CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 245/15

In the matter between:

PIETER PIETERTJIE LIESCHING	First Applicant
MALVIN NAAS SWARTZ	Second Applicant
XAVIER MALGAS	Third Applicant
and	
THE STATE	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent

Neutral citation:	*Liesching and Others v The State and Another* [2016] ZACC 41
Coram:	Mogoeng CJ, Nkabinde ADCJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J
Judgment:	Musi AJ
Heard on:	6 September 2016
Decided on:	15 November 2016
Summary:	Section 17(2)(f) of the Superior Courts Act — power of the President of the Supreme Court of Appeal to refer petition for reconsideration — available to convicted persons — remitted to President of the Supreme Court of Appeal for consideration

Section 327 of the Criminal Procedure Act — not an appeal process — used after recognised legal procedures for appeal and review have been exhausted

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ORDER

On appeal from the Supreme Court of Appeal:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal is upheld.
4. The decision of the President of the Supreme Court of Appeal refusing to refer the applicants' application in terms of section 17(2)(f) of the Superior Courts Act 10 of 2013 is set aside.
5. The matter is remitted to the President of the Supreme Court of Appeal to consider the applicants' application.

JUDGMENT

MUSI AJ (Mogoeng CJ, Nkabinde ADCJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J and Zondo J concurring):

Introduction

[1] The President of the Supreme Court of Appeal (President) dismissed the applicants' application to refer the refusal of their petition to the Supreme Court of Appeal for reconsideration. The applicants approached this Court seeking leave to appeal against that decision.

Background

[2] On 17 November 2011 between 20h00 and 20h30, Messrs Sherwin Arries, Marlin Abrahams, Gordon Swiegers, and, Renaldo Leeroy Booysens (deceased) were standing in front of house number 53 Bluebell Street, Reiger Park, Boksburg.

[3] A Volkswagen Polo (vehicle) with four occupants drove in their direction and gunshots were fired at them from the vehicle. The deceased was struck and fell down. Two of the occupants alighted from the vehicle and shot at the deceased whilst he was lying on the ground. He died at the scene. The three applicants were arrested and charged in the High Court of South Africa, Gauteng Local Division, Johannesburg with murder (count one), unlawful possession of firearms (count two) and unlawful possession of ammunition (count three).

High Court

[4] At the trial, Mr Arries testified that he knew all four occupants of the vehicle. He identified them as the three applicants and one Arthur (who was not charged with the applicants). Messrs Abrahams and Swiegers testified that the applicants were in the vehicle, but they did not know the fourth person.

[5] Each of the applicants proffered an alibi defence and called witnesses in support. The trial Judge rejected their respective alibis and accepted the testimonies of Messrs Arries and Abrahams. He rejected Mr Swiegers' testimony.

[6] All three applicants were convicted of all charges and sentenced as follows:

count one: life imprisonment;

count two: three years' imprisonment; and

count three: two years' imprisonment.

[7] On 9 July 2012, the trial Court granted them leave to appeal against their respective sentences only. They petitioned the President for leave to appeal against their convictions too. Their petition was dismissed on 6 November 2013.

Recantation

[8] After their petition was dismissed, Mr Arthur Saimons, purportedly the fourth person in the vehicle, was charged with the same crimes.

[9] Mr Arries testified during Mr Saimons' trial. He recanted his earlier testimony and, *inter alia*, testified that he did not see who shot the deceased and that the applicants were not at the scene of the crime. He further testified that Mr Saimons was not the "Arthur" to whom he had referred during the applicants' trial. He alleged that he was persuaded by the investigating officer to commit perjury during the applicants' trial.

[10] Mr Saimons was found not guilty and discharged in terms of section 174 of the Criminal Procedure Act (CPA)[1] on 24 March 2014.

Supreme Court of Appeal

[11] The applicants became aware of what transpired during Mr Saimons' trial. They approached the President with an application to refer the refusal of their petition to the Court for reconsideration, in terms of section 17(2)(f) of the Superior Courts Act[2] (SC Act). The application was based on the further evidence that came to light during Mr Saimons' trial.

