

THE DOCTRINE OF *RES JUDICATA* REVISITED: *MOLAUDZI V THE* *STATE*

Angelo Dube
Department of Public, Constitutional and International
Law, University of South Africa
and
Musavengana Machaya
Department of Private Law, University of the Western
Cape

Abstract

The doctrine of *res judicata* is very fundamental to the smooth operation of the justice machinery. It assures the finality of court judgments, and prevents matters from being re-litigated on the same cause of action and between the same parties. However, a strict adherence to this common law principle also has the potential to visit untold suffering and injustice on would be litigants. In 2015, the Constitutional Court of South Africa in *Molaudzi v The State*, dealt with the question of when a court would be allowed to depart from its own earlier decision in the context of criminal law. Drawing from foreign jurisprudence, the court was able to reconsider its own previous final order by relying on the exceptions to the doctrine of *res judicata*. This marked the very first time that the Constitutional Court overturned its own decision. In this note, we present the background of the case of *Molaudzi*, analyse the judgment, and demonstrate how the court managed to depart from a rigid application of the doctrine of *res judicata*.

1. Background

On 25 June 2015, the Constitutional Court of South Africa delivered judgment in the matter of *Molaudzi v The State*, in which it relaxed the doctrine of *res judicata* in the interests of justice to allow a prisoner who had already exhausted the criminal appeal system to advance his

case. This enquiry called for the court to look into the application of section 173 and 39(2) of the Constitution of South Africa (1996). In short the main question which had to be addressed by the court was: "under what circumstances can the court revisit final judgments in criminal cases?".

Before the Constitutional Court, the applicant, Thembekile Molaudzi sought leave to appeal against his convictions and sentences as imposed by the North West High Court sitting at Mafikeng and confirmed on appeal by the Full Court (*Molaudzi* para 1). The matter emanated from the events of 3 August 2002 where Warrant Officer Johannes Dingaan Makuna, a member of the South African Police Service (SAPS), was fatally shot at his home. It was alleged that Molaudzi was part of a group of men who carried out the shooting and had also planned to steal his *bakkie* (*Molaudzi* para 2).

Molaudzi together with seven other accused stood trial before a single judge in the High Court. His co-accused Boswell Mhlongo (accused 2) and Alfred Nkosi (accused 4) were also applicants before the Constitutional Court in similar combined cases (*Mhlongo v S; Nkosi v S*). Mhlongo and Nkosi were charged with murder (count one), robbery with aggravating circumstances (count two), attempted robbery (count three), unlawful possession of firearms (count four) and unlawful possession of ammunition (count five). In the alternative to murder they were charged with conspiracy to commit robbery in contravention of section 18(2)(a) of the Riotous Assemblies Act 17 of 1956 (*Molaudzi* para 3).

The trial court found that the accused had a common purpose to murder and rob the deceased and convicted them on four of the five counts. On 22 July 2004, they were sentenced to life imprisonment for the robbery; and three years' imprisonment in respect of each of the two remaining charges relating to the possession of the firearms and ammunition. The sentences for counts 2, 4 and 5 were ordered to run concurrently with the life sentences. The accused were acquitted of the alternative charge of conspiracy to commit robbery (*Molaudzi* para 5).

1.1 Proceedings before the Full Court and Supreme Court of Appeal

The accused appealed against their convictions and sentences to the Full Court. The appeal was largely grounded on the admissibility of the extra-curial statements. The appeal was dismissed, among other reasons, on the ground that the hearsay evidence of Thabo Matjeke (ac-

cused 1) and George Makhubela (accused 3), which was relied on to convict Molaudzi became 'automatically admissible', because the accused listed above confirmed portions of the statements in their oral testimony (Molaudzi para 6).

The Full Court found that there was no reason to interfere with the sentences imposed, and a petition to the Supreme Court of Appeal (SCA) for leave to appeal was dismissed on 6 August 2013 (Molaudzi para 7).

1.2 Molaudzi's initial litigation before the Constitutional Court

In his initial litigation in *Molaudzi v The State* (2014),¹⁾ the main thrust of his application was that the trial court and the Full Court did not properly apply the principle in *S v Ndhlovu and Others*. In *Ndhlovu*, the SCA had to deal with the question whether an accused's out-of-court statements incriminating a co-accused, if disavowed at the trial, can nevertheless be used in evidence against the latter.

