



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1209/2023

In the matter between:

ROAD ACCIDENT FUND

APPLICANT

and

SARAH WILSON LEWIS

RESPONDENT

Neutral citation: *Road Accident Fund v Sarah Wilson Lewis* (1209/2023) [2025]
ZASCA 174 (18 November 2025)

Coram: PETSE, MBHA AND DLODLO AJJA

Heard: 25 August 2025

Delivered: 18 November 2025

Summary: **Constitutional law** – whether the refusal of the applicant’s application for leave to amend its plea, violated its right to have a dispute capable of resolution by the application of law decided in a fair public hearing before a court, as contemplated in s 34 of the Constitution of the Republic of South Africa – whether the lapsed application for leave to appeal should be reinstated – whether the compromise concluded between the parties was actuated by common incorrect assumption of a present or past fact and therefore void – whether the amendment sought by the applicant was mala fide or not – whether the applicant has demonstrated exceptional circumstances warranting variation of the order refusing leave to appeal – if leave to appeal is granted, whether the judgment of the court a quo should be overturned.

ORDER

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

The application for reconsideration in terms of s 17(2)(f) is dismissed with costs, including costs of two counsel.

JUDGMENT

Dlodlo AJA (Petse and Mbha AJJA concurring):

[1] On 18 May 2023, the Western Cape Division of the High Court, Cape Town (the high court), refused an application by the applicant, the Road Accident Fund (RAF), to amend its plea by withdrawing an admission therein. On 27 July 2023, the high court refused an application for leave to appeal against its order. On 18 October 2023, the Supreme Court of Appeal (per Weiner JA and Musi AJA) refused the application to this Court in terms of s 17(2)(b) of the Superior Courts Act 10 of 2013 (the Superior Courts Act). On 4 April 2024, the President of this Court referred the order refusing leave to appeal to this Court for reconsideration and, if necessary, variation in terms of s 17(2)(f) of the Superior Courts Act. This application arises from the high court's refusal to grant the RAF leave to amend its plea in circumstances where it had previously admitted liability for 100 per cent of the respondent's proven or agreed damages following the death of her husband in a motor vehicle accident. The RAF now seeks to withdraw that admission based on the later opinion of a new expert, Dr Khan, and to repudiate the joint experts' agreement in relation to causation and quantum, which was subsequently endorsed by the high court pursuant to an agreement between the parties.

[2] The respondent, Ms Sarah Lewis, instituted a claim against the RAF arising from a motor vehicle accident in November 2006 in which her husband died. Summons was issued in September 2009, and the matter endured a long procedural history

involving multiple legal representatives and experts over the years. The respondent's claim included damages for: past and future loss of earnings and/or earning capacity; loss of support; general damages; and medical expenses. Both parties appointed psychiatrists and clinical psychologists, whose joint expert minutes agreed that the respondent suffered a serious psychiatric injury as a result of her husband's death in the accident.

[3] An industrial psychologist, Dr Lourens, was jointly appointed by the parties to assess the respondent's loss of earnings and earning capacity. His assessments were based on the prior consensus among psychiatrists that the respondent's psychiatric injury was accident-related. The RAF admitted liability for 100 per cent of the respondent's proven or agreed damages in its 2022 amended plea, and settled claims for general damages and medical expenses on the basis of her psychiatric injury. However, after appointing a new psychiatrist, Dr Khan (based in the USA), and receiving her reports in late 2022, the RAF attempted to amend its plea. It sought, inter alia, to deny that the respondent had suffered a psychiatric injury caused by the accident; to argue that there was no causal link between her mental state and the collision; and to assert that she retained residual earning capacity.

[4] The respondent opposed the amendment, arguing that the RAF had already compromised the issue of causality and, as a result, could not now withdraw its prior admissions or repudiate expert agreements reached in pre-trial proceedings. The RAF also attempted to repudiate the findings of an Industrial Psychologist, Dr Lourens, despite his appointment having been proposed by the RAF itself and based on joint instructions. When the matter came before the high court, it found in favour of the RAF in this regard, and thus leave to appeal was not sought pertaining to this aspect.

[5] The causal connection between the demise of the respondent's husband on 18 November 2006, in the motor vehicle accident, and her subsequent psychiatric injury is central to the respondent's claims in the action. Four of the respondent's claims, namely her claims for past medical expenses, future medical expenses, general damages, and loss of earnings and/or earning capacity, are directly dependent upon the issue of causality.