[12] On 24 December 2014, the President dismissed their application. His reason for the dismissal was, briefly, that the further evidence that the applicants sought to adduce was discovered after they had exhausted all recognised appeal procedures

[1] 51 of 1977.

[2] 10 of 2013.

provided for in the CPA. He pointed out that section 1 of the SC Act provides that "appeal" in Chapter 5 does not include an appeal in a matter regulated in terms of the CPA. He held that section 327(1) of the CPA makes provision for cases where a convicted person wants to adduce further evidence that became available after all the recognised legal procedures pertaining to appeal had been exhausted. He held that Chapter 5 of the SC Act, and therefore section 17(2)(f), is not applicable to the applicants' case. The President issued his order, refusing to refer their application for reconsideration, on 24 December 2014.

Condonation

[13] The application for leave to appeal was filed, in this Court, on 14 December 2015. In terms of rule 19(2) of this Court's rules, the application ought to have been lodged within 15 days after the President's order.[3]

[14] Condonation may be granted if the interests of justice permit. Whether it should be granted depends on the facts and circumstances of each case. The factors to consider when determining whether it is in the interests of justice to grant condonation include: the extent of the delay; the explanation for the delay; the effect of the delay on the administration of justice and other litigants; the importance of the issues to be raised in the appeal; the prospects of success; and the nature of the relief sought. The interests of justice must be determined with reference to all relevant factors.[4]

[15] The delay in this matter, which is 226 days, is excessive. The applicants who were and still are represented by Legal Aid South Africa (Legal Aid) state that the

[3] Rule 19(2) provides:

> "A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the Registrar an application for leave to appeal: Provided that where the President has refused leave to appeal the period prescribed in this rule shall run from the date of the order refusing leave."

[4] *Van Wyk v Unitas Hospital* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 20; *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3.

delay is not due to their fault. They aver that the order was sent to the Bloemfontein Justice Centre. It was received on 15 January 2015 by their legal representative, Mr Guarneri, who is attached to the Johannesburg Legal Aid offices. He drafted the application and the founding affidavit was signed, by the first applicant, on 5 February 2015.

[16] After drafting the papers, Mr Guarneri consulted with Mr Karam, a senior litigator at Legal Aid, to peruse the papers. They met on 27 March 2015 and Mr Karam suggested that the papers should be amended. They also decided to refer the matter to the Impact Litigation Unit of Legal Aid (Unit) which deals with the majority of Legal Aid's constitutional matters. On 16 April 2015, they met with an attorney from the Unit. They were advised to provide a written motivation for the matter to be categorised as an impact matter, with budget for senior counsel's opinion. On 10 June 2015, they consulted senior counsel. He provided a written legal opinion on 15 September 2015. On 9 November 2015, the Constitutional Case Management Committee of Legal Aid South Africa (CCMC) met to consider the opinion. It resolved, on the same day, to approach this Court with applications for condonation and leave to appeal.

[17] The explanation is inept and unfortunate. It is an embodiment of institutional bureaucracy, which is characterised by an excessively layered procedure which would, in most cases, cause unwarranted delays. The systemic delays were exacerbated by the time it took for meetings to take place or actions to be taken. It is not explained when the papers were given to Mr Karam. There is no explanation for the delay between 27 March 2015 and 16 April 2015. There is no explanation as to when the motivation was sent to the Unit. There is also no explanation why senior counsel took three months to render the opinion. Likewise, there is no explanation why the CCMC took so long to consider the opinion. Why it took a month and a few days after the meeting of the CCMC to file the applications is also not explained. All these delays occurred whilst the applicants were in prison.

[18] The deleterious delays were clearly caused by the applicants' legal representatives. Legal Aid should urgently look at its processes and endeavour to eradicate the deleterious delays. Although there is a limit beyond which a litigant would not be allowed to hide behind his or her legal representative's ineptitude, this is not such a case. The applicants were incarcerated. They had no hand in the delays. This is not a case where the applicants should be punished for the delays caused by their legal representatives.

