CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 42/15

In the matter between:

THEMBEKILE MOLAUDZI Applicant

and

THE STATE Respondent

Neutral citation: *Molaudzi v S* [2015] ZACC 20

Coram: Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Khampepe J, Madlanga J, Molemela AJ, Nkabinde J, Theron AJ and Tshiqi AJ

Judgment: Theron AJ (unanimous)

Decided on: 25 June 2015

Summary: Doctrine of *res judicata* — power to relax doctrine in exceptional circumstances — sections 173 and 39(2) of the Constitution — circumstances in which Court will revisit final judgments in criminal cases

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ORDER

On appeal from the Full Court of the North West High Court, Mafikeng (hearing an appeal from Leeuw J):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order under case number CAF 08/2012 of the Full Court of the North West High Court, Mafikeng, is set aside to the extent set out below:
   (i) The appeal by the fifth appellant against his convictions and sentences on counts 1, 2, 4 and 5 is upheld.
   (ii) His convictions and sentences on those counts are set aside.
4. The applicant must be released from prison immediately.

JUDGMENT

THERON AJ (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Khampepe J, Madlanga J, Molemela J, Nkabinde J and Tshiqi AJ concurring):

Introduction

[1] The applicant, Mr Thembekile Molaudzi, seeks leave to appeal against his convictions and sentences as imposed by the North West High Court, Mafikeng (High Court),[1] and confirmed on appeal by the Full Court of the High Court (Full Court).[2] The application concerns the doctrine of *res judicata* and this Court's power to reconsider a previous final order.

[1] Known then as the Bophuthatswana Provincial Division.

[2] A Full Court is the statutory term for a bench of three High Court judges, usually sitting as an appeal court of that Division, in terms of sections 1 and 17(6)(a) of the Superior Courts Act 10 of 2013. It was defined as a court consisting of two or more judges in terms of section 1(v) of the repealed Supreme Court Act 59 of 1959.

Factual background

[2] On 3 August 2002 the deceased, Warrant Officer Johannes Dingaan Makuna, was shot at his home. It was alleged that Mr Molaudzi was part of a group of men who shot Mr Makuna and planned to steal his bakkie. Mr Makuna later died in hospital. At the time, the deceased had been in possession of his service pistol. It was never recovered.

Trial court proceedings

[3] Arising out of this incident, Mr Molaudzi (accused 5), together with seven co-accused,[3] stood trial before a single judge in the High Court (trial court). Two of the accused were Mr Boswell Mhlongo (accused 2) and Mr Alfred Nkosi (accused 4), the applicants before this Court in cases CCT 148/14 and CCT 149/14, respectively (related cases). The accused were charged with murder (count 1), robbery with aggravating circumstances (count 2), attempted robbery (count 3), unlawful possession of firearms (count 4) and unlawful possession of ammunition (count 5). 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.[4] They pleaded not guilty to the charges. The trial commenced in 2003 and continued into 2004.

[4] A trial-within-a-trial was held to determine the admissibility of extra-curial statements made by accused 1, 3, 6 and 7. The admissibility of these statements was contested by the accused on the basis that they were not made freely and voluntarily but under threat of assault or promise of reward. The Court nevertheless ruled that the statements were admissible. It also found that the statements were admissions and not confessions,[5] and admissible against the other accused in terms of section 3(1)(c) of

[3] During the course of the proceedings in the trial court, accused 6 disappeared and failed to attend court.

[4] 17 of 1956.

[5] The trial court was initially of the view that some of the statements were confessions. See the trial court judgment at 49 and 51. (All page references to the trial court judgment in these footnotes have been referred to, for ease of reference, by this Court's own numbering – starting at page one of the judgment (labelled as 1) and onwards.)

the Law of Evidence Amendment Act[6] (Evidence Amendment Act). In this regard, the High Court relied on *Ndhlovu*, where the Supreme Court of Appeal held that such statements were admissible in terms of the Evidence Amendment Act.[7] The evidence supporting the convictions of Mr Molaudzi and the applicants in the related cases was based almost exclusively on the extra-curial statements made by their co-accused.[8]

[5] The trial court found that the accused had a common purpose to murder and rob the deceased and convicted them of four of the five counts.[9] On 22 July 2004, they were sentenced to life imprisonment for the murder; fifteen years' imprisonment for the robbery; and three years' imprisonment in respect of each of the two remaining charges relating to possession of the firearms and ammunition. The sentences imposed 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.

Full Court and Supreme Court of Appeal

[6] The accused appealed to the Full Court against their convictions and sentences. The appeal was largely grounded on the inadmissibility of the extra-curial statements.[10] It was dismissed, amongst other reasons, on the ground that the hearsay evidence of Mr Thabo Matjeke (accused 1) and Mr George Makhubela (accused 3), which was relied on to convict Mr Molaudzi became "automatically admissible",

[6] 45 of 1988.