[6] The issues before this Court presently are: (a) whether the lapsed application for leave to appeal should be reinstated; (b) whether the compromise concluded between the parties was actuated by a correct assumption of a present or past fact and is therefore voidable; and (c) whether the amendment sought to be effected by the RAF was mala fide or not.

Whether the lapsed application for leave to appeal should be reinstated.

[7] The RAF seeks to revive its application that lapsed due to non-compliance with procedural rules. This then raises the question of whether the RAF meets the legal standard for reinstating its application. For reasons that will become apparent in this judgment, the RAF has failed to meet the threshold for such exceptional relief. The applicable legal framework is indeed well settled.

[8] In *Uitenhage Transitional Local Council v South African Revenue Service (Uitenhage)*,¹ this Court emphasised that condonation should not to be granted merely for the asking. The Court held that a full, detailed, and accurate account of the causes of the delay and their effects must be furnished so as to enable the court to understand clearly the reasons and assess the responsibility. Where the non-compliance is time-related, the applicant must spell out the dates, duration, and extent of any obstacle relied upon. This Court put it thus:

‘One would have hoped that the many admonitions concerning, what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.’

This principle was reaffirmed in *Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and Others (Mulaudzi)*² where Ponnann JA stressed that:

¹ *Uitenhage Transitional Local Council v South African Revenue Service* [2003] ZASCA 76; [2003] 4 All SA 37 (SCA); 2004 (1) SA 292 (SCA) para 6.

² *Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and Others, National Director of Public Prosecutions and Another v Mulaudzi* [2017] ZASCA 88; [2017] 3 All SA 520 (SCA); 2017 (6) SA 90 (SCA).

‘What calls for an explanation is not only the delay in the timeous prosecution of the appeal, but also the delay in seeking condonation. An appellant should, whenever he realises that he has not complied with a rule of this [C]ourt, apply for condonation without delay. A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. Factors which usually weigh with this [C]ourt in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent’s interest in the finality of the judgment of the court below, the convenience of this [C]ourt and the avoidance of unnecessary delay in the administration of justice.’³

[9] In *Member of the Executive Council for Health, Eastern Cape Province v Y N obo E N (Y N obo E N)*⁴ Goosen JA reiterated that the touchstone for reinstatement is the ‘interests of justice’, which must be assessed with reference to the facts and circumstances of the particular case. Although prospects of success on appeal are generally important, they are not decisive. The Court made it clear that:

‘The factors relevant to this enquiry include the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, and the prospects of success.’⁵

...

Although the prospects of success on appeal is generally an important consideration in relation to the reinstatement of an appeal, it is not decisive. Where the degree of non-compliance is flagrant and substantial, condonation may be refused irrespective of the prospects of success. If the explanation for such flagrant and substantial non-compliance is manifestly inadequate or there is no explanation at all, the prospects of success need not be considered.’⁶

[10] Applying these principles to the facts of this case, the RAF’s position falls far short of the required standard. On 4 April 2024, the President granted the RAF a lifeline under s 17(2)(f), recognising that the RAF had been denied leave both by the high court and this Court, on the basis that the case potentially implicated issues of grave injustice. In terms of rule 10, read with rule 10A, of this Court’s rules, the RAF was

³ Ibid para 26.

⁴ *Member of the Executive Council for Health, Eastern Cape Province v Y N obo E N* (056/2021) [2023] ZASCA 32 (30 March 2023).

⁵ Ibid para 8. See also *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-D.

⁶ Ibid para 14. *Commissioner for South African Revenue Services Gauteng West v Levue Investments (Pty) Ltd* [2007] ZASCA 22; [2007] 3 All SA 109 (SCA) para 11.

required to file its heads of argument and practice note within six weeks of lodging the appeal record. This meant the RAF had until 15 August 2024 to do so. However, the RAF failed to meet this deadline. It did not file its heads of argument or practice note timeously. Instead, it attempted to lodge these documents on 15 August 2024, the last possible day, outside the Registrar's business hours of filing of documents with this Court. Understandably, the Registrar refused to accept the documents. There is also no proper explanation as to why it took the RAF almost four weeks (25 days) from 15 August 2024 to 9 September 2024 to prepare and file a reinstatement and condonation application after the appeal had lapsed.

