised.

[93] As mentioned, on 1 September 2021, the Supreme Court of Appeal granted Mr Grifhs special leave to appeal to the High Court against his conviction and sentence. The Supreme Court of Appeal noted that “there are substantial unexplained contradictions” in the evidence of the single witness and concluded that there are reasonable prospects of success on the appeal.¹³⁵ Mr Grifhs has not yet lodged an appeal in the Mthatha High Court following his success in the Supreme Court of Appeal. On 16 September 2020 he was granted bail pending his appeal.

[94] The current position does not sit comfortably – the fact that the applicants’ co-accused succeeded in securing leave to appeal is not necessarily determinative of the instant application; it cannot automatically and always follow that applicants should be granted leave to appeal where their co-accused has been. However, the facts of this matter are both particular and peculiar. It is relevant that both the applicants and their third co-accused were convicted of murder, acting in common purpose. They were all convicted based on the same evidence.

[95] It is not an unimportant factor that the State is *dominus litus* (master of the suit) and privy to information in the docket to which the Court is not privy. This includes insights into the credibility and reliability of the witness, the integrity of evidence, and the details provided by investigating officers. This gives the State a full and informed

¹³⁴ *S v Basson* [2004] ZACC 13; 2004 (6) BCLR 620 (CC); 2005 (1) SA 171 (CC) at para 39. See also *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party* [1998] ZACC 9; 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 32 and *Ingledeu v Financial Services Board: In re Financial Services Board v Van der Merwe* [2003] ZACC 8; 2003 (4) SA 584 (CC); 2003 (8) BCLR 825 (CC) (*Ingledeu*) at para 30.

¹³⁵ *Grifhs* above n 18 at paras 4-5.

view of the case. A concession by the State that it is not able to support or defend a conviction should not be taken lightly by a court.

[96] While we accept that unequal treatment of litigants per se would not engage this Court's jurisdiction in terms of *Metcash*, that case is distinguishable since it concerned civil proceedings. In this case, we are faced with the unequal treatment of litigants in the context of a criminal matter which implicates the right not to be deprived of freedom arbitrarily and without just cause and the right to equality. The argument analysed in this section is not simply that there was a misapplication of a rule, which therefore, would not engage this Court's jurisdiction. Pertinently, the applicants submit that the Regional Court misapplied the cautionary rule when it dealt with the evidence of a single witness, leading to their conviction and sentencing based on such evidence. To strengthen their argument of unequal treatment, their co-accused, who was convicted and sentenced on the same evidence, successfully obtained leave to appeal.

[97] Consequently, being refused leave to appeal constitutes an infringement of the right not to be deprived of freedom arbitrarily and without just cause and that engages this Court's jurisdiction. Criminal cases such as *Makhubela*¹³⁶ and *Molaudzi* involved the unequal treatment of litigants, impacting the applicants' rights to freedom and equality. This Court intervened, held that it had jurisdiction and granted leave to appeal in these matters, notwithstanding the *Metcash* principle. It is clear that this Court was concerned about the impact of the deprivation of liberty. It is the alleged breach of the right not to be deprived of freedom arbitrarily and without just cause that engages this Court's jurisdiction and justifies granting leave to appeal in the interests of justice.

[98] A denial by this Court of making an order that would redress the harm to the applicants, carries the risk of a denial of justice to the applicants. There is also a real threat that public confidence in the judicial system may be undermined. Goldstone J acknowledged this: "[it] is hardly conducive to confidence in the [judicial] system that

¹³⁶ *S v Makhubela, S v Matjeke* [2017] ZACC 36; 2017 (2) SACR 665 (CC); 2017 (12) BCLR 1510 (CC) at para 23.

... [a court] should issue contrary orders in substantially identical cases”.¹³⁷ The applicants are currently serving a term of 16 years of imprisonment, while their co-accused, Mr Grifhs, has been out on bail since 16 September 2020. This, at the very least, constitutes disparate treatment.

[99] In *Molaudzi*, this Court said the following about disparate treatment among the same class of persons:

“If this Court could not entertain Mr Molaudzi’s second application, this would deny him his right to equality before the law. His case is similarly situated to the related cases of Mr Mhlonge and Mr Nkosi – as with those applicants, his right to equality before law has also been infringed by the arbitrary distinction between confessions and admissions which has the consequence of rendering extra-curial admissions of an accused, admissible against a co-accused.

The applicant is serving a sentence of life imprisonment; of which he has already served ten years. His co-accused, convicted on similar evidence, had their convictions and sentences overturned. A grave injustice will result from denying him the same relief simply because in his first application he did not have the benefit of legal representation, which resulted in the failure to raise a meritorious constitutional issue. The interests of justice require that this Court entertain the second application on the merits.”¹³⁸

[100] A further consideration favouring the grant of leave to appeal in this matter is the fact that there is no effective alternative remedy for the applicants, and they will suffer harm if this injustice is not addressed.

[101] There is also no risk that this case will open the floodgates. Rarely does the State concede that a conviction is unsustainable, as has happened in this case. In any event, an argument that this Court would be inundated with criminal matters must be rejected. This Court has held that it is inappropriate for this Court to consider “an increase in its

¹³⁷ *Metcash* above n 50 at para 20.

¹³⁸ *Molaudzi* above n 106 at paras 39-40.

workload” when deciding whether a matter raises a constitutional issue.¹³⁹ The “interests of justice” test can be used to determine which matters this Court will consider entertaining.

[102] Prospects of success, although not decisive, are an important factor in the consideration whether to grant leave to appeal.¹⁴⁰ There are reasonable prospects of success in this matter. This is evidenced by the concession made by the State that the conviction of the applicants is indefensible and the judgment of the Supreme Court of Appeal (granting Mr Grifhs leave to appeal) where that Court was of the view that the matter had reasonable prospects of success. On balance, we are of the view that these factors weigh in favour of leave to appeal being granted. The possible infringement of the applicants’ right to a fair trial and not to be arbitrarily deprived of their freedom has grave consequences for the applicants.

Second judgment

[103] We have read the well-written judgment prepared by our Colleague, Dodson AJ (second judgment). He concludes that an appeal does lie in respect of the decision of the President of the Supreme Court of Appeal not to exercise her discretion in terms of the proviso, that the “grave injustice argument” should stand, and that the applicants’ application for reconsideration must be upheld.

[104] We disagree. In *Cloete*,¹⁴¹ this Court said that an appeal against the decision of the President of the Supreme Court of Appeal does not generally engage this Court’s jurisdiction. Otherwise, there would be a dual appeal system by means of which a litigant could appeal the section 17(2)(f) decision before this Court and, if unsuccessful, then seek to appeal to this Court still on the merits of the matter.

¹³⁹ See *Jacobs* above n 99 at paras 159-61 where this Court was split evenly.

¹⁴⁰ *Ingledeu* above n 134 at para 31.

¹⁴¹ *Cloete v S; Sekgala v Nedbank Ltd* [2019] ZACC 6; 2019 (2) SACR 130 (CC); 2019 (4) SA 268 (CC); 2019 (5) BCLR 544 (CC) at paras 36 and 47.

[105] In any event, during oral submissions, the applicants' counsel did not pursue an appeal against a section 17(2)(f) decision and conceded that the application would fail in light of *Cloete*.¹⁴² Therefore, there is no application before this Court for leave to appeal against the exercise by the President of the Supreme Court of Appeal of her powers under section 17(2)(f) and that shall be the end of the matter. The applicants' submissions on the decision of the President must, therefore, be understood to bolster their application for leave to appeal against the judgment and order of the Regional Court. Whether that is bad in law is not for determination by this Court.

Third judgment

[106] Finally, we have also read the well-written judgment prepared by our Colleague, Majiedt J (third judgment) in which he concludes that this Court's jurisdiction is not engaged on any of the grounds raised by applicants since the crux of the matter centres on a misapplication of an established legal principle, the cautionary rule. We disagree with the third judgment for the reasons advanced above.

Conclusion and remedy

[107] In our view, jurisdiction is established by the possible breach of the applicants' right to a fair trial and the right not to be deprived of freedom of the person arbitrarily and without just cause. Where this Court has jurisdiction, it would ordinarily entertain the appeal on the merits. However, since there is a pending appeal concerning Mr Grifhs, it will be appropriate that the applicants' appeal be heard together with his appeal. In any event, this Court has held that in considering whether to grant leave to appeal, it is necessary to consider whether "allowing the appeal would lead to piecemeal

¹⁴² Even if there was an application for leave to appeal against the decision of the President of the Supreme Court of Appeal in this Court, we do not think the present case is the sort where an appeal against the decision of the President can be entertained because: (a) even the possibility of such an appeal was obiter in *Cloete*; (b) there is no application for leave to appeal against the President's decision in the present matter; and (c) allowing an appeal against the President's decision here would create other forms of inequality – a single accused on identical facts does not have an appeal against the President's decision, because it is purely factual, but the fact that a co-accused was granted leave to appeal then confers this Court with jurisdiction. Needless to say, we leave the matter open, nonetheless.

adjudication and prolong the litigation or lead to the wasteful use of judicial resources or costs”.¹⁴³ Where possible, piecemeal adjudication is to be avoided.

[108] Finally, it should be noted that the relief sought by the applicants in their notice of motion is for leave to appeal against their conviction and sentence. We take the view that it is in the interests of justice that the matter be heard by the High Court. It is not desirable that this Court sit as a court of first and last instance and it would be expedient if the applicants’ appeal is heard together with that of Mr Grifhs, if possible, instead of piecemeal. The applicants have indeed made out a case for leave to appeal against the Supreme Court of Appeal’s decision. We are entitled to consider the Supreme Court of Appeal order despite the applicants not specifically seeking to set the order aside as in *CUSA*¹⁴⁴ where this Court held that—

“[a] party who seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant may not on appeal raise a new ground of review. To permit a party to do so may very well undermine the objective of the Labour Relations Act to have labour disputes resolved as speedily as possible.

These principles are, however, subject to one qualification. Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality.”

[109] Further, the applicants sought a prayer for further or alternative relief. The relief sought was foreshadowed in their pleadings and the applicants may benefit from the prayer for alternative relief. In *Glaxo Wellcome*,¹⁴⁵ it was held that further and/or alternative relief may be granted where: (a) a case was made out for that relief on the

¹⁴³ *Cloete* above n 141 at para 57.

¹⁴⁴ *CUSA v Tao Ying Metal Industries* [2008] ZACC 15; 2009 (1) BCLR 1 (CC); 2009 (2) SA 204 (CC) at para 67-8; see also *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC* [2021] ZACC 3; 2021 (3) SA 246 (CC); 2021 (4) BCLR 349 (CC) at para 58.

¹⁴⁵ *Glaxo Wellcome (Pty) Ltd v Terblanche* [2001] ZACAC 2 at 19-20.

papers; (b) parties were apprised of the alternative relief contemplated; and (c) parties are granted a full hearing in respect of such alternative relief. We are of the view that all of these factors are present and the applicants are entitled to alternative relief, which indeed permits this Court to set aside the order of the Supreme Court of Appeal.

Order

[110] We make the following order:

1. Leave to appeal is granted.
2. The appeal succeeds in part and to the extent set out below.
3. The order of the Supreme Court of Appeal is set aside and substituted with the following:
 - “(a) The applicants’ petition for leave to appeal in terms of section 309C of the Criminal Procedure Act 51 of 1977 against both conviction and sentence is granted.
 - (b) The applicants are granted leave to appeal to the High Court of South Africa, Eastern Cape Division, Mthatha.
 - (c) If practically possible, their appeal should be considered together with that of Mr Lungisa Grifhs.”

DODSON AJ (Madlanga J concurring):

Introduction

[111] I have had the pleasure of reading the well-reasoned judgment of my Colleagues Mhlantla J and Theron J (first judgment) and those of Majiedt J (third judgment) and Bilchitz AJ (fourth judgment).

[112] I gratefully adopt the setting out in the first judgment of the litigation history and the parties’ respective submissions.¹⁴⁶ I agree with the first and third judgments insofar

¹⁴⁶ See the first judgment at [1] to [29] and [32] to [33].

as they hold that the Regional Court correctly stated the cautionary rule regarding conviction on the basis of the evidence of a single witness; and that the misapplication of an established legal test or rule, such as that complained of by the applicants, does not engage the jurisdiction of this Court.¹⁴⁷ I also agree with the first judgment insofar as it holds that condonation should be granted; and finds against the applicants on the arguments based on section 93*ter* of the Magistrates' Courts Act¹⁴⁸ and on section 51 of the Criminal Law Amendment Act.¹⁴⁹ I share the concern expressed in the third judgment for avoiding an approach that invites an avalanche of criminal matters.¹⁵⁰

[113] I differ from the first and third judgments, however, on their findings in relation to the application for leave to appeal against the decision of the President of the Supreme Court of Appeal to refuse the applicants' application in terms of the proviso to section 17(2)(f) of the Superior Courts Act (proviso).¹⁵¹ The section 17(2)(f) argument should in my view carry the day. That issue forms the focus of this judgment.

Case law on section 17(2)(f)

[114] The legislation that preceded the Superior Courts Act was the Supreme Court Act. Where a provincial division of the Supreme Court of South Africa refused leave to appeal, it could be sought from the Appellate Division by way of a petition addressed to the Chief Justice.¹⁵² The petition was decided by a panel of two judges of the Appellate Division designated by the Chief Justice. In the event of a difference of opinion, the Chief Justice or her designee would join the panel. The panel enjoyed the power either to decide the petition itself or to refer the petition to the Appellate Division.¹⁵³ Where leave was refused by a panel, it was not possible for an

¹⁴⁷ Id at [35] to [39]. See also the third judgment at [198].

¹⁴⁸ See the first judgment at [31] and [42] to [44].

¹⁴⁹ Id at [45].

¹⁵⁰ See the third judgment at [202].

¹⁵¹ See the first judgment at [49] to [58] and the third judgment at [234] to [246].

¹⁵² Section 21(3)(a) read with section 20(4)(b).

¹⁵³ The reference here to the Appellate Division was to a quorum of five judges as provided for in section 12(1) of the Supreme Court Act, or a lesser or greater number as provided for there.

unsuccessful litigant to secure leave to appeal in any other way. That was the end of the road. This was the applicable legal regime in the High Court and the Supreme Court of Appeal at the time of *Metcash*.¹⁵⁴

[115] The Superior Courts Act changed that. It extended the appeal road by adding a further remedy in a proviso to section 17(2)(f), which, for purposes of the adjudication of this appeal, reads as follows:

“The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, 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.”¹⁵⁵

[116] A number of judgments have dealt with the proviso. In *Avnit*,¹⁵⁶ Mpati P said:

“As section 17(2)(f) is a new section vesting the President of this court with a power that the incumbent has not hitherto possessed, I think it desirable to set out the approach to be taken to such applications.

. . .

The origin of the section no doubt lies in the situation that arose in [*Metcash*] . . . where one panel of judges of this court dismissed Mr Van der Walt’s application for leave to appeal and a differently composed panel granted an identical application raising the

¹⁵⁴ *Metcash* above n 50.

¹⁵⁵ Section 17(2)(f) was replaced by the following provision in terms of section 28 of the Judicial Matters Amendment Act 15 of 2023 with effect from 3 April 2024, after this matter was heard, to read as follows:

“The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may, in circumstances where a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.”

