THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 986/2023

In the matter between:

BIDVEST PROTEA COIN SECURITY (PTY) LTD **APPLICANT**

and

MANDLA WELLEM MABENA **RESPONDENT**

Neutral citation: *Bidvest Protea Coin Security (Pty) Ltd v Mandla Wellem Mabena* (986/2023) [2025] ZASCA 23 (26 March 2025)

Coram: MOKGOHLOA ADP and MBATHA and UNTERHALTER JJA and VALLY and MODIBA AJJA

Heard: 12 March 2025

Delivered: 26 March 2025.

Summary: Section 17(2)*(f)* of the Superior Courts Act 10 of 2013 – reconsideration of a decision of the Supreme Court of Appeal to refuse special leave to appeal – finality of such decision – exceptional circumstances as a jurisdictional fact – who decides whether a reconsideration is permissible.

ORDER

On appeal from: Mpumalanga Division of the High Court, Middelburg (Mphahlele DJP and Mankge and Vukeya JJ, sitting as a court of appeal):

(i) The matter is struck from the roll;

(ii) The applicant is to pay the costs incurred by the respondent in opposing the application for reconsideration.

JUDGMENT

Unterhalter JA (Mokgohloa ADP and Mbatha JA and Vally and Modiba AJJA concurring):

Introduction

[1] The applicant, Bidvest Protea Coin Security (Pty) Ltd (Bidvest) provided security services to the owner of the Wonderfontein mine, a mine outside Middelburg, in the province of Mpumalanga. In March 2016, the Association of Mine Workers and Construction Union (AMCU), the representative union, embarked upon a protected strike. Members of AMCU employed at the mine, including the respondent, Mr Mabena, participated in the strike. On 4 April 2016, the striking workers, including Mr Mabena, engaged in industrial action by demonstrating and picketing in an area that had been designated for this purpose, and was agreed as between the employer and AMCU. A harvester belonging to a farmer, Mr Bezuidenhout, entered the picketing area in order to gain access to an adjoining field in which soya was planted. The harvester drove into a black vehicle (belonging to one of the striking workers), and then entered the field. The striking workers, in response, threw stones at the harvester and at employees of Bidvest who were in place to secure the mine. Employees of Bidvest, as they had

done earlier in the day, in two groups, advanced upon the workers, and opened fire with rubber bullets. The striking workers ran into the nearby bushes, where Mr Mabena was struck by a rubber bullet in his left eye, as a result of which he lost the sight of his eye.

[2] Mr Mabena instituted an action against Bidvest to claim compensation for the loss of his eye. Pleadings were exchanged. The parties agreed to separate the issue of liability and quantum. The trial was heard before Brauckmann AJ in the Mpumalanga Division of the High Court, Middelburg (the trial court). The trial court, having separated the issue of liability for determination, held that Bidvest was 100% liable for the damages that Mr Mabena may prove.

[3] The treatment by the trial court of Bidvest's defence is the matter that now assumes some importance. In its plea, Bidvest denied that the events alleged by Mr Mabena that led to his injury had occurred at all; but if they did, there was no intent or negligence attributable to the employees of Bidvest, acting in the course and scope of their employment; but if this was proven, then, in the alternative, the employees of Bidvest acted in a situation of sudden and unexpected emergency; and, in the further alternative, Mr Mabena's own negligence contributed to the incident leading to his injury.

[4] At the commencement of the proceedings before the trial court, counsel for Bidvest, *Mr Boot SC*, indicated that he had proposed to counsel for Mr Mabena, *Mr Mkize*, that *Mr Mkize* lead evidence on three questions: (i) was Mr Mabena injured by employees of Bidvest; (ii) if so, 'whether the projectile that injured the plaintiff . . . was fired [in] circumstances of necessity'; (iii) if so, that was 'the end of the matter', that is to say, it would be a complete defence, but if not, was Mr Mabena a joint wrongdoer who contributed to his own injuries, and to what

extent? The status of this pronouncement is a matter of some controversy before us. However, the trial court decided the case in the following manner.

[5] The trial court found that Bidvest relied upon the defence of sudden and unexpected emergency, but had failed to plead the defence of necessity. It concluded that Mr Mabena was shot at point blank range by an employee of Bidvest causing him to lose his left eye. The trial court went on to decide that, even if it considered the defence of necessity (disclosed only in the opening address), Bidvest had, on the evidence, failed to discharge its onus to prove necessity or, indeed, sudden emergency. As a result, the trial court ordered, in relevant part, that Bidvest is 100% liable to Mr Mabena for all the damages he may prove, and must pay his costs.

