



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT**

**Reportable**

Case no: 972/2023

In the matter between

**JONATHAN REAGAN SCHOEMAN**

**APPELLANT**

and

**DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**Neutral citation:** *Schoeman v Director of Public Prosecutions* (972/2023) [2025] ZASCA 124 (3 September 2025)

**Coram:** MEYER, MATOJANE, KATHREE-SETILOANE, UNTERHALTER JJA, and WINDELL AJA

**Judgments:** Unterhalter JA (majority): [56] to [96]  
Matojane JA (minority): [1] to [55]

**Heard:** 5 March 2025

**Delivered:** 3 September 2025

**Summary:** The interpretation of s 17(2)(f) of the Superior Courts Act 10 of 2013 – true nature of the enquiry – discretionary power of the President of the Supreme Court of Appeal to refer refusal of leave to appeal for reconsideration – whether threshold solely within President's discretion or the Court – following precedent – the application of s 17(2)(f) – indirect control and joint possession of illegal and unlicensed firearms, ammunitions, explosives and drugs – misapplication of minimum sentencing regime where charge sheet does not properly invoke s 51 of the Criminal Law Amendment Act 105 of 1997.

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## ORDER

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On application for reconsideration: referred by Molemela P in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013:

- 1 Declaring that exceptional circumstances exist in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013.
- 2 The decision of this Court dated 30 August 2023, dismissing the appellant's application for leave to appeal with costs, is set aside and replaced with an order granting leave to appeal to the Supreme Court of Appeal.
- 3 The appeal against the convictions and sentence imposed on counts 5 and 8 is dismissed.
- 4 The appeal against the convictions on counts 4, 6 and 7 is dismissed.
- 5 The appeal against the sentences imposed on counts 4, 6 and 7 is upheld.
- 6 The decision of the high court is set aside and replaced with the following:
  - (a) The accused is acquitted on counts 1, 2 and 3.
  - (b) The accused is convicted on counts 4, 5, 6, 7 and 8.
  - (c) The following sentences are imposed:
    - (i) On count 4: eight years' imprisonment.
    - (ii) On count 5: three years' imprisonment.
    - (iii) On count 6: eight years' imprisonment.
    - (iv) On count 7: eight years' imprisonment.
    - (v) On count 8: three years' imprisonment.
  - (d) All the sentences in (c) above are to run concurrently.
  - (e) The accused is sentenced to an effected term of imprisonment of eight years to run from 28 September 2022.
  - (f) In terms of s 103 of Act 60 of 2000, the accused is declared unfit to possess a firearm.

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## JUDGMENT

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### **Matojane JA**

#### **Introduction**

[1] This matter stems from a referral under s 17(2)(f) of the Superior Courts Act 10 of 2013 (the Act) for the reconsideration and potential variation of a decision by two judges of this Court who, on 30 August 2023, refused Mr J R Schoeman (the appellant) leave to appeal against the conviction and sentence imposed by Acting Judge Du Plessis in the Gauteng Division of the High Court, Johannesburg (the high court). The referral was made by the President of this Court (the President), on 8 December 2023, following an application by the appellant under s 17(2)(f) of the Act. In addition, the President referred the application for leave to appeal for oral argument in terms of s 17(2)(d) of the Act, and that the parties be prepared, if called upon, to address the Court on the merits.

#### **Background**

[2] The appellant was charged in the high court for unlawful possession of firearms, ammunition, explosives, and drugs that he had purportedly directed his accomplices to store (counts 4-8). The charges stemmed from events that took place from 2019 to 2020, linking the appellant to the murder of Mr Saheb Dowjee (count 1), a conspiracy targeting tobacco industry figures (count 2), and the attempted murder of Mr Simon Rudland (count 3).

[3] The high court acquitted the appellant on the charges of murder, attempted murder, and conspiracy to murder (counts 1-3), concluding that there was insufficient evidence to prove a prior agreement or common purpose between the appellant and the deceased hitman, Mr Sebastian Groenewald (Mr Groenewald), who committed the crimes referenced in these counts. The high court convicted the appellant on counts 4-8, accepting the evidence of the accomplices that the appellant had stored firearms, ammunition, explosives, and drugs at their respective residences. The counts were:

‘1. Count 4: Illegal possession of an unlicensed firearm (9mm semi-automatic pistol and 12-gauge shotgun with a filed-off serial number) – Contravention of s 3, Firearms Control Act 60 of 2000 (Firearms Control Act).

2. Count 5: Illegal possession of live ammunition – Contravention of s 90, Firearms Control Act.
3. Count 6: Illegal possession of a prohibited firearm (9mm Beretta 92SB with altered identifying marks) – Contravention of s 4(1)(f)(iv), Firearms Control Act, read with s 51(1), Criminal Law Amendment Act 105 of 1997 (Criminal Law Amendment Act).
4. Count 7: Illegal possession of explosives (6M26HE hand grenades) – Contravention of s 10(1), Explosives Act 15 of 2003 (Explosives Act).
5. Count 8: Illegal possession of 488 Mandrax tablets – Contravention of s 4(b), Drugs and Drug Trafficking Act 140 of 1992.’

[4] The appellant was sentenced as follows: fifteen years’ imprisonment on count 4; three years’ imprisonment on count 5; fifteen years’ imprisonment on count 6; fifteen years’ imprisonment on count 7; and three years’ imprisonment on count 8. The high court ordered the sentences on counts 5, 7, and 8 to run concurrently with the sentence on count 4. Additionally, it ordered that twelve years of the fifteen-year sentence on count six also run concurrently with the sentence on count 4. Consequently, the total effective sentence imposed on the appellant was eighteen years’ imprisonment.

[5] On 10 March 2023, the high court refused the appellant’s application for leave to appeal against his conviction and sentence. A subsequent petition to this Court in terms of s 17(2)(b) of the Act was also dismissed on 30 August 2023 by two judges, who found no reasonable prospect of success or compelling reason to grant leave (the order). The appellant then applied to the President under s 17(2)(f) of the Act for reconsideration of the order. The President referred the matter back to this Court for reconsideration and possible variation of the order.

### **Section 17(2)(f) of the Act**

[6] This case presents a direct challenge to the principle recently established by this Court in *Bidvest Protea Coin Security (Pty) Ltd v Mabena*<sup>1</sup> (*Bidvest*). The central issue is the proper interpretation of s 17(2)(f) of the Superior Courts Act 10 of 2013 (the Act). It must be decided whether the existence of ‘exceptional circumstances’ is a jurisdictional fact to be determined by the Court hearing the reconsideration application,

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<sup>1</sup> *Bidvest Protea Coin Security (Pty) Ltd v Mabena* [2025] ZASCA 23; 2025 (3) SA 362 (SCA).

as *Bidvest* held, or whether it is a matter for the President of this Court to determine when deciding whether to refer a matter for reconsideration.

[7] The President, having been satisfied that exceptional circumstances were present, referred the refusal of the appellant's petition for reconsideration by this Court. *Bidvest* held that, as a preliminary point, the Court must first satisfy itself that exceptional circumstances exist before it can entertain the merits of the reconsideration application. For the reasons that follow, I conclude that *Bidvest* was wrongly decided and its interpretation of s 17(2)(f) should not be followed.

### **The flaws in the *Bidvest* judgment's reasoning**

[8] The Court in *Bidvest* concluded that 'exceptional circumstances' constitute a jurisdictional fact that the Court hearing the referral must determine. The judgment relies on *Motsoeneng v South African Broadcasting Corporation (Motsoeneng)*<sup>2</sup> to justify the jurisdictional fact, but fails to reconcile this with conflicting precedent, as I will demonstrate below. *Motsoeneng*'s jurisdictional fact interpretation is obiter dicta and contradicts the binding guidance of *Avnit v First Rand Bank (Avnit)*<sup>3</sup> that the President's referral is discretionary. *Bidvest* based its conclusion on two primary grounds: the text of the statute and a principle it termed 'institutional coherence'. In my respectful view, the Court's analysis was flawed in both respects.

### **Textual interpretation**

[9] The *Bidvest* Court reasoned as follows at paragraph 13:

'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 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'.

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<sup>2</sup> The jurisdictional fact analysis is imported from *Motsoeneng v South African Broadcasting Corporation Soc Ltd and Others* [2024] ZASCA 80; 2025 (4) SA 122 (SCA) para 19 where this Court stated that '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'.

<sup>3</sup> *Avnit v First Rand Bank Ltd* (2014) ZASCA 132; 2014 JDR 2014 (SCA).

[10] Section 17(2)(f) states simply that:

‘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.’<sup>4</sup> (Own emphasis.)