¹⁵⁶ *Avnit v First Rand Bank Ltd* [2014] ZASCA 132.

same point of law. It is not, however, confined to that kind of situation but is a power available to be exercised by the President of this court in exceptional circumstances.”¹⁵⁷

[117] Mpati P went on to explain what might be considered exceptional circumstances as follows:

“Later cases have . . . declined any invitation to define ‘exceptional circumstances’ for the sound reason that the enquiry is a factual one. A helpful summary of the approach to the question in any given case was provided by Thring J in *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas* . . . where he said:

- ‘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 hoë 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 upon 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.’

¹⁵⁷ Id at paras 1 and 3.

To this I would add only that in the exercise of the discretion vested in the President the overall interests of justice will be the finally determinative feature.”¹⁵⁸

[118] Mpati P elaborated as follows:

“Prospects of success alone do not constitute exceptional circumstances. The case must truly raise a substantial point of law, or be of great public importance or demonstrate that without leave a grave injustice may result.”¹⁵⁹

[119] In *Ntlanyeni*,¹⁶⁰ the Supreme Court of Appeal dealt with a matter consequent upon a decision of the President of the Supreme Court of Appeal to grant reconsideration in terms of the proviso. There, the applicant was the third of three accused, who had been convicted in the same trial. The applicant and the second accused had been convicted of kidnapping and two counts of rape. The first accused had been convicted on all of the charges, including those on which the second and third accused were convicted, and certain additional charges. Each brought separate applications to the Supreme Court of Appeal for leave to appeal. The first and second accused were granted leave to appeal against their convictions by separate panels of two judges. Around the same time the applicant, the third accused, was incorrectly informed by the Registrar of the Supreme Court of Appeal that his application too had been granted. He took steps to prosecute the appeal. While it was pending, he learned that the information from the Registrar was incorrect and that his application had been refused. He immediately sought and was granted reconsideration by the President of the Supreme Court of Appeal in terms of the proviso. In dealing with the matter upon reconsideration pursuant to the President of the Supreme Court of Appeal’s decision, the Supreme Court of Appeal said—

¹⁵⁸ Id at para 5.

¹⁵⁹ Id at para 7.

¹⁶⁰ *S v Ntlanyeni* [2016] ZASCA 3; 2016 (1) SACR 581 (SCA).

“[i]t is apparent from the reasons given by the President of this Court¹⁶¹ that he was satisfied that the refusal of leave to appeal to the applicant alone within the context of the merits of this case and the mishandling of the applicant’s application for leave to appeal constituted exceptional circumstances.”¹⁶²

[120] In *Malele*,¹⁶³ the four applicants were part of a group of eight accused found guilty of murder in the High Court because, acting in common purpose, they were alleged to have dragged a person arrested for a traffic violation behind a moving police vehicle and then to have assaulted him in a police cell, resulting in his death. Mpati AP dealt with their reconsideration request after leave to appeal had been refused by a panel of two judges in terms of section 17(2)(c) and (d). He noted that a single witness had testified to the assault in the police cell and he had conceded that he could not see what was happening, but heard sounds of an assault. He also doubted the correctness of the trial court’s application of the doctrine of common purpose and its finding that the accused had acted with *dolus eventualis* (indirect intention). On these grounds he was of the view that another court may find differently.

[121] He went on to deal with the applicants’ reliance on the fact that Mr Jonas (accused four), convicted in relation to the same incident, had separately applied for and been granted leave to appeal by a different panel. Mpati AP held in this regard as follows:

“In my view, the mere fact that the applicants’ former co-accused’s application for leave to appeal was successful does not necessarily mean that the applicants should, without more, also be granted leave to appeal.”¹⁶⁴

[122] Mpati AP went on to point out that accused four had attempted to stop the dragging of the deceased behind the vehicle, something overlooked by the trial court.

¹⁶¹ These reasons are not available to us.

¹⁶² *Ntlanyeni* above n 160 at para 6.

¹⁶³ *Malele v S; Ngobeni v S* [2016] ZASCA 115.

¹⁶⁴ *Id* at para 11.

For this reason, the situation of accused four was distinguishable. The comparison therefore did not on its own form a basis for granting relief under the proviso. Nevertheless, on the basis of the other possible flaws in the judgment of the trial court, he decided to afford the applicants relief under the provision, saying that “a grave injustice may otherwise result”.¹⁶⁵

[123] In *Gwababa*,¹⁶⁶ yet another accused from the same trial applied to the President of the Supreme Court of Appeal for reconsideration in terms of the proviso. He had been the driver of the vehicle and asserted that he was unaware when he drove off that the deceased was being dragged behind the vehicle. Nor, he alleged, was he at the scene of the assault. The trial court had rejected the applicant’s version.

[124] In his application in terms of the proviso, the applicant relied heavily on the grant of leave to appeal to accused four and the grant of relief under the proviso to four of the accused in *Malele*. Maya P emphasised what had been said by Mpati AP in the extract above¹⁶⁷ and added:

“I am enjoined to determine [this] application on its own merits and consider if the applicant has established exceptional circumstances warranting the reconsideration and, if necessary, variation of the order refusing him special leave.”¹⁶⁸

[125] On the basis of the same reasoning as in *Malele* in relation to the possible flaws in the trial court’s judgment, Maya P was satisfied that reconsideration should be granted in terms of the proviso, as “a grave injustice may otherwise result”.¹⁶⁹

¹⁶⁵ Id at para 12.

¹⁶⁶ *Gwababa v S* [2016] ZASCA 200.

¹⁶⁷ Id at para 7.

¹⁶⁸ Id at para 5.

¹⁶⁹ Id at para 15.

[126] In *Liesching I*,¹⁷⁰ this Court dealt with an appeal against the dismissal by the President of the Supreme Court of Appeal of an application in terms of the proviso. Three of four occupants of a vehicle were convicted of murder when the deceased was shot, once from the vehicle and again at close range by two occupants of the vehicle who had alighted from it. In a subsequent, separate trial of the fourth occupant of the vehicle, the main eyewitness from the initial trial testified again, but on this occasion recanted his evidence and exculpated the accused in both the initial and the subsequent trials. The three accused from the initial trial applied for reconsideration in terms of the proviso on the basis of the recant.

[127] The President of the Supreme Court of Appeal refused the application on the basis that, because the definition of “appeal” in section 1 of the Superior Courts Act¹⁷¹ excluded an appeal regulated by the Criminal Procedure Act, the proviso did not apply. The President of the Supreme Court of Appeal reasoned that the applicants’ remedy was rather to be found in section 327(1) of the Criminal Procedure Act. This provision allows a party for whom appeal procedures are no longer available, but who later comes across further evidence that materially affects her conviction, to petition the Minister of Justice to reopen the case and refer it to the court in which they were convicted.

[128] On appeal against the President of the Supreme Court of Appeal’s decision, this Court characterised the nature of the procedure under the proviso as follows:

“The proviso in section 17(2)(f) is very broad. It keeps the door of justice ajar in order to cure errors or mistakes, and for the consideration of a circumstance, which, if it was 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 that became known after the petition had been considered and determined.

¹⁷⁰ *S v Liesching* [2016] ZACC 41; 2017 (2) SACR 193 (CC); 2017 (4) BCLR 454 (CC).

¹⁷¹ The definition reads—

“‘appeal’ in Chapter 5, does not include an appeal in a matter regulated in terms of the Criminal Procedure Act . . . or in terms of any other criminal procedural law”.

The President is given a discretion, to be exercised judiciously, to decide whether there are exceptional circumstances that warrant referral of the matter to the Court for reconsideration or, if necessary, variation. The President must therefore decide whether there are exceptional circumstances. This will depend on the facts and circumstances of each case.”¹⁷²

[129] This Court granted leave to appeal against the President of the Supreme Court of Appeal’s decision under the proviso. It held that the President of the Supreme Court of Appeal’s decision had been based on a misinterpretation of the Superior Courts Act and a misconception of the procedure under section 327 of the Criminal Procedure Act. Section 327 did not regulate the procedure envisaged by the proviso. The proviso applies while the appeal process is still open. Section 327 applies after the appeal process is closed. A reconsideration under the proviso was therefore open to the applicants. The appeal was upheld because the President of the Supreme Court of Appeal, by reason of the misinterpretation, failed to consider whether the new evidence sought to be adduced constituted an exceptional circumstance.¹⁷³ The decision of the President of the Supreme Court of Appeal was set aside and the matter remitted to the Acting President of the Supreme Court of Appeal (Acting President of the Supreme Court of Appeal) for consideration afresh.¹⁷⁴

[130] *Liesching II*¹⁷⁵ is the sequel to *Liesching I*. Upon remittal to the Acting President of the Supreme Court of Appeal, she considered the matter afresh and dismissed the application for reconsideration. Reasons were not provided. However, her order dismissing the application recorded the reason as being that “no exceptional circumstances have been shown to exist for the decision refusing leave to appeal to be referred to the court for reconsideration”. Again, the applicants applied to this Court for leave to appeal against her decision.

¹⁷² *Liesching I* above n 170 at paras 54-5.

¹⁷³ *Id* at paras 62-5.

¹⁷⁴ *Id* at para 66.

¹⁷⁵ *S v Liesching* [2018] ZACC 25; 2018 (11) BCLR 1349 (CC); 2019 (4) SA 219 (CC).

[131] Theron J, writing for the majority of the Court, assumed without deciding the point, that “this Court has jurisdiction over an appeal to determine the meaning of ‘exceptional circumstances’ in section 17(2)(f)”.¹⁷⁶ As to what constitutes exceptional circumstances, this Court held as follows:

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

In summary, section 17(2)(f) is not intended to afford disappointed litigants a further attempt to procure relief that has already been refused. It is intended to enable the President to deal with a situation where otherwise injustice might result, and does not afford litigants a parallel appeal process in order to pursue additional bites at the proverbial appeal cherry.”¹⁷⁷

[132] This Court held further that the President of the Supreme Court of Appeal’s decision in terms of the proviso involves the exercise of a true discretion. Interference in the exercise of such a discretion on appeal would therefore only be justified if the discretion was exercised injudiciously, capriciously, without substantial reasons for doing so, or on the basis of a wrong principle; or if the lower court did not bring an unbiased judgement to bear on the matter.¹⁷⁸

[133] Approaching the matter on this basis, this Court did not consider the recant on its own to constitute exceptional circumstances and dismissed the application for leave to appeal.¹⁷⁹

¹⁷⁶ Id at para 127.

¹⁷⁷ Id at paras 138-9.

¹⁷⁸ Id at paras 140-2.

¹⁷⁹ Id at paras 161-4.

[134] In *Cloete*,¹⁸⁰ this Court dealt simultaneously with two applications for leave to appeal against decisions of the President of the Supreme Court of Appeal in terms of the proviso, one criminal, the other civil. The first, the criminal matter, involved the refusal by the President of the Supreme Court of Appeal of an application in terms of the proviso, based on alleged new evidence that had subsequently come to light. It was the second time that the applicants had applied for relief in terms of the proviso. It was dismissed by the President of the Supreme Court of Appeal on the basis that the matter was *res judicata* (a matter already decided). The second, the civil matter, sought unsuccessfully to persuade the President of the Supreme Court of Appeal that leave to appeal ought to have been granted to set aside a decision of the High Court refusing rescission of a default judgment.

[135] This Court held that “ordinarily” it would not have jurisdiction to consider an appeal against a decision of the President of the Supreme Court of Appeal in terms of the proviso because the grounds would be factual in nature. This was so in respect of the two applications in question. This rendered it unnecessary to decide the question whether or not a decision in terms of the proviso was the decision of a “court,” bearing in mind that “appeals to this Court must emanate from another court and be brought in terms of some legislation or court rules”.¹⁸¹

[136] Moreover, there would ordinarily be no prejudice to the applicant in not allowing an appeal against the decision of the President of the Supreme Court of Appeal because, having failed in the appeal on the merits (of the High Court’s, or, in this case, the Regional Court’s judgment) before the Supreme Court of Appeal, she would be entitled to apply for leave to appeal to this Court on the merits. This was “a further reason supporting the conclusion that an appeal will not lie against a section 17(2)(f) decision unless there are compelling circumstances”.¹⁸²

¹⁸⁰ *Cloete* above n 141.

¹⁸¹ *Id* at paras 22-53.

¹⁸² *Id* at paras 54-63. The concluding paragraphs of the judgment, paras 64-5, read:

“Section 17(2)(f) is simply a further safety net within the appeals process. It is not necessary for an appeal against a section 17(2)(f) decision to be available separately where a litigant may

[137] An account of the cases dealing with section 17(2)(f) would not be complete without reference to three recent judgments of the Supreme Court of Appeal dealing with the respective powers of the President of the Supreme Court of Appeal under section 17(2)(f) and the court upon referral for reconsideration under the proviso.¹⁸³

[138] In *Motsoeneng*, the Supreme Court of Appeal characterised the President of the Supreme Court of Appeal’s decision-making process under the proviso as requiring a determination on her part as to whether or not exceptional circumstances were present, and, if found to be present, the exercise of a discretion as to whether or not to grant reconsideration.¹⁸⁴ The Court held further that upon the reconsideration by the Court pursuant to the President of the Supreme Court of Appeal’s grant of a request, the applicant would once again have to persuade the Court that exceptional circumstances were present, saying—

“[c]ounsel 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 section 17(2)(f) application* was not out of the starting stalls.”¹⁸⁵ (Emphasis added.)

[139] The observation should immediately and respectfully be made that this approach appears to be based on a misreading of section 17(2)(f). What is referred to the Court by the President of the Supreme Court of Appeal for reconsideration is *not* the section 17(2)(f) application as the above extract suggests. That has already been disposed of

still approach this Court on appeal. It would not prejudice a prospective appellant, because the avenue to appeal to this Court would still be available.

I am compelled to the conclusion that normally no appeal lies against the decision of the President pursuant to section 17(2)(f). An applicant who wishes to appeal must do so within the ordinary appeal process.”

¹⁸³ *Motsoeneng v South African Broadcasting Corporation SOC Ltd* [2024] ZASCA 80; 2025 (4) SA 122 (SCA) (*Motsoeneng*); *Bidvest Protea Coin Security (Pty) Ltd v Mabena* [2025] ZASCA 23; 2025 (3) SA 362 (SCA) (*Bidvest*); and *Schoeman v Director of Public Prosecutions* [2025] ZASCA 124 (*Schoeman*).

¹⁸⁴ *Motsoeneng* above n 183 at para 14.

¹⁸⁵ *Id* at para 19.

by the President of the Supreme Court of Appeal. What is referred to the court is “[t]he decision”. “The decision” is identified in the opening words of section 17(2)(f) as “[t]he 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”. As the cross-reference to section 17(2)(b) makes clear, this is a reference to the original decision to refuse the application for leave to appeal. That is all that comes before the court giving effect to the President of the Supreme Court of Appeal’s decision to refer for reconsideration, nothing more. A reconsideration of that decision to refuse leave to appeal requires no consideration of whether or not there are exceptional circumstances.

[140] The above notwithstanding, the dictum from *Motsoeneng* was applied in *Bidvest* to hold that the court upon referral of “the decision” for reconsideration is—

“required, as a threshold question, to determine whether there are exceptional circumstances that permit of the referral to us for reconsideration of the decision on petition to refuse special leave. If we should find that there are no exceptional circumstances, then that puts an end to the matter, and we need not consider whether the refusal to grant leave on petition was correctly decided, much less whether the judgment and order of the full court are correct.”¹⁸⁶

[141] The Supreme Court of Appeal found that exceptional circumstances did not exist and struck the matter from the roll.