[19] The application for condonation is not opposed. This matter raises important legal issues that deserve this Court's consideration. The prospects of success are good. Irrespective of the poor explanation, it is in the interests of justice to grant condonation.

Leave to appeal

[20] The applicants seek leave to appeal. They must show that the matter falls within the scope of section 167(3)(b) of the Constitution[5] and that it is in the interests of justice for leave to appeal to be granted.

[21] This matter concerns the interpretation of legislation. In terms of section 39(2) of the Constitution we are obliged, when interpreting legislation, to promote the spirit, purport and objects of the Bill of Rights.[6] In *Bakgatla-Ba-Kgafela*[7] this Court stated:

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[5] Section 167(3)(b) reads in relevant part:

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

[6] Section 39(2) provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

> "It is by now trite that section 39(2) of the Constitution has introduced a new approach to the interpretation of statutes. The section obliges courts to promote 'the spirit, purport and objects of the Bill of Rights' when construing legislation. This new approach has been described as 'a mandatory constitutional canon of statutory interpretation'."[8]

The application therefore raises a constitutional matter.

[22] The correct interpretation of and interplay between sections 1 and 17(2)(f) of the SC Act, on the one hand, and section 327 of the CPA, on the other, has not yet been considered by this Court. This matter also raises an arguable point of law of general public importance which ought to be considered. A judgment by this Court would give clarity and certainty about the reconsideration of petitions in criminal matters where further evidence is sought to be adduced. The prospects of success, though not decisive, are good. It is in the interests of justice to grant leave to appeal.

Submissions

[23] The applicants do not challenge the constitutionality of section 17(2)(f) of the SC Act or section 327 of the CPA. They contend that section 17(2)(f), as interpreted by the President, would violate their rights to a fair trial,[9] equality,[10] and access to the courts.[11]

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[7] *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority* [2015] ZACC 25; 2015 (6) SA 32 (CC); 2015 (10) BCLR 1139 (CC).

[8] Id at para 34.

[9] Section 35(3)(o) of the Constitution reads:

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

[10] Section 9(1) of the Constitution reads:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

[11] Section 34 of the Constitution states:

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

[24] The applicants argue that their right to equality before the law and their right to equal protection and benefit of the law would be violated because a litigant in a civil matter who wants to adduce further evidence, after a petition had been dismissed, may utilise section 17(2)(f) whereas a convicted person must utilise section 327 of the CPA. They contend that their right to access to courts would be violated because the section 327 procedure is not an appeal. They further contend that their right to a fair trial would also be violated because they would be denied the right to have their matter reconsidered by the Court.

[25] The first respondent contends that section 17(2)(f) is not applicable to criminal matters because of the definition of "appeal" in section 1 of the SC Act.

Issues

[26] The following issues require determination:

(a) Does the definition of "appeal" in section 1 of the SC Act exclude all criminal matters from the scope of Chapter 5 of the SC Act?

(b) Does section 17(2)(f) apply to criminal proceedings?

(c) Is the section 327 procedure an appeal regulated in terms of the CPA or any other criminal procedural law?

(d) Is adducing further evidence after a petition has been refused a matter regulated in terms of the CPA or any other criminal procedural law?

Legislation

[27] Section 1 of the SC Act reads as follows:

> "In this Act, unless the context otherwise indicates—
> **'appeal'** in Chapter 5 does not include an appeal in a matter regulated in terms of the Criminal Procedure Act, 1977 (Act no. 51 of 1977), or in terms of any other criminal procedural law."

[28] Section 17(2)(f), which is in Chapter 5 of the SC Act, 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 is 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."

[29] Section 327(1) of the CPA provides:

> "If any person convicted of any offence in any court has in respect of the conviction exhausted all the recognised legal procedures pertaining to appeal or review, or if such procedures are no longer available to him or her, and such person or his or her legal representative addresses the Minister by way of petition, supported by relevant affidavit, stating that further evidence has since become available which materially affects his or her conviction, the Minister may, if he or she considers that such further evidence, if true, might reasonably affect the conviction, direct that the petition and the relevant affidavits be referred to the court in which the conviction occurred."