[11] In *S v Liesching (Liesching I)*,<sup>5</sup> the Constitutional Court emphasised that courts must respect both the text of the legislation and its purpose, and must not rewrite statutes under the guise of interpretation. At paragraph 30, the Constitutional Court clarified the approach to statutory interpretation under s 39(2) of the Constitution and stated:

‘This Court has reiterated that statutes must be construed consistently with the Constitution in so far as the language of the statute permits. Words in a statute must be read in their entire context and must be given their ordinary grammatical meaning harmoniously with the purpose of the statute. The actual words used by the Legislature are important. Judicial officers should resist the temptation “to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so regarding a statute or statutory instrument is to cross the divide between interpretation and legislation”.’ (Citations omitted.)

[12] In *AmaBhungane Centre for Investigative Journalism NPC and Another v President of the Republic of South Africa*<sup>6</sup> the approach to interpreting legislative provisions was restated as follows:

‘. . . [O]ne must start with the words, affording them their ordinary meaning, bearing in mind that statutory provisions should always be interpreted purposively, be properly contextualised and must be construed consistently with the Constitution. This is a unitary exercise. The context may be determined by considering other subsections, sections or the chapter in which the keyword, provision or expression to be interpreted is located. Context may also be determined from the statutory instrument as a whole. A sensible interpretation should be preferred to one that is absurd or leads to an unbusinesslike outcome.’ (Citations omitted.)

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<sup>4</sup> Section 17(2)(f) has been amended by s 28 of the Judicial Matters Amendment Act 15 of 2023 which came into effect on 3 April 2024. The amendment alters 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’.

<sup>5</sup> *S v Liesching and Others* [2016] ZACC 41; 2017 (2) SACR 193 (CC); 2017 (4) BCLR 454 (CC).

<sup>6</sup> *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* [2022] ZACC 31; 2023 (2) SA 1 (CC); 2023 (5) BCLR 499 (CC) para 36.

[13] The language of s 17(2)(f) makes it clear that Parliament entrusted the determination of 'exceptional circumstances' exclusively to the President's discretion. The text contains no suggestion that this threshold assessment requires subsequent judicial validation. By imposing an additional layer of review, the *Bidvest* Court engaged in impermissible legislation – amending the statute to insert a procedural requirement that does not appear in the text. This effectively subjects the President's decision to judicial review contrary to the legislative intent.

[14] The Court's proper role under the statute is confined to reconsidering the original petition decision on its merits. The phrase 'in exceptional circumstances' qualifies the President's power to refer. It is the condition upon which the President may act. Any broader review of the President's discretionary determination would constitute an unauthorised expansion of judicial authority at the expense of both the Legislature and the President's constitutionally recognised institutional role. Where Parliament has allocated decision-making authority to a specific office (here, the President), courts must respect that allocation absent explicit statutory authorisation to intervene.<sup>7</sup>

[15] The phrase '*the President . . . may, in exceptional circumstances, . . . refer*'<sup>8</sup> inherently links the existence of exceptional circumstances directly to the President's power to refer; it implies that the President, as the repository of this specific power, is the one who must be satisfied that such circumstances exist before exercising the discretion to refer. If the Legislature intended the Court to be the ultimate arbiter of 'exceptional circumstances' as a jurisdictional fact for the President's referral, it would have used different language, such as 'the President may refer, if the Court finds exceptional circumstances' or 'upon a finding by the Court that exceptional circumstances exist'. The absence of such qualifying language strongly supports the view that the determination rests with the President.

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<sup>7</sup> In *Norwich Union Life Insurance Society v Dobbs* 1912 AD 395 Innes ACJ famously stated: 'Moreover, when a statute directs that a fixed rule shall only be departed from under exceptional circumstances, the Court, one would think, will best give effect to the intention of the Legislature by taking a strict rather than a liberal view of applications for exemption, and by carefully examining any special circumstances relied upon.' This passage is cited and applied in later South African jurisprudence, including: *Avnit* para 4, where Mpati P adopted that language in construing 'exceptional circumstances' under the Act.

<sup>8</sup> Section 17(2)(f) of the Act.

[16] Section 17(2)(f) was deliberately created as an exception to finality, allowing the President to intervene in rare cases. The Constitutional Court, in the combined cases of *Cloete and Another v S and Sekgala v Nedbank Limited*<sup>9</sup> (*Cloete*), delivered a unanimous judgment by Theron J on the application of s 17(2)(f) of the Act. The key point made by the Constitutional Court regarding this section is that it serves as a safety net in the appeals process.<sup>10</sup> It gives the President the power to intervene to correct errors or mistakes, prevent an injustice, or where a failure to intervene would result in the administration of justice being brought into disrepute.<sup>11</sup> The Constitutional Court explained further that the general rule is that the decision of the judges considering an application for leave to appeal 'shall be final'.<sup>12</sup> The President's power disturbs this finality only in cases where she exercises her discretion to 'refer the decision', refusing leave to appeal to this Court for reconsideration.<sup>13</sup>

### **Judicial overreach – the Court usurps the President's statutory role**

[17] It is illogical to suggest that the President possesses the sole power to refer, yet lacks the antecedent power to determine the very conditions that trigger that referral. To argue otherwise would mean the President's power is not truly exclusive, but rather contingent on a prior, external judicial validation of the jurisdictional fact. Such redundancy not only wastes judicial resources but, more fundamentally, violates the separation of powers by allowing Courts to second-guess what Parliament deliberately assigned to the President. The President's referral is the sole gateway for reconsideration; therefore, the President must be the sole gatekeeper in assessing the conditions for opening that gate.

[18] When the President makes an order to refer a decision on a petition for reconsideration under s 17(2)(f), that very act is predicated on the President having formed the opinion that 'exceptional circumstances' exist; the power to refer is explicitly granted to the President in exceptional circumstances. This phrasing unequivocally places the determination of 'exceptional circumstances' as a prerequisite for the President's exercise of the referral power. The amended s 17(2)(f) replaces

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<sup>9</sup> *Cloete and Another v S and a Similar Application* [2019] ZACC 6; 2019 (4) SA 268 (CC); 2019 (5) BCLR 544 (CC); 2019 (2) SACR 130 (CC).

<sup>10</sup> *Cloete* paras 43 and 64.

<sup>11</sup> *Cloete* para 43.

<sup>12</sup> *Cloete* para 46.

<sup>13</sup> *Ibid.*



‘exceptional circumstances’ with ‘where a grave failure of justice would otherwise result, or the administration of justice may be brought into disrepute’. This change reinforces the focus on substantive justice, rather than procedural hurdles. This further undermines *Bidvest*’s reasoning.

[19] The power under s 17(2)(f) is described as a ‘special competence’ for situations where ‘some matter of importance’ has possibly been overlooked or ‘grave injustice will otherwise result’.<sup>14</sup> By requiring litigants to clear an additional procedural hurdle, *Bidvest* makes it harder to correct judicial errors. This risks perpetuating miscarriages of justice, particularly where the two judges may have overlooked a critical issue that the President has identified.

[20] Requiring the reconsideration panel to duplicate the President’s assessment of exceptional circumstances establishes an absurd and inefficient double standard in our appellate process. This flawed approach compels litigants to satisfy the identical legal threshold consecutively before two different judicial bodies – first convincing the President of the existence of exceptional circumstances, then repeating the entire exercise before the Court. Such redundancy transforms what should be an expeditious safeguard into a bureaucratic obstacle course.

[21] When a panel subsequently re-examines whether exceptional circumstances exist, it effectively renders the President’s prior determination meaningless. This amounts to nothing less than an impermissible judicial review of the President’s statutory discretion – a review mechanism conspicuously absent from the legislative framework. The practical consequence is that the President’s constitutionally recognised authority as head of the Supreme Court of Appeal is improperly subordinated to ordinary panel decisions.

### **The flawed ‘institutional coherence’ argument**

[22] The cornerstone of *Bidvest* is its appeal to ‘institutional coherence’.<sup>15</sup> The Court found it would be a ‘discordant institutional norm’<sup>16</sup> for a single judge (the President) to

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<sup>14</sup> *Avnit* para 7.

<sup>15</sup> *Bidvest* paras 15-16.

<sup>16</sup> *Bidvest* para 15.

undo the finality of a decision made by two judges on petition. It argued that to maintain hierarchical integrity, a panel of the Court must make the decision to reopen a 'final' judgment.

[23] This reasoning is, with respect, misplaced. The 'institutional coherence' argument is policy-driven and not textually grounded. It overlooks the unique constitutional and statutory role of the President as the head of the Court, entrusted with its overall administration and integrity. Section 17(2)(f) does not position the President as a junior judge, but as the ultimate guardian of the Court's process, empowered to act as a final safety net against grave injustice. This is not an ordinary appellate step but an extraordinary, discretionary power vested in the office of the President. The Act's structure shows that Parliament intended the President to act as a final gatekeeper, not to delegate the 'exceptional circumstances' test to another panel.