[142] In *Schoeman*, the majority followed *Bidvest* and *Motsoeneng*. The minority, however, found that:

“The correct interpretation, which aligns with the text, purpose, and pre-*Bidvest* jurisprudence, such as *Avnit* and *Liesching II*, is that the determination of ‘exceptional circumstances’ is a discretionary assessment made by the President. The subject of the referral is the original decision, not the President’s reasons for the referral. The *Bidvest*

¹⁸⁶ *Bidvest* above n 183 at para 17.

interpretation improperly conflates these two steps, effectively requiring the Court to perform the President's function. It is 'clearly wrong' and warrants departure."¹⁸⁷

[143] The majority in *Schoeman* explained the scheme of adjudicative responsibility in section 17(2)(f) as follows:

"A referral to this Court by the President is then not a decision as to whether exceptional circumstances exist. The referral is simply a decision that if this Court should find that there are exceptional circumstances, the President considers that the decision on petition warrants reconsideration. . . . This Court alone decides whether there are exceptional circumstances. On the jurisdictional fact interpretation,¹⁸⁸ this Court alone enjoys the competence to do so, and the President does not. If this Court should find that there are exceptional circumstances, the President's discretionary judgment that the decision on petition should be reconsidered stands."¹⁸⁹

[144] The majority went on to find that exceptional circumstances were present and upheld the appeal in certain respects. I am unable to reconcile the conclusion of the majority in *Schoeman* that the President of the Supreme Court of Appeal lacks the competence to decide whether or not there are exceptional circumstances with:

- (a) the statement of this Court in *Liesching I* that "[t]he President is given a discretion, to be exercised judiciously, to decide whether there are exceptional circumstances that warrant referral of the matter to the Court for reconsideration or, if necessary, variation";¹⁹⁰
- (b) the finding of this Court in *Liesching II* that "[t]he President was correct in finding that no exceptional circumstances existed";¹⁹¹

¹⁸⁷ *Schoeman* above n 183 at para 30.

¹⁸⁸ The interpretation preferred by the majority was termed "the jurisdictional fact interpretation" and that preferred by the minority, "the exclusivity interpretation".

¹⁸⁹ *Id* at para 68.

¹⁹⁰ *Liesching I* above n 170 at para 55.

¹⁹¹ *Liesching II* above n 175 at para 161.

- (c) the careful analysis by Mpati P in *Avnit*, acting in his capacity as President under the proviso, as to what constituted exceptional circumstances;¹⁹²
- (d) the statement of Maya P (as she then was) in *Gwababa*, acting in her capacity as President under the proviso, that “I am enjoined to determine [this] application on its own merits and consider if the applicant has established exceptional circumstances warranting the reconsideration”.¹⁹³

[145] The approach in *Bidvest* and that of the majority in *Schoeman*, also seems to leave out of account how the court will determine whether exceptional circumstances are present when, as in this matter, the President of the Supreme Court of Appeal refuses reconsideration, because the matter will not be referred to the court. Surely the President of the Supreme Court of Appeal cannot have the power to determine whether exceptional circumstances are present for purposes of refusing reconsideration, but not for purposes of granting it?

[146] In the analysis that follows, I consider myself bound by the judgments in *Liesching I and Liesching II* to interpret section 17(2)(f) as conferring upon the President of the Supreme Court of Appeal the power to decide whether there are exceptional circumstances, to the exclusion of the court to whom “the decision” is referred for reconsideration if the application for reconsideration is granted by the President of the Supreme Court of Appeal.

Issues raised

[147] On the section 17(2)(f) argument, the first judgment holds that the granting by the Supreme Court of Appeal of leave to appeal to Mr Grifhs, and its denial in respect of the applicants, did not amount to exceptional circumstances as envisaged in the proviso. There had to be something more than this. According to the first judgment,

¹⁹² *Avnit* above n 156 at para 5.

¹⁹³ *Gwababa* above n 166 at para 5.

this required considering the application on its merits. Here the President of the Supreme Court of Appeal had found the application wanting.¹⁹⁴

[148] According to the first judgment, *Metcash* makes it clear that the rights to a fair trial and to equality do not guarantee that an application under the proviso will be granted merely because of different outcomes before different panels of the Supreme Court of Appeal on the same facts, even if the impugned panel decision was wrong. This is because the potential for differences in the outcomes of the exercise of judicial discretion to grant or refuse leave to appeal is inherent in the court system.¹⁹⁵ In this regard, says the first judgment, this Court is bound by *Metcash* to accept the legitimacy of such different outcomes.¹⁹⁶

[149] What the first judgment holds in this regard raises the following issues:

- (a) What constitutes exceptional circumstances in the proviso?
- (b) Is *Metcash* binding authority against addressing inconsistent outcomes?
- (c) Does an appeal lie against the decision of the President of the Supreme Court of Appeal?
- (d) Did the applicants apply for leave to appeal against the President of the Supreme Court of Appeal decision?
- (e) Does this Court have jurisdiction and should leave to appeal be granted?
- (f) What should the outcome be in this case?
- (g) What is the appropriate relief?

[150] It is to these issues that I now turn.

¹⁹⁴ See the first judgment at [48].

¹⁹⁵ Id at [49] to [52] and [54] to [56].

¹⁹⁶ Id at [58].

What constitutes exceptional circumstances?

[151] The first judgment places great store by the dicta of the President of the Supreme Court of Appeal in *Malele* and *Gwababa* that a difference in outcomes before different panels of the Supreme Court of Appeal on the same facts, is not a sufficient basis to invoke the proviso. There must be something more.

[152] With this there can be no quarrel, if it means that an application for reconsideration that is patently ill-founded on the merits would not justify intervention under the proviso, even if another panel had arrived at a different conclusion on the same facts. I hasten to add that such a situation would seldom arise, because it would suggest that a panel of the Supreme Court of Appeal had granted leave to appeal in the application that came before the other panel, when it was patently inappropriate to do so.

[153] Similarly, where the factual position of the applicant under the proviso is clearly distinguishable from that of the litigants in the other panel decision, there would not be exceptional circumstances as contemplated in the proviso.

[154] However, both the President of the Supreme Court of Appeal in *Avnit* and this Court in *Liesching II* recognised that the proviso has its origins in, or addresses situations of the kind that arose in, *Metcash*. This suggests, strongly, that different outcomes from different panels in respect of the same set of factual and legal circumstances, must go a long way, in and of themselves, towards establishing exceptional circumstances. Indeed, and as I have pointed out, it would require a patently inappropriate decision by the other panel, to find that exceptional circumstances had not been established.

[155] The “achievement of equality” is a founding value in section 1(a) of the Constitution. It is no coincidence that the right to equality is the first fundamental right provided for in the Bill of Rights. Judges and Acting Judges are required in terms of Schedule 2 Item 6 of the Constitution to make an oath or solemn affirmation that they

will, amongst other things, “administer justice *to all persons alike*, without fear, favour or prejudice”.¹⁹⁷ As its name records for posterity, apartheid was specifically designed to ensure that all persons were not treated alike and were to be kept apart specifically for this purpose. For that reason, unequal treatment is antithetical to our constitutional order. The need for equal treatment is something that is instinctive to every human being from an early age. Ordinary people would thus expect that the courts in particular would be at pains to ensure that each person is treated with conspicuous equality and fairness. In *K*,¹⁹⁸ this Court, in discussing the system of precedent, referred to the “fundamental principle of justice: that like cases should be determined alike”.

[156] The concern of this Court for seeking to ensure the equal treatment of litigants is reflected in *Molaudzi*.¹⁹⁹ There, the applicant was convicted along with several co-accused of murder and other serious crimes. His application to this Court for leave to appeal failed because he challenged only the factual findings of the High Court.²⁰⁰ Later, two of his co-accused applied for leave to appeal on the basis of a challenge to the constitutionality of the admission of extra-curial statements of one accused against his co-accused.²⁰¹ The two co-accused succeeded in their appeal and had their convictions and sentences set aside. In light of this development, the applicant applied anew for leave to appeal. In its judgment, this Court said the following:

“The parties agreed that apart from this Court reconsidering the appeal, there is no effective alternate remedy. If this Court could not entertain Mr Molaudzi’s second application, this would deny him his right to equality before the law. His case is similarly situated to the related cases of Mr Mhlongo and Mr Nkosi – as with those applicants, his right to equality before the law has also been infringed by the arbitrary distinction between confessions and admissions which has the consequence of rendering extra-curial admissions of an accused, admissible against a co-accused.

¹⁹⁷ Emphasis added.

¹⁹⁸ *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) at para 15.

¹⁹⁹ *Molaudzi* above n 106.

²⁰⁰ *Id* at para 9.

²⁰¹ *S v Mhlongo; S v Nkosi* [2015] ZACC 19; 2015 (2) SACR 323 (CC); 2015 (8) BCLR 887 (CC) at para 10.

The applicant is serving a sentence of life imprisonment, of which he has already served ten years. His co-accused, convicted on similar evidence, had their convictions and sentences overturned. A grave injustice will result from denying him the same relief simply because in his first application he did not have the benefit of legal representation, which resulted in the failure to raise a meritorious constitutional issue. The interests of justice require that this Court entertain the second application on its merits, despite the previous unmeritorious application, and relax the principle of *res judicata*.”²⁰² (Emphasis added.)

[157] In *Richardson*,²⁰³ the Supreme Court of the United States had reason to examine the rationale behind joinder in criminal proceedings. In doing so, Scalia J, on behalf of the majority of the Supreme Court of the United States, pointed out that “joint trials generally serve the interests of justice by avoiding the *scandal and inequity* of inconsistent verdicts”.²⁰⁴

[158] In the circumstances, unequal outcomes from different panels of the Supreme Court of Appeal in respect of litigants who are truly similarly situated, would create a strong prima facie case for exceptional circumstances warranting intervention in terms of the proviso. Only in the unusual situation where the reconsideration application was patently ill-founded on the merits would it allow an override of the prima facie conclusion that exceptional circumstances are present.

The impact of Metcash

[159] Had the matter now before us been decided before the advent of the Superior Courts Act and the proviso in section 17(2)(f), this Court would have been bound by its earlier decision in *Metcash* to refuse the applicants’ application for leave

²⁰² *Molaudzi* above n 106 at paras 39-40.

²⁰³ *Richardson v Marsh* 481 US 200 (1987). See also the earlier case of *Bruton v United States* 391 US 123 (1968) (*Bruton*) at 391 (judgment of White J) where the following was stated:

“It is also worth saying that separate trials are apt to have varying consequences for legally indistinguishable defendants. The unfairness of this is confirmed by the common prosecutorial experience of seeing co-defendants who are tried separately strenuously jockeying for position with regard to who should be the first to be tried.”

²⁰⁴ *Id* at paras 209-10. Emphasis added.

to appeal. This is unless it considered its earlier judgment to be clearly wrong, which is a high bar to meet.²⁰⁵ However, on the authority of both this Court²⁰⁶ and the President of the Supreme Court of Appeal,²⁰⁷ the legislative remedy contained in the proviso was introduced, amongst other things, in order to address situations of the kind that arose in *Metcash*. The proviso thus takes as given that the panel adjudication system for applications for leave to appeal in the Supreme Court of Appeal may, exceptionally but validly, give rise to inconsistent outcomes. It now affords the President of the Supreme Court of Appeal a new statutory remedy to address inconsistent outcomes, regardless of *Metcash*.

[160] For this reason, neither this Court, nor the President of the Supreme Court of Appeal is bound by *Metcash* to decide the present matter against the applicants simply because the valid exercise by panels of their discretion might result in inconsistent outcomes. Were this Court to hold itself and the President of the Supreme Court of Appeal bound by *Metcash* to refuse relief in the face of inconsistent outcomes, notwithstanding section 17(2)(f) (as the first and third judgments propose),²⁰⁸ it would risk rendering the proviso a dead letter to a significant degree. It would also be an outcome inconsistent with one of the very purposes of the provision, as identified by both this Court in *Liesching II* and the President of the Supreme Court of Appeal in *Avnit*. This is against the principles of statutory interpretation. In this regard, Kellaway says:

²⁰⁵ This would require considering whether, upon reflection, the time had come to recognise that the majority judgment was clearly wrongly decided and that the powerful dissenting judgments in *Metcash* above n 50 at paras 29-83 (judgments of Ngcobo J, Madala J and Sachs J) ought to have prevailed. Another possible basis for distinguishing *Metcash* is that it was a civil matter, not a criminal matter. It is unnecessary for me to express any views in regard to these propositions for the reasons that follow in this judgment.

²⁰⁶ *Liesching II* above n 175 at para 138.

²⁰⁷ *Avnit* above n 156 at para 3.

²⁰⁸ See the first judgment at [57] to [58]. See also the third judgment at [202] and [208].

“Where a statute is remedial of a mischief or grievance it ought to be construed liberally, so as to afford the utmost relief which the fair meaning of its language will allow.”²⁰⁹

Does an appeal lie against the decision of the President of the Supreme Court of Appeal?

[161] In *Liesching II*, the majority of the Court was careful to leave open the question whether “this Court has jurisdiction to entertain an appeal against the President’s decision under section 17(2)(f)”.²¹⁰ It decided that matter purely on the assumption that it did have such jurisdiction.

[162] In *Cloete*, this Court pointed out that “ordinarily this court will not have jurisdiction to hear these appeals because their grounds are factual in nature”.²¹¹ The purely factual nature of the appeals in that matter was, therefore, sufficient to dispose of the appeals.

[163] It follows that, in cases where the application for reconsideration in terms of the proviso was based solely on the manner in which factual evidence was dealt with by the High Court, or where it is used solely to seek to introduce new factual evidence that has become available subsequent to the disposal of the application for leave to appeal, this Court will lack jurisdiction to entertain an appeal against the President of the Supreme Court of Appeal’s decision. However, where issues of inconsistent outcomes for similarly situated litigants are concerned, the proviso requires a judicial assessment based on a mixture of fact, law (including the rights in and the values underlying the Bill of Rights),²¹² fairness and judicial experience. The fact that, “ordinarily this court

²⁰⁹ EA Kellaway *Principles of Legal Interpretation: Statutes, Contracts and Wills* (Butterworths, Durban 1995) at 105, citing *Hawkins v Gatherole* LJ (1855) 24 Ch 332; *Giovanni Daputo v James Wylie and Co* (1874) LR5 PC 482 at 492; and *Goddard v Registrar of Deeds, Kingwilliamstown and Colonial Government* (1908) 25 SC 207. See also *Manase v Minister of Safety and Security* 2003 (1) SA 567 (Ck) at para 42.

²¹⁰ *Liesching II* above n 175 at paras 124-5.

²¹¹ *Cloete* above n 141 at para 20.

²¹² In particular, the equality rights in section 9(1) and the right of every accused person in terms of section 35(3)(o) “of appeal to, or review by, a higher court”.

will not have jurisdiction to hear these appeals because their grounds are factual in nature”,²¹³ does not, therefore, dispose of the possibility of an appeal to this Court in respect of a decision under the proviso.

[164] Another reason proffered in *Cloete* why, absent compelling circumstances, an appeal would not lie against a decision of the President of the Supreme Court of Appeal, is that a refusal of reconsideration does not bar the applicant from then applying to this Court for leave to appeal on the merits of the original High Court (or, as in this case, Regional Court) judgment subject to appeal.²¹⁴ Moreover, if appeals were allowed as a matter of course against the President of the Supreme Court of Appeal’s decision in terms of the proviso, it would allow for dual avenues for appeal, one against the decision of the President of the Supreme Court of Appeal and the other against the original decision of the High Court.