In the initial Constitutional Court application, Molaudzi had argued that in admitting hearsay evidence, courts must take all the factors in Section 3(1)(c) of the Evidence Amendment Act 45 of 1988 into consideration. He had further contended that the trial court mistakenly corroborated his co-accused, Matjeke's evidence with other evidence which he maintained did not implicate him; and that the evidence of Matjeke — which primarily implicated him — was unreliable (*Molaudzi v The State* 2014).

He went on to attack the admissibility of extra-curial statements of his co-accused contending that Matjeke's extra-curial statement amounted to a confession, and not an admission. As such, it could not be admitted into evidence on the basis of section 219 of the Criminal Procedure Act 51 of 1977. This section states that, no confession made by any person shall be admissible against another person.

He raised other points, mostly procedural, but no constitutional issue was raised as such. In other words, he did not contest the constitutionality of the reliance by the court on the extra-curial statements of Matjeke. The points he raised included arguments that the trial was procedurally unfair in that the trial court had ruled on the admissibility of hearsay evidence after the state had closed its case. He also accused the trial court of rushing the proceedings; allowing Matjeke to re-open his case; and allowing the defence to testify out of sequential order. These same grounds were canvassed before the Full Court, which had

dismissed his appeal from the High Court (*Molaudzi* para 9).

In 2014 Mhlongo and Nkosi, Molaudzi's former co-accused applied for leave to appeal against their convictions and sentences but raised constitutional arguments regarding the evidence admitted against them (*Mhlongo v S; Nkosi v S*). In particular, they challenged the constitutional validity of the admissibility of extra-curial statements of an accused against a co-accused in a criminal trial. When Molaudzi filed his first application, the Constitutional Court directed that his matter be combined with that of Mhlongo and Nkosi because of the similarities in the two cases and the relief sought. The Constitutional Court considered the challenge to raise a meritorious constitutional issue which engaged the court's jurisdiction; granted the applicants leave to appeal; and subsequently overturned their convictions, and they were subsequently released from prison (*Molaudzi* para 10). However, as regards Molaudzi's application, the Constitutional Court dismissed it for failure to raise any constitutional issues.

The need to raise a constitutional matter in constitutional litigation appearing before the Constitutional Court is sanctioned by the Constitution. Prior to the seventeenth amendment of the Constitution, this was regulated partly by section 167, subsection (3)(a) which proclaimed the Constitutional Court to be the highest court in all constitutional matters. It was amended in 2012 to provide that the Constitutional Court is the "highest court of the Republic" (Constitution Seventeenth Amendment Act 2012). Section 167(3)(b) provides that the court may decide (i) constitutional matters, and (ii) any other matter, if the court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that court. Prior to the seventeenth amendment, apart from the power to hear constitutional matters, the provision only empowered the court to have jurisdiction over issues connected with decisions on constitutional matters, but this was a narrow scope and the need to expand was becoming clearer with each case litigated. Indeed the case of *Alexkor Ltd and Another v Richtersveld Community and Others* (paras 27 and 28), had already developed this provision to hold that the Constitutional Court is also the highest court on all issues connected with decisions on constitutional matters.

In terms of section 167(7), a constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution. In other words, the litigant seeking to attack a finding of the trial court must in his application clearly indicate how the issues he raises interact with the interpretation, protection or enforcement of the Consti-

tution. This resonates with the court's statement in *S v Boesak* (para 14), that a constitutional matter must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of state. This could be done through alleging and proving that the trial court's decision on one or other legal point is in conflict with the Constitution. This could also include the development of (or the failure to develop) the common law in accordance with the spirit, purport and objects of the Bill of Rights (*Khumalo and Others v Holomisa* para 10). Again Van der Westhuizen J opined in *Fraser v ABSA Bank Limited (National Director of Public Prosecutions as Amicus Curiae)* paras 36 and 37 that it is neither necessary nor desirable to rigidly define the limits of the term 'constitutional matter'. The court further held that in a system of constitutional supremacy, it is inappropriate to construe the term 'constitutional matter' narrowly. The court was of the opinion that it is philosophically and conceptually difficult to conceive of any legal issue that is not a constitutional matter within a system of constitutional supremacy.

