IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 42/15

In the matter between:

THEMBEKILE MOLAUDZI Applicant

and

THE STATE Respondent

APPLICANT'S HEADS OF ARGUMENT

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INTRODUCTION

The legal question that is the topic of these heads of argument

[1] During oral argument in the cases of *Mhlongo v S; Nkosi v S* (the 'related cases'), it was submitted that the applicant *in casu* is similarly situated as the applicants in the related cases, but was not before this Court. Accordingly, subsequent to the hearing of the related cases, the Chief Justice invited the applicant *in casu* to make application to this Court within a certain time frame. In pursuance of this invitation, the applicant launched the present application.

[2] However, during the process of preparing the present application, it came to light that the applicant had in fact previously launched an application for leave to appeal to this Court (the 'previous application'), which was dismissed.[1] This raises the legal question – with particular reference to the common law principle of *res judicata* – whether this Court has jurisdiction in the present application that is brought by the same applicant and that relates to the same criminal trial that was the subject of the previous application.

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1 *Molaudzi v S* (CCT 126/13) [2014] ZACC 15; 2014 (7) BCLR 785 (CC).

[3] Subsequent to the filing of the present application, the Chief Justice therefore directed the parties to file written argument on said legal question. These present heads of argument are filed in pursuance of said direction.

[4] To avoid unnecessary repetition, in these heads of argument I use the terminology as defined in my heads of argument in the related cases.

Structure of these heads of argument

[5] The main argument that I develop in these heads of argument is that the issue at the core of the present application – the constitutional tenability of the *Ndhlovu* legal norm – was not adjudicated on by this Court in the previous judgement, and that the present application is accordingly not *res judicata*.

[6] Also, this issue at the core of the present application is clearly a constitutional matter, hence cementing the Court's jurisdiction.

[7] I next consider and reject a potential counter-argument that the applicant had the opportunity but failed to raise this issue as part of the previous application, and should accordingly be barred from bringing the present application and raising the issue now.

[8] I conclude by appealing to basic fairness and equality before the law: Given that the applicant is similarly situated as the applicants in the related cases, they should all share the same legal fate.

THE MAIN ARGUMENT

The principle of *res judicata*

[9] The state of our law regarding *res judicata* was summed up as follows by the SCA in *Smith v Porritt*:[2]

> 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. . . . The recognition of the defence in such cases will however require careful

[2] *Smith v Porritt & others* 2008 (6) SA 303 (SCA) [10].

> scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis . . . Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others. As pointed out by De Villiers CJ as long ago as 1893 in *Bertram v Wood* (1893) 10 SC 177 at 180, 'unless carefully circumscribed, [the defence of *res judicata*] is capable of producing great hardship and even positive injustice to individuals'. [My underlining.]

[10] Accordingly, even in circumstances where the requirements for *res judicata* are relaxed – to the obvious disadvantage of the applicant – it must still be established that the issue that is raised in the present application was an essential element of the judgement in the previous application.

[11] The main argument that I develop in these heads of argument is that the issue at the heart of the present application, namely the challenge to the constitutional tenability of the *Ndhlovu* legal norm, was neither raised in the previous application, nor was it an element of the judgement in the previous application; accordingly the *exceptio res judicata* does not arise.

The previous application

[12] The previous application was dismissed for the following reasons:[3]

> 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.

[13] From the above, and from a reading of the papers and heads of argument filed in the previous application, it is clear that the previous application was framed as an attack on the factual findings of the courts below, implicitly accepting the constitutional tenability of the *Ndhlovu* legal norm that was the existing law at the time. It is trite that an attack on the factual findings of the courts below is not a constitutional matter,[4] and therefore generally outside this Court's jurisdiction.

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3 *Molaudzi op cit* note 1 *supra* [2], footnote reference omitted.

4 *S v Boesak* 2001 (1) SA 912 (CC) [15].

The present application

[14] In contrast with the previous application, the primary ground of appeal in the present application is explicitly framed *qua* constitutional matter – it is directed at challenging the constitutional tenability of the *Ndhlovu* legal norm.

[15] In the previous application, the Court has not made a decision regarding the issue of the constitutional tenability of the *Ndhlovu* legal norm. Accordingly, the present application is not susceptible to the *exceptio res judicata*.

[16] Moreover, the challenge to the constitutional tenability of the *Ndhlovu* legal norm constitutes a proper constitutional issue for this Court to entertain. Accordingly, the present application is within this Court's jurisdiction.