[165] This is undoubtedly correct, provided that this Court has jurisdiction to entertain an appeal against the original decision of the High Court on the merits. A difficulty arises, however, where this Court lacks jurisdiction to consider an appeal on the merits. The present case is a good example. Since the test for reliance on the evidence of a single witness was correctly formulated by the Regional Court that originally convicted the applicants, this Court lacks jurisdiction to entertain an appeal on the merits. This is because it has no jurisdiction to consider the correctness or otherwise of the application to the facts of a correctly formulated legal rule or test.²¹⁵ In the circumstances of a matter such as the present one, absent an appeal against the decision of the President of the Supreme Court of Appeal in terms of the proviso, her decision is final and there is no further appellate remedy. There is accordingly no dual appeal process in matters such as this one. And the applicants would indeed be prejudiced if a right of appeal

²¹³ *Cloete* above n 141 at para 20.

²¹⁴ *Id* at paras 42-53.

²¹⁵ *Tuta* above n 37 at para 50; *Jiba* above n 37 at para 49; *Booyesen* above n 37 at para 50; *Loureiro* above n 37 at para 33; *Mankayi* above n 37 at para 12; and *Phoebus Apollo Aviation* above n 37 at para 9.

against the decision of the President of the Supreme Court of Appeal under the proviso, in circumstances such as these, was not acknowledged.²¹⁶

[166] A question that was posed but not finally decided in *Cloete*, was whether a decision of the President of the Supreme Court of Appeal under the proviso is a decision of a *court*. This Court pointed out the need to consider this issue because it is clear from section 167(6) of the Constitution²¹⁷ that appeals to this Court must emanate from another court.²¹⁸ One line of argument is that the proviso to section 17(2)(f) does not give the President of the Supreme Court of Appeal a power to grant leave to appeal herself or to make a final decision. All that she is empowered to do is to refer the panel decision to grant or refuse leave that is the subject matter of the application “to the court for reconsideration”. The President of the Supreme Court of Appeal decision in terms of the proviso is thus not the decision of a court.²¹⁹

[167] The contrary argument is based on section 168(2) of the Constitution, which provides that “[a] matter before the Supreme Court of Appeal must be decided by the number of judges determined in terms of an Act of Parliament”. According to this argument, section 17(2)(f) dictates that, in that particular component of the appellate decision-making process, the Supreme Court of Appeal is constituted by a single judge in the person of the President of the Supreme Court of Appeal. Without deciding the matter in favour of this second argument, this Court in *Cloete* commented on it as follows:

²¹⁶ But see *Cloete* above n 141 at paras 62-3.

²¹⁷ Section 167(6) of the Constitution provides as follows:

“National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—

(a) to bring a matter directly to the Constitutional Court; or

(b) to appeal directly to the Constitutional Court from *any other court*.” (Emphasis added.)

²¹⁸ *Cloete* above n 141 at para 23.

²¹⁹ Id at paras 30-1. For ease of reference, I repeat the proviso as it reads for purposes of this decision:

“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.” (Emphasis added.)

“Seen in context, as previously held by this Court in *Liesching I*, the section 17(2)(f) procedure is part of the appeal process. It involves making a judicial determination on a defined legal issue between the litigating parties. The President’s decision under section 17(2)(f) of the [Superior Courts] Act thus falls comfortably within the judicial function and purpose of the Supreme Court of Appeal leave-to-appeal process, in this instance, to be exercised by one judge of that Court, its President.”²²⁰

[168] As is tacitly acknowledged in this paragraph, *Liesching I* has in effect already resolved this issue in favour of the second argument, at least in the circumstances where the President of the Supreme Court of Appeal refuses to grant the application for reconsideration. In *Liesching I*, this Court did not hesitate to recognise a right of appeal where the President of the Supreme Court of Appeal’s decision to refuse reconsideration was based on a misinterpretation of the Superior Courts Act and the Criminal Procedure Act. This is appropriate because in the circumstances of a refusal of reconsideration, the President of the Supreme Court of Appeal’s decision represents the final word of the Supreme Court of Appeal on the matter. Her decision is, therefore, clearly a decision of a court.

Did the applicants apply for leave to appeal against the President of the Supreme Court of Appeal’s decision?

[169] The first judgment finds that the applicants failed to bring an application for leave to appeal against the decision of the President of the Supreme Court of Appeal.²²¹ Further, it is suggested that counsel for the applicants conceded that such an application could not, in any event, be sustained in view of what was held by this Court in *Cloete*. On this basis, too, the first judgment finds there to be no application for leave to appeal before this Court.²²²

²²⁰ Id at para 33.

²²¹ See the first judgment at [105] to [106].

²²² Id at [105].

[170] The applicants’ founding affidavit in the application to this Court for leave to appeal refers specifically to the decision of the President of the Supreme Court of Appeal to refuse their application in terms of section 17(2)(f). It then goes on to explain their complaint regarding the decision of the President of the Supreme Court of Appeal in the following paragraph:

“The Applicants submit that the facts relied upon constitute *exceptional circumstances* that warranted the granting of the application for re-consideration. However, the applicants submit that the dismissal of their application for re-consideration is a *grave injustice* that infringes their right to a fair trial, more so, one of their co-accused on the same grounds had been granted leave to appeal by the Supreme Court of Appeal, reference is made to the case of *Lungisa Grifhs vs State* as it is the same case but it appeared before different Justices of the Supreme Court of Appeal. It is submitted that the Applicants’ situation is similar to that of Lungisa Grifhs who was granted leave to appeal by Justice Y T Mbata JA.” (Emphasis added.)

[171] They then refer to *Malele* and *Gwababa* and reiterate that their inconsistent treatment in comparison to Mr Grifhs constitutes exceptional circumstances and gives rise to a grave injustice. They assert that their constitutional rights have been infringed and in this respect they go on to say:

“Therefore based [on] this, the above Honourable Court has jurisdiction to entertain this matter as the dismissal of the applicants’ application for re-consideration of their application [for leave to appeal results in] a deprivation of their right to appeal and this also results [in] the infringement of their rights to be *treated equally before the law* and a *right to equal protection and benefit of the law* and this unfair treatment is shown by the fact that their co-accused whose application appeared before the other two judges was successful.” (Emphasis in the original.)

[172] From these averments, there can be no doubt that they were dissatisfied with and sought to appeal the decision of the President of the Supreme Court of Appeal. Their notice of motion is, however, less clear. It seeks an order—

- “1. [g]ranting applicants leave to appeal against both conviction and sentence of the Regional Court for Eastern Region, Mthatha, under case number RCUM144/2017 delivered by his Worship Mr Sihlahla on 28th November 2018;
2. the conviction and sentencing of the applicants be set-aside; [and]
3. further and/or alternative relief.”

[173] Neither prayer one nor two constitutes any attempt to seek leave to appeal against the decision of the President of the Supreme Court of Appeal. The only basis upon which it might be said that the notice of motion pleads an application for leave to appeal is if it falls within the ambit of prayer three seeking “further and/or alternative relief”.

[174] In *Port Nolloth Municipality*,²²³ Berman J laid down the approach to the grant of relief under such a prayer as follows:

“Finally, there remains the question of the Municipality’s right to an order in the limited form as sought by Mr Barnard on its behalf by way of the prayer for ‘further and/or alternative relief’. Such a prayer can be invoked to justify or entitle a party to an order in terms other than that set out in the notice of motion (or summons or declaration) where that order is clearly indicated in the founding (and other) affidavits (or in the pleadings) and is established by satisfactory evidence on the papers (or is given), *Trustees of the Orange River Land and Asbestos Co v King* 6 HCG 260 at 296 - 7. Relief under this prayer cannot be granted which is substantially different to that specifically claimed, unless the basis therefor has been fully canvassed, viz [namely] the party against whom such relief is to be granted has been fully apprised that relief in this particular form is being sought and has had the fullest opportunity of dealing with the claim for relief being pressed under the head of ‘further and/or alternative relief’.”²²⁴

[175] Applying this to the present matter, the relief sought in relation to the appeal against the President of the Supreme Court of Appeal’s decision in terms of the proviso

²²³ *Port Nolloth Municipality v Xhalisa; Luwalala v Port Nolloth Municipality* 1991 (3) SA 98 (C).

²²⁴ *Id* at 112C–F.

is clearly indicated in the founding affidavit. Nor is the relief claimed in the founding affidavit substantially different from that specifically claimed in the notice of motion. In any event, the State, against whom the relief is claimed, has been fully apprised of the nature of the relief claimed and has had the fullest opportunity of dealing with it, because it was squarely and extensively pleaded in the founding affidavit in the application for leave to appeal. I am accordingly satisfied that the applicants are entitled to seek leave to appeal against the decision of the President of the Supreme Court of Appeal in terms of prayer three of the notice of motion.

[176] Insofar as counsel for the applicants conceded at the hearing in this Court that *Cloete* stood in the way of an appeal against a decision of the President of the Supreme Court of Appeal, that concession was not correctly made and we are, therefore, not bound by it. Whilst *Cloete* is at pains to emphasise the limited scope for an appeal against a decision of the President of the Supreme Court of Appeal, it does acknowledge that such an appeal lies in “compelling” circumstances or where there are “some other overarching interests of justice”.²²⁵

Jurisdiction and leave to appeal

[177] I have accepted that this Court does not have jurisdiction to entertain the appeal against the decision of the Regional Court on its merits for the reasons given in the first and third judgments. However, once it is accepted that an appeal does in principle lie against a decision of the President of the Supreme Court of Appeal in terms of the proviso on the narrow bases set out above and that the applicants have indeed applied for leave to appeal against the President of the Supreme Court of Appeal’s decision, it must be considered whether this Court has jurisdiction in respect of that application. That application is based on complaints of a breach of the applicants’ fair trial and equality rights. These complaints are appropriately raised. The inconsistent treatment of the applicants in comparison to Mr Grifhs plainly raises a constitutional matter pertaining to the applicants’ right to equality before the law and their right to the equal

²²⁵ *Cloete* above n 141 at paras 40, 54, 62 and 65.

protection and benefit of the law in section 9(1) of the Constitution. The refusal of their application for leave to appeal impacts their fair trial right as accused persons “of appeal to, or review by, a higher court” in terms of section 35(3)(o) of the Constitution. These are constitutional matters of considerable substance. They are not questions of a factual nature.²²⁶ This Court, accordingly, has jurisdiction in terms of section 167(3)(b)(i) of the Constitution to entertain the application insofar as it seeks leave to appeal against the decision of the President of the Supreme Court of Appeal in terms of the proviso.

[178] Should leave to appeal be granted? The application for leave to appeal has raised significant and difficult questions pertaining to the correct interpretation of the proviso, along with questions relating to the existence or otherwise in law of an appeal to this Court against decisions of the President of the Supreme Court of Appeal under the proviso. The fact that the problem of inconsistent decisions of the panels of the Supreme Court of Appeal, first raised in *Metcash*, has resurfaced not only in this application, but in the various judgments discussed above, suggests that there is a need for the apex court to provide guidance beyond the confines of this case.

[179] Moreover, the risk of a grave injustice and of bringing the administration of justice into disrepute, because similarly situated criminal defendants assert that they have not been treated alike, must of necessity be a matter of concern for the judiciary as an institution. This is not a case where the interests of justice militate against the grant of leave to appeal as the third judgment suggests²²⁷ on the basis of *Cloete*;²²⁸ quite the contrary.

[180] On these grounds, I am satisfied that it is in the interests of justice that leave to appeal be granted in respect of this component of the application.

²²⁶ For this reason jurisdiction is, in my respectful view, not precluded by *Cloete* (above n 141 at para 21), as the third judgment suggests at [238].

²²⁷ See the third judgment at [238] to [241].

²²⁸ *Cloete* above n 141 at para 20.

What should the outcome be in this case?

[181] Determining the outcome in this case raises the following questions:

- (a) Does an appeal lie in this case?
- (b) Are the applicants and Mr Griffiths similarly situated?
- (c) Is there something more to demonstrate exceptional circumstances?
- (d) Was it in the interests of justice to grant the application for reconsideration?
- (e) Is there any basis to interfere with the exercise by the President of the Supreme Court of Appeal of her discretion?

Does an appeal lie in this case?

[182] For the reasons already alluded to,²²⁹ and subject to demonstrating that the questions in paragraphs (b) to (e) fall to be answered in the applicants' favour, an appeal against the decision of the President of the Supreme Court of Appeal does in principle lie in this case. The decision of the President of the Supreme Court of Appeal in refusing the applicants' application in terms of the proviso was the Supreme Court of Appeal's final word on the matter. It was the decision of a court, the Supreme Court of Appeal, in this case acting through a single judge in the person of the President of the Supreme Court of Appeal.

[183] For the reasons given in the first judgment, this Court has no jurisdiction to consider the appeal on the merits of the Regional Court's decision. This is because it involves the application of an established legal rule or test, which was correctly formulated by the Regional Court. It is therefore appropriate on the basis of the authorities discussed earlier in this judgment to recognise that an appeal does lie in this case in respect of the decision of the President of the Supreme Court of Appeal not to exercise her discretion in favour of the applicants in terms of the proviso.

²²⁹ See [151] to [168] above.

[184] Relevant here is the first judgment's criticism of this judgment on the basis that it will give rise to a dual appeal system, where a party aggrieved with the decision of the President of the Supreme Court of Appeal in terms of section 17(2)(f) may simultaneously prosecute appeals against both that decision and the decision of the court of first instance.²³⁰ This is not so. If this Court's jurisdiction is engaged and it is in the interests of justice to grant leave to appeal against the decision of the court of first instance, it would not be in the interests of justice to grant leave to appeal against the President of the Supreme Court of Appeal's decision in terms of section 17(2)(f). Conversely, if this Court lacks jurisdiction, or it is not in the interests of justice to grant leave to appeal against the decision of the court of first instance, recognising jurisdiction in respect of an application for leave to appeal against the President of the Supreme Court of Appeal's decision does not give rise to dual appeals.

Similarly situated?

[185] As regards whether the applicants and Mr Grifhs were similarly situated, it is essentially common cause that they were. They all faced the same charge, murder, "in that they unlawfully and intentionally killed one [Mr] Thulani Ntsikini, a male person, on 16 June 2017 and at or near Mandela Park by stabbing him with a knife thereby acting in common purpose in causing the death of the deceased". All three accused raised the same alibi defence, namely that they were at the house of the first applicant at the time of the murder. All three accused were identified by the single eyewitness called by the State, Mr Bavu, as having been at the scene of the murder and having stabbed the deceased.

[186] One possible basis for distinguishing the position of Mr Grifhs from that of the applicants is that Mr Bavu initially wrongly gave Mr Grifhs' first name as Siphamandla, whereas that was the name of the first accused. However, if one considers the transcript, this confusion may have arisen as a result of the Magistrate mistakenly having stated during cross-examination that Siphamandla was the third accused. Moreover, Mr Bavu

²³⁰ See the first judgment at [104].

later clarified the position, saying that he knew Mr Grifhs by the nickname “Mchester” and that he knew him from their having attended school together. He was not challenged on this by counsel for the accused.

[187] The only other significant difference in the evidence in comparison to these three accused is that under cross examination, Mr Bavu retreated on his evidence that Mr Grifhs, accused four and the first applicant actually stabbed the deceased. However, this leaves in place a disparity in the treatment by the panels of the Supreme Court of Appeal of the first applicant and Mr Grifhs.

[188] I am accordingly satisfied that the applicants were similarly situated to Mr Grifhs.

