

# DISPUTE RESOLUTION

## ALERT

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INCORPORATING  
**KIETI LAW LLP, KENYA**

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#### Another bite at the appeal cherry? Section 17(2)(f) of the Superior Courts Act

Former President Jacob Zuma launched a reconsideration application earlier this year, which was subsequently dismissed by the President of the Supreme Court of Appeal. Pursuant to Zuma's (very public) reconsideration application there has been an increase in applicants turning to this not particularly common application – but what exactly is a *"reconsideration application"*?



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## Another bite at the appeal cherry? Section 17(2)(f) of the Superior Courts Act

Former President Jacob Zuma launched a reconsideration application earlier this year, which was subsequently dismissed by the President of the Supreme Court of Appeal. Pursuant to Zuma's (very public) reconsideration application there has been an increase in applicants turning to this not particularly common application – but what exactly is a "reconsideration application"?

A reconsideration application is brought in terms of section 17(2)(f) of the Superior Courts Act 10 of 2013, which provides the President of the Supreme Court of Appeal with discretionary power to refer a decision to dismiss an application for leave to appeal for reconsideration. In circumstances where a petition to the Supreme Court of Appeal (SCA) has been refused, an application for reconsideration may be launched within one month in terms of section 17(2)(f) of the Superior Courts Act.

A decision by the SCA to grant or dismiss an application for leave to appeal is final, save in the event that the President of the SCA of his/her own accord, or on application, refers the decision for reconsideration and, if necessary, variation.

An application of this nature will only be granted by the President of the SCA in "exceptional circumstances". In the case of *Liesching and Others v S 2018 (11) BCLR 1349 (CC)*, the Constitutional Court noted that section 17(2)(f) was not intended to afford disappointed litigants a further attempt to procure relief that had already been refused. It was intended to enable the President of the SCA to deal with a situation where injustice might otherwise result.

The threshold for granting an application in terms of section 17(2)(f) is therefore high.

The discretionary power prescribed in section 17(2)(f) is likely to be exercised only in circumstances where grave injustice will result should the status quo of the matter remain.

In the case of *Avnit v First Rand Bank Trading, inter alia, as Westbank and Wesbank Aviation Finance 2014 JOL 32336 (SCA)*, the court held that:

*"In the context of section 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 ... 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."*

Furthermore, the Constitutional Court held in *Cloete and Another v S 2019 (2) SACR 130 (CC)*, that a decision reached by the President of the SCA in a reconsideration application is not appealable.

## Another bite at the appeal cherry? Section 17(2)(f) of the Superior Courts Act

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While a reconsideration application is yet another procedural step, the purpose of such application is certainly not to afford an applicant another bite at the appeal cherry; instead its purpose is to allow the President of the SCA to intervene in circumstances where an injustice would occur.

Despite its purpose, this procedural step could be open to abuse as an applicant seeking to delay the finalisation of a matter may file a reconsideration application without the *bona fide* belief that exceptional circumstances exist for the application to be granted.

As such, this process could be abused by an applicant seeking to frustrate the finality of a matter. However, what is fortunate is that a reconsideration application is normally disposed

of quite expeditiously, given the *dies* within which affidavits are to be exchanged.

While Zuma's reconsideration application shone light on this uncommon application, and seemingly increased applicants and their legal representatives' interest in utilising this procedural step, it remains clear that such application (whether opposed or not) should not be upheld in circumstances where an applicant repeats their grounds for special leave to appeal to the SCA. Instead, an applicant would be required to show exceptional circumstances in order for an application for reconsideration to pass muster.

CLAUDETTE DUTILLEUX AND  
GABRIELLA SCHAFFER

The Legal 500 EMEA 2022 RESULTS

The Legal 500 EMEA 2022 recommended our **Dispute Resolution practice** in **Tier 1** for dispute resolution.

The Legal 500 EMEA 2022 recommended **Tim Fletcher** as a leading individual for dispute resolution.

The Legal 500 EMEA 2022 recommended **Kgosi Nkaiseng** and **Tim Smit** as next generation lawyers for dispute resolution.

The Legal 500 EMEA 2022 recommended **Rishaban Moodley, Jonathan Witts-Hewinson, Lucinde Rhoodie, Clive Rumsey, Desmond Odhiambo, Mongezi Mpahlwa, Corné Lewis, Jackwell Feris** and **Kylene Weyers** for dispute resolution.

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**BBBEE STATUS: LEVEL ONE CONTRIBUTOR**

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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