Taking a Second Bite at the Appeal Cherry: *Molaudzi v S*

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Abstract

The principle of *res judicata* is well-established in our law: essentially it means that parties to a dispute have only one metaphorical "bite at the cherry". The "bite" can entail appealing through the hierarchy of courts, but once the parties have exhausted their appeals, they cannot re-litigate the same dispute. However, in the recent case of *Molaudzi v S* 2015 2 SACR 341 (CC) the appellant attempted to appeal to the Constitutional Court twice: the first time the application for leave to appeal was dismissed; the second time the application was granted and the appeal upheld. The appellant got a second "bite at the cherry". In *Molaudzi v S* the Constitutional Court developed the common law by creating an interest-of-justice exception to the principle of *res judicata* and – for the first time in the Constitutional Court's history – overturned one of its own judgements. In this case note I present the background of the case of *Molaudzi v S*, analyse the judgement, and differentiate it from another Constitutional Court case that dealt with *res judicata*, namely *Mpofu v Minister for Justice and Constitutional Development* 2013 2 SACR 407 (CC).

Keywords

Res judicata; interests of justice.

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1 Introduction

In the case of *Molaudzi v S*[1] the Constitutional Court developed the common law by creating an exception to the principle of *res judicata* and – for the first time in its history – overturned one of its own judgements. This note is structured as follows: Part 2 introduces the principle of *res judicata*; Part 3 presents the factual background of the case; Part 4 analyses the legal argument presented to the Constitutional Court; Part 5 analyses the Constitutional Court's judgement; Part 6 compares the case of *Molaudzi v S* with an analogous case where the Constitutional Court was also requested to overturn one of its previous judgements, but without success; and Part 7 concludes this note with a summary of the salient points.

2 The principle of *res judicata*

Res judicata is the legal doctrine that prohibits a litigant from having a metaphorical second bite at the cherry. It bars continued litigation of the same case, on the same issues, between the same parties.[2] South African law inherited the principle of *res judicata* from Roman Law. In the case of *Bertram v Wood,*[3] a case dating back to 1893, the Supreme Court of the Cape of Good Hope traced the principle of *res judicata* to Justinian's Digest.[4] The underlying rationale of the principle of *res judicata* is (a) to give effect to the finality of judgements, (b) to limit needless litigation, and (c) to promote certainty.[5]

Res judicata is usually raised as a defence in civil matters, but also applies to criminal matters.[6] In the criminal law context, *res judicata* is related to the concepts of *autrefois acquit* and *autrefois convict*. The latter two concepts can be seen as special cases of *res judicata* applicable as potential defences available to an accused person against prosecution. *Res judicata* in the criminal law context has wider application, and can also be raised by

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1 *Molaudzi v S* 2015 2 SACR 341 (CC).

2 *Molaudzi v S* 2015 2 SACR 341 (CC) [14]; also see: *Baphalane Ba Ramokoka Community v Mphela Family; In re: Mphela Family v Haakdoornbult Boerdery CC* 2011 9 BCLR 891 (CC) [31].

3 *Bertram v Wood* 1893 10 SC 177.

4 *Bertram v Wood* 1893 10 SC 177 180.

5 *Molaudzi v S* 2015 2 SACR 341 (CC) [16].

6 *Molaudzi v S* 2015 2 SACR 341 (CC) fn 17.

the State, as was potentially the case in *Molaudzi v S*.

3 Background

In 2003, Thembekile Molaudzi, together with seven co-accused, stood trial in the then Bophuthatswana High Court on charges of murder, robbery, and some lesser offences. The outcome of this case hinged on the application of the *Ndhlovu* rule formulated by the Supreme Court of Appeal (SCA) a year before, in 2002.[7] This rule entailed that an extra-curial admission, but not a confession, by one co-accused is admissible as evidence against another co-accused if required by the interests of justice. The interests of justice in turn required *inter alia* "strong corroboration in all the other evidence" of the incrimination of the co-accused.[8]