The Court establishes jurisdiction over a case as a whole

[17] Similar to the related cases, the present application entails a *primary* ground of appeal framed *qua* constitutional issue, and an *alternative* ground of appeal that is a (non-constitutional) attack on the findings of the courts below. In the event that this Court finds against the applicants regarding their shared primary ground, *jurisdiction having been established*, the alternative ground, although not raising a constitutional matter, would become relevant, not as a

means to develop the law in general, but as a means to obtain justice for the individual applicants.

[18] To analyse the above submission *in abstracto*, I submit that a single appeal can contain multiple grounds, but only one of these needs to be framed as a *proper* constitutional matter in order for this Court to establish jurisdiction over the entire case including all the other grounds that do not necessarily raise constitutional matters; also, the ultimate fate of the constitutional ground cannot influence jurisdiction over the case once established.

No reasonable prospects of success?

[19] The Court's first reason for dismissing the previous application was the absence of a proper constitutional issue. Its further reason for dismissing the previous application was that there were, in the Court's view, no reasonable prospects of success. This further reason is confined to the context of the previous application and its particular framing of an attack on the factual findings of the courts below, and does not reflect on the prospects of success or the present application.

Developing the common law

[20] In *Bafokeng Tribe v Impala Platinum*[5] the High Court analysed the *res judicata* principle *qua* common law artefact in the light of the Bill of Rights – in particular the right to access to courts. The High Court in *Bafokeng* concluded – in a phrase that is reminiscent of the 1893 dictum in *Bertram v Wood*[6] – that the *res judicata* principle 'must be carefully delineated and demarcated in order to prevent hardship and actual injustice to parties'.[7]

[21] The applicant's conviction was unconstitutional, and his prolonged and ongoing imprisonment unconscionable.[8] Any interpretation of the principle of *res judicata* that has the effect of barring the applicant from being granted leave to appeal to this Court would *cause* hardship and grave injustice. At least since the time of *Bertram* – and especially now in our Constitutional dispensation – the

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5 *Bafokeng Tribe v Impala Platinum Ltd & others* 1999 (3) SA 517 (B).

6 As quoted in *Smith v Porritt,* [9] *supra*.

7 *Bafokeng op cit* note 5 *supra* 566E–F.

8 Given that the applicant *in casu* is similarly situated as the applicants in the related cases (applicant's affidavit *in casu* [7], [25]), the Court is respectfully referred to my heads of argument in the related cases.

Court is enjoined to interpret the principle of *res judicata* in such a way as to *prevent* such hardship and injustice.

Conclusion on the main argument

[22] Relying on the enquiry as formulated in *Smith v Porritt*,[9] I analysed whether the issue of the constitutional tenability of the *Ndhlovu* legal norm – the primary ground of appeal in the present application – was an essential element of the judgement in the previous application, and found that it was not an element at all; accordingly, the present application is not *res judicata*.

CONSIDERING A POSSIBLE COUNTER-ARGUMENT

Why only now?

[23] In opposition to the main argument developed above it can be argued that the new issues raised in the present application – especially the challenge to the constitutional tenability of the *Ndhlovu* legal norm – should have been raised in

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9 [9] *supra*.

the previous application, and that the Court should not allow the applicant to raise these new issues in the present application.

The *Mpofu* case

[24] This possible counter-argument calls to mind the recent case of *Mpofu v Minister for Justice and Constitutional Development*.[10] My reading of *Mpofu* is as follows: The applicant in *Mpofu* applied to this Court for leave to appeal. At the time of the application for leave to appeal, he had already unsuccessfully approached this Court twice for leave to appeal in the past. 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. However, the applicant failed to prove a critical factual averment on which the entire constitutional issue depended and the majority of this Court took the view that the likelihood of the veracity of this factual averment was slim.[11] As such, the majority held that no constitutional issue was validly raised and dismissed the application. In contrast, the minority held that the court *a quo* did make a finding

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[10] *Mpofu v Minister for Justice and Constitutional Development & others* 2013 (2) SACR 407 (CC).

[11] *Ibid* [66].

on the critical factual averment hence establishing the necessary factual basis for the constitutional issue that this Court can entertain.

Distinguishing the present application from *Mpofu*'s case

[25] At the onset of my analysis of *Mpofu*, it is important to distinguish the present application from *Mpofu*'s case. In the following I highlight three prominent areas of dissimilarity:

[26] First, the facts on which the new constitutional issue in the present application relies are simply that the applicant was convicted, and that the trial court purported to rely on the *Ndhlovu* legal norm in its decision to convict the applicant.[12] These facts are clearly established on the record[13] and are not in dispute. In contrast, in *Mpofu* the uncertainty about the critical fact upon which

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[12] For the sake of clarity I should note that these facts are necessary, but not sufficient for the primary (constitutional) ground of appeal to be successful: In addition to these *facts*, the Court must also accept the *legal arguments* as submitted in my heads of argument in the related cases relating to the interpretation and limitation of certain human rights.