[11] The RAF should have known that this failure to comply with the rules would not be without consequences. It had already benefitted from the exceptional indulgence of a s17(2)(f) directive. Once that directive was granted, one would have expected the RAF to act with heightened diligence in prosecuting the appeal. Instead, it failed to comply with a mandatory filing requirement, and provided no satisfactory explanation for its failure. The RAF has not offered a full, detailed, or accurate account of why it did not file earlier, what steps it took to ensure compliance, or why it left compliance to the very last day. This is a textbook example of the kind of conduct cautioned against in *Uitenhage* and *Mulaudzi*.

[12] What is more is that both the delay and tactical about-turns are highly prejudicial to the respondent. The RAF is ultimately seeking an indulgence from this Court, and one would have expected it to prosecute its appeal not with ineptitude, but with a sense of urgency, given that this litigation has already spanned over 14 years. Even if the Court were to consider the RAF's prospects of success, those, too, are slim. The RAF argues that the parties' compromise was based on a common incorrect assumption that the respondent had suffered a psychiatric injury, thereby rendering the agreement void in terms of the principles analysed in *Osman v Standard Bank National Credit Corp Ltd (Osman)*.⁷ However, this argument is not borne out by the facts. At the time the settlement was reached, all expert reports, on both sides, confirmed the respondent's psychiatric injury. Dr Khan's opinion came many years later and does not retroactively render that consensus mistaken. In totality, the RAF's application is

⁷ *Osman v Standard Bank National Credit Corporation Ltd* 1985 (2) SA 378 (C).

characterised by inexcusable delay, a lack of a full and frank explanation, procedural prejudice to the respondent, and weak prospects of success. Goosen JA's warning in *YN obo EN* applies squarely: where non-compliance is flagrant and the explanation is deficient, condonation may be refused regardless of the merits.⁸

Whether the compromise concluded between the parties was induced by an incorrect assumption of a present or past fact and is therefore voidable.

[13] Our law recognises that a contract, including a compromise or settlement agreement, may be set aside if it was entered into on the basis of a common mistake of fact. The mistake must relate to an existing or past fact that is material to the agreement, and must be shared by both parties at the time the agreement was concluded. This principle was authoritatively considered in *Osman* where the court held that 'what is required in order to render a contract void is a common assumption which turns out to be unfounded'.⁹ A contract may be void if both parties operated under a common incorrect assumption concerning a fact that formed the basis of their agreement. However, not every mistake justifies setting aside a compromise. It is important to note that where only one party labours under a mistaken belief and the other does not share that mistake, the contract will not be voidable. As stated in *Osman*, and captured in the quote below, the fact that one party is mistaken unilaterally does not suffice to undo the agreement:

'The fact that plaintiff's assumption that he could settle his indebtedness to Porter Sigma by paying R1 400 turned out to be unfounded, does not, in the circumstances, avail plaintiff and does not constitute a ground for avoiding the settlement concluded with defendant. Whatever assumption plaintiff might have made, the compromise concluded between the parties was not entered into on the basis of that assumption as far as defendant was concerned.'¹⁰

[14] This quote affirms that a unilateral assumption that turns out to be wrong does not amount to a mutual mistake and does not vitiate the compromise. In the instant case, the RAF seeks to avoid the binding effect of its pre-trial admissions and the settlement of certain claims by essentially contending that the parties laboured under a common incorrect assumption, namely, that the respondent had suffered a

⁸ *YN obo EN* para 14.

⁹ *Osman* at 386E.

¹⁰ *Ibid* at 386I-J.

psychiatric injury caused by the motor vehicle accident. This argument, however, does not withstand scrutiny when viewed through the lens of the legal principles set out above. At the time the compromise was concluded, there was extensive evidence supporting the psychiatric diagnosis. The parties' respective psychiatrists (Dr Le Fevre and Prof. Zabow) and psychologists (Ms Coetzee and Ms Burke) had produced joint minutes confirming the causal link between the respondent's psychiatric condition and the accident. The industrial psychologist, Dr Lourens, whose reports underpinned the quantification of damages, based his findings on the consensus reached by these mental health professionals. The RAF explicitly admitted in its amended plea that the respondent had suffered a "significant psychiatric injury" as a result of the accident. It settled damages accordingly. The agreement was reached on the strength of expert consensus, and there is no evidence that the RAF was labouring under any mistaken belief or that it misunderstood the facts at the time. On the contrary, what is beyond question from the facts, is that both parties were under no illusion as to the ambit of their agreement that culminated in the compromise.