[6] With leave, Bidvest appealed the judgment and order of the trial court to the full court of the trial court (the full court). Mankge J (Mphahlele DJP and Vuyeka J concurring) dismissed the appeal, with costs. First, the full court found no basis to interfere with the trial court's assessment of the evidence, and the conclusions it reached. Second, it held that the defence of necessity had not been pleaded and should not have been raised, as it was, at the start of the trial. Third, it doubted that the defence of sudden emergency, as pleaded, 'would have succeeded'. Fourth, on viewing the video footage of the events of the day, the full court concluded the striking workers were 'at a state of sudden emergency' created by the harvester that was approaching them, and not 'the other way round'. It then observed, 'I will however . . . not comment beyond this on the defence of necessity'.

[7] Bidvest sought special leave from this Court to appeal the judgment and order of the full court. The application was considered by Mabindla-Boqwana JA

and Mali AJA, and was dismissed, with costs (the decision on petition). Bidvest then brought an application in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013 (the SC Act) seeking from the President of this Court (the President) a referral of the decision on petition for reconsideration, and if necessary, variation. Bidvest's affidavit in support of its application invoked exceptional circumstances that, it contended, warranted the referral of the decision on petition to this Court for reconsideration and variation. On 1 March 2024, Mocumie ADP (on behalf of the President) ordered that the decision on petition be referred to this Court for reconsideration, and, if necessary, variation. This referral now serves before us.

The referral issue

[8] The question that arises is this: what must we reconsider? The referral is made to us by the President. Does s 17(2)*(f)*, and the referral made to us by the President, require us simply to reconsider the decision on petition, or does it also require us first to decide whether there are exceptional circumstances that warrant the reconsideration of the decision on petition, and only if we so find, then to reconsider the decision on petition?

[9] In *Motsoeneng*,[1] this Court held that it is for the Court to which the referral is made in terms of s 17(2)*(f)* to decide whether there are exceptional circumstances. This, it said, is a jurisdictional fact. Ponnan JA framed the proposition as follows: 'Counsel appeared not to appreciate that the requirement for the existence of exceptional circumstances is a jurisdictional fact that had to first be met, and that absent exceptional circumstances, the s 17(2)*(f)* application was not out of the starting stalls'.[2]

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[1] *Motsoeneng v South African Broadcasting Corporation Soc Ltd and Others* [2024] ZASCA 80.
[2] *Motsoeneng* para 19.

[10] Section 17(2)*(f)*, of application as at the date of the referral by Mocumie ADP, read thus: '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 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'.[3] This provision has a number of features. First, the power conferred upon the President is a special competence that permits of the possibility of revisiting the finality that ordinarily attaches to a decision on petition; finality that is affirmed by s 17(2)*(f)*. Second, by reason of how unusual it is to permit of this possibility, the standard is very high: exceptional circumstances. Third, the referral to this Court follows upon the exercise of the power enjoyed by the President. In *Avnit*,[4] this Court understood the power as one, 'likely to be exercised only when the President believes that some matter of importance has possibly been overlooked, or a grave injustice will otherwise result'. Fourth, the power may be exercised, either in response to an application by a party or of the President's own accord, and in response to the grant or refusal of a petition. The President may either dismiss the application or refer it to this Court.

[11] Once the President has exercised her power, the question posed in paragraph [8] above then arises. On one interpretation, what the President refers for reconsideration is simply the decision on petition. The President alone enjoys

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[3] Section 17(2)*(f)* was amended by s 28 of the Judicial Matters Amendment Act 15 of 2023 which came into effect on 3 April 2024. The effect of the amendment is to alter the standard for referral from exceptional circumstances to the following test: 'where a grave failure of justice would otherwise result, or the administration of justice may be brought into disrepute'. The change of standard does not however change the essential question before this Court.

[4] *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 para 7.

the power to decide whether there are exceptional circumstances that warrant this Court reconsidering the merits of the decision on petition. That is certainly an interpretation that accords with one reading of the text of s 17(2)*(f),* in that it confers a power upon the President to refer, and the subject matter of that referral is the decision on petition, and not, in addition, the President's power to refer. I shall refer to this interpretation as 'the exclusivity interpretation' because it is for the President alone to decide whether there are exceptional circumstances.