[24] Most importantly, the President does not 'undo' the finality of the decision. She merely refers it for reconsideration. The power to vary the original order remains with the Court hearing the reconsideration. The President's role is that of a gatekeeper, and *Bidvest's* interpretation strips that function of its intended effect, turning the President into a mere conduit for matters the Court will evaluate.

[25] The principle of institutional coherence is indeed salient, but it must be applied to the substantive decisions on appeal, not to the President's discretionary power to refer. To require a panel of this Court to re-evaluate the 'exceptional circumstances' that led to the President's referral is an undue burden on the judicial process and a misinterpretation of the statutory intent.

### **Conflict with binding precedent**

[26] *Bidvest* directly contradicts this Court's earlier decision in *Avnit*.<sup>17</sup> *Avnit* clarified that the President's referral power is a special competence to correct oversights or injustices. This Court stated:

'In the context of s 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

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<sup>17</sup> *Avnit* fn 3.

reconsideration . . . It is intended to enable the President of this Court to deal with a situation where otherwise injustice might result . . .

. . .

The [President's power under s17(2)(f)] is likely to be exercised only when . . . some matter of importance has possibly been overlooked or grave injustice will otherwise result.<sup>18</sup>

[27] The *Bidvest* Court disregarded this precedent, creating confusion about whether *Bidvest's* (jurisdictional fact interpretation)<sup>19</sup> or *Avnit's* (President's discretion)<sup>20</sup> represents the correct approach. *Bidvest* also ignored *S v Liesching and Others (Liesching II)*,<sup>21</sup> where the Constitutional Court clarified that 'the exceptional circumstances' requirement in s 17(2)(f) is a 'controlling measure' or a 'jurisdictional fact' for the President to exercise her discretion to refer the decision. It allows for a departure from the 'ordinary course of an appeal process'.<sup>22</sup>

### **Stare decisis**

[28] While *stare decisis* provides certainty, it cannot overwrite the fundamental duty of the Court to interpret and apply legislation correctly. If a previous interpretation, even a recent one, is demonstrably inconsistent with a plain and logical meaning of a statute, then it is, in my opinion, 'clearly wrong'. In *Patmar Explorations (Pty) Ltd v Limpopo Development Tribunal (Patmar)*,<sup>23</sup> Wallis JA explained that:

' . . . The basic principle is stare decisis, that is, the Court stands by its previous decisions, subject to an exception where the earlier decision is held to be clearly wrong. A decision will be held to have been clearly wrong where it has been arrived at on some fundamental departure from principle, or a manifest oversight or misunderstanding, that is, there has been something in the nature of a palpable mistake. This Court will only depart from its previous decision if it is clear

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<sup>18</sup> *Avnit* paras 6-7.

<sup>19</sup> *Ekurheleni Metropolitan Municipality v Business Connexion Pty Ltd* [2025] ZASCA 41; 2025 JDR 1488 (SCA). *Tarentaal Centre Investments (Pty) Ltd v Beneficio Developments* [2025] ZASCA 38; 2025 JDR 1461 (SCA) paras 4-7. *Nel v S* [2025] ZASCA 89, *Japhta v The State* [2025] ZASCA 80, *Doorware CC v Mercury Fittings CC* [2025] ZASCA 25; 2025 JDR 1340 (SCA), *S v Lorenzi* [2025] ZASCA 58; 2025 JDR 2015 (SCA).

<sup>20</sup> *S v Dithlakanyane* [2025] ZASCA 90; 2025 JDR 2551 (SCA); *The Minister of Police and Another v Ramabanta* [2025] ZASCA 95; 2025 JDR 2804; *Ekurheleni Metropolitan Municipality v Business Connexion Pty Ltd* [2025] ZASCA 41 2025 JDR 1488 (SCA).

<sup>21</sup> *S v Liesching and Others* [2018] ZACC 25; 2019 (4) SA 219 (CC); 2018 (11) BCLR 1349 (CC); 2019 (1) SACR 178 (CC).

<sup>22</sup> *Liesching II* para 136, with reference to the approach to exceptional circumstances under s 18(1) of the Act as set out in *Ntlemenza v Helen Suzman Foundation* [2017] ZASCA 93; 2017 (5) SA 402 (SCA) para 35.

<sup>23</sup> *Patmar Explorations (Pty) Ltd v Limpopo Development Tribunal* [2018] ZASCA 19; 2018 (4) SA 107 (SCA) para 3.

that the earlier Court erred or that the reasoning upon which the decision rested was clearly erroneous. The cases in support of these propositions are legion. The need for palpable error is illustrated by cases in which the Court has overruled its earlier decisions. Mere disagreement with the earlier decision on the basis of a differing view of the law by a court differently constituted is not a ground for overruling it.' (Citations omitted.)

[29] The *Bidvest* Court made a palpable error by inserting a review mechanism absent from the Act's precise wording, thereby diminishing the President's expressly granted authority. It subverts Parliament's deliberate design of the President as the sole arbiter of reconsideration and contradicts *Avnit's* binding interpretation of the Presidential discretion. The jurisdictional fact interpretation also harms access to justice by creating unnecessary barriers for meritorious cases and wastes judicial resources on procedural litigation rather than substantive justice.

### **The correct approach**

[30] The correct interpretation, which aligns with the text, purpose, and pre-*Bidvest* jurisprudence, such as *Avnit and Liesching, II*, is that the determination of 'exceptional circumstances' is a discretionary assessment made by the President. The subject of the referral is the original decision, not the President's reasons for the referral. The *Bidvest* interpretation improperly conflates these two steps, effectively requiring the Court to perform the President's function. It is 'clearly wrong' and warrants departure.

[31] The second judgment, penned by my colleague Unterhalter JA, presents a methodically constructed defence of judicial formalism and the doctrine of *stare decisis*. While intellectually rigorous, its reasoning ultimately prioritises procedural precedent over legislative intent, practical workability, and the substantive purpose of s 17(2)(f) of the Act. The judgment, in its zealous protection of the *Bidvest* decision, entrenches an interpretation that is institutionally awkward, logically circular, and ultimately detrimental to the provision's role as a final safeguard against grave injustice.

### **Flawed deference to precedent: when *stare decisis* protects a 'palpable error'**

[32] The cornerstone of the second judgment's argument is an unwavering adherence to *stare decisis*, positing that the decisions in *Motsoeneng* and *Bidvest* must stand unless they are proven to be 'clearly wrong'. However, the judgment fails to adequately consider that a decision can be 'clearly wrong' not just because it overlooks a statute,

but because it establishes a rule that is fundamentally unworkable or leads to an absurd outcome – what *Patmar* termed a ‘palpable mistake’. The jurisdictional fact interpretation, as established in *Bidvest* and defended by the second judgment, creates exactly such a palpable mistake. It establishes a redundant and illogical two-stage process:

1. An applicant must first persuade the President of the Court, in her capacity as the head of the institution, that ‘exceptional circumstances’ exist.
2. If successful, the applicant must then persuade a panel of the very same court of the same preliminary point before the merits can even be considered.

[33] This is not merely an ‘interpretative disagreement’, as the second judgment suggests.<sup>24</sup> It is a manifest absurdity. It reduces the President’s statutory function to that of a preliminary screening officer whose decision carries no weight and is subject to immediate review. The second judgment’s assertion that there is ‘no two-stage determination’<sup>25</sup> is a semantic sleight of hand; in practice, the litigant is forced to argue the same jurisdictional point twice. This procedural loop is the very definition of a ‘palpable mistake’ that justifies a departure from the precedent. The first judgment correctly identifies this inefficiency as a core flaw that makes *Bidvest* ‘clearly wrong’.<sup>26</sup>

[34] The second judgment’s model creates institutional *incoherence*. It subordinates the judgment of the head of the Court to that of a regular panel on a preliminary issue, rendering the President’s role confusing and functionally impotent. The first judgment’s interpretation, by contrast, respects the distinct and hierarchical roles assigned by the Parliament, which is the very essence of institutional coherence.

### **Leave to appeal**

[35] Now I proceed to determine whether the two judges of this Court who refused the application for leave to appeal in the application for reconsideration before us should have found that reasonable prospects of success existed to justify granting leave to appeal. The State relied on the evidence of Ms Melissa Chantal Olivier (Ms Olivier) and Mr Isaac Petersen (Mr Petersen), both of whom were the co-accused and accomplices

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<sup>24</sup> Second judgment para 84.

<sup>25</sup> Second judgment para 71.

<sup>26</sup> First judgment paras 20 and 29.

of the appellant in counts 4 to 8. They were warned under s 204 of the Criminal Procedure Act 51 of 1977. For counts 4, 5, and 8, the State relied on the evidence of Mr Petersen, while for counts 6 and 7, it relied on the evidence of Ms Olivier.