[13] With 'record' I refer to the record of the related cases, already before the Court. The relevant references are: Trial court judgement, p123 line 20 – p125 line 5; full bench judgement, p147 [18] – p148 [19], p159 [43] – p161 [45].

the constitutional issue in that case hinged was a central theme of the case and the basic dividing line between the majority and the minority.

[27] Secondly, the applicant *in casu* did not drag his heels for years as did the applicant in *Mpofu*; on the contrary, the applicant *in casu* struggled for years to get hold of the transcripts of the trial court proceedings in order to launch his appeals. In the words of this Court, the various obstacles that the applicant had to face were 'unacceptable'[14] and called for 'censure'.[15]

[28] Thirdly, the respondent *in casu* is not opposing the present application, while the respondent in *Mpofu* opposed his application.[16]

[29] The above differences establish an essential backdrop against which my analysis of the counter-argument and the *Mpofu* judgement proceeds.

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[14] *Molaudzi op cit* note 1 *supra* [5].

[15] *Ibid* [3].

[16] *Mpofu op cit* note 10 *supra* [2].

The approaches of the majority and the minority in *Mpofu*

[30] Given the majority's rejection of the veracity of the critical factual averment, the applicant in *Mpofu* therefore 'failed to cross a preliminary hurdle'.[17] In contrast, given the minority's acceptance of the factual averment as per the minority's reading of the judgement of the court *a quo*, it was necessary for the minority to confront the fact of the applicant's two previous unsuccessful applications for leave to appeal to this Court in which he failed to raise the constitutional issue. In this regard, the minority held as follows:[18]

> 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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17 *Ibid* [58].

18 *Ibid* [15].

[31] The majority did not explicitly engage with the issue of the development of the *res judicata* principle. However, it did hold as follows:[19]

> 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.

[32] I submit that Mr Mpofu's failure to raise the constitutional issue in his first two applications and his apparent inadequate explanation for such failure must be perceived within the broader context that entailed, *inter alia*: the uncertainty about the critical factual averment on which the constitutional issue depended; the fact that Mr Mpofu dragged his heels for a decade; and that such long passage of time lessened the chances of obtaining reliable evidence regarding said critical factual averment. Similarly, the majority's relative harsh approach

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19 *Ibid* [69]–[70].

towards the Mr Mpofu's failure to raise the constitutional issue in his previous applications must be interpreted and understood against this broader context.

[33] In contrast, I submit that the broader context of the present application[20] – undisputed facts, a proactive applicant that had to overcome multiple legal hurdles, and no opposition by the respondent – justifies a significantly softer approach *in casu* that is more akin to the minority's position quoted above.[21]

Applying the softer approach *in casu*

[34] The minority articulated two criteria, namely that an applicant must have been unrepresented previously, and that the new issue must relate to a possible violation of a right protected in the Bill of Rights; if these criteria are met, the fact that an applicant failed to raise the issue in a previous application for leave to appeal should not bar him or her from bringing a new application for leave to appeal to raise such issue.[22]

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20 [25]–[28] *supra*.

21 *Mpofu op cit* note 10 *supra* [15]; [30] *supra*.

22 *Ibid*.

[35] I submit that the applicant *in casu* complies with both criteria: He did not have legal representation for purposes of his previous application;[23] and the new issue at the heart of the present application entails the violation of two rights protected in the Bill of Rights.

[36] Accordingly, the fact that the applicant failed to raise said issue in the previous application, should not bar him from bringing the present application and raising said issue in the present application.

The softer approach is well supported

[37] Given the particular circumstances of the applicant *in casu*, I submit that the softer approach is appropriate both in principle and in terms of its equitable outcome.

[38] In general, the softer approach resonates with the judgement in *Smith v Porritt* cited above,[24] which emphasised the importance of a case-by-case methodology based on considerations of equity and fairness. It also resonates

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[23] Applicant's affidavit *in casu* [13].

[24] [9] *supra*.

with the judgements in *Bertram* and *Bafokeng* cited above,[25] which cautioned that the development of the *res judicata* principle must be done in a careful fashion in order to prevent hardship and injustice.

CONCLUSION

[39] In contrast with the previous application that only challenged the factual findings of the courts below, the issue at the heart of the present application is explicitly framed *qua* constitutional matter – it is directed at challenging the constitutional tenability of the *Ndhlovu* legal norm. Accordingly, the present application is not *res judicata* and the Court has jurisdiction to hear the present application.