However, in Mr Molaudzi's trial there was *no* independent corroborative evidence at all. The *only* evidence against Mr Molaudzi that was presented by the state was an incriminating "admission" statement made by one of the co-accused, Mr Matjeke (Accused 1), to a magistrate, and a statement by Mr Matjeke to a police officer during a pointing out excursion that was inconsistent with the statement to the magistrate. Following a trial-within-a-trial, during which Mr Matjeke denied the veracity of his extra-curial statements, the trial court held that his extra-curial statements were indeed admissible as evidence against himself. On a proper application of the *Ndhlovu* rule, these extra-curial statements should not have been admissible as evidence against Mr Molaudzi, given the complete lack of corroborative evidence. Accordingly, as the state failed to present any admissible evidence against Mr Molaudzi, he should have been discharged at the end of the state's case.[9] However, this is not what transpired.

The trial court, purportedly (but erroneously) relying on the *Ndhlovu* rule, decided that the incriminating extra-curial statements made by Mr Matjeke were not only admissible against himself but also admissible as evidence against all his co-accused, *inter alia* Mr Molaudzi. As such, the trial proceeded. During his testimony Mr Matjeke again denied any involvement in the crime. However, later during the trial Mr Matjeke requested to re-open his defence and testify again, which request was granted. During his second testimony during the main trial, Mr Matjeke incriminated all his co-accused save himself and Mr Makhubela (Accused 3), but within a novel storyline that had marked discrepancies with his extra-curial statements. Mr

7 *S v Ndhlovu* 2002 2 SACR 325 (SCA).
8 *S v Ndhlovu* 2002 2 SACR 325 (SCA) [44].
9 *S v Mathebula* 1997 1 SACR 10 (W) 34J-35D.

Makhubela testified directly after Mr Matjeke's second testimony and essentially repeated Mr Matjeke's latest version of events. Mr Makhubela's testimony was wholly inconsistent with his extra-curial statement, which never even mentioned Mr Molaudzi.

The trial court convicted Mr Molaudzi and all his co-accused (except a certain Mr Motloung, Accused 6, who disappeared during the trial) and sentenced them to life imprisonment. After eventually obtaining the transcripts of the proceedings, Mr Molaudzi and all his co-convicted appealed to the full bench of the Northwest High Court in 2012. However, in 2013 the full bench confirmed the erroneous application of the *Ndhlovu* rule by the trial court and dismissed the appeal. Mr Molaudzi and four of his co-convicted then petitioned the SCA, but their petition was dismissed without reasons. Finally, Mr Molaudzi on his own applied for leave to appeal to the Constitutional Court in 2013.[10] I refer to this case as *Molaudzi I*. In his application Mr Molaudzi explicitly pointed out the erroneous application of the *Ndhlovu* rule by the trial court and the full bench. However, in 2014, given that his application had failed to raise a constitutional issue, the Constitutional Court dismissed his application with the following rationale:[11]

> The applicant now seeks leave to this Court essentially on the basis that he was wrongly convicted. The application cannot succeed. It is based on an attack on the factual findings made in the trial court. That does not raise a proper constitutional issue for this Court to entertain. In addition, there are no reasonable prospects of success. The Full Court considered the arguments on appeal and properly rejected them. The application for leave to appeal must thus be dismissed.

With our country's apex court dismissing his application for leave to appeal, this must have appeared as the end of the road for Mr Molaudzi. However, about a month prior to the judgement in *Molaudzi I* there was a tectonic shift in Bloemfontein: the SCA reversed its decision in *Ndhlovu* in the judgement of *Litako*,[12] re-establishing the common law rule that no extra-curial statement by a co-accused can ever be admissible evidence against another co-accused. The SCA based its decision in *Litako* on constitutional considerations. Subsequent to the *Litako* decision, two of Mr Molaudzi's co-convicted, Boswell Mhlongo and Alfred Nkosi (Accused 2 and 4 in the trial, respectively), applied for leave to appeal to the Constitutional Court. Unlike Mr Molaudzi's application, which focused on the erroneous application of the *Ndhlovu* rule, Mr Mhlongo and Mr Nkosi added an additional element in their applications to the Constitutional Court, namely that the *Ndhlovu* rule

10 *Molaudzi v S* 2014 7 BCLR 785 (CC).
11 *Molaudzi v S* 2014 7 BCLR 785 (CC) [2], footnote reference omitted.
12 *Litako v S* 2014 3 All SA 138 (SCA).

on which the trial court and full bench purportedly relied was unconstitutional. The Constitutional Court decided to grant Mr Mhlongo and Mr Nkosi a hearing.

