



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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FirstRand Limited and Another v National Bank of Abu Dhabi PJSC (Pty) Limited (662/2024) [2026] ZASCA 98 (7 July 2026)

Today, the Supreme Court of Appeal (SCA) struck from the roll an application for reconsideration of an order by two SCA judges refusing leave to appeal.

The case arises from a trade mark dispute and concerns the interpretation of s 17(2)(f) of the Superior Courts Act 10 of 2013 (the SC Act). FirstRand Limited is the proprietor in South Africa of several trade mark registrations in class 36 under the Trade Marks Act 194 of 1993 (the TM Act). The trade marks in class 36 cover a wide range of financial services. Abu Dhabi Bank, under s 21 of the TM Act, filed two trade mark registration applications with the Registrar of Trade Marks, seeking registration of the marks First Abu Dhabi Bank and Grow Stronger First Abu Dhabi Bank, respectively, in class 36 for, among other things, banking affairs and related services. The marks were advertised for opposition. FirstRand filed its opposition. The Registrar subsequently transferred the matter to the High Court, which dismissed FirstRand's opposition and its subsequent application for leave to appeal. FirstRand applied for leave to appeal in the SCA. Two judges of the SCA considered the application and dismissed it on the ground that the appeal had no reasonable prospects of success and that there were no compelling reasons for the appeal to be heard. FirstRand then applied to the President of the SCA, under s 17(2)(f), for reconsideration of the dismissal of its application for leave to appeal.

In its heads of argument, FirstRand had argued that by referring the matter to the court, the President had already determined that exceptional circumstances exist and that the court was to consider only whether the order refusing leave to appeal should be reconsidered. However, counsel's attention was drawn to the SCA's unanimous judgments in *Motsoeneng* and *Bidvest*, which held that it is the court, not the President, that determines the presence of exceptional circumstances. Counsel then abandoned their argument and accepted that the matter should be determined on the basis that FirstRand had to demonstrate the presence of exceptional circumstances for the order refusing leave to be reconsidered.

Turning to that issue, the majority, per Makgoka JA, considered the High Court's incorrect characterisation of the nature of the enquiry under s 10(4) of the TM Act, as well as its conflation of the onus requirement in opposition proceedings under s 10(4) with that in revocation proceedings under s 27 of the TM Act. The majority held that the High Court erred in stating that it was required to determine whether Abu Dhabi Bank's trade mark was confusingly or closely similar to FirstRand's registered trade mark, and that the enquiry concerned whether the registration of Abu Dhabi Bank's trade mark would infringe FirstRand's rights. Despite these findings, the majority held that these misstatements of the law were merely *per incuriam*. The majority further emphasised

that, because an appeal lies against the lower court's substantive order, not the reasons for judgment, the fact that a court has misstated the law is ordinarily not, in itself, a ground for reversing a judgment.

The majority held that once FirstRand opposed Abu Dhabi Bank's application for registration, Abu Dhabi Bank bore the burden of adducing evidence that the application to register its trade marks was made with a genuine intention to use them. It noted that there was no reason to doubt that, should its trade marks be registered, Abu Dhabi Bank would comply with all necessary legal requirements to operate in South Africa, including applying for a banking licence. The majority, therefore, could not fault the High Court's findings. Even if the High Court's findings were wrong, FirstRand faced a formidable obstacle to establishing that they were so gross as to result in a grave failure of justice or to bring the administration of justice into disrepute. The majority found no such circumstances. FirstRand's complaints fell far short of the higher standard required to bring the administration of justice into disrepute. According to the majority, they amounted to no more than a 'mere difference of opinion'. Reading the High Court's judgment, an informed and reasonable member of the public might disagree with it. But, aware of all the relevant circumstances of the case, they are unlikely to undermine the public's confidence in our legal system or its integrity.

For these reasons, the majority held that no exceptional circumstances warranted reconsideration of the order refusing leave to appeal. According to the majority, this should have been the end of the matter. However, the majority noted that the minority, by Mbatha ADP, revisited the question of whether it is the President or the court that determines the presence of exceptional circumstances. The majority considered this unnecessary because: (a) the issue has been authoritatively settled in *Motsoeneng* and *Bidvest*, and affirmed in *Luphondo*; and (b) the issue did not arise in this case, as FirstRand had abandoned the argument that it is the President who determines the question.