[40] The applicant *in casu* and the applicants in the related cases are similarly situated. At the time of drafting these heads of argument, this Court has already granted leave to appeal to the applicants in the related cases, upheld their appeals, vitiated their convictions and ordered their immediate release from prison. Basic fairness and equality before the law demand that all three applicants

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[25] [20]–[21] *supra*.

share the same legal fate, legal technicalities notwithstanding. Accordingly, I respectfully submit that this Court should accept jurisdiction in the present application and grant the applicant the same relief as the applicants in the related cases.

Donrich Jordaan, PhD

Counsel for the applicant (at the request of the Court)

31 March 2015

TABLE OF AUTHORITIES

Cases cited

Statutes

IN THE CONSTITUTIONAL COURT OF THE REPUBLIC OF SOUTH AFRICA (BRAAMFONTEIN)

CONSTITUTIONAL COURT CASE NUMBERS: CCT 42/15
NORTH WEST HIGH COURT CASE NUMBER: CC 164/03

In the matter between:

THEMBEKILE MOLAUDZI **Applicant**

AND

THE STATE **Respondent**

RESPONDENT'S HEADS OF ARGUMENT

A: INTRODUCTION

1. The applicant, who was accused 5 in a trial with 7 other accused, was indicted and convicted in the then North West High Court, sitting at Ga-Rankuwa on four counts, namely Murder, Robbery with aggravating circumstances, Unlawful possession of a firearm and Unlawful possession of ammunition. He was acquitted on the alternative charge to the murder count, namely Conspiracy to commit robbery in contravention of section 18(2)(a) of Act 17 of 1956.
2. He was sentenced as follows:

2.1 Murder – Life Imprisonment,

2.2 Robbery with aggravating circumstances – 15 year's imprisonment,

2.3 Unlawful possession of a firearm – 3 year's imprisonment,

2.4 Unlawful possession of ammunition – 3 year's imprisonment.

3. His appeal to the Full Court of the North West High Court was dismissed and he subsequently petitioned the Supreme Court of Appeal for leave to appeal to that Court. The application was dismissed by the Supreme Court of Appeal.

4. Thereafter the applicant petitioned, in person, this Honourable Court for leave to appeal to this Honourable Court, (under case number CCT126/13). The application for leave to appeal was dismissed.[1] It appears that there was no transcribed record provided to this Honourable Court and the application was decided on the applicant's heads of argument (application for leave to appeal). The applicant did not use the prescribed Notice of Motion format.[2]

5. Two of his co-accused, Boswell John Mhlongo (accused 2) and Alfred Disco Nkosi (accused 4) also petitioned this Honourable Court for leave to appeal. They were granted leave to appeal.[3] Their matter was argued before this Honourable Court on 10 March 2015.

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[1] **Molaudzi v S** 2014 (7) BCLR 785 (CC) (Hereinafter referred to as the **Molaudzi** judgment)
[2] Rule 11 and 15 of the Rules of the Constitutional Court
[3] **Boswell John Mhlongo v The State** CCT148/14; **Alfred Disco Nkosi v The State** CCT149/14

6. On 11 March 2015 the Chief Justice issued directions regarding the applicant's leave to appeal.[4]

7. On 25 March 2015 the Chief Justice issued further directions directing that the parties file written submissions on whether this Honourable Court has jurisdiction to hear the matter and specifically if the matter is *res judicata* in light of the prior judgment given by this Honourable Court.

B. CONSTITUTIONAL COURT'S JURISDICTION IN REGARD TO THE SECOND (NEW) LEAVE TO APPEAL APPLICATION

C. RES JUDICATA

8. *Res Judicata* is the Latin term for "a matter already judged" and in the broad sense it is generally a plea or defence raised by a respondent in a civil trial. It is a claim preclusion in both civil law and common law legal systems.[5]

9. Claasen[6] defines *res judicata* as "[a] case or matter is decided. Because of the authority with which in the public interest, judicial decisions are invested, effect must be given to a final judgment, even if it is erroneous. In regard to *res judicata* the enquiry is not whether the judgment is right or

[4] At that stage the parties were unaware of the applicant's prior application for leave to appeal.
[5] **Patrick Smith v Heirs of Camsell St. Catherine and others**, Court of Appeal Eastern Caribbean Supreme Court, 29 January 2015 at paragraphs [36] and [42].
[6] Dictionary of Legal Words and Phrases, RD Claassen,2014 Update

wrong, but simply whether there is a judgment. A defendant is entitled to rely upon *res judicata* notwithstanding that the judgment is wrong (**African Farms and Townships Ltd v Cape Town Municipality** 1963 (2) SA 564 (A)).”

10. *Res Judicata* refers to two concepts:

10.1 A case in which there has been a final judgment and is no longer subject to an appeal;[7](in this respect the principle applies to criminal matters) and

10.2 The legal doctrine meant to bar or preclude continued litigation of a case on the same issues between the same parties.