2. The second litigation — considerations of *res judicata*

Molaudzi brought a second application for leave to appeal to the Constitutional Court in which he raised the same arguments as Mhlongo and Nkosi. Upon receiving his papers, the court issued further directions to the parties, calling for written submissions on whether the court was precluded from entertaining the matter on the basis that it was *res judicata* (*Molaudzi* para 11).

In the second application, Molaudzi argued that his first application differed from the second one, in that it was premised on an attack against the factual findings of the trial court and the Full Court. The first application did not raise a constitutional issue and accordingly did not engage the court's jurisdiction. Molaudzi argued that, the challenge to the constitutional tenability of the admissibility of extra-curial statements by an accused against a co-accused was not raised in the first application. In other words, it was being raised before the court for the first time, and since the court did not make a decision on that constitutional challenge in the first application, the second application was not *res judicata* (*Molaudzi* para 12).

The court relied on the definition of *res judicata* given by Claassen, which holds that *res judicata* means that, "[a] case or matter is de-

cided. 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 wrong, but simply whether there is a judgment" (Claassen 1977).

The underlying rationale of this doctrine is to give effect to the finality of judgments. This means that where a cause of action has been litigated to finality between the same parties on a previous occasion, a subsequent attempt by one party to proceed against the other party on the same cause of action should not be permitted. This limits needless litigation and ensures certainty on matters that have been decided by the courts (*Molaudzi* para 16). Indeed the doctrine of *res judicata* is underpinned by the principle that it is in the interest of public policy that there be an end to litigation (*Ndlangamandla v Hadebe* para 29).

The Court of Appeal of Lesotho, in *Private Sector Foundation of Lesotho v Thabo Qhesi and Others* stated that "it is now well established that the requirements for the *exceptio rei judicata* will be relaxed in appropriate circumstances to the extent that the *exception* will be upheld in respect of a particular issue of law or fact even where the relief claimed and the cause of action are not the same, provided that the parties are the same and the same issue arises" (para 12). In *Masara v Tsepong (Pty) Ltd* (para 14), the court said the following, "the principle of *res judicata* requires that one establish that the current and old matters are based on the same set of facts and have been finalised between the same parties on the merits of a cause of action". The Lesotho Court of Appeal held that a court may, when the appropriate circumstances arise, exercise that jurisdiction to review its own judgments, based on its inherent common law duty and obligation to serve the interests of justice (*Lepule v Lepule and Others* para 96).

In *Moyo v Rex*, the High Court of Swaziland stated that an applicant seeking to impugn the operation of *res judicata* can move a fresh application upon new facts or circumstances having come to the fore. However, such new facts must be realistic and not merely conjured so as to defeat the *res judicata* or the *functus officio* principle (para 14). The *exceptio rei judicatae* cannot operate in a matter where subsequent to the first judgment new circumstances have arisen which have a bearing to a just and fair determination of the matter (*Tfwala v R* para 7).

The *exception res judicata* is a form of estoppel aimed at preventing an issue which has already been decided between the same parties from being litigated upon again (*Standard Chartered Bank Botswana Ltd v Isaacs and Another* 456G-H).

Again in the case *In Re Pinochet* it was held that:

In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered.

However, it should be made clear that the House will not reopen any appeal, save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case, there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.

3. Is there a cause of action in criminal appeal cases?

The question that occupied the Constitutional Court was whether a cause of action can be said to exist in criminal law. This is largely because the doctrine of *res judicata* most commonly applies in or is developed largely in civil cases. In that sphere, *res judicata* operates to prevent a litigant from reinstating proceedings against the same respondent on the same cause of action.

In *Byombalira v Agency Maritime International*, the High Court of Tanzania stated that the expression 'cause of action' may be taken to mean essentially facts which it is necessary for the plaintiff to prove before it can succeed in the suit.