[36] Ms Olivier testified that a week before her arrest, the appellant brought a black box to her house, asking her to keep it for him and that he would fetch it sometime later. The appellant told her that he had received the black box from Ms Alicia Prins (Ms Prins), the girlfriend of Mr Groenewald (the deceased hitman). He furthermore said to her that he was trying to protect Mr Groenewald's name by concealing the items. The appellant opened the box in the presence of Ms Olivier. She saw a firearm and several hand grenades among its contents. A few days later, the appellant's wife, Ms Tersia Schoeman, arrived and took the box, leaving behind the firearm and hand grenades, which Ms Olivier had hidden in her shoe cupboard.

[37] Mr Petersen, a handyman in the area who did odd jobs for the appellant, testified that the appellant brought a bag to his house, asking him to keep it. He promised to collect it at a later time. Mr Petersen placed the bag on his bed, but when the appellant did not return as expected, he became suspicious and looked through its contents. Inside the bag, he found firearms, including a pump-action shotgun and a 9mm pistol, along with two packets of tablets and a short black pipe, which the police later identified as a silencer. Concerned for the safety of his children, aged 17 and 13, he opened the back of his washing machine and hid the bag inside. The appellant never returned to retrieve the items and only came back later, accompanied by the police.

[38] Warrant Officer Heyns (W/O Heyns) testified to the following effect: he was investigating the death of Mr Groenewald, whose body was discovered abandoned in an open field near an informal settlement. During the investigation, he spoke with Mr Groenewald's girlfriend, Ms Prins, who informed him that firearms and ammunition had been removed from Mr Groenewald's house on the day his body was found. She provided W/O Heyns with a phone number, which he dialled, revealing that it belonged to the appellant. He contacted the appellant, who presented him with a black box containing R5 rifle ammunition. When questioned about why he had removed the ammunition from the deceased's house, the appellant stated that Ms Prins had instructed him to do so.

[39] Later, during a follow-up interview at the Boksburg police station, the appellant unexpectedly began discussing firearms and hand grenades. He voluntarily provided W/O Heyns with the names and addresses of individuals who had the weapons. While he was providing the information, W/O Heyns noticed the appellant discreetly using his phone under the table to send a WhatsApp message to Ms Olivier. The message read, 'ASB. ousa ek in kak . . . Steek we[g] die tool . . .' warning her of the imminent arrival of the police and instructing her to hide the firearm ('tool').

[40] The appellant testified that before his arrest on 20 October 2020, he had been detained by W/O Heyns for the attempted murder of Mr Rudland (count 2) and the murder of Mr Dowjee (count 1), which he denied. During cross-examination, he testified that Ms Olivier had admitted to him that the late Mr Groenewald had asked her to store the weapons for him at her house. He did not, however, specify who asked Mr Petersen to keep the other weapons that were found in his possession. He denied ever having them. He admitted to secretly sending the WhatsApp message to Ms Olivier, warning her of an impending police search, and instructing her to conceal the firearm. Initially, however, the appellant denied leading the police to the homes of Ms Olivier and Mr Petersen, insisting that the police were already in possession of their addresses. However, he later claimed that the police only knew their names and had coerced him into leading them to their homes.

[41] The high court dismissed the appellant's account as 'inherently improbable' and accepted the State's account. However, the high court did not clarify, in its judgment, whether the appellant's conviction on counts 4 to 8 rested on him possessing the weapons and ammunition as the owner, on behalf of the owner as a servant, employee, or agent, or jointly with Ms Olivier and Mr Petersen. This omission constitutes a misdirection, as it prevents this Court from discerning the rationale for the high court's decision and order. This Court should have granted the appellant leave to appeal for this reason alone.

### **Legal principles on possession**

[42] In *Adams*,<sup>27</sup> possession was defined as generally comprising two essential elements when found in a penal statute: a physical component (*corpus*) and a mental

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<sup>27</sup> *S v Adams* 1986 (4) SA 882 (A), at 890G-H. See also *S v Jacobs* 1989 (1) SA 652 (A) at 656E-F and *S v Cameron* 2005 (2) SACR 179 (SCA).

component (*animus*). *Corpus* refers to either direct physical control over an object or indirect control through another person. *Animus* is broadly described as the intent to have *corpus*, meaning the intention to control the object. Possession need not be physical; control through intermediaries suffices. The inquiry is whether the accused intended to exercise control over the item.<sup>28</sup>

[43] Section 3 of the Firearms Control Act 60 of 2000 provides that no person may possess a firearm without the requisite license, permit, or authorisation. Section 90<sup>29</sup> of the same Act prohibits possession of ammunition without the appropriate legal authority. Section 4(1)(f)(iv),<sup>30</sup> read together with s 51 of the Criminal Law Amendment Act, addresses the possession of firearms with altered or removed identifying marks. Section 10(1)<sup>31</sup> of the Explosives Act 15 of 2003 prohibits the keeping, storing, or possessing of explosives. The appellant's role, as well as that of Ms Olivier and Mr Petersen, in concealing the weapons and ammunition, meets the requirements of the abovementioned penal statutes.

[44] The appellant attempted to evade criminal liability by arguing that he was not the owner of the items, but merely a temporary custodian acting out of goodwill to protect the deceased hitman's name, Mr Groenewald. He claimed that he relinquished control over the items and that both Ms Olivier and Mr Petersen independently formed the

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<sup>28</sup> *S v Jacobs* 1989 (1) SA 652 (A).

<sup>29</sup> Section 90 of the Firearms Control Act reads:

'Prohibition of possession of ammunition

No person may possess any ammunition unless he or she -

- (a) holds a licence in respect of a firearm capable of discharging that ammunition;
- (b) holds a permit to possess ammunition;
- (c) holds a dealer's licence, manufacturer's licence, gunsmith's licence, import, export or in-transit permit or transporter's permit issued in terms of this Act; or
- (d) is otherwise authorised to do so.'

<sup>30</sup> Section 4 of the Firearms Control Act reads:

'Prohibited firearms

(1) The following firearms and devices are *prohibited firearms* and may not be possessed or licensed in terms of this Act, except as provided for in sections 17, 18(5), 19 and 20(1)(b):...

(f) any firearm -...

- (iv) the serial number or any other identifying mark of which has been changed or removed without the written permission of the Registrar.'

<sup>31</sup> Section 10 of the Explosives Act reads:

'Keeping, storage, possession or transportation of explosives

(1) No person may keep, store or be in possession of any explosives on any premises other than an explosives manufacturing site or an explosives magazine, unless the explosives are kept, stored or possessed in accordance with-

- (a) the conditions of a permit issued by an inspector; and
- (b) any applicable regulation.'



intention to keep the items, and did not do so on his behalf. The appellant's conduct demonstrates control, not mere safekeeping. There is no evidence that Ms Prins ever instructed the appellant to distribute the weapons and explosives to third parties. The late Mr Groenewald's wife also had no control over the items once the appellant took them. She had no means of reclaiming the weapons or directing their handling once they were in the appellant's possession. If he was merely safeguarding them for Ms Prins, why did he not return them to her or inform her where they were being kept? Instead, the items remained under his indirect control.

[45] His conduct provides compelling evidence of his continued control and intent to possess the items in question. He explicitly informed both Ms Olivier and Mr Petersen that he would return to collect the items, clearly indicating an ongoing interest and intention to assert control over them. This was not a passing involvement, but a sustained assertion of authority. His decision to send his wife, Ms Schoeman, to retrieve some of the items from Ms Olivier further underscores his dominion over their disposition – he retained the power to determine when, how, and by whom they would be moved.

[46] Most telling, however, is the WhatsApp message he sent to Ms Olivier, warning her to 'get rid of the tool' (own translation) – a reference to the Beretta, the firearm later confirmed to have been used in the attempted murder forming the subject of count 3. This message reveals not only his awareness of the weapon's incriminating value but also his active participation in efforts to conceal it from law enforcement. Such conduct goes far beyond mere custodial involvement. It is a clear manifestation of ongoing possession, exercised through intermediaries, with full knowledge of the nature and significance of the items.

[47] The evidence is irrefutable that at the critical time, the appellant exercised both dominion and intent over the items, rendering his assertion of relinquishment not just implausible, but wholly unconvincing. The appellant and the two witnesses were in joint possession of the items, as they were in collaborative control and were aware of their unlawful nature. In *S v Mbuli (Mbuli)*,<sup>32</sup> this Court provided an interpretation of joint

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<sup>32</sup> *S v Mbuli* 2003 (1) SACR 97 (SCA). See also *S v Nkosi* 1998 (1) SACR 284. In *S v Kwanda* [2011] ZASCA 251; [2011] ZASCA 50; 2013 (1) SACR 137 (SCA) this Court held that merely handing over the firearm to a third party does not necessarily mean that possession has been relinquished particularly where the accused retained control over the firearm. *S v Motsema* [2011] ZAGPJHC 239; 2012 (2) SACR 276 (GSJ); *S v Ramoba* [2017] ZASCA 74; 2017 (2) SACR 353 (SCA).

possession in cases involving the unlawful possession of armaments, in that case, a hand grenade under s 32(1)(c) of the Arms and Ammunition Act 75 of 1969. The judgment is essential in distinguishing between joint possession and the doctrine of common purpose, reinforcing that possession-related offences require a distinct legal framework. The Court's ruling addressed the critical question of whether multiple individuals could be held liable for possessing the same prohibited item under the principles of joint possession rather than the common purpose doctrine.