[7] *S v Ndhlovu and Others* [2002] ZASCA 70; 2002 (2) SACR 325 (SCA) (*Ndhlovu).*

[8] This is dealt with later at [46] and below n 82.

[9] Murder (count 1), robbery with aggravating circumstances (count 2), unlawful possession of firearms (count 4) and unlawful possession of ammunition (count 5).

[10] The other grounds upon which the appeal was based in the Full Court, and no longer at issue on appeal before this Court, were: (1) An irregularity in the proceedings in that the State closed its case before the trial court made a ruling on the reception of hearsay evidence against the co-accused; (2) The accused testified out of sequence to the prejudice of their co-accused; (3) Mr Matjeke (accused 1) was allowed to reopen his case without good reason; (4) The extra-curial evidence of Mr Matjeke was given involuntarily, he was not warned of his rights beforehand and his in-court testimony was contradictory and unreliable; (5) The Court failed to apply the cautionary rule to the evidence of Mr Matjeke and Mr Makhubela (accused 3); and (6) The use of hearsay evidence in the form of extra-curial statements by some of the accused against other accused, was contrary to the principles laid down in *S v Molimi* [2008] ZACC 2; 2008 (3) SA 608 (CC); 2008 (5) BCLR 451 (CC).

because these accused confirmed portions of the statements in their oral testimony. The Full Court concluded that the statements—

> "[are] not hearsay evidence but evidence envisaged in section 3(1)(b) of the [Evidence Amendment] Act. Once the declarant of the statement confirms it under oath, the evidence becomes automatically admissible. The question of whether the interests of justice require it, has no application here".[11]

[7] The Court ruled that the statement of Mr Samuel Khanye (accused 7)[12] was admissible in the interests of justice, as provided for in section 3(1)(c) of the Evidence Amendment Act, and it was corroborated by aspects of the testimony of Mr Matjeke and Mr Makhubela. The Full Court also found that there was no reason to interfere with the sentences imposed. A petition to the Supreme Court of Appeal for leave to appeal was dismissed on 6 August 2013.

In this Court

[8] In 2013, Mr Molaudzi applied for leave to appeal, without legal representation, to this Court in case CCT 126/13 (first application). Mr Molaudzi based the first application largely on the fact that the trial court and the Full Court did not properly apply the principles of *Ndhlovu* to his case. He drew attention to the fact that in admitting hearsay evidence, courts must take all the factors in section 3(1)(c) of the Evidence Amendment Act into consideration. He contended that the Court mistakenly corroborated Mr Matjeke's evidence with other evidence which he maintained did not implicate him and that the evidence of Mr Majteke – which primarily implicated him – was unreliable.

[9] His further argument was that the extra-curial statement of Mr Matjeke was a confession and not an admission and was therefore barred by section 219 of the

[11] *Matjeke and Others v S* [2013] ZANWHC 95 (Full Court judgment) at para 44.

[12] Appellant 6 before the Full Court.

Criminal Procedure Act.[13] Mr Molaudzi also argued that the trial was procedurally unfair in that the trial court: ruled on the admissibility of hearsay evidence after the State closed its case; rushed the proceedings; allowed Mr Matjeke to re-open his case; and allowed the defence to testify out of sequential order. These grounds covered many of the same issues dealt with by the Full Court. The first application was dismissed. In a short judgment, this Court held:

> "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."[14] (Footnote omitted.)

[10] In 2014, the applicants in the related cases, Mr Mhlongo and Mr Nkosi, applied for leave to appeal against their convictions and sentences but raised constitutional arguments regarding the evidence admitted against them. 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. This Court considered the challenge to raise a meritorious constitutional issue which engaged this Court's jurisdiction; granted those applicants leave to appeal; and subsequently overturned their convictions. They have been released from prison.

[11] Pursuant to directions issued by this Court, Mr Molaudzi brought a further application (second application) for leave to appeal to this Court. In this application, he raises the same arguments as Mr Mhlongo and Mr Nkosi in the related cases. This 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

[13] 51 of 1977.

[14] *Molaudzi v S* [2014] ZACC 15; 2014 (7) BCLR (CC) (*Molaudzi* first judgment) at para 2.

res judicata.[15] Submissions were filed by both parties and the Court has decided this matter without a hearing.

Submissions in this Court

[12] Mr Molaudzi contends that his first application was different from his 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 this Court's jurisdiction. Mr Molaudzi argues 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. This Court did not make a decision on this constitutional challenge and therefore the second application (which pertinently raises it) is not *res judicata*. The State agrees with these submissions.

Leave to appeal

[13] Mr Molaudzi argues that this second application raises constitutional issues that place the matter firmly within this Court's jurisdiction. It does. As this Court held in the related cases, the admissibility of an extra-curial statement by an accused against a co-accused in a criminal trial engages this Court's jurisdiction as it implicates the right to equality before the law.[16] In addition, the unusual questions the application raises about the doctrine of *res judicata* are arguable points of law of general public importance. It is in the interests of justice for this Court to grant leave to appeal.