In the context of a criminal appeal there is, strictly speaking, no 'cause of action' but rather grounds of appeal against a particular conviction or sentence. It is arguable that this may be akin to a 'cause of action' for the purpose of *res judicata*. It could be reasoned that in the first application the court was not called upon to adjudicate the substantive merits of the constitutional challenges now raised. Therefore, this can be regarded as a different 'cause of action' and consequently the Constitutional Court is not precluded from hearing the application because of the *res judicata* rule (*Molaudzi* para 18).

The court in *Mpofu* opined that in the criminal law context, the principle of *res judicata* means that once an application for leave to appeal is dismissed, this amounts to a judicial decision, which is final and determinative (*Mpofu v Minister for Justice and Constitutional Develop-*

ment and Others para 14). This is different from civil cases where a defendant may raise a plea of *res judicata* in circumstances where the same litigant seeks the same relief on the same cause of action. It appears that in the context of criminal cases that the 'cause of action' is more aptly regarded as the conviction or sentence as a whole (*Molaudzi* para 19). In effect, this means that an accused who would have been convicted and sentenced, generally may not appeal against the decision more than once — despite changing the grounds of appeal (*Mpofu* para 14). If a convicted person was allowed to launch successive appeal proceedings on different grounds, this would undermine legal certainty and inundate courts with frivolous litigation (*Molaudzi* para 20).

Therefore, even though a constitutional challenge was not raised and decided in the first application, the second application ought to be considered *res judicata* as the merits of *Molaudzi*'s appeal were considered and ruled upon (*Molaudzi* para 21)

4. The need to relax the doctrine of *res judicata*

It is trite that no legal principle is cast in stone, and that where the interests of justice require it, courts can actually depart from an established legal principle. The principle of *res judicata* is no exception. De Villiers CJ in the case of *Bertram v Wood* opined that "unless carefully circumscribed, the defence of *res judicata* is capable of producing great hardship and even positive injustice to individuals". This sentiment was echoed by the court some 100 years later in the case of *Bafokeng Tribe v Impala Platinum Ltd and Others* (at 566E-F) where the court held that the principle of *res judicata* must be carefully delineated and demarcated in order to prevent hardship and actual injustice to the parties.

The Constitutional Court in *Molaudzi* decided to ground the doctrine of *res judicata* in the Canadian case of *Amtim Capital Inc v Appli-ance Recycling Centres of America*, where the Court of Appeal for Ontario stated that the purpose of *res judicata* is to balance the public interest in the finality of litigation with the public interest of ensuring a just result on merits. The court also noted that the doctrine is intended to promote orderly administration of justice and is not to be mechanically applied where to do so would create injustice (para 14).

Comparatively, article 137 of the Constitution of India states that, "subject to the provisions of any law made by Parliament or any rules made under article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it" (Constitution of India

1950). This is a very progressive provision, which shows that as early as the 1950s India was alive to the injustices that may be visited upon litigants if the court only had strict reliance on the doctrine of *res judicata*. Instead of simply leaving it to the courts, the State of India decided to develop the common law through a constitutional provision. In applying this progressive provision, the Supreme Court of India opined that this power is reserved for the correction of serious injustice (Choudhury 2012). Choudhury asserts that under the Indian scheme, three factors must be considered by the court faced with an application to relax the *res judicata* principle. First, the litigant must prove that new and important evidence has been discovered. However, the applicant in such a case must prove that there was no remission on his part in adducing all possible evidence at the trial. This new evidence must be relevant, and of such a character that if it would have been brought into the notice of the court, it might have possibly altered that judgment. In *GL Gupta v DN Mehta*, the Supreme Court of India reviewed its earlier decision in a criminal appeal because a statutory provision of the Foreign Exchange Act which had a bearing on the case, was not brought to its notice.

Again in *PN Eswara Iyer v The Registrar* the Indian Supreme Court opined that:

a review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different counsel, of old and overruled argument, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient.

The court also pointed out in *Northern India Caterers (India) Ltd v Lt Governor of Delhi* that the principle that a judgment of the Supreme Court was settled and final was an established one. It went on to state that departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so (para 8).