[15] The later emergence of Dr Khan's opinion (years after the settlement) does not retrospectively prove that the original assumption was incorrect, much less that it was shared by both parties and material at the time of contracting. The high court correctly found that the assumption was not incorrect, and even if it were later disputed, it was not a mutual mistake. The court a quo held the following:

'In *President Versekeringsmaatskappy Bpk v Moodley*, two guiding rules were distilled from the various authorities under discussion in that matter. Firstly, there must have been a *bona fide* mistake on the part of the party seeking to amend and secondly, the amendment must not cause prejudice to the other side which cannot be cured by an appropriate order as to costs.

In this instance there was clearly no *mistake* on the part of RAF when it made the admission. The admission in fact, was based on the advice received from the experts it consulted on this issue, namely a psychiatrist, Professor Zabow, and a clinical psychologist, Ms Burke. At the time of making the admission, RAF's experts had also met with the experts consulted by the Plaintiff on this issue, namely Dr le Fèvre, a psychiatrist, and Ms Coetzee, a psychologist. These experts were all in agreement regarding the issue of causality. The mere fact that Dr Khan at a later stage expressed an opinion which differs from the other experts on whose advice(s) RAF relied on when it elected to make the election, cannot in this instance be a good reason to withdraw the admission made. It is not a new ground of defence in the true sense

of the word that comes to RAF's knowledge for the first time after it filed its Amended Plea. It is merely a different opinion by another expert on an issue which was already within the knowledge of the parties. When RAF elected to make the admission, it surely must have known a possibility exists that another expert may hold a different opinion. However, it was prepared to accept that risk in the interest of limiting the issues for trial.' (Own Underlining.) As it was explained in *Osman*, a party cannot escape a valid compromise by pointing to a later-disproved or contested belief, especially where the other party did not share that belief and the agreement was not based on it. Here, the RAF now disputes the psychiatric diagnosis, but that does not mean that the respondent also shared any incorrect belief at the time. As already stated, the compromise was deliberately and unequivocally entered into by both parties on the basis of agreed-upon expert evidence.

[16] The RAF now seeks to transform a belated change of its litigation strategy into a ground for undoing a compromise which was final, considered, and based on consensus. The circumstances do not support the conclusion that the compromise was entered into on the basis of a common incorrect assumption. To adopt the court's reasoning in *Osman*, whatever assumption the RAF might now claim to have made, the compromise concluded between the parties was not entered into on the basis of that assumption as far as the respondent was concerned. A compromise is not lightly set aside. Unless both parties laboured under a common, material, and mutual mistake of fact existing at the time of the agreement, the compromise remains valid and binding. In this case, the agreement was based on extensive expert consensus, deliberate litigation conduct, and pre-trial admissions. The RAF's later dissatisfaction with the medical evidence does not undo the settlement. Its attempt to resile from the compromise must fail, as the legal standard for voiding an agreement on the basis of an incorrect assumption has not been met.

Whether the amendment sought to be effected by the RAF was mala fide or not.

[17] The amendment of pleadings is a mechanism central to procedural fairness and the proper adjudication of disputes in civil litigation. It enables parties to clarify and refine their cases, and ensures that matters are adjudicated on their true merits. However, this liberal discretion to permit amendments is not absolute. Where an amendment entails the withdrawal of an admission, particularly an admission relied

upon by the other party, it is treated with greater caution. The foundation of the law on amendment of pleadings lies in the principle that amendments should ordinarily be allowed to ensure that the real dispute between the parties is properly aired. This was clearly articulated in *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and another and Commercial Union Assurance Co Ltd v Waymark NO (Trans-Drakensberg)*,¹¹ where the court held:

‘The primary principle appears to be that an amendment will be allowed in order to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done. Overall, however, is the vital consideration that no amendment will be allowed in circumstances which will cause the other party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement.’¹²

Similarly, in *Moolman v Estate Moolman (Moolman)*,¹³ the court held that an amendment will generally be granted unless it is mala fide or would cause injustice that cannot be remedied by costs or other procedural protections. The court further held:

‘...[T]he practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which is sought to amend was filed.’¹⁴

[18] Amendments that seek to withdraw admissions, particularly factual admissions, are scrutinised more rigorously. In *President Versekeringsmaatskappy v Moodley (Moodley)*¹⁵ the court held that the amendment of a pleading involving the withdrawal of an admission stands on a somewhat different footing because it involves a change of stance and is more likely to prejudice the other party. The court further stated that the applicant must first convince the court of his bona fides; but even if he has done

¹¹ *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D).

¹² *Ibid* at 638A. See also *Randa v Radopile Projects CC* [2012] ZAGPJHC 151; 2012 (6) SA 128 (GSJ); [2012] 4 All SA 434 (GSJ) para 7.