During the hearing of *Mhlongo v S; Nkosi v S*,[13] it became apparent that the Constitutional Court was *ad idem* with the SCA's *Litako* judgement. It should also be noted that, given the *Litako* judgement, the state did not oppose the applications. In fact, it was counsel on behalf of the state who, during the hearing of *Mhlongo v S; Nkosi v S,* brought it to the Constitutional Court's attention that "Accused 5" – Mr Molaudzi – was similarly situated to Mr Mhlongo and Mr Nkosi, in that all of these persons were convicted based on extra-curial statements by their co-accused. Accordingly, the Constitutional Court *invited* Mr Molaudzi to also apply for leave to appeal. At that stage, neither the Constitutional Court nor counsel for any of the parties realised that Mr Molaudzi had in fact previously applied to the Constitutional Court. *Molaudzi I* and the principle of *res judicata* would accordingly still pose an obstacle.

Within days of the hearing of *Mhlongo v S; Nkosi v S,* the Constitutional Court granted leave to appeal to these applicants, vitiated their convictions and sentences, and ordered their immediate release. However, reasons for the judgement were reserved.

4 Argument advanced on behalf of Mr Molaudzi

Counsel for Mr Mhlongo and Mr Nkosi volunteered to represent Mr Molaudzi as well. However, once counsel started with his research, he soon discovered the existence of *Molaudzi I*. He addressed a memorandum to the Chief Justice informing the Chief Justice of *Molaudzi I*, but took the position that because the constitutional tenability of the *Ndhlovu* rule was neither raised nor decided in *Molaudzi I*, the issue of *res judicata* does not arise, and proceeded to file an application on Mr Molaudzi's behalf. I refer to this second application as *Molaudzi II*.[14] The state did not oppose the application. However, the Chief Justice requested the parties to submit written argument on the issue of *res judicata.*

13 *Mhlongo v S; Nkosi v S* 2015 2 SACR 323 (CC).

14 *Molaudzi v S* 2015 2 SACR 341 (CC). It can be noted that the author was counsel for the applicant/appellant in *Molaudzi II*.

In his heads of argument, Mr Molaudzi's counsel relied primarily on the following dictum by the SCA in *Smith v Porritt*:[15]

> Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio res judicata* has over the years been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quastio*) must arise. Broadly stated, the latter involves an enquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. [Counsel's underlining.]

Evidently, the legal issue of the constitutional tenability of the *Ndhlovu* rule was not an "essential element of the judgement" in *Molaudzi I* – on the contrary, it was not even raised or considered. Accordingly, Mr Molaudzi's counsel argued that his client's second application to the Constitutional Court was not susceptible to the *exceptio res judicata*. Counsel for the state was in general agreement with this argument.

5 The Constitutional Court's judgement in *Molaudzi II*

In a unanimous judgement penned by Theron AJ the Constitutional Court did not agree with counsel's argument, but reached the same outcome by developing the common law. The Constitutional Court held that although there is an analogy between causes of action in the civil context and grounds of appeal in a criminal context, the two contexts must to be treated differently. In contrast with *Smith v Porrit,* which dealt with civil cases, a criminal appeal must be considered *res judicata* once decided, irrespective of whether additional grounds of appeal may exist that can be raised in subsequent appeals. Essentially, an appellant in a criminal matter has only one bite at the appeal cherry, and must ensure that he or she raises all the relevant grounds of appeal during this single opportunity, because he or she will not be allowed a second bite at the cherry based on the existence of different grounds of appeal. As such, Mr Molaudzi's second application (at the invitation of the Constitutional Court) was held to be *res judicata*. The Constitutional Court's rationale was that the alternative, as proposed by counsel for both parties, would allow for consecutive appeals in criminal matters, each based on different grounds of appeal; and that such