[48] In a clear rejection of the common purpose doctrine in possession cases, the Court in *Mbuli* stated that mere association or involvement in a broader criminal act does not suffice to establish possession. Instead, citing *S v Nkosi*,<sup>33</sup> it reaffirmed that for joint possession to exist, there must be a shared intent (*animus*) among all parties, with at least one individual physically holding the item on behalf of the group. This ensures that liability is not unfairly extended to those who lack the requisite intention and control over the item. By drawing this crucial distinction, *Mbuli* fortified the legal understanding of possession, ensuring that convictions are based on clear, legally sound principles rather than broad and indiscriminate applications of the common purpose principles.

[49] In the present case, it is undisputed that the late Mr Groenewald was the original owner of the items and that both witnesses were merely custodians, holding the items on behalf of the appellant. The nature of their involvement was different. The appellant shared a close personal relationship with Ms Olivier, while his connection with Mr Petersen was purely work-related. Ms Olivier was acquainted with the late Mr Groenewald, whereas it remains uncertain, on the evidence, whether Mr Petersen had any direct knowledge of, or was associated with him.

[50] These differing relationships are critical in assessing the extent and implications of their possession. Ms Olivier's close ties to the appellant suggest a deeper level of trust and alignment with his intentions, whereas Mr Petersen's involvement may have been more transactional. This distinction shows that possession is not a one-size-fits-all concept. The legal consequences and inferences drawn from their custody of the items must take into account their respective roles and awareness. Therefore, the appellant's argument that seeks to minimise his control over the items because they were found in

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<sup>33</sup> *S v Nkosi* 1998 (1) SACR 284.

the possession of Ms Olivier and Mr Petersen is untenable, as they were all in joint possession of the items, though in different capacities and roles.

[51] The appellant's reliance on *S v Collet*<sup>34</sup> (defence of temporary possession to prevent harm) is misplaced. There was no evidence that he intended to surrender the items to the authorities.<sup>35</sup> His message to Ms Olivier stating 'ASB ousa ek in kak' is not reconcilable with his version that he only wanted to protect the reputation of the late Mr Groenewald. The high court's credibility findings are unassailable. Appellate Courts are hesitant to overturn factual findings unless they are glaringly wrong.<sup>36</sup> No such error exists here.

[52] The high court imposed the minimum sentence of fifteen years' imprisonment in terms of s 51 of the Criminal Law Amendment Act on count 4 (unlawful possession of an unlicensed firearm), count 6 (unlawful possession of a firearm – 9mm semi-automatic pistol) and count 7 (unlawful possession of explosives – hand grenades). The high court erred in imposing the minimum sentence regime on count 4. The indictment did not specify that the firearm was a prohibited firearm, which attracts a higher sentence.

[53] The appellant is a first-time offender with no criminal record, which demonstrates his potential for rehabilitation. He is a family man with dependents: a wife and two children. He was gainfully employed as a sales representative, indicating the potential for reintegration. He was not the primary perpetrator of the crimes. He was convicted of possession, not the actual use of the firearms or explosives. There is also no evidence that he profited financially from possessing the items.

[54] The sentence of eighteen years' imprisonment is unduly harsh and fails to account for the appellant's personal circumstances, the nature of the offences, and the principles of proportionality and rehabilitation. A reduced sentence of eight years' imprisonment, given the facts of this case, would be more appropriate and just.

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<sup>34</sup> *S v Collett* 1991 (2) SA 854 (A).

<sup>35</sup> *S v Brick* 1973 (2) SA 571 (A) at 580G-H the Court stated that the fact that 'the prohibited, but innocently acquired, articles were being temporarily held with the intention of informing the police . . . [did not entitle the] accused to an acquittal'.

<sup>36</sup> *S v Hadebe* 1997 (2) SACR 641 (SCA).

[55] As a result, I would have made the following order:

- 1 The decision of this Court dated 30 August 2023, dismissing the appellant's application for leave to appeal with costs, is set aside and replaced with an order granting leave to appeal.
- 2 The convictions and sentences on counts 5 and 8 are confirmed.
- 3 The appeal against the sentence is upheld in respect of counts 4, 6 and 7.
- 4 The sentences of fifteen years' imprisonment imposed in respect of counts 4, 6, and 7 are set aside and replaced with the following:  
'The appellant is sentenced to eight years' imprisonment on each of counts 4, 6, and 7, ante-dated to 25 October 2022.'
- 5 All sentences are to run concurrently.

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K E MATOJANE  
JUDGE OF APPEAL

### **Unterhalter JA (Meyer and Kathree-Setiloane JJA and Windell AJA concurring)**

#### **The interpretation of s 17(2)(f)**

[56] I have read the judgment of my colleague (the first judgment). I am not in agreement with its interpretation of s 17(2)(f) of the Superior Court Act 10 of 2013, nor its treatment of the doctrine of precedent. These are matters of importance. Litigants are entitled to a settled regime of rules that govern appeals in this Court. The first judgment is antithetical to this essential requirement of the rule of law.

[57] The first judgment's essential reasoning rests on the following postulates. First, that the clear language of s 17(2)(f) entrusts the determination of exceptional circumstances exclusively to the President's discretion. Second, that it is illogical to suggest that the President enjoys the sole power to refer, but not the antecedent power to determine the condition for the exercise of such power. Third, that to attribute to this Court the competence to decide whether there are exceptional circumstances is duplicative, an impermissible 'additional layer of review', a wasteful redundancy, and

‘violates the separation of powers’. Fourth, *Bidvest* has failed to follow binding precedent. I will traverse each of these postulates in turn.

[58] The first judgment says that the language of s 17(2)(f) is clear and entrusts the determination of exceptional circumstances solely to the President’s discretion. I shall refer to this interpretation, as I did in *Bidvest*, as ‘the exclusivity interpretation’. In *Bidvest*, I recognised that the exclusivity interpretation accords with one reading of the text of s 17(2)(f). However, there is another interpretation that has a foundation in the text, which I styled in *Bidvest* ‘the jurisdictional fact interpretation’.<sup>37</sup> There appears to be agreement that s 17(2)(f) requires that there must be exceptional circumstances for the President to exercise the power of referral. In *Motsoeneng* and *Bidvest*, the existence of exceptional circumstances is understood as a jurisdictional fact. This is precisely how s 17(2)(f) was understood in *Liesching II*.<sup>38</sup> The first judgment accepts that exceptional circumstances must exist for the President to enjoy the power of referral. The first judgment however understands the existence of exceptional circumstances to fall within the *discretionary* power of the President.

[59] How a legislative provision of this kind is to be interpreted was the subject of authoritative pronouncement in the *Defence and Aid* case.<sup>39</sup> There Corbett J explained that a jurisdictional fact ‘may consist of a fact or state affairs which objectively speaking must have existed before the statutory power could validly be exercised . . . . On the other hand, it may fall into the category comprised by instances where the statute itself has entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the pre-requisite fact, or state affairs, existed prior to the exercise of power’.<sup>40</sup> That is precisely the issue of interpretation to which s 17(2)(f) gives rise.

[60] The first judgment, as I have observed, reasons that because the President has the exclusive power to refer, the President must be taken to enjoy the antecedent power to determine whether there are exceptional circumstances that permit of the exercise of the President’s power of referral. The first judgment considers this to be an entailment

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<sup>37</sup> *Bidvest* paras 12 and 13.

<sup>38</sup> *Liesching II* para 137.

<sup>39</sup> *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C) (*Defence and Aid*) at 34F-35D.

<sup>40</sup> *Defence and Aid* at 34H-35C.

of logic, to be implied by the Legislature having conferred upon the President the power of referral, and an interpretation that is also practical.