¹³ *Moolman v Estate Moolman and Another* 1927 CPD 27.

¹⁴ *Ibid* at 29. See also *Tjiroze v Appeal Board of the Financial Services Board* [2020] ZACC 18; 2021 (1) BCLR 59 (CC) para 26.

¹⁵ *President Versekeringwsmatskappy BKP v Moodley* 1964 (4) SA 109 (T).

so, the respondent can still stave off the amendment by showing prejudice which cannot be cured by an order as to costs.¹⁶ The court continued:

‘An application for an amendment of a plea involving a withdrawal of an admission stands on the same basis as any other application for the amendment of pleadings, viz., the Court generally leans towards the granting thereof provided there has been a *bona fide* mistake on the party seeking to amend and the amendment does not cause prejudice to the other side which cannot be cured by an appropriate order as to costs. But though the approach is the same, the withdrawal of an admission is usually more difficult to achieve because it involves a change of front which requires full explanation to convince the Court of the bona fides thereof, and it is more likely to prejudice the other party, who had by the admission been led to believe that he need to prove the relevant fact and might for that reason have omitted to gather the necessary evidence.’¹⁷

[19] In *Zarug v Parvathie N O*¹⁸ the court discussed the withdrawal of an admission by stating the following:

‘[I]t seems that the general tendency of the decisions of our Courts, following in this respect the trend of English judicial opinion, has been in the direction of allowing amendments where this can be done without prejudice to the other party, and, I think that the following legal principles can be gathered from the decisions quoted to me:

1. That the Court will allow an amendment, even though it may be a drastic one, if it raises no new question that the other party should not be prepared to meet.
2. With its large powers of allowing amendments, the Court will always allow a defendant, even up to the last moment, to raise a defence, such as prescription, which might bar the action.
3. No matter how negligent or careless the mistake or omission may have been and no matter how late the application for amendment may be made, the application can be granted if the necessity for the amendment has arisen through some reasonable cause, even though it be only a *bona fide* mistake.

An amendment cannot however be had for the mere asking. Some explanation must be offered as to why the amendment is required and if the application for amendment is not timeously made some reasonable satisfactory account must be given for the delay. Of course, if the application to amend is *mala fide* or if the amendment causes an injustice to the other side which cannot be compensated by costs, or in other words, if the parties cannot be put

¹⁶ Ibid at 110H-111A.

¹⁷ Ibid at 109G-H.

¹⁸ *Zarug v Parvathie N O* 1962 (3) SA 872 (D).

back for the purposes of justice in the same position as they were in when the pleading it is sought to amend was filed, the application will not be granted...

An amendment to a pleading involving the withdrawal of an admission has, however, been regarded in a somewhat different light from that of other amendments. In *Rishton v Rishton*, 1912 T.P.D. 718, the Court held that it would only allow an admission in the pleading to be withdrawn on proof that it was made in error and that no prejudice was thereby caused to the other side. In that case WESSELS, J., as he then was, said at p. 720:

“In judging whether it ought or ought not to grant an amendment its very necessary for the Court to consider whether the admission as contained in the pleading is exactly as the client would have wished the admission to have been made before the Court.” And at p.721

“I think it is the duty of the court to have recorded on the pleadings exactly what the parties estimate the facts to be and what they think are the defences that they ought to lay before the Court. Under these circumstances, I think, whatever the consequences of such an amendment may be, that it is the duty of the court to allow the amendment, because it is the duty of the court to see that the facts are correctly represented before it and that it is not being deceived by some mere technicality.”

In the same case CURLEWIS, J., said at p. 722:

“When the application was made yesterday, I personally felt, as I feel now, that the only question to consider was whether it was a bona fide application for amendment, and whether, if the amendment was allowed, it would cause an injustice to the other side.”

The modern practice is in favour of granting applications for leave to amend whenever the amendment facilitates the proper ventilation of the dispute between the parties.’¹⁹

[20] In this case, the RAF applied to amend its plea in order to withdraw its admission that the respondent had suffered a psychiatric injury caused as a result of the motor vehicle accident. This admission had been made expressly in the RAF’s amended plea and was also reflected in multiple pre-trial minutes where liability for 100% of proven damages was accepted. The RAF now argues that the admission only related to the merits of the collision, and that the issue of causation remains unresolved – particularly in light of a new report by Dr Khan, which disputes the causal link between the accident and the respondent’s psychiatric condition. The RAF contends that the new report introduced a new ground of defence not previously available.