15 *Smith v Porritt* 2008 6 SA 303 (SCA) [10].

consecutive appeals would "place too great a burden on the administration of justice".[16]

It is important to note that the Constitutional Court differentiated criminal cases from civil cases; accordingly, the *Smith v Porrit* judgement remains valid in the civil context, meaning that there may be consecutive proceedings in the civil context, provided that the new proceeding is based on a point of law or a fact that was not an "essential element of the judgment" in a prior proceeding. This dichotomy raises the question: why would consecutive appeals in the *criminal* context be too burdensome for the administration of justice, while not consecutive *civil* appeals?

After finding that Mr Molaudzi's second application was *res judicata*, how did the Constitutional Court find a way to assist Mr Molaudzi? In brief, by *inventing* the new way, given the unique circumstances of *Molaudzi II*: Mr Molaudzi was similarly situated to Mr Mhlongu and Mr Nkosi; while these two men had already been released from prison, Mr Molaudzi remained a convicted, incarcerated "murderer" – only because of a procedural rule. Accordingly, the Constitutional Court fashioned an interests-of-justice exception to the *res judicata* rule:[17]

> In this matter, the interests of justice require this Court to balance the rule of law and legal certainty in the finality of criminal convictions, as well as the effect on the administration of justice if parties are allowed to approach the Court on multiple occasions on the same matter, against the necessity to vindicate the constitutional rights of an unrepresented, vulnerable party in a case where similarly situated accused have been granted relief. As in this case, the circumstances must be wholly exceptional to justify a departure from the *res judicata* doctrine. The interests of justice are the general standard, but the vital question is whether there are truly exceptional circumstances.

The Constitutional Court briefly analysed the relevant positions in the law of four comparative jurisdictions, namely Canada, the United Kingdom, India, and Singapore.[18] With the exception of Singapore (in the criminal law context), all these jurisdictions recognise that *res judicata* is not absolute and allowed for exceptions in rare circumstances of "injustice".[19]

In summary, the Constitutional Court held that *Molaudzi II* was *res judicata*, but that *Molaudzi II* presented truly exceptional circumstances that called for relief in the interests of justice. The *Ndhlovu* rule was declared unconstitutional in the judgement of the related case of *Mhlongo v S; Nkosi*

16 *Molaudzi v S* 2015 2 SACR 341 (CC) [44].
17 *Molaudzi v S* 2015 2 SACR 341 (CC) [38].
18 *Molaudzi v S* 2015 2 SACR 341 (CC) [24]-[30].
19 *Molaudzi v S* 2015 2 SACR 341 (CC) [24]-[30].

v S, and accordingly Mr Molaudzi was granted leave to appeal, his conviction and sentence were vitiated, and his immediate release from prison ordered.

6 The interests of justice: a comparison between *Molaudzi II* and *Mpofu*

Concepts such as "the interests of justice" and "truly exceptional circumstances" are of course susceptible to divergent interpretations. To illustrate: *Molaudzi II* was not the first time that the Constitutional Court was requested to reconsider one of its previous judgements. In *Mpofu v Minister for Justice and Constitutional Development*[20] the applicant applied to the Constitutional Court for a third time for leave to appeal, the previous applications for leave to appeal having been dismissed. What potentially made the third application different from the previous unsuccessful applications was that the third application raised a constitutional issue for the first time – similar to *Molaudzi II*. However, unfortunately for the applicant in *Mpofu*, he failed to prove a critical factual averment on which the entire constitutional issue depended, with the result that the majority of the Constitutional Court held that no constitutional issue had been validly raised and dismissed the application. In the words of the majority, the applicant "failed to cross a preliminary hurdle".[21] In contrast, the minority held that the court *a quo* had made a finding on the critical factual averment, hence establishing the necessary factual basis for the constitutional issue that the Constitutional Court could entertain. Given the minority's acceptance of the factual averment, it was necessary for the minority to confront the fact of the applicant's two previous unsuccessful applications for leave to appeal to the Constitutional Court in which he failed to raise the constitutional issue. In this regard, the minority held as follows:[22]