[12] The other interpretation is this. The President may only decide to exercise the power conferred upon her if there are exceptional circumstances. The text of s 17(2)*(f)* does not refer to exceptional circumstances as a state of affairs that exist if the President forms the opinion that this is so. Rather, exceptional circumstances must exist for the President to enjoy the power of referral. Exceptional circumstances thus constitute, as this Court found in *Motsoeneng*, a jurisdictional fact. If they do not exist, the Court to which the referral is made is duty-bound to so find. Absent the existence of exceptional circumstances, there is no basis for the exercise of the power conferred upon the President, and hence, no basis for this Court to consider again the merits of the decision on petition. The finality of the decision on petition stands. I shall refer to this interpretation as 'the jurisdictional fact interpretation' because it is ultimately for this Court to decide whether there are exceptional circumstances.

[13] Both the exclusivity interpretation and the jurisdictional fact interpretation have some foundation in the text of s 17(2)*(f)*. As we have observed, the power is conferred upon the President and its exercise is to refer the decision on petition to the Court. That framing supports the exclusivity interpretation. However, the text confers the power upon the President if there are exceptional circumstances, and does not make the determination of those circumstances the exclusive

preserve of the President. If the exercise of a power depends upon the existence of a state of affairs (here exceptional circumstances), absent a clear expression to the contrary, the repository of the power will not lightly be found simultaneously to exercise the power and be the only judge as to whether the state of affairs exists that permits of the exercise of such power. Hence, it lies with the Court to which the referral is made by the President to be the ultimate arbiter as to whether the jurisdictional fact for the exercise of the power exists. This reasoning supports the jurisdictional fact interpretation.

[14] Since the text is not decisive of the issue, we are required to enrich our interpretation of s 17(2)*(f)* by recourse, in addition, to context and purpose. The following is salient. Section 17 sets out the sequence of decision-making by recourse to which a litigant may seek to secure a right of appeal. The sequence is hierarchical in nature. In essence, if the trial court that made the order does not grant leave to appeal, this Court may do so, upon a decision on petition. That is a decision taken by two judges of this Court, and in the event of their disagreement by a third judge of this Court.

[15] Given this hierarchical sequence of decision-making, it would be a discordant institutional norm if s 17(2)*(f)* were to be interpreted to allow a single judge of this Court, albeit the head of court, to undo the finality of a decision taken by two (and sometimes three) judges of the same court. It lends much greater institutional coherence to the principle of hierarchical reconsideration if the jurisdictional fact that is required to reconsider the presumptive finality of a decision on petition is taken by a panel of this Court to which the matter is referred by the President. That would better accord with the scheme of s 17. The refusal of leave by the trial court is reconsidered on petition by two (and sometimes three) judges of this Court. If their decision is to be judged worthy of reconsideration

(and hence rendered not final), that is done by recourse to a stringent standard and one ultimately determined by a panel of this Court. Hence s 17(2)*(f)* does not use language which references exceptional circumstances to have been found to exist 'in the opinion of the President'. Rather, exceptional circumstances are referenced as an objective state of affairs that must exist as a predicate for the exercise of the power by the President. If the predicate does not exist, then this Court has no competence to engage upon a reconsideration of the decision on petition. The President's referral cannot invest this Court with jurisdiction to reconsider the decision on petition, if the jurisdictional predicate for such consideration is absent.

[16] I observe that this principle of institutional coherence is also of a piece with another feature of s 17. The substantive standard for the grant of leave to appeal increases in its stringency once a litigant has had the benefit of an appeal before a full bench of the trial court. Special leave requires the satisfaction of a more stringent test than leave from the judgment and order of a single judge of the trial court. So too, the test for reconsideration from a decision on petition is yet more stringent. And rightly so. Once the grant of leave has been refused (in the usual case) by a puisne judge in the trial court, and by way of a decision on petition by this Court, a very high bar must be met to have the question of leave to appeal reconsidered by this Court. It would be an oddity if the substantive test for reconsideration were to be more stringent, but the institutional arrangements under which a decision on petition could be reconsidered is determined by a single judge, the President, to undo the finality of a decision taken by two judges of this Court.

[17] For these reasons, I consider the position taken in *Motsoeneng* to be correct. And in consequence, we are required, as a threshold question, to

determine whether there are exceptional circumstances that permit of the referral to us for reconsideration of the decision on petition to refuse special leave. If we should find that there are no exceptional circumstances, then that puts an end to the matter, and we need not consider whether the refusal to grant leave on petition was correctly decided, much less whether the judgment and order of the full court are correct.

Were there exceptional circumstances?