Despite its expressed view that the issue was unnecessary to address in the present case, the majority went on to deal with it in light of what was expressed in the minority judgment. It supported the conclusion in *Motsoeneng* and *Bidvest* that it is the court, not the President, that determines whether exceptional circumstances exist. The President makes only a *prima facie* determination that such circumstances appear to be present. It is the court that makes the final determination in this regard. The majority provided a useful analogy to s 17(2)(f) by comparing it with s 304(4) of the Criminal Procedure Act 51 of 1977, which empowers a senior magistrate to submit a record of proceedings to the high court for review if it appears that the proceedings in a case are not in accordance with justice. Such a magistrate, the majority stresses, decides nothing substantive, other than forming a *prima facie* view that the proceedings might not be in accordance with justice. It is the high court to which the proceedings are referred that finally and determinatively decides whether they accord with justice.

Furthermore, in engaging with the minority dissenting judgment, the majority reiterated the purpose of s 17(2)(f) of the SC Act. Referring to *Mpati P in Avnit*, the majority emphasised that the special narrow 'safety net' provided by s 17(2)(f) should not be abused. In response to the argument in the minority judgment that the power to establish exceptional circumstances lies with the President, the majority drew attention to the fact that while this was initially contended by FirstRand, the contention was abandoned and, considering the issue, disregarded the Constitutional Court's caution against addressing issues not necessary for the disposal of cases. The majority also took issue with the inconsistency of some members of the SCA, who in one case supported *Motsoeneng* and *Bidvest*, while in others criticised them. The majority described these divergences as undesirable because litigants are entitled to certainty that their s 17(2)(f) applications will be adjudicated on a predictable, authoritative and principled basis, rather than the changing and evolving views of members of the SCA.

The majority also elucidated *Avnit* and emphasised that it did not determine that the power to decide whether exceptional circumstances exist resided with the President rather than with the court to which the application is referred. According to the majority, *Avnit* did not lay down any precedent on the interpretive question. The notion, raised in the minority judgment, that some constitutional harm is done to litigants whose application is not referred to the court is, according to the majority, premised on the flawed basis that the court is reviewing the President's decision. Referring to the SCA's recent judgment in *Luphondo*, the majority underscored that the judgments of the SCA have the same authority, irrespective of the number of judges on the panel, except where there is a difference in opinion between a smaller bench and the larger bench. In such an event, the binding

authority is that of the larger bench, meaning that a smaller bench cannot competently overrule a judgment by a larger bench. The majority relied on the recent SCA judgment of *Fisher*, which affirmed the doctrine of precedent and the binding authority of *Motsoeneng* and *Bidvest*. The majority stressed the importance of consistency and legal certainty in the application of reconsideration proceedings, in critiquing *4 Seasons*. Furthermore, the majority alluded to the UK Supreme Court's caution that an appellate court should not readily depart from its own decisions.

Finally, the majority judgment also pointed out that the minority judgment gave no reasoned basis for concluding that the order granting leave should nevertheless not be reconsidered, even though exceptional circumstances are present (as determined by the President). If the two judges did not err, asserts the majority, then the President's determination (on the approach adopted in the minority judgment) that exceptional circumstances are present must be wrong, and that determination is (impermissibly) reviewed by the court. This irretrievable internal contradiction, held the majority, is exposed in *4 Seasons* where the SCA found that the President had already determined that exceptional circumstances were present, but still concluded that no exceptional circumstances were discernible.

The minority, per Mbatha ADP, framed the central question differently, asserting that since the President had already established that exceptional circumstances existed, it was for the court to step into the shoes of the two judges who refused leave to appeal and consider whether their decision should stand. While the applicants emerged unsuccessful from both the majority and minority judgments, the distinction between the approach of the majority and the minority is premised on a difference in the interpretation of s 17(2)(f) of the SC Act. The majority and the minority represent the two main approaches to the interpretation of the section, identified in *Bidvest* as the jurisdictional fact approach (the referral court determines whether exceptional circumstances exist) and the exclusivity approach (the President of the SCA determines whether exceptional circumstances exist and the referral court steps into the shoes of the initial two judges). In light of diverging judgments on this section by differently constituted panels of the SCA, both the majority and the minority also engaged with the doctrine of *stare decisis* and the impact of panel sizes.