Interpretative approach

[30] This Court has reiterated that statutes must be construed consistently with the Constitution in so far as the language of the statute permits.[12] Words in a statute must be read in their entire context and must be given their ordinary grammatical meaning harmoniously with the purpose of the statute.[13] The actual words used by the Legislature are important. Judicial officers should resist the temptation "to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between

[12] See *Minister of Mineral Resources v Sishen Iron Ore Company (Pty) Ltd* [2013] ZACC 45; 2014 (2) SA 603 (CC); 2014 (2) BCLR 212 (CC) at para 40; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit NO* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai Motor Distributors*) at para 22.

[13] See *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at para 51; *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (SA) at para 17.

interpretation and legislation".[14] All statutes must be interpreted through the prism of the Bill of Rights in order to give effect to its fundamental values.[15] This is so because section 39(2) of the Constitution requires courts to do so.

[31] The command of section 39(2) has been articulated in various judgments of this Court. In *Bato Star*,[16] Ngcobo J stated it as follows:

> "The Constitution is now the supreme law in our country. It is therefore the starting point in interpreting any legislation. Indeed, every court 'must promote the spirit, purport and objects of the Bill of Rights' when interpreting any legislation. That is the command of section 39(2). Implicit in this command are two propositions: first, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and second, the statute must be reasonably capable of such interpretation. This flows from the fact that the Bill of Rights 'is a cornerstone of [our constitutional] democracy'. It 'affirms the democratic values of human dignity, equality and freedom'."[17]

[32] An impugned provision must therefore be interpreted in conformity with the Constitution. Courts must, as far as possible, avoid a construction that would render a provision unconstitutional unless such construction would be unduly strained. Every reasonable construction must thus be resorted to in order to save the impugned provision from unconstitutionality. This principle was articulated in *De Beer NO*,[18] where it was said that—

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[14] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18.

[15] *Hyundai Motor Distributors* above n 12 at paras 21-2.

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

[17] Id at para 72. See also *Van Vuren v Minister of Correctional Services* [2010] ZACC 17; 2012 (1) SACR 103 (CC); 2010 (12) BCLR 1233 (CC) at para 47; *Chagi v Special Investigating Unit* [2008] ZACC 22; 2009 (2) SA 1 (CC); 2009 (3) BCLR 227 (CC) at para 14; *Daniels v Campbell* [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) at paras 81-3.

[18] *De Beer NO v North-Central Local Council and South-Central Local Council* [2001] ZACC 9; 2002 (1) SA 429 (CC); 2001 (11) BCLR 1109 (CC).

> "[t]his Court has accepted the well-recognised principle of constitutional construction that where a statutory provision is capable of more than one reasonable construction, one of which would lead to constitutional invalidity and the other not, a court ought to favour the construction which avoids constitutional invalidity, provided such interpretation is not unduly strained."[19]

Section 1 of the SC Act

[33] "Appeal" is defined in section 1 of the SC Act. Where a word is defined in a statute, the meaning ascribed to it by the Legislature must prevail over its ordinary meaning.[20] The definition makes plain that the word "appeal" would only bear the meaning ascribed to it by the Legislature if the context so requires. If, however, there are compelling reasons, based on the context, to disregard the ascribed meaning then the ordinary meaning of the word must be used. If a defined word or phrase is used more than once in the same statute it must be given the same meaning unless the statutory definition would result in such injustice or incongruity or absurdity as to lead to the conclusion that the Legislature could never have intended the statutory definition to apply.[21]

[34] Where the definition section provides that the definition should be applied "unless the context otherwise indicates", "context" should be given a wide and not a narrow meaning. In *Hoban*,[22] it was said that—

> "'[c]ontext' includes the entire enactment in which the word or words in contention appear . . . and in its widest sense would include enactments in *pari materia* [on the same subject] and the situation, or 'mischief' sought to be remedied. . . . The moment one has to analyse context in order to determine whether a meaning is to be given which differs from the defined meaning one is immediately engaged in ascertaining

[19] Id at para 24.