¹⁹ Ibid at 876A-H.

[21] The high court rightly rejected this argument. At the time of the original admission, there was expert consensus between the respondent's and the defendant's psychiatrists and psychologists confirming the respondent's psychiatric injury and its causal connection to the accident. The RAF's own CEO, when applying for the respondent to be assessed by Dr Khan, asserted under oath that the purpose of the examination was to assess the current residual earning capacity, and not to dispute causation or gain a strategic advantage. This context undermines any claim to bona fides. The timing of the amendment (after trial readiness had been declared and after years of litigation), is highly prejudicial to the respondent. The respondent had reasonably relied on the RAF's admission and did not prepare to re-litigate causation. The withdrawal of the admission would force the respondent to secure new expert evidence and reargue an issue long considered settled, which violates the *Moodley* test of prejudice. Thus, it is curious that the RAF so late in the day contends that the admission 'related to the merits' – presumably this being a reference to the issue of liability – thereby leaving the issue of causation unresolved. This contention needs only to be stated to be rejected. It smacks of lack of bona fides on the part of the RAF. It also raises the question as to why the RAF now seeks to amend its plea if, as it now professes, the admission had no bearing on the issue of quantum. Had this been its case all along, its amended plea would have been crafted differently, making plain to the respondent that causation remained in contention. However, the amended plea woefully failed to do so. Instead, it put matters beyond doubt by explicitly admitting that the respondent's psychiatric injury was causally connected to the accident.

[22] Further, as held in *Coppermoon Trading v Government of the Province of the Eastern Cape and Another Eastern Cape Province*:²⁰

'A defendant will ordinarily be allowed to amend his plea where a new ground for defence comes to the defendant's knowledge for the first time after he has filed his plea, provided the application is bona fide and is not prejudicial to the plaintiff'.²¹

A differing opinion by a new expert does not constitute a new fact but merely a different interpretation of facts that were already in the domain of both parties. If this type of argument were accepted, it would encourage litigants to retreat from their admissions

²⁰ *Coppermoon Trading 13 (Pty) Ltd v Government of the Province of the Eastern Cape and Another* [2019] ZAECHC 16; 2020 (3) SA 391 (ECB).

²¹ *Ibid* para 16.

whenever a newly appointed expert expressed a contrary view, thereby destabilising the integrity of judicial case management. The bona fides of the RAF are definitely undermined, and there is no question that the respondent would be prejudiced. In *Frenkel, Wise & Co Ltd v Cuthbert*,²² the court reaffirmed the principle set out in *Moolman* and considered the bona fides of the application for amendment. The court held that it is unable to hold that, that this was a mala fide defence, and that any prejudice which the respondent will suffer by the granting of the amendment can be rectified by an order as to costs.²³

[23] The RAF's justification that the settlement was made 'in good faith with the available information at the time' is insufficient. The legal principles governing amendment of pleadings, while flexible, impose clear constraints where the amendment involves the withdrawal of an admission. Courts are justifiably cautious in such cases, especially where the amendment entails a change of front on a central factual issue, is sought at a late stage, and prejudices the other party. In this case, the proposed amendment fails on all these counts. The RAF did not act in good faith, it failed to provide a compelling explanation of its change of stance, and sought to introduce uncertainty on an issue already resolved through expert consensus. The high court was therefore correct in refusing the amendment, and the applicable legal principles fully support that outcome.

Legal framework and jurisdictional standard under s 17(2)(f).

[24] Prior to its amendment on 3 April 2024, s 17(2)(f) required that the President of this Court be satisfied of the existence of exceptional circumstances before referring a decision for reconsideration. Because the RAF's application was made prior to the amendment, this is the applicable standard. The subsequent amendment, which allows referral if there is a risk of grave injustice or the administration of justice being brought into disrepute, does not change the essence of the President's discretion, as explained by Smith JA in *Tarentaal Centre Investments (Pty) Ltd v Beneficio Developments*.²⁴ This Court held that:

²² *Frenkel, Wise & Co, Ltd v Cuthbert* 1947 (4) SA 715 (C).

²³ *Ibid* at 718.

²⁴ *Tarentaal Centre Investments (Pty) Ltd v Beneficio Developments* (15/2025) [2025] ZASCA 38 (8 April 2025).