Secondly, in the event of an error apparent on the face of the record, the Supreme Court of India will move away from the *res judicata* doctrine and review its own earlier decision. Thirdly, where there exists some other sufficient reason, the court will review its own decision.

Although designed to prevent a single cause of action from being re-litigated, it is the flagrant injustice that would result if the application of the doctrine would be strictly adhered to that has allowed the courts

to relax this rule. This would not only affect the aggrieved applicant, but also subsequent cases, unless the applicant is allowed to show that the issue was incorrectly decided. Collateral estoppel, as it is known in US criminal law, applies only to criminal cases.

5. The power of the South African Constitutional Court to revisit final judgment

Section 173 of the Constitution states that:

The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa, each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interest of justice.

Since *res judicata* is a common law principle, the above provision allows the Constitutional Court to develop or relax the doctrine if the interests of justice so demand (*Molaudzi* para 32). The question whether it is in the interests of justice to develop the common law or the procedural rules of a court must be determined on a case by case basis. The South African position differs from the Indian one in that the powers of the courts in South Africa are broad. The Indian Constitution empowers courts only to visit their earlier decisions. Whilst this allows them to depart from the doctrine of *res judicata*, it is also limiting in the sense that common law principles are multifarious and are not simply limited to the *res judicata* principle. In the South African case, however, the powers of the courts includes the power to develop the common law, which takes into account not only the doctrine of *res judicata* but a broad range of common law principles.

Section 173, however, contains internal limitations in that it stipulates that the power must be exercised with due regard to the interest of justice. As the court put it, courts should not impose inflexible requirements for the application of this section and rigidity has no place in the operation of court procedures (*Molaudzi* para 32).

The Constitutional Court held in the case of *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* that the power in section 173 vests in the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering justice in a regular, orderly and effective manner. The court continued to state that to understand the import of section 173, it is imperative to conceive the provision as a mechanism to prevent any possible abuse of pro-

cess and to allow the courts to act effectively within their jurisdiction (*SABC v NDPP* para 90).

6. The putative clash between *res judicata* and the principle of *functus officio*

The principle of *functus officio* is an administrative law principle. It means that, as a general principle, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. As Trollip JA put it, the court thereupon becomes *functus officio* (*Firestone South Africa (Pty) Ltd v Genticuro AG* 306F-307G).

In general, the *functus officio* doctrine applies only to final decisions, so that a decision is revocable before it becomes final. Finality is a point arrived at when the decision is published, announced or otherwise conveyed to those affected by it (Hoexter 2012: 278). Hiemstra and Gonin (1992) define the term *functus officio* to mean "*nie meer diensdoende nie; nie meer in funksie niell* no longer in office (officiating); having discharged his office".

Per Plasket AJA in *Retail Motor Industry Organisation v Minister of Water & Environmental Affairs* (para 24), although the *functus officio* principle is also intended to foster certainty and fairness in the administrative process, it is not absolute. Courts still have to balance the need for certainty and fairness against the equally important practical consideration that requires the re-assessment of decisions from time to time in order to achieve efficient and effective public administration in the public interest.

The court noted that, the interests of justice require the court, to balance the rule of law and the need for 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. This should be weighed against the necessity to vindicate the constitutional rights of an unrepresented accused, the vulnerable party, in a case where similarly situated accused have been granted relief (*Molaudzi* para 38).

7. Exceptional circumstances to depart from *res judicata*

The parties agreed that apart from this court reconsidering the appeal, there is no effective alternate remedy. If the court had failed to entertain

Molaudzi's second application, this would have denied him the right to equality before the law. His case was similarly situated to the related cases of Mhlongo and Nkosi. His right to equality before the law would also have been infringed by the arbitrary distinction between confessions and admissions, whose consequences would have been to render extra-curial admissions of an accused admissible against a fellow co-accused (*Molaudzi* para 39).