> But, under our Constitution, there may be scope for situations in which the *res judicata* principle is softened in relation to unrepresented accused persons. When unrepresented persons apply for leave to appeal, without necessarily properly knowing their rights and what arguments may be available to them, it could be unduly harsh to preclude them from subsequently applying for leave to appeal where they may have a valid point, particularly where there is a possible violation of one of their rights protected in the Bill of Rights.

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20 *Mpofu v Minister for Justice and Constitutional Development* 2013 2 SACR 407 (CC).

21 *Mpofu v Minister for Justice and Constitutional Development* 2013 2 SACR 407 (CC) [58].

22 *Mpofu v Minister for Justice and Constitutional Development* 2013 2 SACR 407 (CC) [15].

In contrast, the majority held as follows regarding the interests of justice in the *Mpofu* case:[23]

> Further, the interests of justice in granting Mr Mpofu's application are weakened by his failure to act timeously in bringing it. It has taken 10 years for this matter to be brought to this Court. The passage of this significant length of time has surely impacted on the possibility of establishing reliable evidence as to the facts on which Mr Mpofu's case rests. The interests of justice thus do not favour re-opening his case.
>
> Nor has Mr Mpofu adequately explained why he brought two previous applications to this Court for leave to appeal against his sentence in which this [constitutional] issue was not raised.

Molaudzi II and *Mpofu* can be distinguished on at least two dimensions: in *Molaudzi II* there was no uncertainty about the facts on which the applicant based his constitutional challenge, while in *Mpofu* the application was crippled by factual uncertainty; in *Molaudzi II* the applicant was himself the victim of delays in the system, while in *Mpofu* the applicant dragged his heels in bringing the application.

Regarding an adequate explanation for not raising the constitutional issue as a ground for appeal in his previous application, it can be argued that Mr Molaudzi could have raised the issue of the constitutional tenability of the *Ndhlovu* rule in *Molaudzi I* and indeed even before that in his petition to the SCA. In fact, prior to Mr Molaudzi's petition to the SCA the *Ndhlovu* rule had been subject to criticism in at least two SCA judgements,[24] and the possibility of the unconstitutionality of the *Ndhlovu* rule had been raised in argument (but not decided) in the Constitutional Court.[25] However, in this regard the Constitutional Court in *Molaudzi II* relied on the minority judgement in *Mpofu* quoted above, with the purport that absent proper legal representation, a lay person can simply not be expected to know and fully appreciate his or her rights and what grounds of appeal can be formulated based on such rights.

7 Conclusion

Molaudzi II established that *res judicata* is not an absolute prohibition in the context of criminal appeals. In truly exceptional cases where the interests of justice so demand, an appeal can be entertained despite the fact that the

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23 *Mpofu v Minister for Justice and Constitutional Development* 2013 2 SACR 407 (CC) [69]-[70].

24 *Balkwell v S* 2007 3 All SA 465 (SCA) [32]-[35] (minority judgment); *S v Libazi* 2010 2 SACR 233 (SCA) [14].

25 *S v Molimi* 2008 2 SACR 76 (CC).

appeal is *res judicata*. Given the facts of *Molaudzi II*, the interests of justice are more likely to favour the applicant in an application for leave to appeal in a case that is *res judicata* if persons similarly situated to the applicant have already successfully appealed to the relevant court. On the other hand, with reference to *Mpofu*, the interests of justice are less likely to favour the applicant if the new application raises a constitutional issue that is based on disputed facts, and the applicant has delayed for such a long time in bringing the application that the possibility of establishing reliable evidence as to the facts has been negatively impacted.

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