[18] I consider next whether there are exceptional circumstances established by Bidvest that permit of the reconsideration of the decision on petition. Both in its application to the President in terms of s 17(2)*(f)*, and before this Court, Bidvest contended that exceptional circumstances existed that warranted the reconsideration of the decision on petition. Bidvest complained that it had not been treated fairly in the full court. The full court had found that Bidvest was bound by its pleaded defence of sudden emergency, and could not rely on the defence of necessity. This deprived Bidvest of its right to have its sole defence considered by the full court. Bidvest accepted that its case could rest only on the defence of necessity, since the evidence established that an employee of Bidvest had shot Mr Mabena and the defence of sudden emergency could not be sustained. Bidvest submitted that it had raised the defence of necessity at the outset of the trial; that Mr Mabena's counsel had not demurred; that the trial had been conducted on this basis; and hence both the trial court and the full court were bound, as a matter of high authority,[5] to consider this defence on its merits; that the full court did not do so; that this was unfair; and this then disclosed exceptional circumstances that warranted a reconsideration of the decision on petition.

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[5] *Builders Ltd v Union Government* 1928 AD 46 at 53; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 SCA; *Shill v Milner* 1937 AD 101 at 105.

[19] Counsel made submissions at some length in oral argument as to whether Bidvest was required to amend its plea to include the defence of necessity or whether it sufficed that the defence was invoked at the commencement of the trial and evidence was led and cross-examination was directed to the merits of this defence. Counsel for Mr Mabena disavowed any agreement on his part to the triad of questions that counsel for Bidvest had proposed in his opening address to the trial court.

[20] It is unnecessary to resolve these matters. A careful reading of the judgment of the full court does not show that Bidvest was denied a consideration of its defence of necessity. To see why this is so, I must revert to the reasoning of the trial court. The trial court concluded (correctly) that the defences of sudden emergency and necessity are distinct, and that Bidvest only pleaded the defence of sudden emergency. The trial court then undertook a full analysis of the evidence led at trial. It then postulated the following: 'even if I consider the defence (only disclosed in the opening address) of necessity', it nevertheless came to the conclusion, '[O]n the evidence before me the defence of necessity was not proven'. The trial court thus did consider the defence of necessity, and there was no unfairness suffered by Bidvest on the basis that its defence was excluded because it was not pleaded.

[21] What then of the treatment of this issue in the appeal before the full court? The full court was critical of the failure by Bidvest to plead the defence of necessity. In an important passage from its judgment, the full court stated: 'Even though I do not agree with the trial court in its approach of accepting the issue at the opening address stage, I however agree with the trial court's ultimate finding on the issue of necessity'. This affirmation of the trial court must be read together

with the acceptance by the full court that the findings of the trial court, underlying its order, could not be faulted. There are certain references in the judgment of the full court which might suggest that it considered the defence of necessity with circumspection. So, for example, upon its viewing of the video evidence, the full court concluded thus: 'the defence of necessity *would* have probably be met with difficulties looking at the events as they unfold in the video recording'. (Emphasis added.) But its viewing of the video evidence also led the full court to conclude that it was the striking workers who were faced with a situation of sudden emergency and the following finding is then made: 'I will however not comment beyond this on the defence of necessity. Therefore, the conclusion by the trial court should stand, *even on this basis alone*'. (Emphasis added.)

[22] A fair reading of the judgment of the full court indicates that it did have regard to the evidence led at trial and concluded that it could find no error that the trial court had made as to the defence of necessity. Once this is so, there was no unfairness of the kind attributed by Bidvest to the full court. And hence there are no exceptional circumstances disclosed that permit of a reconsideration of the decision on petition.

[23] Section 17(2)*(f)* requires that this Court must decide whether exceptional circumstances exist. If they do not, as I find, then the jurisdictional fact has not been established that permits of a reconsideration of the decision on petition. The decision on petition remains the final word on whether Bidvest may appeal the judgment and order of the full court. It may not. And hence the matter must be struck from the roll.

[24] In the result:

(i) The matter is struck from the roll;

(ii) The applicant is to pay the costs incurred by the respondent in opposing the application for reconsideration.

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D N UNTERHALTER

JUDGE OF APPEAL

Appearances

For the applicant:	Adv B Boot SC
Instructed by:	Weavind & Weavind, Pretoria
	Hattingh Attorneys, Bloemfontein
For respondent:	Adv L P Mkize
Instructed by:	Mkize Attorneys, Delmas
	Phatshoane Henney Inc., Bloemfontein.