[20] *Minister of Defence and Military Veterans v Thomas* [2015] ZACC 26; 2016 (1) SA 103 (CC); 2015 (10) BCLR 1172 (CC) at para 20.

[21] *Canca v Mount Frere Municipality* 1984 (2) SA 830 (TK) at 832B-G.

[22] *Hoban v ABSA Bank Ltd t/a United Bank* [1999] ZASCA 12; 1999 (2) SA 1036 (SCA).

> legislative intention. One remains so engaged until the interpretive process is concluded."[23]

[35] A definition in an Act therefore applies to the entire Act unless its meaning is specifically confined to a particular section or chapter. The definition of "appeal" in section 1 of the SC Act is confined to its use in Chapter 5. Where it is used in other chapters of the SC Act it would have its ordinary grammatical meaning.[24]

[36] The reason for the exclusion of appeals regulated in terms of the CPA or any other criminal procedural law from the purview of Chapter 5 is to avoid duplication. It would be senseless to have two statutes regulate the same subject matter. The Legislature recognised that, although the CPA deals comprehensively with appeals in criminal matters, it does not do so exhaustively. Chapter 5 of the SC Act, in so far as it deals with appeals, complements and supplements the CPA. The purpose of the definition is therefore not only to harmonise the provisions of the CPA and the SC Act but also to supplement the provisions of the CPA.

[37] "Appeal" for purposes of Chapter 5 does not include an appeal in a matter regulated in terms of the CPA or any other criminal procedural law. The converse is also true; if it is not a matter regulated by the CPA or any other criminal procedural law it would be an appeal for the purposes of Chapter 5.[25]

The CPA

[38] The CPA regulates appeals in criminal proceedings, in respect of Superior Courts, in sections 315 to 324. These provisions regulate various matters including applications for leave to appeal, petitions, applications to adduce further evidence and special entries. The CPA regulates applications to adduce further

[23] Id at para 20.

[24] "Appeal" in Chapter 4 of the SC Act (sections 12-4) would therefore bear its ordinary grammatical meaning and include criminal appeals irrespective of whether they are regulated in terms of the CPA or any other criminal procedural law.

[25] See *Van Wyk v S*; *Galela v S* [2014] ZASCA 152; 2015 (1) SACR 584 (SCA) (*Galela*) at para 18.

evidence, after conviction in the High Court, in two instances. First, in section 316(5) and second, in sections 316(13)(d) and (e).

[39] The relevant parts of section 316 reads as follows:

> "(1)(a) Subject to section 84 of the Child Justice Act, 2008, any accused convicted of any offence by a High Court may apply to that court for leave to appeal against such conviction or against any resultant sentence or order.
>
> . . .
>
> (5)(a) An application for leave to appeal under subsection (1) may be accompanied by an application to adduce further evidence (hereafter in this section referred to as an application for further evidence) relating to the prospective appeal.
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> (5)(b) An application for further evidence must be supported by an affidavit stating that—
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> (i) further evidence which would presumably be accepted as true, is available;
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> (ii) if accepted the evidence could reasonably lead to a different verdict or sentence; and
>
> (iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial.
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> (5)(c) The court granting an application for further evidence must—
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> (i) receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court; and
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> (ii) record its findings or views with regard to that evidence, including the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness.
>
> (6) Any evidence received under subsection (5) shall for the purposes of an appeal be deemed to be evidence taken or admitted at the trial in question."

[40] In terms of section 316(5) of the CPA, the application for leave to appeal must be accompanied by the application to adduce further evidence. The application to adduce further evidence is heard by the trial court. It must be supported by an affidavit stating that the requirements of section 316(5)(b)(i) to (iii) have been met. If

any of the three requirements is not met, then the application would not succeed.[26] The dismissal of an application of this kind is appealable.[27]

[41] If the application is successful, the further evidence and any rebuttal evidence by the State and evidence called by the Court must be received by the trial court. The court must then record its findings and views with regard thereto and such evidence shall be deemed to be evidence taken or admitted at the particular trial.