11. *Res Judicata* also includes two related concepts:

11.1 Claim preclusion which bars a suit from being brought again on an event that was the subject of a previous legal cause of action that has been finally decided between the parties; and

11.2 Issue preclusion which bars the relitigation of issues of facts or law that have already been decided by a court in an earlier case.[8]

12. It is respectfully submitted that the approach to be followed in *res judicata* matters is correctly set out in **Bafokeng Tribe v Impala Platinum Ltd** 1999 (3) SA 517 (B) by Friedman JP when he held that

[7] **Mpofu v Minister for Justice and Constitutional Development and others** 2013 (9) BCLR 1072 (CC) at paragraph [14]
[8] Civil Procedure Res Judicata

"From the aforegoing analysis I find that the essentials of the *exceptio res judicata* are threefold, namely that the previous judgment was given in an action or application by a competent court (1) between the same parties, (2) based on the same cause of action (*ex eadem petendi causa*), (3) with respect to the same subject-matter, or thing (*de eadem re*). Requirements (2) and (3) are not immutable requirements of *res judicata*. The subject-matter claimed in the two relevant actions does not necessarily and in all circumstances have to be the same. However, where there is a likelihood of a litigant being denies access to the courts in a second action, and to prevent injustice, it is necessary that the said essentials of the threefold test be applied. Conversely, in order to ensure overall fairness, (2) or (3) above may be relaxed. A court must have regard to the object of the *exceptio res judicata* that it was introduced with the endeavour of putting a limit to needless litigation and in order to prevent the recapitulation of the same thing in dispute in diverse actions, with the concomitant deleterious effect of conflicting and contradictory decisions. This principle must be carefully delineated and demarcated in order to prevent hardship and actual injustice to parties."[9]

13. In United Sates Supreme Court case of **Federated Department Stores, Inc et al v Marilyn Moitie and Floyd R Brown**[10] the following was stated by Justice Brennan, in a dissenting judgment, that "First, I, for one, would not close the door upon the possibility that there are cases in which the doctrine of *res judicata* must give way to what the Court of Appeals

[9] At 566 B – F
[10] 452 US 394

referred to as "overriding concerns of public policy and simple justice." 611 F.2d 1267, 1269 (CA9 1980). Professor Moore has noted: "Just as *res judicata* is occasionally qualified by an overriding, competing principle of public policy, so occasionally it needs an equitable tempering." 1B J. Moore & T. Currier, Moore's Federal Practice ¶ 0.405[12], p. 791 (1980) (footnote omitted). See also Reed v. Allen, 286 U.S. 191, 209, 52 S.Ct. 532, 537, 76 L.Ed. 1054 (1932) (Cardozo, J., joined by Brandeis and Stone, JJ., dissenting) ("A system of procedure is perverted from its proper function when it multiplies impediments to justice without the warrant of clear necessity").”[11]

14. This view is endorsed by the Canadian Courts. In **Amtim Capital Inc v Appliance Recycling Centres of America**[12] it is held at paragraph [13] that “Finally, even if the requirements for the doctrines of issue estoppel and *res judicata* were met, the motion judge would have exercised his discretion to refuse to apply them. The underlying purpose of these doctrines is to balance the public interest in finality of litigation with the public interest of ensuring a just result on the merits. He held that dismissal of Amtim’s action on the basis of *res judicata* or issue estoppel “would be inconsistent with the ends of justice and deprive an Ontario company of a hearing on the merits in this province of a claim for compensation that is integrally tied to Ontario”, and at paragraph [15] that “[t]hey are intended to promote the orderly administration of justice and

[11] At paragraph 18
[12] 2014 ONCA 62 (CanLii)

are not to be mechanically applied where to do so would work an injustice. See *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (CanLII), [2001] 2 S.C.R. 460, at paras. 1, 19, 20, 33."[13]

15. It is therefore respectfully submitted that interests of justice must be taken into account, under the current Constitutional dispensation, when deciding if a matter is *res judicata* and this is in line with section 173 of the Constitution.

16. It is respectfully submitted that due to the fact that this is a criminal appeal that a plea of *res judicata* could not be made by the applicant but that the principle applies once a final appeal judgment is given in a criminal matter.