Molaudzi's claim would have been premised on section 9 of the South African Constitution. It provides, "Everyone is equal before the law and has the right to equal protection and benefit of the law". The exact meaning of this clause is not cast in stone, but is deduced on an *ad hoc* basis. In other words, the circumstances of each individual case will determine how equality is to be understood in each case. Both his co-accused, Mhlongo and Nkosi's cases were on all fours with Molaudzi's. Molaudzi was serving a sentence of life imprisonment, for which he had already served ten years. Both Mhlongo and Nkosi were convicted on similar evidence, had their convictions and sentences overturned, and the court had already granted them liberation because they were able to raise constitutional issues in their initial application. To treat Molaudzi's cases differently, in light of the fact that he was unrepresented, would have led to the violation of his section 9 equality rights. Indeed the Constitutional Court opined that a grave injustice would have resulted from denying him the same relief simply because in his first application he did not have the benefit of legal representation, which resulted in the failure to raise a meritorious constitutional issue (*Molaudzi* para 40).

It is a settled position of our law that an unrepresented accused places a burden upon the court to assist the accused. The presiding officer is obliged to ensure that the unrepresented accused receives a fair trial (*Crowther v The State* para 5). Perhaps that is why the Constitutional Court gave directions to Molaudzi to indicate any constitutional issues his case was premised on (*Molaudzi* para 11). In *S v Rudman; S v Johnson; Sv Xaso; Xaso v Van Wyk NO* it was held that the presiding officer acts as a guide to the undefended accused.

The Constitutional Court also took into account the fact that Molaudzi was unrepresented when he lodged his first application. Needless to say, this had a bearing on his right to a fair trial. Section 35 of the Constitution generally provides for the fair trial rights of everyone, including detainees and sentenced prisoners. Subsection (2)(d) in particular recognises the rights of sentenced prisoners to "challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released". Molaudzi was doing exactly that, and treating

his case differently from those of similarly circumstanced prisoners would have deprived him of this right.

It is worth noting that the right to a fair trial as contained in section 35(3) is broader than the list specified therein. The right espouses the concept of substantive fairness which differs markedly from how this right might have been viewed in pre-constitutional criminal law (*S v Mofokeng* para 17). Today it is agreed that the legal proceedings must be fair in accordance with the notions of basic fairness and justice (*S v Zuma and Others* para 16).

The power of the courts to regulate their own process is not the only arsenal the courts have when faced with the need to revisit their own earlier final orders. The courts are bound to develop the common law if it is in the interests of justice to do so. Further, section 39(2) of the Constitution enjoins courts to develop the common law in line with the objects of the Bill of Rights (*Molaudzi* case para 41). As highlighted above, the *res judicata* provision has its origins in common law, and has served to ensure finality in litigation. However, where, as in the *Molaudzi* case, its strict adherence leads to grave injustices, the courts have the power to relax it. Section 39(2) endows our courts with such power, enabling them to develop the common law such that this doctrine does not trump fundamental rights contained in the Bill of Rights.

Relying on *Everfresh*, the court went on to hold that, in truly exceptional cases, where a mechanical application of *res judicata* would fail to give effect to the fundamental rights of an accused and would result in a grave injustice, the court is required, even obliged, to relax the doctrine to the extent necessary, to provide an appropriate remedy (*Everfresh Market Virginia v Shoprite Checkers (Pty) Ltd* para 42).

The court eventually held that the *res judicata* doctrine shall not be rigidly applied to preclude apex courts from reviewing their decisions, it has, however, cautioned against easy resort to the alteration of its own court decisions, holding that the section 173 power must be sparingly used, to avoid uncertainly, potential chaos; and the erosion of the settled *functus officio* and *res judicata* doctrines. Hence the court in *Molaudzi* (para 45) concluded that:

where significant or manifest injustice would result should the order be allowed to stand, the doctrine ought to be relaxed in terms of sections 173 and 39(2) of the Constitution in a manner that permits this Court to go beyond the strictures of rule 29 to revisit its past decisions. This requires rare and exceptional circumstances, where there is no alternative effective remedy.

The above decision in the case of *Molaudzi*, shows that the *res judicata* doctrine is not absolute. It can be relaxed in cases where significant or manifest injustice would result if a decision is allowed to stand without room of being contested.

