THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Schoeman v Director of Public Prosecutions (972/2023) [2025] ZASCA 124 (3 September 2025).

Today the Supreme Court of Appeal (SCA) handed down judgment in which it reconsidered and varied the decision of two judges of the SCA refusing leave to appeal, referred for reconsideration by Molemela P. Having granted leave to appeal against the conviction and sentences imposed by Du Plessis AJ in the High Court, Gauteng Local Division, Johannesburg (the high court), the SCA partially upheld the appeal against three of the sentences imposed by the high court.

The appellant, Mr Schoeman, was convicted and sentenced in September 2022 to an effective 18 years' imprisonment for the unlawful possession of firearms, ammunition, explosives and drugs that he had directed his accomplices to store. His application for leave to appeal was dismissed in the high court in March 2023 and his application for leave to appeal to the SCA was dismissed by two judges in August 2023, whereafter the appellant brought an application for reconsideration in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013 (the Act). In December 2023 the President of the SCA referred the decision dismissing the application for leave to appeal, for reconsideration, and if necessary variation, by the SCA.

The central question raised by the proceedings was this: who decides, in terms of s17(2)(*f*), whether exceptional circumstances exist, the President of the SCA or the Panel of the SCA to which a referral has been made? The majority and minority judgments come to different conclusions on this question, as also on the issue as to how precedent is to be followed. Ultimately, both judgments agree that a reconsideration was warranted, and leave to appeal was granted.

Writing for the majority, Unterhalter JA (Meyer and Kathree-Setiloane JJA and Windell AJA concurring), held that the existence of exceptional circumstances is a jurisdictional fact and confirmed the approach followed in *Motsoeneng* and *Bidvest*. Relying on the *Defence and Aid* case, the majority held that a legislative provision of the kind exemplified by s 17(2)*(f)* does not permit of only one construction. The two interpretations, styled the exclusivity interpretation (which accords the exclusive power to determine whether there are exceptional circumstances to the President of the SCA) and the jurisdictional fact interpretation (which understands the power to rest with the Court to determine whether the jurisdictional fact of exceptional circumstances exists) are both available interpretations of the text of s17(2)(f). Neither interpretation, according to the majority, has *a priori* supremacy, much less logical inevitability. The majority held that the best interpretation is arrived at by the application of the principles of interpretation. Since the text of s 17(2)*(f)* supports both the exclusivity interpretation and the jurisdictional fact interpretation, the majority followed the approach in *Bidvest*, to show fidelity to the norm of institutional coherence and the hierarchy of decision-making by which a case may be taken on appeal. The majority further held that the President's discretionary power to refer in terms of s 17(2)*(f)* of the Act must be distinguished from the competence to determine the existence of exceptional circumstances. The issue of interpretation is binary:

either the President has the power to determine whether there are exceptional circumstances or the Court does. As a result, the interpretation favoured by the majority entails no review or reconsideration of the President's discretionary power to refer, as the minority judgment supposes.

The majority confirmed the jurisdictional fact approach followed in *Motsoeneng* and *Bidvest*. These authorities are binding, and are not contrary to the holdings in *Avnit* or *Liesching II.* To diverge from *Motsoeneng* and *Bidvest* would require this Court to show that they are clearly wrong. The majority reaffirmed that the interpretation adopted in *Motsoeneng* and *Bidvest* is correct. To over-rule *Motsoeneng* and *Bidvest,* it would have to be shown that the interpretation favoured in these cases is so aberrant that it cannot count as a possible meaning because it cannot be derived from a conscientious application of the principles of interpretation. This the minority judgment had not done. The majority affirmed the important for the rule of law of adhering to precedent. Precedent secures certainty, predictability, reliability, equality, uniformity, and hence the high threshold for deciding not to follow a binding precedent.

Writing for the minority, Matojane JA held that the language of s 17(2)*(f)* of the Act makes it clear that parliament entrusted the determination of 'exceptional circumstances' exclusively to the President's discretion. The minority further held that the proper role of the SCA under the statute is confined to reconsidering the original application for leave to appeal decision on its merits and that the phrase in 'exceptional circumstances' qualifies the President's power to refer. The minority held that the jurisdictional fact approach, followed in *Bidvest* as derived from *Motsoeneng*, duplicated the President's assessment of exceptional circumstances and rendered the President's prior determination meaningless, amounting to a judicial review of the President's statutory discretion, which review mechanism is absent from the legislative framework. According to the minority, *Bidvest* made a palpable error by inserting a review mechanism absent from the Act's precise wording. Furthermore, according to the minority, *Bidvest*'s reliance on the policy-driven argument of institutional coherence was flawed, and it was in conflict with binding precedents set in *Avnit* and *Liesching II*. Following *Patmar*, the minority held that *Bidvest* was clearly wrong and they were therefore not bound by its precedent. Accordingly, the minority found that the two judges of the SCA who refused the application for leave to appeal should have found that reasonable prospects of success existed to justify granting leave to appeal.

Regarding the question whether exceptional circumstances existed, the majority found firstly that the unjustified invocation of the minimum sentencing regime in terms of s 51 of the Criminal Law Amendment Act 105 of 1997 in respect of one of the counts was a material misdirection, secondly that the circumstances of the appellant and nature of the offences did not justify an 18-year effective sentence, and thirdly that failure of the high court to provide sufficient reasoning to sustain joint possession, and the absence of a clear articulate whether it found exclusive or derivative possession in respect of each count, undermined the confidence in the justness of the sentence. The majority therefore held, based on the three factors cumulatively, that a grave injustice would result if the SCA were to close its doors to the appellant. The majority found that exceptional circumstances existed, warranting a reconsideration of the decision to refuse the application for leave to appeal.

As a result, the SCA granted leave to appeal, dismissed the appeal against all the convictions and the sentences in respect of two counts, but upheld the appeal against sentencing in regards with three of the counts, resulting in an effective eight years' imprisonment to run from 28 September 2022.

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