D. PLEA OF AUTREFOIS CONVICT AND AUTREFOIS ACQUIT

17. In the criminal law there can be no plea of *res judicata* but the accused is entitled to plead *autrefois convict* and *autrefois acquit* in terms of section 106 of the Criminal Procedure Act 51 of 1977. In Commentary on the Criminal Procedure Act, Du Toit and others, Revision Service 52, 2014 (hereinafter referred to as Du Toit) it is stated that these pleas are regarded as the equivalent of the *exceptio rei judicatae*.[14]

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[13] This decision was confirmed on appeal. See **Appliance Recycling Centres of America v Amtim Capital Inc** 2014 CanLii 29541 (SCC), **Court of Appeal for Ontario rejects a "race to res judicata"** Marc Kestenburg (Norton Rose Fulbright February 2014)

[14] At pages 15-29 to 15-30

18. Du Toit sets out the principles underlying these pleas and specifically states that “reasonableness and justice (fairness) form the basis of these pleas.”[15]

19. These pleas can be raised on appeal[16], especially where an accused was unrepresented during the trial.

20. In **S v Mgilane** 1974 (4) SA 303 (Tk) Munnik CJ held that “in the case of R. v Burns, 19 S.C. 477, that a plea of *autrefois acquit* cannot be raised for the first time on appeal, but in my view to apply this rule rigidly, especially in the case of an unsophisticated and uneducated person who is not represented, would be repugnant to one's feeling of fair play and justice. In this regard I prefer the view expressed by Lord GODDARD, C.J., in Flatman v Light and Others, 1946 (2) All E.R. 368, when he said:

> "In common justice and fairness if during the course of the case it turned out that a man had been previously convicted or acquitted of the same offence with which he was then charged, the court would of course allow him to plead and to give effect to that plea."[17]

21. It is respectfully submitted that these pleas are not applicable in this case but the fact that reasonableness and fairness are underlying principles in

[15] At page 15-29
[16] Du Toit pages 15-36 to 15-37
[17] At 303H. See also **Mpofu** (supra) at paragraph [15]

such pleas, is important. These principles are aligned to an accused's right to a fair trial, including the accused's right to appeal to a higher court.[18]

E. THE SECOND (NEW) APPLICATION FOR LEAVE TO APPEAL

22. It is also respectfully submitted that the applicant has exhausted all his statutory rights of appeal. His appeal has been heard by a Full Court, he has petitioned the Supreme Court of Appeal[19] and has applied for direct access to this Honourable Court. The applicant has been unsuccessful in all of his attempts to have the matter heard by another court after his appeal was dismissed by the Full Court.

23. It is respectfully submitted that it is important to bear in mind that when he made his first application to this Honourable Court he was not assisted by a legal practitioner.

24. The judgment dismissing his first application for leave to appeal (direct access to this Honourable Court)[20] was given by a bench consisting of 9 Justices.

25. It is respectfully submitted that the *ratio decidendi* for the refusal of the leave to appeal was that his application did "not raise a proper

[18] Section 35(3)(o) of the Constitution.
[19] Section 316(3)(a) of the Criminal Procedure Act 51 of 1977; Section 16(1) of the Superior Courts Act 10 of 2013
[20] Rule 18 – 20 of the Rules of the Constitutional Court

constitutional issue for this [Honourable] Court to entertain' and the applicant's application was "based on an attack on the factual findings made in the trial court."[21]

26. Subsequent to the judgment being given on 20 May 2014 portions of the transcribed record have been made available to this Honourable Court when leave to appeal was granted to his co-accused and the matter was argued before this Honourable Court, as their appeal raised constitutional matters.[22]

27. It is respectfully submitted that the applicant's second application for leave to appeal raises the same constitutional matters as his co-accused.

F. PROCEDURE TO BE FOLLOWED WITH THE SECOND APPLICATION FOR LEAVE TO APPEAL

28. It is respectfully submitted that the only Court that can deal with the applicant's appeal is this Honourable Court due to the fact that the Supreme Court of Appeal has refused his application for leave to appeal to that Court. The applicant has correctly proceeded up the hierarchy of appeals and is now at the pinnacle of the hierarchy.[23]

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[21] **Molaudzi** (supra) at page 786 paragraph [2]
[22] See fn 2 (supra)
[23] **Matshona v S** [2008] 4 All SA 68 (SCA) at paragraph [6]

29. In a strict approach the **Molaudzi** judgment refusing the applicant's leave to appeal finalised the applicant's appeal rights and his conviction and sentence should be upheld.

30. It is respectfully submitted that in the broad sense of the word the applicant's second application is *res judicata*, as his first application was dismissed. If the strict approach is followed then the applicant's application for leave to appeal should be dismissed.

31. However, it is respectfully submitted that this would lead to a travesty of justice in respect of the applicant.[24]

32. It is respectfully submitted that this Honourable Court has jurisdiction to deal with the second application for leave to appeal if regard is had to the following.

G. COMPOSITION OF THE COURT

33. Firstly, it is respectfully submitted that a previous decision of a court can be overruled by a bench consisting the same number or a greater number of judges than the bench which gave the first decision.