8. Conclusion

From the above discussion it can be noted that, the doctrine of *res judicata* gives effect to the finality of court judgments. It is a doctrine that is underpinned by the principle that, there must be an end to litigation. Although the doctrine brings finality to judgment, the court in the case of *Molaudzi* held that the doctrine is not supposed to be to be mechanically or rigidly applied. Hence its conclusion to the effect that, the doctrine of *res judicata* can be relaxed in terms of section 173 and 39(2) of the Constitution in cases where significant or manifest injustice would result. Apart from these two provisions, several other considerations, such as the fact that the applicant was unrepresented in his initial application and that grave injustices would flow from a strict adherence to the rule, will motivate a court to relax the *res judicata* principle. Finally, the fact that no alternative effective remedy exists will work in favour of the accused.

Endnote

1. *Molaudzi v The State* [2014] ZACC 15 was the first case in which the applicant, Molaudzi unsuccessfully sought to vindicate his constitutional rights before making his second attempt in 2015.

Bibliography

- Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC).
- Arntim Capital Inc v Appliance Recycling Centres of America* 2014 ONCA 62.
- Bafokeng Tribe v Impala Platinum Ltd and Others* 1999 (3) SA 517 (B).
- Bertram v Wood* (1893) 10 SC 177.
- Byombalira v Agency Maritime International* 1983 TLR 1 (High Court of Tanzania).
- Choudhury, A (2012), "Review Jurisdiction of Supreme Court of India: Article 137", in *Social Science Research Network*. (Available at: <http://dx.doi.org/10.2139/ssrn.2169967>.)
- Claassen, C (1977), *Dictionary of Legal Words and Phrases*. Durban: Butterworths.

Editors (1967), "An exception to collateral estoppel in criminal cases because of prosecutor's incompetence", *University of Pennsylvania Law Review*, Vol 115, No 8, pp 1346-1358. (Available at http://scholarship.law.upenn.edu/penn_law_review/vol115/iss8/.)

Constitution of India 1950.

Constitution of South Africa 1996.

Everfresh Market Virginia v Shoprite Checkers (Pty) Ltd [2011] ZACC 30.

Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (AD).

Fraser v ABSA Bank Limited (National Director of Public Prosecutions as Amicus Curiae) 2007 (3) SA 484 (CC).

GL Gupta v DN Mehta [1971] 3 SCR 748, 760, (Supreme Court of India).

Hiemstra, V and H Gonin (1992), *Trilingual Legal Dictionary*, 3 edition. Cape Town: Juta Publishers.

Hoexter, C (2012), *Administrative Law in South Africa*, 2 edition. Cape Town: Juta Publishers

In Re Pinochet [1999] UKHL 1.

Khumalo and Others v Holomisa 2002 (5) SA 401 (CC).

Lepule v Lepule and Others [2015] LSCA 29.

Masara v Tsepong (Pty) Ltd [2015] LSLC.

Mhlongo v S; Nkosi v S [2015] ZACC 19.

Molaudzi v The State [2014] ZACC 15.

Molaudzi v The State [2015] ZACC 20.

Moyo v Rex [2016] SZHC 35.

Mpofu v Minister for Justice and Constitutional Development and Others [2013] ZACC 15.

Ndlangamandla v Hadebe [2013] SZHC 57.

Northern India Caterers (India) Ltd v Lt. Governor of Delhi 1980 AIR 674; 1980 SCR (2) 650.

PN Eswara Iyer v The Registrar 1980 AIR 808; 1980 SCR (2) 889.

Private Sector Foundation of Lesotho v Thabo Qhesi and Others [2013] LSCA 16.

Retail Motor Industry Organisation v Minister of Water & Environmental Affairs [2013] ZASCA 70.

S v Boesak 2001 (1) SA 912 (CC).

S v Mofokeng [2012] ZAFSHC 117.

S v Rudman; S v Johnson; Sv Xaso; Xaso v Van Wyk NO 1989 (3) SA 3698 (E).

S v Zuma and Others [1995] ZACC 1.

South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others [2006] ZACC 15.

Standard Chartered Bank Botswana Ltd v Isaacs and Another [1999] BLR 1 453.

Tfwala v R [2013] SZHC 146.

The Criminal Procedure Act 51 of 1977 (South Africa).
The Law of Evidence Amendment Act 45 of 1988.
The Riotous Assemblies Act 17 of 1956 (South Africa).