‘When the President referred the matter for reconsideration, the jurisdictional requirement for the exercise of her discretion in terms of s 17(2)(f) was the existence of “exceptional circumstances”. That section was subsequently amended by s 28 of the Judicial Matters Amendment Act 15 of 2023, which came into operation on 3 April 2024. In terms of the amended section the jurisdictional facts for the exercise for the President’s discretion are, “circumstances where a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute”. The amendment did not alter the nature of the President’s discretion in any way since the Constitutional Court in *S v Liesching and Others (Liesching)* – which was decided before the amendment – held that the phrase “exceptional circumstances” encompasses the aforementioned jurisdictional factors.’²⁵

[25] In *Anvit v First Rand Bank Ltd (Anvit)*,²⁶ Mpati P clarified the purpose of s 17(2)(f): it is not a mechanism for disappointed litigant to secure another opportunity for appeal, but rather a safeguard to avoid manifest injustice. He further held that:

‘In the context of s 17(2)(f) the President will need to be satisfied that the circumstances are truly exceptional before referring the considered view of two judges of this court to the court for reconsideration. I emphasise that the section is not intended to afford disappointed litigant a further attempt to procure relief that has already been refused. It is intended to enable the President of this Court to deal with a situation where otherwise injustice might result. An application that merely rehearses the arguments that have already been made, considered and rejected will not succeed, unless it is strongly arguable that justice will be denied unless the possibility of an appeal can be pursued. A case such as *Van der Walt* may, but not necessarily will, warrant the exercise of the power. In such a case the President may hold the view that the grant of leave to appeal in the other case was inappropriate.’²⁷

An application must not merely rehearse earlier arguments; it must demonstrate that, absent reconsideration, justice will be denied. This position was echoed in *Motsoeneng v South African Broadcasting Corporation Soc Ltd and Others (Motsoeneng)*²⁸ where the Court held that exceptional circumstances are a jurisdictional threshold and that, without them, the application cannot proceed: it is ‘not out of the starting stalls’.²⁹

²⁵ Ibid para 4.

²⁶ *Anvit v First Rand Bank Ltd* (20233/14) [2014] ZASCA 132 (23 September 2014).

²⁷ Ibid para 6.

²⁸ *Motsoeneng v South African Broadcasting Corporation Soc Ltd and Others* [2024] ZASCA 80; 2025 (4) SA 122 (SCA).

²⁹ Ibid para 19.

[26] Similarly, in *Bidvest Protea Coin Security (Pty) Ltd v Mandla Wellem Mabena*,³⁰ this Court reaffirmed that it must first consider whether exceptional circumstances exist. If they do not, the matter ends there. *Minister of Police and Another v Ramabanta (Ramabanta)*³¹ underscores that reconsideration is not a routine remedy but an extraordinary one, requiring “markedly unusual” circumstances akin to a grave failure of justice. It stated the following:

‘The jurisprudence on s 17(2)(f) establishes that reconsideration is an extraordinary remedy, not a routine second chance. *Avnit*, *Liesching I* and *Liesching II* clarify that it is not an appeal on the merits but a safeguard against manifest injustice, requiring circumstances so exceptional that the initial refusal of leave would bring the administration of justice on disrepute. *Mbatha* and *Manyike* further hold that such circumstances must be ‘markedly unusual’, not merely arguable errors.’³²

This jurisprudence has been reaffirmed consistently in several subsequent cases of this Court.³³

Have exceptional circumstances been established?

[27] The RAF argues that the matter warrants reconsideration due to the emergence of a new expert opinion by Dr Khan, which contradicts earlier expert consensus regarding the plaintiff’s psychiatric injury and its causal link to the accident. It contends that this new report justifies a fresh defence on causation and that the high court erred in refusing its amendment application. The RAF seeks to frame this as a matter of procedural injustice. It further argues that this matter is of great importance to the RAF because it deals with an astronomical amount of money, namely R133 Million.

³⁰ *Bidvest Protea Coin Security (Pty) Ltd v Mandla Wellem Mabena* [2025] ZASCA 23; 2025 (3) SA 362 (SCA) para 23.

³¹ *The Minister of Police and Another v Ramabanta* (511/2024) [2025] ZASCA 95 (24 June 2025).

³² *Ibid* para 22.