[61] There is no entailment of logic that holds that because the Legislature has conferred one species of power upon an office bearer, the Legislature has thereby conferred a separate and distinct power. That is precisely why, as the *Defence and Aid* case makes plain, sometimes the repository of the power enjoys the competence to decide *both* whether the jurisdictional fact exists and, if she so decides, whether to exercise a discretion, in this case, to make a referral. But there are statutory provisions which, properly interpreted, confer upon the Court the competence to determine whether the jurisdictional fact exists as a necessary condition for the discretionary exercise of power. If the jurisdictional fact is found not to exist by the Court, the condition for the discretionary exercise of power is absent. On this construction, it is the Court that determines the jurisdictional issue. As *Defence and Aid* holds, as also the long line of authority in our law that has confirmed and applied its *dicta*, a legislative provision of the kind exemplified by s 17(2)(f) does not permit of only one construction. Rather it allows for the interpretations that I have here styled the exclusivity interpretation and the jurisdictional fact interpretation. Neither interpretation has *a priori* supremacy, much less logical inevitability. The best interpretation is arrived at by the application of the principles of interpretation. That is done with a measure of humility: different interpretations are often plausible, supported by different dimensions of the interpretative enterprise. Interpretation is enriched by inclusive consideration, and impoverished by *a priori* exclusion. While I recognise that the exclusivity interpretation is an available interpretation, the first judgment proceeds from the mistaken premise of the logical exclusion of the jurisdictional fact interpretation.

[62] The first judgment appears to recognise, in some of its reasoning, that there is no express language in s 17(2)(f) that supports the exclusivity interpretation that it favours. Thus the first judgment reasons that the President's power to refer 'implies' the President's power to decide that there are exceptional circumstances. It is unclear why this must be so. The President's power to refer, as in many similar statutory contexts, depends upon whether there are jurisdictional facts that support the existence of exceptional circumstances, and there is no implication, necessary or otherwise, that the power to refer implies the distinct power to decide whether there exist exceptional circumstances.

[63] In another passage, the first judgment states that the language of s 17(2)(f) makes the exclusivity interpretation ‘clear’.<sup>41</sup> That clarity is said to derive from the following text to be found in s 17(2)(f): ‘. . . the President of the Supreme Court of Appeal may, in exceptional circumstances, . . . refer . . .’. The text yields no such clarity. The statutory formulation is simply that the President may, in exceptional circumstances, refer. So formulated, the language is consistent with the exclusivity interpretation and the jurisdictional fact interpretation. The text of s 17(2)(f) does not identify who must determine whether there are exceptional circumstances. There is no language in the provision that references the President being satisfied that there are exceptional circumstances or forming the opinion that such circumstances exist – statutory language that is ordinarily used to indicate that a power is conferred upon a particular office to decide something. The text is clear that exceptional circumstances must exist. That is the necessary predicate for the President to exercise her power to refer. What the text does not make plain is who must decide whether that predicate exists. That the first judgment says the language is clear on this matter, does not make it so.

[64] The first judgment reasons that if the Legislature had intended to make this Court the arbiter of exceptional circumstances as a jurisdictional fact, it would have included language to the effect that ‘the President may refer, if the Court finds exceptional circumstances’. The Legislature did not do so, and hence, ‘[T]he absence of such qualifying language strongly supports the view that the determination rests with the President’. The first judgment draws the incorrect conclusion from what s 17(2)(f) does not contain. If a textual inclusion would have supported a particular construction, its absence from the text does not ordinarily affirm the opposite construction, as the first judgment incorrectly supposes. Rather, as I have indicated, the absence of a textual indication as to who is to determine whether there are exceptional circumstances renders the text consistent with both the exclusivity interpretation and the jurisdictional fact interpretation.

[65] The text, as the necessary starting point, does not yield a clear pointer to the correct interpretation. What is required, to take the interpretative endeavour further, is to apply all the principles of interpretation, with an open mind, to decide which interpretation

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<sup>41</sup> First judgment para 13.

affords the best account of what the provision means. That is the approach adopted in *Bidvest*, and how I proceed here too. The first judgment is convinced that the text provides a clear answer. It is incorrect to do so, and thus, its foundational postulate is faulty.

[66] The first judgment fails adequately to engage a further dimension of the question of interpretation that was also made clear in the *Defence and Aid* case. Corbett J said the following: ‘The power itself is a discretionary one. Even though the jurisdictional fact exists, the authority in whom the power resides is not bound to exercise it. On the other hand, if the jurisdictional fact does not exist, then the power may not be exercised and the purported exercise of the power would be invalid’.<sup>42</sup> So too with s 17(2)(f): if there are exceptional circumstances, the President *may* refer the decision, she is not bound to do so. But if she does, this does not mean that she enjoys the power to determine whether the jurisdictional fact exists for the exercise of her power of referral. The first judgment fails to distinguish the discretionary dimension of the President’s power and the distinct competence as to the authority to decide upon the jurisdictional facts necessary for the exercise of that power. And hence it assumes, without engaging the required interpretative enquiry, that because the President has the power to refer, she must enjoy the authority to determine the existence of exceptional circumstances. That is to mistake what can be done by the exercise of one power with the predicate for its exercise. That predicate, being the existence of exceptional circumstances, raises a distinct issue as to who must decide whether such jurisdictional fact exists.

[67] That the first judgment fails to distinguish the President’s discretionary power to refer and the competence to determine the existence of exceptional circumstances leads it to make compounding errors. The first judgment considers that the power to refer must entail the power to decide whether there are exceptional circumstances for additional reasons. It is said that if this Court were to enjoy the competence to decide whether exceptional circumstances exist, it would amount to an impermissible ‘subsequent judicial validation’ of the exercise by the President of her discretion, ‘imposing an additional layer of review’. The first judgment considers the holding in *Bidvest* to be ‘impermissible legislation – amending the statute to insert a procedural requirement that does not appear in the text’.

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<sup>42</sup> *Defence and Aid* at 34H.



[68] The first judgment entirely mistakes the interpretative debate and attributes to *Bidvest* a position that its holding does not adopt. The issue that requires resolution is whether the President or this Court enjoy the competence to decide whether there are exceptional circumstances. Either the President has this power or this Court does. *Bidvest* does not hold that both the President and this Court are the repositories of the power. If the correct interpretation of s 17(2)(f) is that this Court enjoys the power to decide whether there are exceptional circumstances, then it follows that the President has no such power. A referral to this Court by the President is then not a decision as to whether exceptional circumstances exist. The referral is simply a decision that if this Court should find that there are exceptional circumstances, the President considers that the decision on petition warrants reconsideration. This Court does not review or reconsider the President's decision in any way. This Court alone decides whether there are exceptional circumstances. On the jurisdictional fact interpretation, this Court alone enjoys the competence to do so, and the President does not. If this Court should find that there are exceptional circumstances, the President's discretionary judgment that the decision on petition should be reconsidered stands. That decision is not reviewed or subject to correction by this Court. It is not subject to any kind of judicial validation by this Court.

[69] The interpretative issue for determination is thus binary: either the President enjoys the power or this Court does so. The first judgment fails to recognise this. Nothing in *Bidvest* attributes a power to this Court that is duplicative of the power of the President. Nor, for the same reason, does *Bidvest* impose some additional layer of review or procedural requirement. It is simply a question of who enjoys the power: if this Court does so, then the President does not. The resolution of this question is a matter of statutory interpretation, along entirely conventional and well-established principles. This is precisely what the reasoning in *Bidvest* engages. There is no basis for the first judgment's gratuitous criticism that *Bidvest* has engaged upon judicial trespass by way of impermissible law-making.

[70] In like vein, the first judgment says this: '[I]t is 'illogical to suggest that the President possesses the sole power to refer, yet lacks the antecedent power to determine the very conditions that trigger that referral. To argue otherwise would mean that the President's power is not truly exclusive'. This would lead, the first judgment

apprehends, to redundancy, a waste of judicial resources, and ‘violates the separation of powers by allowing the Courts to second-guess what Parliament deliberately assigned to the President’.

[71] This understanding falls into the same error. First, as indicated, there is no two-stage determination of exceptional circumstances. On the jurisdictional fact interpretation, that determination is made by this Court alone. On the exclusivity interpretation, it is made by the President alone. There is no redundancy of decision-making. Nor is there any judicial inefficiency. On either interpretation, if the matter is referred to this Court, either this Court must first decide whether there are exceptional circumstances in order to proceed further, or it would entertain the decision on petition as its first order of business. What issue this Court considers first is not a matter of unwarranted inefficiency.

[72] As to the violation of the separation of powers, it is difficult to understand how this weighty constitutional doctrine is implicated, when the task at hand lies at the heart of the judicial domain that the Constitution assigns to the judiciary – the authoritative interpretation of statutes. The first judgment concludes that *Bidvest* violates the separation of powers because it usurps the power that Parliament has assigned to the President. This amounts to the following: because the first judgment considers the exclusivity interpretation to be correct, a different interpretation (that is, that this Court enjoys the power) is a usurpation by this Court of the power of Parliament. Such reasoning is mistaken. It would render a difference of judicial opinion as to how best to interpret a statute a usurpation of legislative power. That courts have advanced reasons to favour the jurisdictional fact interpretation does not render the exclusivity interpretation a usurpation of legislative competence, just as adherence to the exclusivity interpretation does not warrant the conclusion that the jurisdictional fact interpretation is an unconstitutional usurpation. Each interpretation is simply seeking to decide how best to interpret what Parliament meant when it passed the legislation that it did.