[42] Section 316(13)(d) and (e) provides:

> "The judges considering a petition may, whether they have acted under subsection (12)(a) or (b) or not—
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> . . .
>
> (d) in the case of an application for further evidence, grant or refuse the application, and, if the application is granted the judges may, before deciding the application for leave to appeal, remit the matter to the High Court concerned in order that further evidence may be received in accordance with subsection (5)(c); or
>
> (e) in exceptional circumstances refer the petition to the Supreme Court of Appeal for consideration whether upon argument or otherwise, the Supreme Court of Appeal may thereupon deal with the petition in any manner referred to in this subsection."[28]

[43] An application to adduce further evidence may therefore also be made after an application for leave to appeal has been refused by the High Court. Judges considering the petition have a discretion to grant or refuse the application. If they

[26] *S v Swanepoel* 1983 (1) SA 434 (A) at 439C-F.

[27] Id at 451C-D.

[28] Subsection 12 reads as follows:

> "The Judges considering a petition may—
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> (a) call for any further information from the judge who refused the application in question, or from the judge who presided at the trial to which the application relates, as the case may be;
>
> (b) in exceptional circumstances, order that the application or applications in question or any of them be argued before them at a time and place determined by them."

decide to grant it they must decide whether to remit the matter to the High Court to consider the further evidence in terms of section 316(5) or refer it to the Supreme Court of Appeal for consideration.

[44] The CPA does not regulate receiving further evidence, after a trial in the High Court, other than in the manner prescribed by sections 316(5) and (13). It also does not regulate an application to adduce further evidence after a petition, in terms of section 316(8)(a),[29] had been refused. There is no other criminal procedural law that regulates it. An application to adduce further evidence on appeal, after a petition had been refused, is not a matter regulated by the CPA or any other criminal procedural law. Chapter 5 of the SC Act is therefore applicable to such matters.

Section 19 of the SC Act

[45] Section 19 of the SC Act, which is in Chapter 5, gives the Supreme Court of Appeal or a High Court exercising appeal jurisdiction very wide powers with regard to receiving evidence. Section 19 provides:

> "The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law—
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> (a) dispose of an appeal without the hearing of oral argument;
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> (b) receive further evidence;
>
> (c) remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Supreme Court of Appeal or the Division deems necessary; or

[29] Section 316(8)(a) reads as follows:

> "If any application—
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> (i) referred to in subsection (1)(b)(ii) (hereafter in this section referred to as an application for condonation);
>
> (ii) referred to in subsection (1)(b)(i) (hereafter in this section referred to as an application for leave to appeal); or
>
> (iii) referred to in subsection (5)(a) to adduce further evidence (hereafter in this section referred to as an application for further evidence),
>
> is refused by a High Court, the accused may by petition apply to the President of the Supreme Court of Appeal to grant any one or more of the applications in question."

> (d) confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require."

[46] Subsection 19(b) is not subject to time limits. It does not prescribe a procedure as to when and how the new evidence may be received by the Court of Appeal. There is, more specifically, no indication in the section or any other relevant legislation that the Court of Appeal may not receive further evidence after a petition has been refused.

[47] Before the enactment of section 19 of the SC Act, section 22 of the Supreme Court Act[30] stipulated the powers of the Courts of Appeal as follows:

> "The appellate division or a provincial or local division shall have power—
> (a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by such division, or to remit the case to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as to the division concerned seems necessary; and
> (b) to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require."

[48] Evidence could therefore only be received in terms of section 22 of the Supreme Court Act "on the hearing of the appeal". In *Sibande*[31] the accused was convicted in the Supreme Court. Leave to appeal was refused by the trial Court and the Appellate Division.[32] The applicant applied to adduce further evidence after the refusal of the petition. The Court said the following:

[30] 59 of 1959.

[31] *R v Sibande* 1958 (3) SA 1 (A).

[32] The Supreme Court and the Appellate Division are now respectively called the High Court and the Supreme Court of Appeal.