[24] Especially in light of the fact that the respondent has already submitted that the applicant's case should be dealt with in the same manner as his co-accused.

34. It is respectfully submitted that this Honourable Court can overturn the **Molaudzi** judgment if the second application for leave to appeal is dealt with by quorum of nine or more Justices.

H. SECTION 167(3)(C) OF THE CONSTITUTION, 1996

35. Secondly, it is respectfully submitted that in terms of section 167(3)(c) of the Constitution this Honourable Court is given the power to make "the final decision whether a matter is within its jurisdiction."

36. It is respectfully submitted that now that this Honourable Court has the transcribed record this Honourable Court is fully appraised of the issues in the matter and clearly, at least, the matter raises a constitutional matter.

37. Therefore, it is respectfully submitted that this is a matter where this Honourable Court can invoke the provisions of the section and ensure that justice is done with regards to the applicant.[25]

I. RATIO DECIDENDI OF THE MOLAUDZI JUDGMENT

38. Thirdly, it is respectfully submitted that if the *ratio decidendi* of the **Molaudzi** judgment is that the application for leave to appeal raised no

[25] **S v Boesak** 2001(1) BCLR 36 (CC) at paragraphs [10] – [15]

constitutional issue,[26] then the second application clearly raises constitutional issues and as such the second application for leave to appeal can be considered afresh.

39. It is respectfully submitted that it can be argued that the second application for leave to appeal also "raises an arguable point of law of general public importance which ought to be considered by [this Honourable Court]."[27]

40. It is respectfully submitted that a decision on the second application for leave to appeal will contradict the previous decision of this Honourable Court as the second application revolves around constitutional matters and does not revolve around factual issues.[28]

J SECTION 35(3)(O) OF THE CONSTITUTION

41. It is respectfully submitted that if it is found that the **Molaudzi** judgment made the second application *res judicata* then the applicant's right to appeal might be infringed, as he is now raising a constitutional matter for this Honourable Court to consider.

[26] See paragraph 25 (supra)
[27] Section 167(3)(b)(ii) of the Constitution
[28] **Mpofu** (supra) at paragraph [16]

42. It is respectfully submitted that then this Honourable Court should not follow a strict approach but that a more flexible approach should be followed where the interests of justice play an important role.[29]

43. Furthermore, it is respectfully submitted that the dicta in **Mgilane** judgment (supra) endorsing a flexible approach is clearly applicable in this matter as the applicant compiled the first application for leave to appeal without the assistance of a legal representative.[30]

44. It is respectfully submitted that a flexible approach which allows this Honourable Court to take into account the second application for leave to appeal would ensure a just decision on the merits is arrived at. This would satisfy both the applicant's and society's interest in the matter.

K CONCLUSION

45. It is respectfully submitted that the *res judicata* principle should not apply in this matter as the issue to be decided is now a constitutional matter and not a factual matter.

46. It is respectfully submitted that if it is found that the *res judicata* principle is applicable then a flexible approach should be followed which allows this Honourable Court to deal with the second application for leave to appeal.

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[29] As set out in paragraphs 12 – 21 (supra)
[30] **Mpofu** (supra) at paragraph [15]

47. It is respectfully submitted that this Honourable Court has jurisdiction to hear this matter.

Dated at Mahikeng on this 2nd day of April 2015.

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NJ Carpenter
Counsel for the Respondent

IN THE CONSTITUTIONAL COURT OF THE REPUBLIC OF SOUTH AFRICA (BRAAMFONTEIN)

CONSTITUTIONAL COURT CASE NUMBERS: CCT 42/15

NORTH WEST HIGH COURT CASE NUMBER: CC 164/03

In the matter between:

THEMBEKILE MOLAUDZI **Applicant**

AND

THE STATE **Respondent**

RESPONDENT'S PRACTICE NOTE

THE NATURE OF PROCEEDINGS

1. This matter is a criminal appeal from a trial held in the High Court where there were 8 accused and the applicant was one of the accused. The applicant's appeal to the Full Bench was dismissed. The applicant's petition to the SCA was refused. This Honourable Court refused leave to appeal to this court after the applicant petitioned the Court in person. A second application for leave to appeal was filed by the applicant.

THE ISSUES THAT WILL BE ARGUED

2. Whether the applicant's second application for leave to appeal is *res judicata* or not.

3. Whether this Honourable Court has jurisdiction to hear this matter.

4. Whether the applicant received a fair trial when regard is had to the fact that State's case was closed before the ruling on the admission of hearsay evidence had been decided.

5. Whether the applicant received a fair trial when regard is had to the fact the accused testified outside their numerical order in the indictment.

