THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1038/2023

In the matter between:

THE ROCK FOUNDATION PROPERTIES **FIRST APPLICANT**

ESTHER NYARWI NDEGWA **SECOND APPLICANT**

and

DOSVELT PROPERTIES (PTY) LTD **FIRST RESPONDENT**

ELI NATHAN CHAITOWITZ **SECOND RESPONDENT**

Neutral citation: *The Rock Foundation Properties & Another v Chaitowitz* (1038/2023) ZASCA 82 (9 June 2025)

Coram: MOCUMIE, KEIGHTLEY and UNTERHALTER JJA

Heard: 7 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and released to SAFLII. The date and time for hand down is deemed to be 9 June 2025 at 11h00.

Summary: Section 17(2)*(f)* of the Superior Courts Act 10 of 2013 – reconsideration of refusal of petition by Supreme Court of Appeal – whether exceptional

circumstances established – alleged simulated transaction – no exceptional circumstances justifying reconsideration of rejection by high court and Supreme Court of Appeal that agreements were simulated.

ORDER

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

1 The matter is struck from the roll.

2 The applicants are directed to pay, jointly and severally, the one paying the other to be absolved, the costs incurred by the respondent in opposing the application for reconsideration.

JUDGMENT

Keightley JA (Mocumie and Unterhalter JJA concurring):

Introduction

[1] This is an application for the reconsideration of a refusal, by two judges of this Court, to grant leave to appeal, on petition, against a judgment of the Gauteng Division of the High Court, Johannesburg (the high court). The application comes before this Court by way of a referral by the President of the Supreme Court of Appeal under s 17(2)(*f*) of the Superior Courts Act 10 of 2013 (the SC Act).

[2] The second applicant, Esther Nyarwai Ndegwa (Ms Ndegwa) is the sole member of the first applicant, The Rock Foundation Properties (the Rock Foundation). The subject matter of the application is a suite of agreements entered

into by Ms Ndegwa, through the Rock Foundation, with the first respondent, Dosvelt Properties (Pty) Ltd (Dosvelt). The second respondent, Eli Nathan Chaitowitz (Mr Chaitowitz), is the sole director of Dosvelt. The agreements concerned an immovable property, Erf 2[...] S[...] Extension 24 Township (the property), which was previously owned by Ms Ndegwa.

[3] When Ms Ndegwa purchased the property, it was in a derelict state. She effected some improvements with the assistance of a home loan of R1,2 million from Absa Bank (the bank). Ms Ndegwa believed that the property also had development potential in that it was situated in an affluent area. She considered that with the requisite planning and subdivision approvals, she could develop a small, gated cluster complex on the property and maximise its value.

[4] In 2007, Ms Ndegwa fell into arrears with her bond repayments. Judgment was entered against her, and she faced the prospect that the property would be sold in execution. Her application for subdivision, which was necessary for the envisaged development, had stalled due to her lack of finances. Ms Ndegwa cast around for potential investors to realise her development plans for the property and to stave off a threatened sale in execution by the bank. As a judgment debtor, Ms Ndegwa could not approach a financial institution for investment finance. It was against this background that Ms Ndegwa met Mr Chaitowitz and concluded the suite of agreements. The agreements were concluded simultaneously on 28 June 2018.

[5] The first agreement in the suite was a deed of sale (the sale agreement) between Ms Ndegwa and Dosvelt, in terms of which she sold the property to Dosvelt for a purchase price of R3 million. The sale agreement recorded that Ms Ndegwa would be entitled to remain in occupation of the property in terms of a lease

agreement to be entered into between the parties. The latter agreement (the lease agreement) was between Dosvelt, being the intended new owner, and lessor, of the property, and the Rock Foundation, as lessee.

[6] The lease agreement was to take effect on the date of transfer of the property to Dosvelt. It gave the Rock Foundation the right, at the latter's own expense, to procure the subdivision of the property; to demolish existing buildings; to erect new residential buildings on the property in terms of an approved site development plan; and to market for sale any residential units so erected. It was expressly recorded that the purpose of these provisions was to enable the Rock Foundation to secure sufficient funds, through the sale of residential dwelling units, to enable it to exercise the separate option agreement between the parties.