> "The power of this Court to set aside a conviction and direct the taking of further evidence flows from section 4 of Act 1 of 1911, which provides that this may be done 'on the hearing of an appeal'. There must be an appeal, i.e. a claim for relief on the existing record, before this Court can order the taking of further evidence. Leave to appeal may be granted, although there is no prospect of success on the existing record, if there is a reasonable prospect, if leave to appeal is granted, that this Court will order the taking of further evidence, with, of course, a reasonable prospect of successful appeal on the augmented record. This appears from *R v Ncube*, 1955 (2) SA 152 (AD), and *R v Siwesa*, 1957 (2) SA 223 (AD). But although the reasonable prospect that the taking of further evidence may be ordered may provide the only reason for granting leave to appeal, this does not alter the fact that there must be an appeal to this Court in existence before the taking of further evidence can be ordered."[33]

[49] Schreiner JA held that the Court did not have the power to receive the further evidence because the refusal of the petition was final.[34] Section 19 of the SC Act does not contain the limitation in section 22 of the Supreme Court Act.[35] Further evidence

[33] See *Sibande* above n 31 at 5E-G. Section 4 of the Appellate Division Further Jurisdiction Act 1 of 1911 was in *pari materia* (on the same subject) with section 22 of the Supreme Court Act. It read:

> "Power of Appellate Division to Remit Cases to Court Appealed from, with Instructions, etc.—
>
> On the hearing of any appeal, the Appellate Division shall have power to remit the case to the court appealed from for further hearing, with such instructions as regards the taking of further evidence or otherwise as may be deemed necessary, and shall have full powers of amendment, and also power to receive further evidence on questions of fact, either orally or by deposition before a commissioner, and may give any judgment or make any order which the case may require: Provided that in exercising the power to receive such further evidence the Appellate Division shall make such order as will secure an opportunity to the parties to the proceedings to appear for the purpose of examining every witness whose evidence shall be so received."

[34] *Sibande* id at 5G-H.

[35] Although the headings of section 22 of the Supreme Court Act and section 19 of the SC Act are the same, the texts of the respective provisions are different. A heading is only used as an interpretive tool when the particular clause is unclear or ambiguous. When the wording of the clause is clear, like section 19 of the SC Act, then it cannot be overridden by the words of the heading. See *President of the RSA v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 12; *Mkrola v Samela* 1981 (1) SA 925 (A) at 941G; *Turffontein Estates Ltd v Mining Commissioner, Johannesburg* 1917 AD 419 at 431; *Greater Johannesburg Transitional Metropolitan Council v Absa Bank Ltd t/a Volkskas Bank* 1997 (2) SA 591 (W) at 607E-F; *S v W* 1975 (3) SA 841 (T) at 844A-C; *Bhagwan's v Swanepoel* 1963 (4) SA 42 (E) at 43C-E.

can therefore be received on the hearing of the appeal,[36] when considering a petition[37] and when reconsidering a petition.[38]

[50] Our courts have always been reluctant to reopen trials in order to receive further evidence.[39] The reopening of a case is ordered only if the requirements for reopening have been met. This is so because—

> "[i]t is clearly not in the interests of the administration of justice that issues of fact, once judicially investigated and pronounced upon, should lightly be re-opened and amplified. And there is always the possibility, such is human frailty, that an accused, having seen where the shoe pinches, might tend to shape evidence to meet the difficulty."[40]

[51] The judicially developed requirements for receiving further evidence, which are by and large similar to those in section 316(5), were summarised as follows:

> "(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it sought to lead was not led at the trial.
> (b) There should be a prima facie likelihood of the truth of the evidence.
> (c) The evidence should be materially relevant to the outcome of the trial."[41]

[52] Finality in criminal proceedings is very important. This policy consideration underlies the requirements for adducing further evidence. It is important that litigation be brought to an end as speedily and expeditiously as possible.[42] Legal controversies, once judicially settled, should not be reopened except under a few

[36] Section 316(5) of the CPA.

[37] Section 316(13)(d) of the CPA.

[38] Section 17(2)(f) of the SC Act.

[39] *S v N* 1988 (3) SA 450 (A) at 458; *S v De Jager* 1965 (2) SA 612 (A) (*De Jager*) at 613 A-B.

[40] *De Jager* id at 613A-B.