[73] Since the text of s 17(2)(f) is capable of supporting both the exclusivity interpretation and the jurisdictional fact interpretation, I proceed, following my approach in *Bidvest*, to show fidelity to the norms of interpretation by offering an analysis of the text, interpreted in the context of s 17 as a whole, and upon an account of the purpose of the provision, so as to assist in deciding between the two available interpretations of

the text. I do so by recourse to a consideration of institutional coherence and the hierarchy of decision-making by which a case may be taken on appeal. I do not repeat all the reasoning in *Bidvest*, save to recall that in *Bidvest* I said this: ‘. . . 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 the panel of this Court to which the matter is referred by the President’.<sup>43</sup> Upon reflection, I consider this analysis to be correct. This institutional norm supports the conclusion that this Court should decide whether exceptional circumstances exist.

[74] The first judgment seeks to meet my invocation of institutional hierarchical fidelity in this way. It says that the appeal to institutional coherence ‘is policy-driven and not textually grounded. It overlooks the unique constitutional and statutory role of the President as the head of the court, entrusted with its overall administration and integrity. Section 17(2)(f) does not position the President as a junior judge, but as the ultimate guardian of the Court’s process, empowered to act as a final safety net against grave injustice’.

[75] I am unpersuaded. First, the norm of institutional coherence is not a policy. It is anchored in an endeavour to interpret a legislative provision within the hierarchical constitutional scheme of appellate consideration. Compatibility with the Constitution and its norms lies at the very heart of the interpretative enterprise. Second, courts are required to engage upon interpretation, in this way, even where the text of a statute appears to yield a clear meaning. How much more so when the text does not. Third, I have not found any provision in the Constitution which confers upon the President the unique constitutional role to determine extraordinary circumstances in preference to the constitutional functions of a panel of this Court. The force of the institutional norm I reference does not diminish the office of the President. That office, for all its importance, is not invested with some unique attribute that renders it more fitting than a panel of this Court to decide the question of exceptional circumstances. Quite the opposite is the case by reason of the institutional norm I have emphasised.

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<sup>43</sup> *Bidvest* para 15.

[76] In sum, the first judgment finds that s 17(2)(f) has a singular meaning, when the text of s 17(2)(f) requires interpretation to resolve an issue that has long been identified in provisions of this kind: who enjoys the competence to decide whether the jurisdictional fact exists in order to exercise the power? The first judgment affords an inadequate engagement with the principles of interpretation. And it ignores the value of institutional norms on a mistaken understanding of what it supposes to be the unique attributes of the office of the President. For these reasons the first judgment does not persuade me that the position adopted by this Court in *Motsoeneng* and *Bidvest* is wrong, much less clearly so.

### Following precedent

[77] The first judgment affords unpersuasive reasoning in deciding that it is not obliged to follow *Motsoeneng* and *Bidvest*. It understands that *stare decisis* ‘... cannot overwrite the fundamental duty of the Court to correctly interpret and apply legislation. If a previous interpretation, even a recent one, is demonstrably inconsistent with a plain and logical meaning of a statute, then it is, in my opinion “clearly wrong”’. The first judgment concludes that *Bidvest* made ‘a palpable error by inserting a review mechanism absent from the Act’s clear wording, thereby diminishing the President’s expressly granted authority. It subverts Parliament’s deliberate design of the President as the sole arbiter of reconsideration ...’.

[78] In *Camps Bay Ratepayers*,<sup>44</sup> Brand AJ, writing for the Constitutional Court, affirmed what is secured by adherence to the doctrine of precedent: certainty, predictability, reliability, equality, uniformity, and convenience. He found that the doctrine ‘is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite chaos’.<sup>45</sup> Brand AJ formulated the doctrine as a rule, of relevance to this case, as follows: ‘... courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong’.<sup>46</sup>

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<sup>44</sup> *Camps Bay Ratepayers’ and Residents’ Association and Another v Harrison and Another* [2010] ZACC 19; 2011 (4) SA 42 (CC) (*Camps Bay Ratepayers*) para 28; cited and applied in *First Rand Bank Limited Kona and Another* [2015] ZASCA 11; 2015 (5) SA 237 (SCA) para 22.

<sup>45</sup> *Camps Bay Ratepayers* para 22.

<sup>46</sup> *Camps Bay Ratepayers* para 28.

[79] The first judgment invokes this rule, and relies upon *dicta* in the decision of this Court in *Patmar*.<sup>47</sup> *Patmar* entirely endorses the position taken in *Camps Bay Ratepayers*. It emphasises that *stare decisis* is a doctrine fundamental to the rule of law that serves to lend certainty to the law and avoid confusion. To permit a court to depart from its previous decisions on a matter of law, a high threshold must be met; and hence *Patmar*'s reference to a manifest oversight, a palpable mistake, or a fundamental departure from principle. I would add, by way of elaboration, the following. There are times when a court makes a patent error. It may have failed to have regard to a statutory provision that is determining or an authority by which it is plainly bound. These are instances in which this Court may properly be said to be clearly wrong, and a departure is required. So too, a particular case may highlight an injustice so great that some refinement or even revision of precedent is also indicated. There are also paradigm-shifting cases in which a long-established line of authority is considered an impediment to the development of the common law. Such cases are few and require the most careful consideration. Lastly, there is the constitutional imperative that our courts develop the common law. The steps necessary to engage such an enquiry were set out by the Constitutional Court in *MEC for Health and Social Development, Gauteng v DZ obo WZ*,<sup>48</sup> with the cautionary observation that 'the common law develops incrementally though the rule of precedent, which ensures that like cases are treated alike'. This is so not least because of the conceptual problems of retrospectivity highlighted by Kentridge AJ in *Du Plessis v De Klerk*.<sup>49</sup> This last category does not truly arise from a court's recognition of clear error, but rather from the overarching duty to ensure that all law is in conformity with the Constitution. I do not suggest there may not be other ways in which a decision of this Court may be clearly wrong. But what is clear from the case law is how sparingly, and with what great care, departures from precedent are countenanced.

[80] *Motsoeneng* and *Bidvest* were unanimous decisions of this Court, and they were followed in *Business Connexion*.<sup>50</sup> These authorities are recent. Of this the first judgment takes the view that *Motsoeneng* is *obiter*, and that both *Motsoeneng* and *Bidvest* contradict *Avnit's* 'binding guidance'. Further, it is said that *Bidvest* 'ignored' *Liesching II*.

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<sup>47</sup> *Patmar Explorations (Pty) Ltd & Others v Limpopo Development Tribunal & Others* 2018 (4) SA 107 (SCA) paras 3 and 4.

<sup>48</sup> *MEC for Health and Social Development, Gauteng v DZ obo WZ* [2017] ZACC 37; 2018 (1) SA 335 (CC) paras 27 and 28.

<sup>49</sup> *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) paras 65 and 66.

<sup>50</sup> *Ekurhuleni Metropolitan Municipality v Business Connexion (Pty) Ltd* [2025] ZASCA 41 paras 1-3.

This is not correct. The holding in *Motsoeneng* as to the interpretation of s 17(2)(f) is not *obiter*. *Motsoeneng* had to determine whether the appellant should be granted condonation to revive the appeal which had lapsed. The Court considered the prospects of success. It concluded that the application did not meet ‘the higher threshold of ‘exceptional circumstances’ set by s 17(2)(f)’.<sup>51</sup> This finding formed part of the reasoning that led the Court to its conclusion, and hence its interpretation of s 17(2)(f) forms part of the *ratio* of the decision.

[81] *Avnit*<sup>52</sup> does reference the President’s power to refer. But the reasoning does not engage or distinguish the discretionary power conferred upon the President by s 17(2)(f), and the establishment of the jurisdictional facts necessary for its exercise. This distinction, introduced by *Liesching II* and rendered central in *Motsoeneng*, lies at the heart of the interpretative exercise. Of this, *Avnit* has nothing to say, and hence it is difficult to understand its ‘binding guidance’ on this point. In *Liesching II*,<sup>53</sup> the Constitutional Court explained that before the President can exercise her discretion, exceptional circumstances constitute a jurisdictional fact which ‘may operate as a controlling or limiting factor’. *Liesching II* went on to explain what exceptional circumstances consist of, and it was for this purpose only that it cited and found *Avnit* to be of assistance. Nor did *Bidvest* ignore *Liesching II*, it simply followed the conceptual framework provided by *Motsoeneng*, which, in turn, relied upon *Liesching II*.