Something more?

[189] As to whether there was “something more” beyond the three accused being similarly situated in order to justify a finding of exceptional circumstances, I must consider whether the applicants’ application for reconsideration is patently ill-founded. The clearest indicator that this is not so is that the State has here conceded that leave to appeal ought to have been granted to the applicants against the judgment of the Regional Court.

[190] The State gives as its reasons for this concession:(a) that the Supreme Court of Appeal said in its judgment granting Mr Grifhs leave to appeal to the High Court that “it appears that there are substantial unexplained contradictions between Mr Bavu’s oral testimony and his written statement to the police”;²³¹ and (b) the vacillation of the single state witness regarding who stabbed the deceased.

[191] I am accordingly satisfied that there is “something more” than the applicants and Mr Grifhs being similarly situated.

²³¹ *Grifhs* above n 19 at para 4.

Interests of justice

[192] *Avnit* requires that in the final analysis under the proviso, consideration must be given to the overall interests of justice.²³² Weighing all of the circumstances outlined in this judgment, and taking into account the importance attached to the rights to equality and a fair trial in our constitutional order, it would, in my view, be in the overall interests of justice to uphold the applicants' application for reconsideration in terms of the proviso.

[193] The Supreme Court of Appeal's recent judgment in *Rathebe*,²³³ confirms its shared view that it is in the interests of justice that courts go the extra corrective mile to ensure equal treatment of similarly situated co-accused. This was a matter where two accused had been convicted of several counts of rape in the same trial on the same evidence of a single witness and sentenced to lengthy terms of imprisonment. Their appeal to the High Court backfired. The appeal was dismissed, and their sentences of imprisonment were increased. One of the co-accused, Mr Sekoala, nevertheless applied to the Supreme Court of Appeal for special leave to appeal. Mr Rathebe, on the other hand, accepted his fate. Special leave was granted to Mr Sekoala and his appeal succeeded, with both conviction and sentence being set aside.²³⁴

[194] After handing down judgment in Mr Sekoala's favour, and despite Mr Rathebe not having applied for special leave, the Supreme Court of Appeal took the initiative to alert Mr Rathebe to the outcome of Mr Sekoala's appeal and to issue a directive for Mr Rathebe to be released, on warning, from the correctional facility where he was serving his sentence.²³⁵ This was no doubt on account of the Court's having recognised

²³² *Avnit* above n 156 at para 5.

²³³ *Rathebe v S* [2025] ZASCA 73.

²³⁴ *Sekoala v S* [2024] ZASCA 18.

²³⁵ *Rathebe* above n 233 at para 2. I have not considered and make no comment on whether the issuing of the directive was consistent with the relevant constitutional and statutory framework. The circumstances of the issuing of the directive are not clear but follow the Court's having said the following in *Sekoala* id at para 45:

“[D]ue to the positive outcome of Mr Sekoala's appeal, it is imperative that this judgment be urgently brought to [Mr Rathebe's] attention. It will be in the interest of justice that legal aid

the iniquity of the disparate treatment to which Mr Sekoala's successful appeal gave rise. Upon receipt of the directive, Mr Rathebe belatedly pursued an application for special leave to appeal with the assistance of Legal Aid South Africa. Condonation and special leave were granted and Mr Rathebe's appeal was similarly successful. In setting aside his conviction and sentence, the Court said the following:

"Our criminal justice system seeks to promote fairness for all accused persons. It emphasises that fairness is a fundamental requirement of the Constitution during a trial, meaning that a trial court must consider what is fair in the circumstances and ensure that the accused person is treated fairly. Where a trial court failed to do so, the appellate court must be extra careful not to repeat the same misdirection. Section 9 of the Constitution provides for the equal treatment of all who appear before the courts."²³⁶

[195] Allowing an appeal against the President of the Supreme Court of Appeal's decision in the unusual and particular circumstances of this case, allows the court system to go the extra corrective mile to ensure an outcome consistent with the interests of justice.

Interference with a true discretion

[196] As pointed out, the President of the Supreme Court of Appeal exercised a true discretion in refusing the application for reconsideration. There is therefore limited scope to interfere with her decision on appeal. What presents a difficulty in making the assessment as to whether any of the limited grounds for interference have been established, is that we do not have reasons for the President of the Supreme Court of Appeal's decision beyond the following recordal in the order refusing the application in terms of the proviso:

"The application in terms of section 17(2)(f) of [the Superior Courts] Act 10 of 2013 is dismissed for the reason that no exceptional circumstances warranting reconsideration

counsel be appointed for Mr Rathebe to bring an application for special leave to appeal on an expedited basis to this Court for the consideration of his appeal. This matter will be brought to the attention of the Registrar and the President of this Court."

²³⁶ *Rathebe* above n 233 at para 12.

or variation of the decision refusing the application for leave to appeal have been established.”

[197] Whilst it would in my view be wrong to expect that the President of the Supreme Court of Appeal should provide reasons in every instance where she refuses an application in terms of the proviso, in an instance such as the present one, where there is indeed a compelling case for granting the reconsideration and a reasoned judgment is in place from the Supreme Court of Appeal granting leave to appeal to a similarly situated accused, written reasons would, with respect, be required to avoid a finding that the decision was not based on substantial reasons. Simply reciting the absence of exceptional circumstances is not enough in circumstances such as these. There are cases, referred to earlier in the judgment, where the President of the Supreme Court of Appeal has provided written reasons for her decision in terms of the proviso. Absent such reasons in the present matter, the conclusion is unavoidable that the exercise by the President of the Supreme Court of Appeal of her discretion was not based on substantial reasons. It therefore falls to be set aside on appeal. To the extent that this conclusion, and the reasoning by which it is reached, is at odds with the first, third and fourth judgments, I disagree with them.

Appropriate relief

[198] In my view, respect for the high judicial office of the President of the Supreme Court of Appeal and the requirements of comity would ordinarily dictate that the matter be remitted to her for consideration afresh. This was the approach of this Court in *Liesching I*. However, given the strength of the case that has been made out by the applicants for the grant of relief in terms of the proviso and the lengthy period for which the applicants have been in custody, it is appropriate that the President of the Supreme Court of Appeal’s decision be substituted with one granting reconsideration on the basis that exceptional circumstances have been established.

[199] This judgment should not by any means be taken to suggest that a general right of appeal exists to this Court in respect of decisions of the President of the Supreme

Court of Appeal under the proviso. To the contrary, where the President of the Supreme Court of Appeal has decided to grant reconsideration under the proviso, the finality required for her decision to be subject to appeal will be absent.²³⁷ Where reconsideration has been refused and an appeal to this Court on the merits of the decision of the court of first instance remains available, it will not ordinarily be in the interests of justice to grant leave to appeal to this Court against the decision of the President of the Supreme Court of Appeal. Where the President of the Supreme Court of Appeal's decision turns entirely on issues of fact, or on the application of a correctly formulated legal rule or test to the facts, this Court will not enjoy jurisdiction to entertain such an appeal. As pointed out in *Cloete*, no appeal will lie against the decision of the President of the Supreme Court of Appeal, unless there are the most compelling circumstances, consistent with the wording of section 17(2)(f).²³⁸ Any attempt in future to abuse the process by bringing unwarranted applications for leave to appeal against decisions under the proviso may be visited with a punitive costs order, including one *de bonis propriis* (from their own pockets) against the legal representatives responsible where the litigant was poorly advised.

Order

[200] Had this judgment commanded a majority, I would have made the following order:

1. Condonation is granted.
2. Leave to appeal is granted against the decision of the President of the Supreme Court of Appeal to dismiss the applicants' application in terms of the proviso to section 17(2)(f) of the Superior Courts Act 10 of 2013.
3. The order of the President of the Supreme Court of Appeal is set aside and substituted with the following:
 - “(a) The application in terms of the proviso to section 17(2)(f) of the Superior Courts Act 10 of 2013 is granted.

²³⁷ *Cloete* above n 141 at paras 39-41.

²³⁸ *Id* at paras 54 and 65.

- (b) The decision and order of the Supreme Court of Appeal made on 13 August 2020 dismissing the application for special leave to appeal against the dismissal of the applicants' petition in terms of section 309C of the Criminal Procedure Act 51 of 1977 is set aside.
- (c) The decision referred to in paragraph (b) is referred to the Court for reconsideration and, if necessary, variation."

MAJIEDT J:

[201] I have had the pleasure of reading the judgment prepared by Mhlantla J and Theron J (first judgment). I disagree with the outcome and reasoning in respect of jurisdiction. I take the view that this Court does not have jurisdiction in this matter and would refuse leave to appeal on that basis.

[202] I gratefully adopt the first judgment's comprehensive narration of the facts, issues and parties' submissions. I will repeat these only where necessary for emphasis and elucidation. Three important general criminal law propositions bear emphasis at the outset:

- (a) Not every wrong judgment is a miscarriage of justice. There are conceivably many cases where the case could have gone either way because the evidence is not very clear. A conclusion may follow that the court was wrong in its decision, but another court could justifiably have reached the opposite conclusion. There is no travesty of justice in that case. Not every wrong judgment is an injustice.²³⁹
- (b) Unequal outcomes for litigants in petitions for leave to appeal do not automatically constitute a grave injustice warranting reconsideration

²³⁹ *Lane and Fey NNO* above n 65 at para 4, where it was held that: "[t]he Constitution does not and could hardly ensure that litigants are protected against wrong decisions."; and *Metcash* above n 50 at para 19: "[t]he judicial system in any democracy has to rely on decisions taken in good faith by judges. As already mentioned, reasonable minds may well differ on the correct outcome of similar or even identical cases."

under section 17(2)(f) of the Superior Courts Act. The courts have said so many times.²⁴⁰

- (c) The alleged inadequacy of evidence to sustain a conviction cannot establish this Court's jurisdiction, because then every wrong decision would clothe this Court with jurisdiction, potentially resulting in an avalanche of cases in this Court. And it is unavailing for a litigant, in order to establish constitutional jurisdiction, to rely on bald averments that various constitutional rights would be infringed in the case of a wrong conviction and/or unequal outcomes.²⁴¹

[203] I shall elaborate on these general propositions presently. But first, some general remarks about the divergent approaches in the first judgment and mine.

[204] The central difference between this and the first judgment is the approach to the two different outcomes in the petitions for leave to appeal to the Supreme Court of Appeal. Contrary to the first judgment's conclusion, I hold that this Court's jurisdiction is not engaged where there are two different outcomes in the same case in respect of leave to appeal applications of different litigants. As I will endeavour to show, this Court's jurisprudence is clear and compelling in that regard, including *Metcash*,²⁴² and other cases. The constitutional arguments raised by the applicants that have found favour with my colleagues are simply the dressing up in constitutional garb of these different outcomes in the Supreme Court of Appeal petitions in the same case. The objective is plainly to overcome the binding precedent of this Court that:

²⁴⁰ *Avnit* above n 156 at para 6; *Malele* above n 163 at para 11; and *Gwababa* above n 166 at para 5.

²⁴¹ See *Fraser v ABSA Bank Ltd* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at para 40 where this Court held that:

“[T]his Court will not assume jurisdiction over a non-constitutional matter *only because an application for leave to appeal is couched in constitutional terms*. It is incumbent upon an applicant to demonstrate the existence of a bona fide constitutional question. An issue does not become a constitutional matter merely because an applicant calls it one”. (Emphasis added.)

See also *Loureiro* above n 37 at para 33.

²⁴² *Metcash* above n 50.

- (a) this Court’s jurisdiction is not engaged where there are two different outcomes in the same case in respect of leave to appeal applications of different litigants;²⁴³ and
- (b) the misapplication of an established legal principle (here, the cautionary rule) also does not engage this Court’s jurisdiction.²⁴⁴

[205] It is axiomatic that the Constitution, although ubiquitous, cannot and is not meant to be the panacea for all legal questions.²⁴⁵ Conflicting outcomes in cases do not equate to infringement of constitutional prescripts.²⁴⁶ It bears emphasis that, as this Court made plain in *Metcash*, “the Constitution does not and could hardly ensure that litigants are protected against wrong decisions”.²⁴⁷ The spectre of an opening of the floodgates looms large in this case, were we to find jurisdiction simply based on the different outcomes to the petitions in the Supreme Court of Appeal in this instance.

[206] The first judgment deals with the jurisdiction issue under various headings, and I propose doing the same. They are:

- (a) the alleged misapplication of the cautionary rule;
- (b) the alleged violation of the rights to equality, fair trial and access to courts emanating from the President of the Supreme Court of Appeal’s dismissal of the application for reconsideration in terms of section 17(2)(f) (the grave injustice argument); and
- (c) the right not to be deprived of freedom arbitrarily without just cause. I omit the discussion in the first judgment concerning the alleged failure to

²⁴³ Id.

²⁴⁴ *Mankayi* above n 37 at para 12; *Mbatha v University of Zululand* [2013] ZACC 43; 2014 (2) BCLR 123 (CC) at para 194; *Loureiro* above n 37; *Booyesen* above n 37 at para 50; *Buffalo City Metropolitan Municipality v Metgovis (Pty) Ltd* [2019] ZACC 9; 2019 (5) BCLR 533 (CC) at para 31; *Public Protector v Commissioner for the South African Revenue Service* [2020] ZACC 28; 2021 (5) BCLR 522 (CC); 2022 (1) SA 340 (CC) at para 12; and *TM obo MM v Member of the Executive Council for Health and Social Development, Gauteng* [2022] ZACC 18; 2023 (3) BCLR 315 (CC) at paras 45-6.

²⁴⁵ Du Plessis “Interpretation” in Woolman and Bishop (eds) *Constitutional Law of South Africa* 2 ed (2013) at 32-153.

²⁴⁶ Id at 32-153.

²⁴⁷ *Metcash* above n 50 at para 14. See also *Lane and Fey NNO* above n 65 at para 4.

comply with section 93ter of the Magistrates' Court Act, and the minimum sentence legislation issue, because as the first judgment rightly points out, those have been abandoned.

Misapplication of the cautionary rule

[207] Citing *Tuta*²⁴⁸ and *Villa Crop*,²⁴⁹ the first judgment correctly concludes that the applicants do not challenge the Regional Court's formulation of the cautionary rule, but the misapplication of an established legal test. It is correct in holding that "[t]herefore, the misapplication of the cautionary rule does not engage this Court's jurisdiction".²⁵⁰ Nothing more need be said about it, except that the first judgment then grasps at the various alleged constitutional breaches to avoid this well-established principle.

The grave injustice argument

Access to court and equality

[208] The first judgment correctly identifies the central issue under this rubric as the contention by the applicants that "their rights to a fair trial and equality are infringed by the President [of the Supreme Court of Appeal's] dismissal of the application for reconsideration, especially in light of the fact that Mr Grifhs was granted leave to appeal, and that reconsideration was granted in other similar cases like *Malele* and *Gwababa*".²⁵¹ I agree with the first judgment's reasoning and conclusion that, as was decided in *Malele*, *Gwababa* and *Metcash*, just because reconsideration under section 17(2)(f) of the Superior Courts Act was granted to one litigant, that another one in the same case would *ipso facto* (automatically) be entitled to a reconsideration order. That, in and by itself, does not constitute exceptional circumstances as contemplated in section 17(2)(f). And the first judgment is right when it concludes:

²⁴⁸ *Tuta* above n 37.

²⁴⁹ *Villa Crop* above n 41.

²⁵⁰ See the first judgment at [39].

²⁵¹ *Id* at [47].