[7] The final agreement in the suite was the option agreement referred to in the lease agreement (the option). It gave the Rock Foundation an option, exercisable within three years of date of transfer of the property to Dosvelt, to purchase the property (or whatever portions of which it may have been comprised following subdivision) from Dosvelt on the terms agreed in Annexure A thereto. The agreed purchase price for the exercise of the option was R 3,3 million. The lease agreement and the option were further linked in that it was expressly recorded that the option would be cancelled in the event of the cancellation of the lease agreement.

[8] Transfer of the property to Dosvelt was duly registered on 30 October 2018 and the lease agreement took effect. It is common cause that the Rock Foundation defaulted on its rental payments. The parties entered into an addendum to the lease agreement on 24 May 2019, which granted certain indulgences to the Rock Foundation, including a payment holiday and a payment plan. Despite this, the Rock

Foundation fell into arrears once more, triggering a letter of cancellation from Dosvelt in respect of both the lease agreement and the option on 23 December 2020.

[9] The response to this development by Ms Ndegwa and the Rock Foundation was to institute an application in the high court seeking, as their primary relief, a declaration that the agreements were unlawful credit agreements under s 8(4)(*f*), alternatively s 40 of the National Credit Act 34 of 2005 (the NCA) and were void *ab initio*. They sought a further order directing that the property be transferred back to Ms Ndegwa at Dosvelt's cost without, incidentally, any concomitant tender by Ms Ndegwa to repay to Dosvelt the purchase price she had received.

[10] Dosvelt and Mr Chaitowitz were both cited as respondents in the high court application. They opposed the relief sought and instituted a counterapplication for an order declaring that the lease agreement was in force on 23 December 2020; that it had been validly cancelled on that date; and that the Rock Foundation be ordered to vacate the property. In addition, they sought an order confirming that the option, having not been exercised by 23 December 2020, had lapsed.

[11] The essence of the applicants' case in the high court, was that the suite of agreements constituted a simulated transaction: while they may have appeared to be a sale agreement, with a linked lease and option, the real intention of the parties was to effect a loan to Ms Ndegwa, with Ms Ndegwa's property as security. According to the applicants, this loan bore all the hallmarks of a credit agreement under the NCA and, because neither Dosvelt nor Mr Chaitowitz was a registered credit provider, the agreement fell to be declared void *ab initio*.

[12] The high court dismissed the applicant's application and granted the relief sought by the respondents in their counterapplication. It refused the application for leave to appeal. This Court similarly refused an application for leave on petition under s 17(2)(*b*) of the SC Act (the petition refusal) on the grounds that there was no reasonable prospect of success in an appeal and no other compelling reason why an appeal should be heard. This triggered the applicants' reconsideration application to the President of this Court under s 17(2)(*f*) of the SC Act in October 2018 (the reconsideration application).

[13] At the time of the reconsideration application, and the President's determination thereof, s 17(2)(*f*) read, in relevant part:

'The decision of the majority of the judges considering an application referred to in paragraph (*b*) … to … refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may *in exceptional circumstances*, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.'[1] (Emphasis added.)

[14] On 5 January 2024, the President referred the petition refusal to the Court for reconsideration under s 17(2)(*f*). The binding jurisprudence of this Court establishes that it is for the Court to which the President's referral is made to decide, as a jurisdictional requirement, whether exceptional circumstances exist.[2]

[1] Section 17(2)*(f)* was amended with effect from 3 April 2024 by the deletion of the phrase 'in exceptional circumstances' and the substitution therefor with the phrase 'in circumstances where a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute'.

[2] *Motsoeneng v South African Broadcasting Corporation Soc Ltd and Others* [2024] ZASCA 80, confirmed in *Bidvest Protea Coin Security (Pty) Ltd v Mandla Wellem Mabena* [2025] ZASCA 23. Compare the dissenting judgment of Coppin JA in *Lorenzi v The State* (1171/2023) [2025] ZASCA 58 (13 May 2025) paras 25 to 33.

[15] In their application to the President, the applicants relied almost entirely on the far-reaching contention that exceptional circumstances exist because the alleged simulated transaction in this case was akin to the 'Brusson-type' schemes that have been set aside by, among other courts, the Constitutional Court. Those schemes involve a fraud perpetrated on financially distressed property owners who, believing that they are agreeing to offer their property as security for a loan, are duped into passing transfer of the property to a third party who is in on the scam.[3]

[16] Wisely, counsel for the applicants disavowed reliance on the Brusson-type argument at the hearing of the application. It was an argument that was correctly rejected by the high court. Ms Ndegwa did not claim to have been defrauded in her dealings with Mr Chaitowitz and Dosvelt, or to have been misled as to the nature and effect of the agreements. Instead, her case was that the parties agreed that what was presented to the world as a sale agreement was intended by them to be a secured loan. This raises different considerations to those that prevail in true Brusson-type cases.