[82] This Court has thus provided an authoritative interpretation of s 17(2)(f) in *Motsoeneng* and *Bidvest*. In order to depart from these decisions, it does not suffice for the first judgment to reason as to why its interpretation is correct, nor to explain why its interpretation is to be preferred. It will also not satisfy the threshold for departure if it provides reasons as to why the existing authorities provide a less persuasive account of what s 17(2)(f) means. For these authorities to be clearly wrong, the first judgment would have to show that the interpretation favoured in *Motsoeneng* and *Bidvest* 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.

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<sup>51</sup> *Motsoeneng* para 20.

<sup>52</sup> *Avnit* paras 6 and 7.

<sup>53</sup> *Liesching II* paras 137 and 138.

[83] Here the disagreement that I have with the first judgment concerns the interpretation of a statutory provision. In *Bidvest* I recognised that s 17(2)(f) can give rise to two meanings: the exclusivity interpretation and the jurisdictional fact interpretation. And I have again here affirmed that this is so. The first judgment considers that the exclusivity interpretation is the correct way to understand what s 17(2)(f) means. On a question of interpretation of this kind, the conviction that a particular interpretation is correct does not entail that another interpretation is clearly wrong. This is so because on questions of interpretation the conscientious efforts of the members of a court to arrive at the best interpretation of a provision may reasonably give rise to different interpretations. Those differences almost always reflect a spectrum of possible meanings that the application of the principles of interpretation may yield. Judgment requires that a particular meaning must ultimately be selected as the meaning that best reflects what, in this case, the Legislature passed into law. This does not ordinarily entail that other interpretations are clearly wrong. These interpretations are rather judged, on an application of the principles of interpretation, to be a less persuasive account of what the provision in question means.

[84] The first judgment locates the errors of *Motsoeneng* and *Bidvest* as being inconsistent with a plain and logical meaning. This criticism is not supported by the first judgment's articulated interpretative endeavours. The text of s 17(2)(f) does not state what the exclusivity interpretation requires. Indeed, as I have explained, the text gives rise to an issue of interpretation that has long been recognised in our law. The issue is not resolved by asserting that the meaning is plain, when it is not, and can only be resolved by engaging in an interpretative exercise of the kind reflected in the reasoning that has engaged this Court in *Motsoeneng*, *Bidvest*, and now in the present case. The existence of the interpretative disagreement, and the reasoning that underlies it, suffice to show that this is not a case of clear error, understood against the demanding standard of *Patmar*.

[85] The first judgment also attributes to the jurisdictional fact interpretation what it says is 'an additional layer of judicial review'. I have explained why this cannot be so. The jurisdictional fact interpretation rests upon the position that the President lacks the power to decide whether there are exceptional circumstances. The Court to which the matter is referred does not review any decision of the President, nor could it, since one Court does not review the curial decision of another judge. But even if this were an

interpretational pointer, in a series of considerations, that assist to build an interpretation of s 17(2)(f), it cannot amount to a clear error because the jurisdictional fact interpretation rests upon a layering of reasons.

[86] Nor does the first judgment explain why the jurisdictional fact interpretation is not a possible interpretation, much less why that interpretation is entirely unavailable on any conscientious application of the principles of interpretation. The understandable conviction that the first judgment has as to its correctness does not establish that the jurisdictional fact interpretation is clearly wrong. Considerably more is required to meet the standard. That is more especially so because the jurisdictional fact interpretation recognises that the text of s 17(2)(f) permits of more than one meaning. That is a reasonable approach that the insistence of the first judgment as to the singularity of what the text of s 17(2)(f) must mean does nothing to avoid. It follows that the first judgment has not provided any basis that meets the standard as to what constitutes a clear error. And hence the first judgment does not justify a departure from the existing authorities of this Court.

[87] There are additional considerations that support this conclusion. Adherence to precedent is an important dimension of the rule of law. I have referenced above the values secured by the doctrine of precedent. The first judgment offers no reflection upon the consequences of its decision. What is the law after the first judgment is handed down? As I have indicated, two decisions of this Court have unanimously decided that the jurisdictional fact interpretation is correct, and that precedent has been followed in this Court. What then is the effect of the first judgment? Principally to damage the virtues of following precedent: certainty, predictability, equality, uniformity, and convenience. Litigants will be uncertain as to whether, in future, this Court, to which a matter is referred in terms of s 17(2)(f), will have to be satisfied that there are exceptional circumstances or, as the amended formulation now requires, that a grave injustice would otherwise result or the administration of justice may be brought into disrepute.<sup>54</sup>

[88] These systemic issues are matters of great importance. The fragmentation of law is a grave impediment to its legitimacy. Every Court must adhere to the binding force of precedent in contemplation of the virtues that such adherence yields. And this should be

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<sup>54</sup> 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.



done, even where a court considers a binding authority to be wrong. The Court may of course articulate why it has formed this view, provided that it ultimately decides in accordance with what precedent requires. Regrettably, the first judgment has adopted the exclusivity interpretation. It has wrongly held that it is not bound by *Motsoeneng* and *Bidvest*, and it has failed to account for the systemic consequences of its decision.

### **Do exceptional circumstances exist?**

[89] For these reasons, I am unable to agree with the first judgment's interpretation of s 17(2)(f). I turn then to consider the question that the first judgment held to be beyond the remit of this Court: do exceptional circumstances exist? *Liesching II*<sup>55</sup> provides a helpful account of what is meant by exceptional circumstances in s 17(2)(f). They are circumstances which give rise to a probability of grave individual injustice, or the administration of justice might be brought into disrepute if no reconsideration occurs, a formulation that has now been adopted by the Legislature in the amendment effected to s 17(2)(f).

[90] I find that this is one of those rare matters in which a grave injustice would result if this Court were to close its doors to the appellant.

[91] First, the sentencing on count 4 was materially flawed. As the first judgment explains, the charge sheet did not allege that the relevant firearm was a prohibited firearm within the meaning of s 4(1)(f)(iv) of the Firearms Control Act. Yet the high court nevertheless invoked the minimum sentencing regime in terms of s 51 of the Criminal Law Amendment Act 105 of 1997. This was a material misdirection on law of considerable gravity.

[92] Second, the appellant is a first offender with a stable personal and professional history, convicted not for acts of violence, but for offences concerning possession. The evidence established that he did not personally use the arms or explosives in question, and secured no financial gain. His actions constitute serious wrongdoing, but are not aggravated to the extent that would ordinarily justify an 18-year effective sentence.

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<sup>55</sup> *Liesching II* para 138.

[93] Third, the high court failed to provide sufficient reasoning to sustain joint possession, and more importantly, did not articulate whether it found exclusive or derivative possession in respect of each count. This omission undermines confidence in the justness of the sentence.

[94] Taken cumulatively, these factors persuade me that a grave injustice would result if the sentencing is not reconsidered. The minimum sentencing regime was unlawfully applied to count 4; and the sentence is disturbingly disproportionate. I am thus of the view that exceptional circumstances do exist in terms of s 17(2)(f), and I do so find.

[95] In the result, having found that exceptional circumstances exist, I am in agreement with the first judgment's decision as to leave to appeal, the merits of the appeal, and the order that it would make in respect of the appeal.

[96] In the result, I make the following order:

- 1 Declaring that exceptional circumstances exist in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013.
- 2 The decision of this Court dated 30 August 2023, dismissing the appellant's application for leave to appeal with costs, is set aside and replaced with an order granting leave to appeal to the Supreme Court of Appeal.
- 3 The appeal against the convictions and sentence imposed on counts 5 and 8 is dismissed.
- 4 The appeal against the convictions on counts 4, 6 and 7 is dismissed.
- 5 The appeal against the sentences imposed on counts 4, 6 and 7 is upheld.
- 6 The decision of the high court is set aside and replaced with the following:
  - (a) The accused is acquitted on counts 1, 2 and 3.
  - (b) The accused is convicted on counts 4, 5, 6, 7 and 8.
  - (c) The following sentences are imposed:
    - i On count 4: eight years' imprisonment.
    - ii On count 5: three years' imprisonment.
    - iii On count 6: eight years' imprisonment.
    - iv On count 7: eight years' imprisonment.
    - v On count 8: three years' imprisonment.
  - (d) All the sentences in (c) above are to run concurrently.

- (e) The accused is sentenced to an effected term of imprisonment of eight years to run from 28 September 2022.
- (f) In terms of s 103 of Act 60 of 2000, the accused is declared unfit to possess a firearm.

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**D N UNTERHALTER**  
**JUDGE OF APPEAL**

## Appearances

|                      |                                                                                         |
|----------------------|-----------------------------------------------------------------------------------------|
| For the appellant:   | A J J Du Plooy                                                                          |
| Instructed by:       | Witz Incorporated Attorneys, Johannesburg<br>Michael Du Plessis Attorneys, Bloemfontein |
| For the respondents: | J M K Joubert                                                                           |
| Instructed by:       | Director of Public Prosecutions, Johannesburg.                                          |