“There is no basis for the applicants’ contention that the dismissal of their application for reconsideration constituted a grave injustice. This Court is bound by the precedent and principles established in *Metcash* in respect of the equality argument.”²⁵²

Right to a fair trial

[209] The first judgment, after an extensive review of this Court’s case law, holds that an alleged breach of fair trial rights engages this Court’s jurisdiction.²⁵³ There can be no quibble with that. But I differ with the abrupt, bald conclusion that “[t]he applicants allege that the decision of the trial Magistrate was not judicious”²⁵⁴ and based on incorrect principles of law. “The alleged breach of the applicants’ right to a fair trial raises a constitutional issue engaging our jurisdiction”.²⁵⁵ I reiterate that not every wrong decision of a court is a grave injustice. And there was no application of incorrect principles of law. The alleged breach of fair trial rights is a poorly disguised deflection from the real issue here – the misapplication of an established legal principle.

The right not to be deprived of freedom arbitrarily and without just cause

[210] The same method is followed by the first judgment under this rubric – a detailed discussion of this Court’s jurisprudence relating to the topic and a bald conclusion that “a potential infringement or limitation of the right in section 12(1)(a) [of the Constitution], raises a constitutional issue”.²⁵⁶ Again, there can self-evidently be no objection to this conclusion. But it is not explained (nor can it be, I daresay) how that relates to the applicants’ claim to jurisdiction in this case. It bears repetition that, stripped of all its verbiage, what they base their case on is simply a misapplication by the trial court of an established legal principle, the cautionary rule. That does not engage our jurisdiction, as this Court has held several times. The flimsy, false veneer of a constitutional breach fails to hide the true nature of the issue here.

²⁵² Id at [58].

²⁵³ Id at [60] to [64].

²⁵⁴ Id at [64]. It may well be that my Colleagues meant to say “not judicial”.

²⁵⁵ See the first judgment at [64].

²⁵⁶ Id at [71].

[211] The crux of my disagreement with the first judgment lies in its application of these principles to the present matter. It cites *Boesak*²⁵⁷ and then proceeds to make the point, (I am summarising and paraphrasing) that the Constitution imposes a duty on all courts to ensure that a legal rule is not applied in a manner that violates constitutional rights or that is inconsistent with the Constitution.²⁵⁸ It then holds that because the State has made a concession that “it would be ‘foolhardy’ for it to support the conviction of the applicants, this Court cannot ignore the potential infringement of the applicants’ right not to be deprived of their freedom arbitrarily or without just cause”.²⁵⁹ That is so, because this Court must “give effect to the fundamental and founding constitutional value of freedom”.²⁶⁰ And it holds that “[t]he possible risk of a wrongful conviction directly impacts the right of the applicants not to be deprived of their freedom arbitrarily”.²⁶¹

[212] The first and obvious point that must be made is that the State’s concession does not bind this Court, even where the State is *dominus litis* (master of the suit) and “[a] concession by the State that it is not able to support or defend a conviction should not be taken lightly by a court”.²⁶² As is the case with any litigant before a court, the State’s stance on any issues of law or fact can never be more than mere submissions which need to be tested for correctness. That is more so where, as here, the State concedes the merits of a case. Jurisdiction is a matter to be decided by a court; after all, it concerns the power of the court to hear and decide a case, the first and crucially important step in the process of adjudication.²⁶³

²⁵⁷ *Boesak* above n 97.

²⁵⁸ See the first judgment at [73] to [74].

²⁵⁹ *Id* at [75].

²⁶⁰ *Id*.

²⁶¹ *Id* at [76].

²⁶² *Id* at [95].

²⁶³ *Jiba* above n 37 at para 37; *Loureiro* above n 37 at para 31; *Boesak* above n 97 at para 11; and *Fraser* above n 241 at para 35.

[213] My Colleagues hold that *Metcash* is distinguishable from this case since it concerned civil proceedings.²⁶⁴ They hold that here this Court is “faced with the unequal treatment of litigants in the context of a criminal matter which implicates the right not to be deprived of freedom arbitrarily and without just cause and the right to equality”.²⁶⁵ The first judgment then refers to the applicants’ contention, in an effort to bolster their argument of unequal treatment, that their co-accused, who was convicted and sentenced on the same evidence, successfully obtained leave to appeal.²⁶⁶ My colleagues take the view that there are a few factors which converge to found jurisdiction in this matter, namely the alleged misapplication of the cautionary rule in the Magistrates’ Court, coupled with the Supreme Court of Appeal’s acknowledgment of the fact that the evidence of the single witness relied upon by the Magistrate to convict the applicants (and their co-accused Mr Grifhs) had “substantial unexplained contradictions”.²⁶⁷ According to the first judgment, these factors make the incarceration of the applicants an infringement of the right not to be deprived of freedom arbitrarily and without just cause. This, they then hold, engages this Court’s jurisdiction.

[214] The first judgment found jurisdiction on the basis that the applicants’ constitutional rights to a fair trial and freedom and security of the person have been infringed by the trial court.²⁶⁸ This infringement, they hold, is a consequence of the trial court’s misapplication of the cautionary rule.²⁶⁹ According to the first judgment, “[i]n a long line of cases, this Court has held that a breach of the right to a fair trial is a constitutional issue”.²⁷⁰ They note that “[t]he purpose of section 35(3), read holistically, is to minimise the risk of wrong convictions and the failure of justice”.²⁷¹

²⁶⁴ See the first judgment at [96].

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.* at [41] and [93].

²⁶⁸ *Id.* at [59] and [98].

²⁶⁹ *Id.* at [64].

²⁷⁰ *Id.* at [59].

²⁷¹ *Id.* at [63].

[215] The first judgment’s ultimate conclusion is based on *Boesak*. But it quotes that case out of context. The full quotation from *Boesak* is “the application of a legal rule *by the Supreme Court of Appeal* may constitute a constitutional matter if the application of the rule is inconsistent with some right or principle of the Constitution”.²⁷² There is a clear reference to the Supreme Court of Appeal. This omission in the first judgment extends the dictum in *Boesak* to establishing constitutional jurisdiction where there has been an application of a legal rule by any lower court (in this case, the Magistrates’ Court) in a manner that is inconsistent with some right or principle of the Constitution.

[216] This Court in *Boesak* laid down “[c]ertain broad principles for criminal cases”.²⁷³ The Court qualified these broad principles by explaining that the incorrect “application of a legal rule by the Supreme Court of Appeal *may* constitute a constitutional matter [provided that it] is inconsistent with some right or principle of the Constitution”.²⁷⁴ These are circumscribed grounds which, in my view, cover restricted terrain, compared to what the first judgment purports to do. The extension in the first judgment potentially widens the scope of this Court’s constitutional jurisdiction past the contours envisaged in *Boesak*. It is an extension with potential alarming implications. On that approach, one would be able to establish constitutional jurisdiction in all criminal matters in which it is alleged that there has been a misapplication of a legal rule by the lower courts. This is so, because the rights under sections 12(1)(a) and 35(3) of the Constitution will always be implicated where there is a misapplication of a criminal law rule which results in the conviction of the accused.

[217] As I read the case, the passages in *Boesak* are far less generous than what the first judgment understands them to be. For instance, it was held:

“In the context of section 167(3) of the Constitution *the question whether evidence is sufficient to justify a finding of guilt beyond reasonable doubt cannot in itself be a*

²⁷² *Boesak* above n 97 at para 15. (Emphasis added.)

²⁷³ *Id.*

²⁷⁴ *Id.*

*constitutional matter. Otherwise, all criminal cases would be constitutional matters.*²⁷⁵ (Emphasis added.)

[218] Ultimately, this is what seems to be the applicants’ contention here, that if the trial court had correctly applied the cautionary rule, it would have found that there was insufficient evidence to justify a finding of guilt beyond a reasonable doubt. That is a misapplication of an established legal principle and that does not engage this Court’s jurisdiction, as was reaffirmed in this Court’s recent decision in *Olesitse*.²⁷⁶

[219] The first judgment then relies on a quote from *Molaudzi* to support their proposition that the interests of justice require that wrongful convictions, which would result in substantial hardship or injustice, must not be allowed to stand. It opines that a court should not permit injustice on grounds that procedural factors preclude it from intervening in a particular case. For that view it places reliance on this passage from *Molaudzi*: “[t]o perpetuate an error is no virtue but to correct it is a compulsion of judicial conscience”.²⁷⁷ But, as is rightly acknowledged by my Colleagues, that passage relates to a different context, in reference to the strict application of the doctrine of *res judicata* and the need to relax it in the interests of justice.²⁷⁸

[220] The first judgment states that “criminal cases such as *Makhubela* and *Molaudzi* involved the unequal treatment of litigants, impacting the applicants’ rights to freedom and equality. This Court intervened, held that it had jurisdiction and granted leave to appeal in these matters, notwithstanding the *Metcash* principle”.²⁷⁹ It is striking that *Molaudzi* makes no mention at all of *Metcash*. This can only be because in *Molaudzi* no reliance was placed on the unequal treatment between co-accused persons in order to establish this Court’s jurisdiction.

²⁷⁵ Id at para 16.

²⁷⁶ *Mmabasotho Christinah Olesitse N.O. v Minister of Police* [2023] ZACC 35; 2024 (2) BCLR 238 (CC) at para 32.

²⁷⁷ See the first judgment at [77].

²⁷⁸ *Molaudzi* above n 106 at para 30.

²⁷⁹ See the first judgment at [97].

[221] On the facts, *Molaudzi* has some similarities to this case. In *Molaudzi* an accused was convicted of murder on the basis of common purpose. In this Court, the applicant's complaint was that he was convicted almost exclusively on the extra-curial statements made by his co-accused.²⁸⁰ Mr Molaudzi submitted that the evidence of his co-accused, Mr Majteke – which primarily implicated him – was unreliable.²⁸¹ In the present matter, there is also before us a conviction for murder on the basis of common purpose. But here the complaint does not relate to a conviction on the basis of unreliable extra-curial statements. It, instead, relates to a conviction on the basis of the contradictory and inconsistent evidence of a single witness in alleged violation of the cautionary rule.

[222] I accept that, in principle, *Molaudzi* is similar to this case inasmuch as it also implicates the issue of equal treatment between co-accused persons. In *Molaudzi*, the applicant brought an application for leave to appeal against his conviction and sentence in this Court. This was the first application Mr Molaudzi had brought before the Court (first application). At the time of the application, Mr Molaudzi was unrepresented. This Court dismissed the application on the basis that it did not raise a proper constitutional issue for this Court to entertain. The following year, two of Mr Molaudzi's co-accused applied for leave to appeal against their convictions and sentences but raised constitutional arguments regarding the evidence admitted against them.²⁸² They challenged the constitutional validity of the admissibility of extra-curial statements of an accused against a co-accused in a criminal trial.²⁸³ This Court granted leave to appeal, upheld the appeal and set aside the convictions and sentences of the two applicants.²⁸⁴

²⁸⁰ *Molaudzi* above n 106 at para 4.

²⁸¹ *Id* at para 8.

²⁸² *Id* at para 10.

²⁸³ *Id*.

²⁸⁴ *Id*.

[223] Pursuant to directions issued by this Court, Mr Molaudzi brought a further application (second application) for leave to appeal to this Court. In that application, he raised the same arguments as his two co-accused who had been successful in their application. This Court then issued further directions to the parties, calling for written submissions on whether the Court was precluded from entertaining the matter on the basis that it was *res judicata*.²⁸⁵ Mr Molaudzi submitted that his first application had failed to establish this Court's jurisdiction as it was an attack on the factual findings of the High Court. However, his second application raised a constitutional issue. That issue is the constitutional tenability of the admissibility of extra-curial statements by an accused against a co-accused.²⁸⁶

[224] This Court agreed that the matter raised a constitutional issue which places the case firmly within its jurisdiction.²⁸⁷ The Court emphasised that the admissibility of an extra-curial statement by an accused against a co-accused in a criminal trial engages this Court's jurisdiction as it implicates the right to equality before the law.²⁸⁸ This Court in *Molaudzi* was further satisfied that, in addition to the constitutional issue raised, the second application brought by Mr Molaudzi raised unusual questions about the doctrine of *res judicata* in criminal matters.²⁸⁹ The Court thus found the application to raise arguable points of law of general public importance. It was also in the interests of justice for this Court to grant leave to appeal.

[225] This Court in *Molaudzi* held that it was in the interests of justice for this Court to relax the doctrine of *res judicata* in that case in order to hear the applicant's second application which sought to overturn his conviction and sentence by raising a constitutional issue. This relaxation was required in order to address the fact that Mr Molaudzi had already brought an unsuccessful application to the Court to overturn

²⁸⁵ Id at para 11.

²⁸⁶ Id at para 12.

²⁸⁷ Id at para 13.

²⁸⁸ Id.

²⁸⁹ Id at paras 13 and 19.

his conviction and sentence. In deciding to relax the doctrine, this Court found it significant that Mr Molaudzi's co-accused, convicted on similar evidence, had their convictions and sentences overturned.²⁹⁰ Therefore, a grave injustice would result from denying Mr Molaudzi the same relief simply because in his first application he did not have the benefit of legal representation, which resulted in the failure to raise a meritorious constitutional issue.²⁹¹ It is important to note that the Court held that Mr Molaudzi had indeed raised a constitutional issue in his second application (the constitutional tenability of the use of extra-curial statements by a co-accused). There was also an arguable point of law of general public importance raised. The Court thus found that both its constitutional and general jurisdiction were engaged.

[226] From my reading of *Molaudzi*, it seems that considerations of fairness and equal treatment between co-accused persons played a more central role when the Court determined leave to appeal and ruled on the merits. It was not a decisive factor regarding the determination of jurisdiction as the applicant had established jurisdiction by raising a constitutional issue in his papers. The same cannot be said in the present case. It seems to me that the first judgment relies on the general violation of constitutional rights in order to establish jurisdiction, instead of identifying a constitutional issue or arguable point of law raised by the applicants. In my view, the first judgment seeks to establish a principle that the incorrect application of a settled criminal law principle which results in the infringement of constitutional rights will amount to a constitutional issue, clothing this Court with jurisdiction. That was not the *ratio decidendi* (reason for the decision) in *Molaudzi*.

[227] The first judgment also appears to attempt to relax the *Metcash* principle in criminal cases where unequal treatment between co-accused persons results in what the Court finds to be unjustified incarceration. Principles of constitutional jurisdiction then start to become nebulous, as it seems to me that there is a willingness to relax central

²⁹⁰ Id at para 40.

²⁹¹ Id.

principles in order to reach an outcome which the Court believes to be just and equitable in the circumstances. That is something a court needs to guard against.

[228] There appears to be a general reliance by the first judgment on the general infringement of a cluster of the applicants' constitutional rights, which flow from what is seen to be a wrong conviction. But when one disassembles all these complaints of constitutional breaches, it all leads back to the central issue, the trial court's misapplication of the well-established cautionary rule. That does not engage this Court's jurisdiction.

[229] According to the first judgment, there is no floodgates risk here, for the following reasons:

“This Court must give effect to the substantive protection afforded to the applicants by the right not to be deprived of their freedom arbitrarily or without just cause. *Where the State has conceded that it would be ‘foolhardy’ for it to support the conviction of the applicants, this Court cannot ignore the potential infringement of the applicants’ right not to be deprived of their freedom arbitrarily or without just cause.* This Court is called upon to give effect to the fundamental and founding constitutional value of freedom.”²⁹² (Emphasis added.)