³³ See, for example, *Bidvest Protea Coin Security (Pty) Ltd v Mandla Wellem Mabena* [2025] ZASCA 23; 2025 (3) SA 362 (SCA) para 23; *Spa Group Limited and Others v Twelve Gods Supermarket (Pty) Ltd and Others* [2025] ZASCA 7; 2025 (3) SA 137 (SCA) para 2; *Doorware CC v Mercury Fittings CC* (836/2023) [2025] ZASCA 25 (27 March 2025) para 11; *Lorenzi v S* (1171/2023) [2025] ZASCA 58 (13 May 2025) paras 10-12; *Ekurhuleni Metropolitan Municipality v Business Connexion (Pty) Ltd* (1186/2023) [2025] ZASCA 41 (10 April 2025) para 3; *Tarentaal Centre Investments (Pty) Ltd v Beneficio Developments* (15/2025) [2025] ZASCA 38 (8 April 2025) para 4; *Nel v S* (708/2023) [2025] ZASCA 89 (12 June 2025) paras 5-6; *Japhta v S* [2025] ZASCA 80; 2025 (2) SACR 305 (SCA) para 7; *Ditlhakanyane v The State* (775/2023) [2025] ZASCA 90 (12 June 2025) para 2.

[28] This argument does not rise to the level of exceptional circumstances as required by s 17(2)(f). The SCA had made clear, notably in *Ramabanta*,³⁴ that reconsideration requires circumstances so exceptional that the initial refusal of leave would bring the administration of justice into disrepute. Here, no such danger is present. The RAF had multiple opportunities to challenge causation and raise a defence based on psychiatric evidence. It appointed its own expert, Prof Zabow, participated in joint expert meetings, and explicitly conceded causation in its amended plea. It later settled certain heads of damages premised on that very causal link. The question of the amount of money claimed by the respondent is thus of no moment; the RAF had been aware of this from the onset and still conceded liability. The introduction of Dr Khan's divergent view, obtained after the trial was ready and following several years of litigation, does not amount to a new fact or miscarriage of justice. At most, it is a change in litigation strategy. Ponnann JA explained in *Motsoeneng*, 'the requirement for the existence of exceptional circumstances...is a jurisdictional fact'.³⁵ It cannot be presumed from the existence of a different expert opinion. The President's referral under s 17(2)(f) does not relieve the RAF of its burden to prove that truly exceptional circumstances exist. As *Bidvest* confirmed, if the Court is not satisfied that such circumstances exist, 'we need not to consider whether the refusal to grant leave...was correctly decided, much less whether the judgment and order of the [court below] are correct'.³⁶

[29] The RAF's procedural conduct undermines any claim to the exceptionalism of its case. Following the President's referral on 4 April 2024, the RAF failed to file its heads of argument and practice note by the required date (15 August 2024) in terms of SCA rule 10, read with rule 10A. It belatedly attempted to lodge its documents on the final day, but they were refused by the Registrar. This noncompliance with Court rules, without a full and satisfactory explanation, reflects indifference to procedural obligations and contradicts the very purpose of an extraordinary remedy designed to avoid injustice.

³⁴ *Ramabanta* para 22.

³⁵ *Motsoeneng* para 16.

³⁶ *Bidvest* para 17.

[30] Section 17(2)(f) is not intended to bail out dissatisfied litigants by affording them the proverbial third 'bite at the cherry'. Rather, it is an extraordinary remedy reserved for truly deserving cases where grave injustice would otherwise result if relief were not granted. In sum, the jurisprudence of this Court in relation to s 17(2)(f) has been categorical: the threshold for s 17(2)(f) is met only where exceptional circumstances exist, signifying a real risk of grave injustice or disrepute to the administration of justice. In this case, the RAF has not demonstrated any such circumstances. The attempt to rely on a new expert report years into the litigation, after clear admissions and partial settlements based on contrary expert consensus, does not constitute a jurisdictional basis for reconsideration. Nor does the RAF's failure to comply with this Court's rules, after the President's referral, lend credence to any claim of injustice. The intended appeal would not even make it out of the starting stalls.

[31] It bears mentioning that litigants must always keep it at the forefront of their minds that reconsideration under s 17(2)(f) is a statutory dispensation designed to consider whether the judge or judges of the high court and the two judges of this Court were correct in refusing leave to appeal. This Court, in reconsidering the decision, essentially steps into the shoes of the two judges.³⁷ Moreover, if the decision refusing leave is unassailable, it will be left intact.

Order

[32] In the result the following order is made:

The application for reconsideration in terms of s 17(2)(f) is dismissed with costs, including costs of two counsel.

D V DLODLO
ACTING JUDGE OF APPEAL

³⁷ *Mbatha v S* (928/2018) [2020] ZASCA 102 (15 September 2020) para 17.

Appearances

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