The minority dissented and insisted on the exclusivity approach to the interpretation of s 17(2)(f) because it is faithful to the text of the section and to the first decision on the section in *Avnit*; it gives content to the wording of the section and to the President's status as a judicial officer; it treats referred and chambers dismissed litigants alike; and keeps the threshold for referral and the threshold for leave to appeal distinct. Taking the merits as set out in the first judgment, the minority was satisfied that the two judges who refused leave to appeal did not err. It held that there was no basis to vary the two judges' order refusing leave to appeal. The minority held that, in line with the principle of finality, the proper order was dismissal, and not striking from the roll. Such an order is also consistent with the exclusivity approach.

Referring to *Avnit*, the minority restated that the origin of the section lay in the situation that arose in *Van der Walt*, where the SCA on successive days in 2001 made contrary orders in two cases which were materially identical. After traversing the evolution of the decisions on s17(2)(f), starting in 2014, the minority pointed out that the change in the established practice was introduced by the judgment in *Motsoeneng* in 2024. The minority however drew attention to the fact that in *Motsoeneng* held that the referral court effectively steps into the shoes of the two judges, who refused leave or special leave to appeal.

On the question of precedent, the minority acknowledged that the doctrine of *stare decisis* requires that the SCA follow its own previous decisions and those of the Constitutional Court to ensure legal certainty and consistency. However, it emphasised that the SCA may depart from them if convinced that the previous decision was clearly wrong, based on a fundamental misconception of the law. A court is not obliged to follow precedent that is incompatible with constitutional values or that was decided *per incuriam*. While the majority espouses certainty by its reliance on *Motsoeneng* and *Bidvest*, the minority points out that the divergence in approaches to the section started when these judgments departed from *Avnit*. The minority found the jurisdictional fact interpretation per *Bidvest* to be clearly wrong. It pointed to the logical gap in the *Bidvest* framework that was raised in a minority judgment in the Constitutional Court in *Godloza*, that the *Bidvest* approach has the effect that the President of the SCA has the power to determine whether exceptional circumstances are present for

purposes of refusing reconsideration, but not for purposes of granting it. This, the minority argued, was in conflict with the spirit, purport and objects of the Bill of Rights. Regarding the text and structure of s 17(2)(f), the minority drew attention to the fact that the President of the SCA can also refer a matter for reconsideration of his or her own accord. The phrase has to be interpreted conjunctively with the rest of the provision, and, according to the minority, points towards the power of establishing exceptional circumstances vesting in the President. The minority therefore submitted that the exclusivity interpretation follows naturally from the words used while jurisdictional fact interpretation reads into the statute a function for which the provision makes no express provision. Furthermore, the *Bidvest* approach, according to the minority, treats the President's referral as devoid of substantive content.

Relying on s 13 of the SC Act, which provides that proceedings of the SCA must ordinarily be presided over by five judges, but that the President may direct that an appeal be heard before a larger or smaller panel, the minority emphasised that the President's power to constitute panels differently is a matter of practice and expediency — not of hierarchy or authority. With reference to the United Kingdom case of *Young*, the majority stressed that the SCA is 'one court', regardless of the number of judges sitting.

Engaging with the challenges and what it calls mischaracterisations in the majority judgment, the minority agreed that the proliferation of disparate views on s 17(2)(f) do not redound to the benefit of the SCA, but pointed out that the majority does not resolve the anterior question whether *Motsoeneng* and *Bidvest* were correctly decided. It described the majority judgment's characterisation of the statement in *Avnet* as not constituting a *ratio decidendi*, as too narrow. Furthermore, the minority argued that the majority's reliance on panel size, to discount the judgments that rejected *Bidvest* and *Motsoeneng*, not supported by the provisions of the SC Act. The majority judgment, according to the minority, did not address the constitutional point. The minority also argued that the approach advocated for by the majority, treats 'exceptional circumstances' (the threshold for referral) and 'reasonable prospects of success or compelling reasons' (the threshold for leave) as though they were a single enquiry. According to the minority, the *Luphondo* decision may itself require constitutional scrutiny on the issue of panel sizes, given the provisions of the SC Act. The minority insisted that contrary to the majority's averments, the question of the repository of power under s 17(2)(f) was fully canvassed at the hearing and the concession made was based on an error in law. Relying on the Constitutional Court in *Sebed* the minority held that it was not bound by a legal concession if it finds the concession to be legally incorrect. This informed the decision to pen the dissenting judgment.

As a result, the SCA struck the matter from the roll and ordered the applicants to pay the respondent's costs, including the costs of two counsel.

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