[230] The first judgment then continues:

“*There is also no risk that this case will open the floodgates. Rarely does the State concede that a conviction is unsustainable, as has happened in this case. In any event, an argument that this Court would be inundated with criminal matters must be rejected.* This Court has held that it is inappropriate for this Court to consider ‘an increase in its workload’ when deciding whether a matter raises a constitutional issue. The ‘interests of justice’ test can be used to determine which matters this Court will consider entertaining.”²⁹³ (Emphasis added.)

²⁹² See the first judgment at [75].

²⁹³ Id at [101]. See *Jacobs* above n 99 at paras 159-161.

[231] As can be seen in this passage, my Colleagues cite *Jacobs*.²⁹⁴ The relevant passage in *Jacobs* is this:

“There is, generally speaking, no discretion involved in deciding that and a court should not exclude from its jurisdiction a matter that falls within its jurisdiction just because holding that such a matter falls within its jurisdiction may increase the workload of the Court.”²⁹⁵

[232] But that dictum in *Jacobs* must be considered against section 167(3)(b)(i) and (c) of the Constitution:

“The Constitutional Court—

...

(b) may decide—

(i) constitutional matters; and

...

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

[233] Section 167(3) is unambiguous that this Court is not hamstrung when considering the issue of jurisdiction.²⁹⁶ A plain reading of section 167(3)(b) and (c) suggests that this Court is not straitjacketed when determining which matters fall within its jurisdiction. The Constitution endows the Court with broad powers to determine which matters fall within its jurisdiction and the Court may take into account various factors when doing so.

²⁹⁴ *Jacobs* above n 99.

²⁹⁵ *Id* at para 161.

²⁹⁶ See *University of Johannesburg v Auckland Park Theological Seminary* [2021] ZACC 13; 2021 (6) SA 1 (CC); 2021 (8) BCLR 807 (CC) at para 40 where this Court held that litigants’ access to this Court “is not merely for the taking and this Court has made it clear that ‘not all litigants who knock on this Court’s door’ will be granted leave to appeal”. In *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31 (CC); 2015 (12) BCLR 1407 (CC); 2016 (1) SA 132 (CC) at para 134 the majority held that “[i]t follows that ‘the substantive merits of a claim cannot determine whether a court has jurisdiction to hear it’”.

Reconsideration order under the proviso in section 17(2)(f) of the Superior Courts Act

[234] I have read the judgment of my Colleague Dodson AJ (second judgment). He holds that an appeal does lie against the decision of the President of the Supreme Court of Appeal in terms of the proviso to section 17(2)(f) of the Superior Courts Act (the President of the Supreme Court of Appeal’s decision).²⁹⁷ Furthermore, the second judgment proceeds to hold that the President of the Supreme Court of Appeal’s decision engages this Court’s jurisdiction, grants leave to appeal, upholds the appeal²⁹⁸ (which it holds has been lodged based on the prayer in the applicants’ notice of motion for “further and/or alternative relief”)²⁹⁹ and substitutes the President of the Supreme Court of Appeal’s decision with one granting a reconsideration order.³⁰⁰

[235] The second judgment has to jump through several legal hoops with considerable legal twists and turns to reach the orders it makes. I disagree on several fronts with the legal contortions employed to reach the outcome at which it eventually arrives. I will deal with them separately.

[236] First, I disagree that the President of the Supreme Court of Appeal’s decision engages our jurisdiction. It was held thus unequivocally in *Cloete*, where this Court stated that, “ordinarily, this Court will not have jurisdiction to hear these appeals because their grounds are factual in nature”.³⁰¹ The Court left open the further question whether the section 17(2)(f) decision is a decision of a court.³⁰² The Court also held that even where this Court will have jurisdiction to hear the appeal, the interests of justice will more often than not militate against the granting of leave to appeal.³⁰³ While

²⁹⁷ See the second judgment at [176] and [177].

²⁹⁸ *Id* at [177] to [183].

²⁹⁹ *Id* at [172] to [175].

³⁰⁰ As stated in the second judgment at [198], this drastic order is motivated by “the strength of the case that has been made out by the applicants for the grant of relief in terms of the proviso and the lengthy period for which the applicants have been in custody”.

³⁰¹ *Cloete* above n 141 at para 20.

³⁰² *Id*.

³⁰³ *Id* at para 21.

the latter was expressed in general terms, there is nothing in this case to suggest otherwise.

[237] My Colleague seeks to distinguish *Cloete*. The attempt falls flat at the first hurdle. The first and foremost reason why the Court adopted that approach in respect of jurisdiction is that, as the second judgment correctly points out, absent compelling circumstances, an appeal would not lie against a decision of the President of the Supreme Court of Appeal. The second judgment correctly explains that “a refusal of reconsideration does not bar the applicant from then applying to this Court for leave to appeal on the merits of the original High Court (or, as in this case, the Regional Court) judgment subject to appeal”.³⁰⁴ And the second judgment is right when it states “if appeals were allowed as a matter of course against the President of the Supreme Court of Appeal’s decision in terms of the proviso, it would allow for dual avenues for appeal, one against the decision of the President of the Supreme Court of Appeal and the other against the original decision of the High Court”.³⁰⁵

[238] *Cloete* concerned an appeal against the President of the Supreme Court of Appeal’s decision to refuse a reconsideration application. This Court in *Cloete* directly addressed the question whether an appeal against a section 17(2)(f) decision lies to this Court. The Court held that “in the ordinary course, the decision is not appealable, unless there are some other overarching interests of justice that require this Court to grant leave to appeal”.³⁰⁶ It added:

“It may be that in exceptional circumstances a section 17(2)(f) decision is considered final in nature and hence, in principle, appealable. This is where, for instance, no appeal to this Court on the merits of the court a quo’s judgment is available to the applicant. In such cases the decision may be final and appealable, *but whether the application to appeal that decision will engage this Court’s jurisdiction, for reasons*

³⁰⁴ See the second judgment at [164], citing *Cloete* above n 141 at paras 42-53.

³⁰⁵ *Id.*

³⁰⁶ *Cloete* above n 141 at para 40.

outlined above, is a different question. In most instances, as in this case, it will not.”³⁰⁷

(Emphasis added.)

[239] This Court further held that the decision will ordinarily not be appealable because “[i]ts grounds are purely factual in nature as they target the President’s decision regarding the existence of exceptional circumstances. An appeal of this nature does not engage the jurisdiction of this Court”.³⁰⁸ The Court thus held that an applicant’s inability to appeal the President of the Supreme Court of Appeal’s decision will usually not result in undue prejudice as the applicant still has an opportunity to launch an appeal to this Court on the merits of the case. The Court put it thus:

“Two results are possible. If this Court grants leave to appeal, then there is plainly no prejudice. If this Court refuses leave to appeal, it means that the litigant has then failed to persuade four different judicial fora that she has reasonable prospects of success – the High Court Judge, the two Judges in the Supreme Court of Appeal, the President of the Supreme Court of Appeal and this Court. It is then perfectly fair and non-prejudicial to say that the matter has come to an end.”³⁰⁹

[240] This Court then, importantly, cautioned as follows:

“Granting leave to appeal against the President’s decision in terms of section 17(2)(f) would normally result in the same difficulties that arise with the determination of interlocutory orders – leaving protracted litigation pending, piecemeal adjudication of issues and ultimately wasting court resources at the expense of the parties.”³¹⁰

That caution is particularly apposite in the present matter.

[241] As I understand it, the second judgment’s primary basis for the attempt to distinguish *Cloete* is premised on the circumstances of the case insofar as, “absent an

³⁰⁷ Id at para 41.

³⁰⁸ Id at para 37.

³⁰⁹ Id at para 63.

³¹⁰ Id at para 59.

appeal against the decision of the President of the Supreme Court of Appeal in terms of the proviso, her decision is final and there is no further appellate remedy”.³¹¹ According to the second judgment, “there is accordingly no dual appeal process” in matters such as this one, and the applicants would be prejudiced if a right of appeal against the President of the Supreme Court of Appeal’s decision under the proviso was not acknowledged.³¹² Again, that is directly contrary to this Court’s judgment in *Cloete* to which we are bound unless, of course, it was clearly wrongly decided, which is not what is suggested by the second judgment. There is no basis to distinguish *Cloete*. Then the second judgment invokes *Liesching I* to conclude that the President of the Supreme Court of Appeal’s decision is appealable.³¹³

[242] *Liesching I* appears to me to be distinguishable on the facts. There, this Court ultimately concluded:

“The President did not consider whether the further evidence sought to be adduced was an exceptional circumstance. The section enjoins him to apply his mind to the issue and make a determination whether the matter presents an exceptional circumstance that warrants its referral to the Court for reconsideration or variation, in the interests of justice. The President should be given the opportunity to do so. The matter should, therefore, be remitted to the President.”³¹⁴

In this instance, we are not dealing with a disregard of further evidence as a possible exceptional circumstance.

[243] Next I consider the “further and/or alternative relief” aspect. While it does seem a long shot to hold that the applicants’ claim for further and/or alternative relief is adequate to encompass an appeal against the President of the Supreme Court of Appeal’s decision, I accept that approach since the case involves the liberty of

³¹¹ See the second judgment at [165].

³¹² *Id.*

³¹³ *Id.* at [126] to [129], referring to *Liesching I* above n 170.

³¹⁴ *Liesching I* above n 170 at para 65.

individuals. The only proviso to accepting this approach is that reliance on a prayer for “further and/or alternative relief” is limited to narrow, circumscribed instances. Permitting a party to obtain an order in terms other than those set out in the notice of motion, under the prayer, “further and/or alternative relief, will only be allowed where the basis for substantially different relief is clearly indicated in the founding affidavit and established by satisfactory evidence on the papers”.³¹⁵

[244] While the applicants do not directly make mention of an appeal against the President of the Supreme Court of Appeal’s decision, there are copious references in the papers to their disagreement and dissatisfaction with that decision. They do so both in respect of the merits and this Court’s jurisdiction. Those averments are followed up and elucidated in the applicants’ written submissions which point to an appeal against the President of the Supreme Court of Appeal’s decision. The submissions raise infringement of the applicants’ fair trial rights under section 35 of the Constitution, and of their right to equality under section 9 of the Constitution.

[245] The last aspect for consideration is the second judgment’s invocation of the recent decision of the Supreme Court of Appeal in *Rathebe*. Quite apart from the fact that the judgment is not binding on this Court, it does not refer to *Metcash* at all. As explicated earlier, *Metcash* is binding authority in both civil *and* criminal cases. Neither the first, nor the second judgments, nor *Rathebe*, recognise this crucial aspect. And that is where I part ways with all three of them. Moreover, despite *Rathebe* not relating to a reconsideration application, my Colleague, Dodson AJ, adopts it to support his finding that the reconsideration application in this case should succeed. In any event, *Rathebe* does not change what has been pronounced by this Court about appeals against reconsideration applications in *Cloete* and *Liesching I*.

³¹⁵ Daniels *Beck’s Theory and Principles of Pleadings in Civil Actions* 6 ed (2002) at 4.1.11 cites the example of the court in *Ireland v Ireland* 1925 CPD 173, in a claim for divorce on the grounds of adultery, granting a restitution order under the prayer for alternative relief, as the evidence clearly showed desertion.

[246] For all these reasons I would dismiss the application for leave to appeal on the basis that it does not engage this Court's jurisdiction.

BILCHITZ AJ:

Introduction

[247] I have had the pleasure of reading the judgments prepared by my Colleagues Mhlantla J and Theron J (first judgment), Dodson AJ (second judgment), Majiedt J (third judgment) and Zondo CJ (fifth judgment). These judgments have outlined the main legal approaches in deciding this case. This judgment outlines the central issue from my perspective, and the reasons for my qualified concurrence with the first judgment.

[248] In my view, the most important issue, which merits the attention of this Court, relates to the different decisions relating to leave to appeal reached by two different panels of the Supreme Court of Appeal. The result of these decisions is that one individual – Mr Grifhs – is currently out on bail and may have his conviction overturned whereas the applicants are currently incarcerated and, without any intervention of this Court, will serve sentences of 16 years' imprisonment – even though they are similarly situated and were convicted on the basis of the same evidence and factual complex. This differential treatment was not considered sufficient by the President of the Supreme Court of Appeal to require re-consideration in terms of the proviso to section 17(2)(f) of the decision of the panel that refused leave to appeal to the applicants.

[249] The situation that arose in this case is perhaps one of the clearest cases of unequal treatment that can arise due to the structure and rules of our system of criminal justice. If the status quo in this case is allowed to stand, it can lead to the violation of several fundamental rights. These include the right to equal protection and benefit of the law (section 9(1)), the right not to be deprived of freedom arbitrarily or without just cause

(section 12(1)(a)), and the right of an accused person to a fair trial which includes the right of appeal to, or review by a higher court (section 35(3)(o)). Leaving the status quo undisturbed could also lead to the perpetuation of a grave injustice, and bring the administration of justice into disrepute. It thus, most certainly, falls within the constitutional jurisdiction of this Court and merits its attention and intervention. I thus agree with my Colleagues, Theron J and Mhlantla J, that the violation of constitutional rights is a central founding basis for this Court to exercise jurisdiction and to grant leave to appeal to this Court.

[250] However, I do not agree with the first judgment that we are bound to affirm the principles in *Metcash* – the recognition that the current position “does not sit comfortably”³¹⁶ appears to me to call that troubling precedent into question. I have grave doubts as to the correctness of the majority decision in *Metcash* in civil cases and I am inclined to the view that it crosses the threshold of being “clearly wrong” which would, if necessary, permit this Court to overturn it.³¹⁷ As Ngcobo J, in a dissenting judgment, eloquently wrote at the time, if the Supreme Court of Appeal sits in panels as it is constitutionally permitted to do, “it has the duty to make sure that its system is not applied in a manner that results in similarly situated litigants being treated differently with the result that an injustice ensues”.³¹⁸ I, thus, do not concur with the parts of the first judgment that affirm the reasoning and outcome in *Metcash*.³¹⁹

[251] The third judgment illustrates the dangers of transposing the approach adopted by the majority in *Metcash* into the criminal context – allowing similarly situated accused persons to be faced with vastly different consequences.³²⁰ Yet, the criminal context has its own unique dimensions. As is discussed in more detail in the first

³¹⁶ See the first judgment at [94].

³¹⁷ See *Camps Bay Ratepayers’ and Residents’ Association v Harrison* [2010] ZACC 19; 2011 (2) BCLR 121 (CC); 2011 (4) SA 42 (CC) at para 28 and *Bwanya v Master of the High Court, Cape Town* [2021] ZACC 51; 2022 (3) SA 250 (CC); 2022 (4) BCLR 410 (CC) at para 46.

³¹⁸ *Metcash* above n 50 at para 51.

³¹⁹ See the first judgment at [49] to [58].

³²⁰ See the third judgment at [204], [205], [208] and [227].

judgment, there is a specific right not to be deprived of freedom arbitrarily and without just cause which places emphasis on the importance of freedom and that there be strong substantive grounds for the denial thereof.³²¹ The interests at stake in a criminal trial have the highest degree of significance where incarceration for long periods is a real possibility – as in this case. There are also specific entitlements to a fair trial, including the right of appeal to, or review by, a higher court: they guarantee the highest degree of fairness when a court is faced with making a determination relating to a conviction for a criminal offence. Divergent decisions which result in differential treatment could lead to lengthy periods of imprisonment for some accused persons while others who are similarly situated walk free. Such outcomes cannot just be accepted as an inevitable feature of the judicial process. The effect of such divergent decisions can lead to grave injustices. One of the purposes of the right to appeal is to provide opportunities to remedy inequitable outcomes of this kind, which were not deliberately intended by the lower courts.