[41] Id at 613C-D; *S v Marais* [2010] ZACC 16; 2011 (1) SA 502 (CC); 2010 (12) BCLR 1223 (CC) at para 21.

[42] Kruger *Hiemstra's Criminal Procedure* 2 (2016) 31-18.

circumscribed circumstances. Finality enhances certainty and allows litigants to get on with their lives.

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

> "Just as in the law, we can love truth, like all other good things, unwisely; pursue it too keenly; and be willing to pay for it too high a price, so we can love finality too much."[43]

Section 17(2)(f) of the SC Act

[54] 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 became known after the petition had been considered and determined.

[55] 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.

[43] *Burrell v The Queen* [2008] HCA 34; 238 CLR 218; 82 ALJR 1221; 248 ALR 428 at para 72.

[56] In *Avnit,*[44] Mpati P succinctly examined some cases wherein the words "exceptional circumstances" were discussed and analysed. He correctly came to the conclusion that "the overall interests of justice will be the finally determinative feature" for the exercise of the President's discretion.[45]

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

Section 327 of the CPA

[58] The President held that section 17(2)(f) was inapplicable in this case. He further held that the procedure to be followed in a case where a convicted person desires to lead further evidence, that became available after he or she exhausted all the recognised legal procedures pertaining to appeal, is regulated by section 327(1) of the CPA. Therefore, because it is a matter regulated by the CPA, it is in terms of section 1 of the SC Act excluded from the scope of Chapter 5.

[59] The procedure in section 327 of the CPA is not an appeal. The section makes plain that it may only be utilised after the convicted person has exhausted all recognised legal procedures pertaining to appeal or review or if such procedures are no longer available to him or her. The section may therefore only apply after an appeal process is no longer available to the convicted person.

[60] Sections 327(1) and 17(2)(f) are both geared at preventing an injustice. They serve the same purpose, but at different stages. Section 17(2)(f) does so while the

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

[45] Id at paras 4-5.

appeal process is still open while section 327(1) applies after the appeal processes are spent and permanently closed. The section 327 procedure is also not a substitute for an appeal. It is a process beyond the appeal stage that is meant to be the final net in order to avoid a grave injustice.

[61] Even after the section 17(2)(f) application is dismissed, the applicants can still approach this Court with an application for leave to appeal. If successful, they could even apply to adduce further evidence in this Court.[46]

Conclusion

[62] The first respondent's contention that Chapter 5 of the SC Act does not apply, at all, to criminal proceedings is not textually supported by a careful reading of section 1 of the SC Act. The President has correctly, on numerous occasions, applied section 17(2)(f) to criminal proceedings.[47] The first respondent's contention that those cases were incorrectly decided is misplaced.

[63] The President's interpretation creates an anomaly in that a litigant in a civil matter who wants to adduce further evidence, after a petition had been dismissed, may utilise section 17(2)(f) whereas a convicted person, in the same position, may not. That interpretation precipitated the applicants' contention that their right to equal treatment before the law would be violated.

[64] The interpretation that section 17(2)(f) may be utilised by litigants in criminal or civil proceedings to adduce further evidence after a petition had been dismissed eradicates that anomaly. It also preserves the applicants' right to equal treatment before the law and is in conformity with the command in section 39(2) of the Constitution.

[46] See rule 30 of this Court's Rules and *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile* [2010] ZACC 3; [2010] 5 BCLR 465 (CC) at para 35; *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at paras 42-3.

[47] *Notshokoru v S* [2016] ZASCA 161; *Ntlanyeni v S* [2016] ZASCA 3; 2016 (1) SACR 581 (SCA).

[65] 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.

Order

[66] The following order is made:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal is upheld.
4. The decision of the President of the Supreme Court of Appeal refusing to refer the applicants' application in terms of section 17(2)(f) of the Superior Courts Act 10 of 2013 is set aside.
5. The matter is remitted to the President of the Supreme Court of Appeal to consider the applicants' application.

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For the First Respondent:	S J Khumalo instructed by the State Attorney
For the Second Respondent:	D J Joubert SC instructed by the State Attorney