[17] The question is whether there are any other considerations that establish the existence of exceptional circumstances in this case. Ms Ndegwa must show more than that she would have prospects of success were she be permitted to proceed to an appeal. It will not assist her to rely on a mere repetition of arguments that have been rejected by the high court and by two judges of this Court on petition. Section 17(2)(*f*) is intended to be restricted to matters that are truly exceptional, involving

[3] See, for example, *Absa Bank Limited v Moore and Another* [2016] ZACC 34; 2017 (1) SA 255 (CC); 2017 (2) BCLR 131 (CC).

substantive points of law, an issue of great public importance, or a strongly arguable prospect of a denial of grave justice should reconsideration be refused.[4]

[18] The cornerstone of the applicants' case is that exceptional circumstances exist in that, unless they are given the opportunity to pursue an appeal, a grave injustice will befall the public in general. This is so, they argue, because the suite of agreements was, by common intent, really a loan by Mr Chaitowitz to Ms Ndegwa, masquerading as an interlinked sale, lease and option. The loan agreement fell foul of the NCA. The applicants say that if permitted to stand, the high court judgment will strike a blow to the heart of what the NCA intends to achieve, namely, to protect debtors like Ms Ndegwa.

[19] A closer examination reveals insurmountable difficulties with these contentions. The fundamental difficulty is that the applicants' case stands or falls on their success in proving that the suite of agreements constituted simulated transactions: that the parties' common intent was that the agreements were not what they purported to be. The quandary for the applicants is that this involves a factual inquiry, coupled with an interpretation of the agreements. This Court in *Uys NNO and others v The National Credit Regulator (Uys)*[5] stated with reference to *Zanderberg* v *Van Zyl,*[6] that '[t]he inquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down.'

[20] In this case, the applicants raised no substantive issue of law. In fact, it was conceded by the applicants that they have no quarrel with the well-established

[4] *Avnit v First Rand Bank Ltd* (20233/14) [2014] ZASCA 132 (23 September 2014) paras 6-7.
[5] *Uys NNO and others v The National Credit Regulator* [2025] ZASCA 34 (1 April 2025).
[6] *Zandberg v Van Zyl* 1910 AD 302.

principles governing simulated transactions in our law as restated most recently by this Court in *Uys*. They raised no new arguments on the facts and no new insights on the interpretational question. Their submissions were no more than a rehearsal of those that had been dismissed by the high court and by two judges of this Court on petition.

[20] It follows that there are no exceptional circumstances to justify a re-examination of the high court's rejection of the applicants' simulated transaction argument. Once this is so, the central tenet of their case fails.

[21] For completeness' sake, I should add that there are neither prospects of success, nor the risk of grave injustice for the applicants. Ms Ndegwa's averments, that the parties' common intention was to conclude a personal loan to her by way of a simulated sale, lease and option arrangement, were emphatically disputed by Mr Chaitowitz, with good reason. An interpretation of the agreements demonstrates no more than an intent by the parties to agree to a common commercial arrangement: Mr Chaitowitz purchased the property through Dosvelt, while at the same time, and for a price, giving Ms Ndegwa the opportunity to proceed with her intended development and, if she had the means within three years to do so – presumably if her development plans reached fruition – to exercise an option, through the Rock Foundation, to purchase it. There is nothing unusual or suspicious in that arrangement.

[22] The applicants having failed to establish the requisite jurisdictional fact that exceptional circumstances exist, a reconsideration of the petition decision is impermissible. Consequently, the matter falls to be struck from the roll. There is no reason why costs should not follow this result.

[23] I make the following order:

1 The matter is struck from the roll.

2 The applicants are directed to pay, jointly and severally, the one paying the other to be absolved, the costs incurred by the respondent in opposing the application for reconsideration.

R M KEIGHTLEY
JUDGE OF APPEAL

Appearances

For the applicants:	M Meyerowitz
Instructed by:	Pandor Davids Attorneys Inc, Roodepoort
	c/o Symington de Kok Attorneys, Bloemfontein
For the respondent:	W Strobl
Instructed by:	Clifford Levin Inc, Johannesburg
	c/o McIntyre van der Post, Bloemfontein.