[252] Consequently, there are particularly compelling reasons for this Court to recognise that its constitutional jurisdiction is engaged in a matter such as the one that is before us and that the interests of justice require leave to appeal to be granted. I now elaborate on the reasons given in the first judgment as to why this Court should decide substantively in favour of granting leave to appeal to the applicants to the High Court in Mthatha.

Judicial consideration of trials and appeals with multiple accused persons

[253] The Criminal Procedure Act has specific provisions that relate to when accused persons may be tried together. Section 155 of the Criminal Procedure Act allows participants in the same criminal offence to be tried together.³²² Section 156 allows for persons committing separate offences at the same time and place to be tried together, where the evidence admissible against one person will be admissible against the

³²¹ See the first judgment at [65] to [77].

³²² Id section 155.

others.³²³ Section 157(1) allows for the joinder of the trials of different accused in the same criminal proceedings.³²⁴

[254] There are a range of reasons for these provisions. In an already overburdened court system, to try accused persons separately for committing the same offence (or where the case rests on the same body of evidence) can be inefficient and a waste of resources. There are also important reasons of fairness why persons charged with the same offence or on the basis of the same body of evidence, should generally be tried together.³²⁵

[255] The Supreme Court of the United States had reason to examine the rationale behind joint trials in *Richardson*.³²⁶ Scalia J, on behalf of the majority, wrote the following, emphasising both the efficiency and fairness rationales:

“Joint trials play a vital role in the criminal justice system. . . . It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favouring the last-tried defendants who have the advantage of knowing the prosecution’s case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability – advantages which sometimes operate to the defendant’s benefit. Even apart from these tactical considerations, joint trials generally serve the interests of

³²³ Id section 156.

³²⁴ Id. Conversely, section 157(2) also allows for a separation of trials in certain circumstances.

³²⁵ See Leipold and Abbasi “The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study” (2006) 59 *Vanderbilt Law Review* 349 at 354-5. These authors also interestingly find little prejudice to accused persons being tried together with other co-accused persons: see 401.

³²⁶ *Richardson* above n 203. See also the earlier case of *Bruton* above n 203 where, White J (dissenting) at 143 stated the following:

“It is also worth saying that separate trials are apt to have varying consequences for legally indistinguishable defendants. The unfairness of this is confirmed by the common prosecutorial experience of seeing co-defendants who are tried separately strenuously jockeying for position with regard to who should be the first to be tried.”

justice by avoiding the *scandal and inequity* of inconsistent verdicts.”³²⁷ (Emphasis added.)

[256] Permitting multiple separate trials of accused persons for the same offence also creates many possibilities of gaming the system. Let us imagine a hypothetical situation in which the prosecution has gathered the same evidence against two accused persons. The prosecution – as is often the case – is uncertain if judges will deem the evidence sufficient to sustain a conviction. It recognises the fact that a determination of guilt in a criminal trial involves elements of judicial discretion and that different judges may therefore reach different conclusions. Whilst it would prefer both accused to be convicted, it wants to maximise the opportunity to gain at least one conviction.³²⁸ As a result, it decides to try these individuals in two different trials. The same evidence is brought in each trial against each accused. The judge in the one case finds there to be evidence beyond a reasonable doubt of guilt whereas the judge in the other case finds that onus has not been discharged. Whilst both accused persons have received the diligent attention of a judicial officer and both decisions are reached in good faith, the divergent outcomes seem manifestly unfair. The prosecution here can utilise the inevitable fact that there are elements of judicial discretion in a criminal trial to avoid, metaphorically, “putting all its eggs into one basket” and thus seek to maximise the possibility of obtaining at least one conviction even though different results may emerge in relation to the same set of facts and the same crime. The situation itself is likely to bring the administration of justice into disrepute, rightly causing consternation amongst the public.

[257] Such a situation is also unacceptable if it occurs on appeal. Our law does not specify that accused persons who were tried together are required to appeal together – there may be good reasons for that, given that different circumstances may apply to different accused persons or that they may lack the ability to co-ordinate their appeals. Nevertheless, the system inevitably admits of possibilities of gaming. Given the

³²⁷ *Richardson* id at 209-10.

³²⁸ On a different possibility of gaming by the prosecution, see *Leipold and Abbasi* above n 325 at 394.

inevitability of judicial discretion, such a system encourages convicted persons who committed the same crime to apply for appeal separately in order to maximise the chances that some of them would have their convictions overturned. If multiple accused persons convicted of the same offence lodge separate appeals, it is for this reason desirable that the judicial system endeavours to ensure that the same judges that consider such an appeal (or petition) in relation to one accused, also do so in relation to the other accused.

[258] The situation I have described remains unacceptable even if it occurs inadvertently. The goal of our criminal justice system should be to dispense criminal justice equally and the fairness of its procedures must take account of the possibility that discretion may be exercised differently by different judges.³²⁹ That is not merely an inevitable feature of the judicial system to which we must simply accommodate ourselves, as is suggested by the first and third judgments in the segments thereof that affirm the reasoning in *Metcash*.³³⁰ It is rather a fact which must be borne in mind when moulding the criminal justice system and its rules to ensure it achieves the core values of fairness, and equality as well as the fundamental rights guarantees that are at stake. As such, it is incumbent upon the judiciary to ensure the criminal justice system is sufficiently flexible to avoid the type of grave injustice that arose in this case.

[259] The recent case of *Rathebe* dealt with circumstances in which one accused person, Mr Sekoala, appealed his rape conviction successfully to the Supreme Court of Appeal.³³¹ The other accused person, Mr Rathebe, had not appealed to the Supreme Court of Appeal. Both accused persons were convicted on the same facts and the same evidence. Upon the acquittal of Mr Sekoala, the Supreme Court of Appeal, of its own initiative, ordered that the judgment be brought to

³²⁹ There has been a lot of empirical research internationally on discretion in judging and how judges are susceptible – as all humans are – to various errors in reasoning exposed by behavioural psychologists and economists. For a review of some of the literature and the importance of taking account of this in South Africa, see Gravett “The Myth of Rationality: Cognitive Biases and Heuristics in Judicial Decision-making” (2017) 134 *SALJ* 53 at 53-79.

³³⁰ See the first judgment at [54] to [58] and the third judgment at [204] to [205].

³³¹ *Rathebe* above n 233.

Mr Rathebe's attention and that Legal Aid counsel be appointed for him to bring an application for special leave to appeal on an expedited basis.

[260] In her judgment, Mocumie JA stated that this Court's judgment in *Molaudzi* "makes plain the importance of the need to serve the interests of justice in cases where co-accused persons have 'split appeals' and unfortunate anomalies consequently occur".³³² She also stated that section 9 of the Constitution "provides for the equal treatment of all who appear before the courts".³³³

[261] This case is different in that two separate applications for leave to appeal were lodged. Yet, the reason the applications for leave to appeal in this case were considered by different panels is that the administration of the judicial system is not always capable of ascertaining that different accused persons may lodge different applications for leave to appeal in relation to the same judgment of a lower court. In the future – with the advent of artificial intelligence and digitisation – it may well be easier to avoid such an anomalous situation from arising. At present, though, the state of our administration allows different accused persons convicted of the same crime with the same body of evidence to have their applications for leave to appeal considered by a different panel of judges. As happened in this case, that situation can lead to substantive unfairness and divergent outcomes. It is important not to make a virtue out of an administrative problem and for this Court to correct blatant injustices where they arise from administrative failures in the operation of the judicial system.

The duty of courts to achieve substantive justice

[262] It is important to emphasise that courts are tasked with ensuring that substantive justice is done in South Africa – indeed, that is the crucial break that has occurred with our past and is a key feature of transformative constitutionalism.³³⁴ Whilst form and

³³² Id at para 9.

³³³ Id at para 12.

³³⁴ Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146 at 152.

procedure are often important for ensuring fairness, they should not be utilised to obscure and preclude the achievement of substantive justice.

[263] In my view, a substantive approach must also be adopted to the pleadings: once, as in this case, the factual circumstances and legal assertions clearly disclose particular issues – such as the inconsistent decisions in this case – then courts are duty-bound to address them, even if the relief claimed is not expressed optimally in the notice of motion or application for leave to appeal or the substantive arguments are not fully developed in the papers.³³⁵ Indeed, the fact that we live in a society of great inequality in access to resources places a greater responsibility on our courts to ensure that substantive justice is achieved in the matters that come before them. It may, in appropriate cases, require departures from strict accusatorial processes and for judges to adopt a more inquisitorial role in order to ensure fairness. Vulnerable persons, in particular, must not be penalised for the shortcomings of their legal practitioners.

[264] As early as *R v Hepworth*,³³⁶ Curlewis JA recognised that:

“[A] judge’s position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figurehead, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.”³³⁷

[265] Lawrence Friedman, in an academic contribution relating to access to justice, clearly expresses the importance of achieving a substantive and just outcome as follows:

“So far, we have talked about access to justice in basically procedural terms. But the phrase can also mean something quite different. ‘Justice’ might refer not to an

³³⁵ This position already has significant support in judicial dicta – see, for instance, *Thompson v South African Broadcasting Corporation* [2001] ZASCA 7; 2001 (3) SA 746 (SCA) at para 7 and *Nedbank Ltd v Mendelow* [2013] ZASCA 98; 2013 (6) SA 130 (SCA) at para 17.

³³⁶ 1928 AD 265.

³³⁷ Id at 277. The Supreme Court of Appeal cited this dictum approvingly in *Take and Save Trading CC v The Standard Bank of SA Ltd* [2004] ZASCA 1; [2004] 1 All SA 597 (SCA); 2004 (4) SA 1 (SCA) at para 3.

institution or a process, but to a concrete result that is, ‘justice’ in the sense of a fair outcome, or getting one’s due. The Supreme Court of the United States has suggested that it is valid (constitutionally speaking) to execute an innocent man, as long as he has had a fair trial. I suspect most ordinary people, as long as legal training has not mangled their minds, would find this both bizarre and revolting. Justice to most of us is, above all, an outcome.”³³⁸

[266] It seems to me, in a similar vein, that ordinary people in South Africa would find it offends their basic sense of justice that one accused person might walk free and two others serve 16 years in prison despite being similarly situated. The pleadings in this case clearly disclose a challenge to the central unfairness in this case: different decisions on leave to appeal being reached by different panels of the Supreme Court of Appeal in relation to similarly situated accused persons. The pleadings and submissions also are framed in terms of the fundamental rights of the applicants that are violated by these circumstances. The oral argument in the court also proceeded on the basis of challenges based on fundamental rights. The relief sought was for leave to appeal to be granted against the conviction and sentence imposed by the Regional Court and for the appeal to be upheld.

[267] The inconsistent treatment of different accused persons rather blatantly violates all the rights I have mentioned in an intersecting manner which requires relief from this Court.³³⁹ Section 9(1) protects the right of everyone to “equal protection and benefit of the law”: this Court has recognised, in its equality jurisprudence, that a substantive approach must be adopted to equality and a purely formal approach is not consistent with the transformative ethos of the Constitution.³⁴⁰ Such a substantive approach to equality must also be adopted in the realm of criminal justice to prevent circumstances where similarly situated accused persons are treated differently in the appellate process.

³³⁸ Friedman “Access to Justice: Some Historical Comments” (2010) 37 *Fordham Urban Law Journal* 3 at 4.

³³⁹ See *Phaahla v Minister of Justice and Correctional Services* [2019] ZACC 18; 2019 (2) SACR 88 (CC); 2019 (7) BCLR 795 (CC) at para 62 regarding intersecting rights in the criminal justice context.

³⁴⁰ *Mahlangu v Minister of Labour* [2020] ZACC 24; 2021 (1) BCLR 1 (CC); 2021 (2) SA 54 (CC); [2021] 2 BLLR 123 (CC); (2021) 42 ILJ 269 (CC) at para 55.

[268] That conclusion coheres well with two other impugned rights in the Constitution. The first judgment learnedly expounds on this Court’s jurisprudence on the right not to be deprived of freedom arbitrarily and without just cause. Importantly, what emerges, is that the deprivation of freedom must take place only for substantively justifiable reasons: inconsistent verdicts or decisions for similarly situated accused persons would call into question the justifiability of those reasons.

[269] Finally, this Court has held from the first case it decided thirty years ago that the right to a fair trial “embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force.”³⁴¹ The Court has demonstrated through cases such as *Molaudzi*³⁴² and *Phaahla*³⁴³ that the unjustifiable differential treatment of accused persons who are similarly situated within the criminal justice system is not acceptable within our constitutional order. This applies with equal force to this case and the need to ensure that similarly situated accused persons are treated equally in the appellate process. The failure to do so violates section 35(3)(o) of the Constitution.³⁴⁴

[270] For these reasons, I prefer the approach of the first judgment to that of the second judgment in addressing the issues that were placed squarely before the court in this case. I am also of the view that the first judgment’s order corrects for the central violation of rights that has taken place and requires the applicants to be placed in the same position as Mr Grifhs by having their appeal heard by the High Court in Mthatha.

³⁴¹ *Zuma* above n 72 at para 16.

³⁴² *Molaudzi* above n 106.

³⁴³ See *Phaahla* above n 339.

³⁴⁴ There is no possibility to justify the infringement of these rights in terms of section 36(1) of the Constitution for the following reasons. It is clear that the violation of fundamental rights arose from disparate decisions flowing from the judicial administration of the criminal appeals system and there is no clear law of general application that authorizes an infringement arising in this manner: see, in a similar vein, *August v Electoral Commission* [1999] ZACC 3; 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC) at paras 23 and 31. Even if it could be argued that the powers involved were exercised in terms of relevant legislation, it is difficult to ascertain any important purpose for permitting the differential treatment that arose in this case that could justify the violation of rights involved.

[271] I do not, however, concur in the first judgment's dicta³⁴⁵ that would in all cases preclude an appeal to this Court against the decision of the President of the Supreme Court of Appeal in terms of the proviso contained in section 17(2)(f) of the Superior Courts Act. I do not believe it is necessary to make such a determination and compelling reasoning to the contrary has been provided in the second judgment. I also do not agree with the dicta in the first judgment³⁴⁶ concerning what exceptional circumstances require for the exercise of the discretion in terms of section 17(2)(f) by the President of the Supreme Court of Appeal and do not concur in that segment of the first judgment.

[272] In sum, I concur in the reasoning and order of the first judgment subject to the qualifications I have expressed in this judgment.

ZONDO CJ:

[273] I have had the benefit of reading the joint judgment by Mhlantla J and Theron J (first judgment), the judgment by Dodson AJ (second judgment), the judgment by Majiedt J (third judgment) as well as the judgment by Bilchitz AJ (fourth judgment).

[274] For the reasons given in Majiedt J's judgment in paragraphs 201 to 231 above, I agree that this Court does not have jurisdiction in this matter and that the application for leave to appeal should be dismissed.

[275] With regard to the decision of the President of the Supreme Court of Appeal refusing the application for reconsideration, even if that decision were appealable the fact of the matter is that the applicants did not apply for leave to appeal against it. In my view, that means that the decision is not before us. As the first judgment makes

³⁴⁵ See the first judgment at [104].

³⁴⁶ Id at [48].

plain, the applicants conceded that they did not apply for leave to appeal. Therefore, I would concur in the dismissal order proposed in the third judgment.

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