6. Whether the applicant received a fair trial when regard is had to the fact when they were convicted on the basis of the SCA judgment of **S v Ndhlovu and Others** 2002 (2) SACR 325 (SCA) (2002 (6) SA 305; [2002] 3 All SA 760; [2002] ZASCA 70) (hereinafter referred to as the Ndhlovu judgment), which decision has been subsequently overruled by the SCA judgment of **S v Litako and Others** 2014 (2) SACR 431 (SCA), which allowed the admission of co-accused's extra-curial statement, in terms of section 3 of The Law of Evidence Amendment Act 45 of 1988, as evidence against the other accused.

7. Whether the applicant received equal treatment, in terms section 9 of the Constitution, as accused in light of the different sections applying to the admissibility of extra-curial statements made an in terms of sections 217 – 219A of the CPA.

RELEVANT PORTIONS OF THE RECORD

8. The whole record is relevant.

ESTIMATED DURATION OF ORAL ARGUMENT

9. The estimated duration of oral argument is 2 hours.

SUMMARY OF THE ARGUMENT

10. The *res judicata* principle should not apply in this matter as the issue to be decided is now a constitutional matter and not a factual matter.

11. If it is found that the *res judicata* principle is applicable then a flexible approach should be followed which allows this Honourable Court to deal with the second application for leave to appeal.

12. This Honourable Court has jurisdiction to hear this matter.

13. The applicant was aware of all the evidence admitted against him before he testified and therefore his right to a fair trial we not infringed.

14. The testifying of the accused and applicant different to their numerical order in the indictment did not infringe on his right to a fair trial.

15. The common law allowed the admission as evidence of an extra-curial statement as against the maker of the statement.

16. The SCA judgment of **Ndhlovu** changed the position by allowing co-accused statements, in terms of section 3 of The Law of Evidence Amendment Act 45 of 1988, to be admitted as evidence against the other accused.

17. All hearsay evidence is governed by section 3 of The Law of Evidence Amendment Act 45 of 1988 and the common law exceptions allowing the admission of certain hearsay evidence has been abolished.

18. The old common law exceptions of “executive statements”, statements of co-conspirators and statements used to establish a common purpose or conspiracy must now be dealt with in terms section 3 of The Law of Evidence Amendment Act 45 of 1988.

LIST OF AUTHORITIES

CASE LAW

African Farms and Townships Ltd v Cape Town Municipality 1963 (2) SA 564 (A)

S v Mgilane 1974 (4) SA 303 (Tk)

Bafokeng Tribe v Impala Platinum Ltd 1999 (3) SA 517 (B)

S v Ndhlovu and Others 2001 (1) SACR 85 (W)

S v Boesak 2001(1) BCLR 36 (CC)

S v Ndhlovu and Others 2002 (2) SACR 325 (SCA) (2002 (6) SA 305; [2002] 3 All SA 760; [2002] ZASCA 70)

Matshona v S [2008] 4 All SA 68 (SCA)

Mpofu v Minister for Justice and Constitutional Development and others 2013 (9) BCLR 1072 (CC)

S v Litako and Others 2014 (2) SACR 431 (SCA)

Molaudzi v S 2014 (7) BCLR 785 (CC)

CANADA

Amtim Capital Inc v Appliance Recycling Centres of America 2014 ONCA 62 (CanLii)

Appliance Recycling Centres of America v Amtim Capital Inc 2014 CanLii 29541 (SCC)

UNITED STATES OF AMERICA

Federated Department Stores, Inc et al v Marilyn Moitie and Floyd R Brown 452 US 394

EASTERN CARIBBEAN SUPREME COURT

Patrick Smith v Heirs of Camsell St. Catherine and others, Court of Appeal Eastern Caribbean Supreme Court, 29 January 2015.(www.eccourts.org/wp-content/files_mf/29.01.15patricksmithvheirsofcamsellestcatherine1.pdf)

REFERENCE WORKS

Dictionary of Legal Words and Phrases, RD Claassen,2014 Update

Commentary on the Criminal Procedure Act, Du Toit and others, Revision Service 52, 2014

UNITED STATES OF AMERICA

Civil Procedure Res Judicata (www.west.net/-smith/resjud-content.htm)

CANADA

Court of Appeal for Ontario rejects a "race to res judicata" Marc Kestenburg (Norton Rose Fulbright February 2014) (www.nortonrosefulbright.com/knowledge/publications/112922/court-of-appeal-for-ontario-rejects-a-race-to-res-judicata)

STATUTES

Criminal Procedure Act 51 of 1977

The Law of Evidence Amendment Act 45 of 1988

Constitution of South Africa, 1996

Rules of Constitutional Court

Superior Courts Act 10 of 2013