Res judicata

[14] *Res judicata*[17] is the legal doctrine that bars continued litigation of the same case, on the same issues, between the same parties.[18] Claassen defines *res judicata* as—

[15] See [14] below.

[16] *Mhlongo v S; Nkosi v S* [2015] ZACC 19 (*Mhlongo*) at paras 16-7.

[17] *Res judicata* is the Latin term for "a matter adjudged". It is usually raised as a defence in civil matters. In criminal matters the principle automatically applies once final judgment is given.

> "[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 wrong, but simply whether there is a judgment."[19]

[15] In *Bertram*,[20] the Supreme Court of the Cape of Good Hope traced the doctrine back to the Digest (50.17.207), which provided that – as a rule of law – once a matter is adjudged it is accepted as the truth:

> "The meaning of the rule is that the authority of *res judicata* includes a presumption that the judgment upon any claim submitted to a competent court is correct and this presumption being *juris et de jure*, excludes every proof to the contrary. The presumption is founded upon public policy which requires that litigation should not be endless and upon the requirements of good faith which, as said by Gaius, does not permit of the same thing being demanded more than once. On the other hand, a presumption of this nature, unless carefully circumscribed, is capable of producing great hardship and even positive injustice to individuals. It is in order to prevent such injustice that the Roman law laid down the exact conditions giving rise to the *exceptio rei judicatae*."[21] (Citation omitted.)

[16] The underlying rationale of the doctrine of *res judicata* is to give effect to the finality of judgments. 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. It is an attempt to limit needless litigation and ensure certainty on matters that have been decided by the courts.[22]

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[18] *Baphalane Ba Ramokoka Community v Mphela Family and Others; In re: Mphela Family and Others v Haakdoornbult Boerdery CC and Others* [2011] ZACC 15; 2011 (9) BCLR 891 (CC) (*Baphalane*) at para 31 referring to *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* [2000] ZASCA 70; 2001 (2) SA 232 (SCA) (*National Sorghum*) at para 2.

[19] Claassen *Dictionary of Legal Words and Phrases* (Butterworths, Durban 1977).

[20] *Bertram v Wood* (1893) 10 SC 177.

[21] Id at 180.

[22] *Ka Mtuze v Bytes Technology Group South Africa (Pty) Ltd and Others* [2013] ZACC 31; 2013 (12) BCLR 1358 (CC) at para 18; *Mpofu v Minister for Justice and Constitutional Development and Others* [2013] ZACC

Is the second application res judicata?

[17] In the first application, Mr Molaudzi raised challenges to the factual findings of the trial court,[23] which did not properly engage this Court's jurisdiction.[24] He also alleged procedural trial irregularities which were dealt with comprehensively by the Full Court.[25]

[18] 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 purposes of *res judicata*. It could be reasoned that in the first application this Court was not called upon to adjudicate the substantive merits of the constitutional challenges now raised. By analogy this is a different "cause of action" and therefore this Court is not precluded from hearing the second application under the *res judicata* rule.

[19] However, the general principle of *res judicata* in the criminal context is that once an application for leave to appeal is dismissed, this is a judicial decision, which is final and determinative.[26] It is somewhat different from civil cases where a defendant may raise a plea of *res judicata* only where the same litigant seeks the same relief on the same cause of action.[27] Thus it appears that in the criminal context, the "cause of action" is more aptly regarded as the conviction or sentence as a whole. An accused who has been convicted and sentenced, generally may not appeal against the

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15; 2013 (2) SACR 407 (CC); 2013 (9) BCLR 1072 (CC) at paras 14-5; and *Bafokeng Tribe v Impala Platinum Ltd and Others* 1999 (3) SA 517 (B) at 566B-F.

[23] *Molaudzi* first judgment above n 14.

[24] See *Mbatha v University of Zululand* [2013] ZACC 43; 2014 (2) BCLR 123 (CC) at paras 193-7 and the judgment of Madlanga J at paras 215-24; *Phoebus Apollo Aviation CC v Minister of Safety and Security* [2002] ZACC 26; 2003 (2) SA 34 (CC); 2003 (1) BCLR 14 (CC) at para 9; and *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 15.

[25] *Molaudzi* first judgment above n 14. See also the Full Court judgment at paras 16-24.

[26] *Mpofu* above n 22 at para 14, referencing *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835F-G.

[27] *Baphalane* above n 18 at para 31 referring to *National Sorghum* above n 18 at para 2.

decision more than once – despite changing the grounds for appeal.[28] The minority judgment of Van der Westhuizen J in *Mpofu* confirmed the need for finality in criminal matters:

> "The fact that an application for leave to appeal or an appeal is without merit, or 'ill-advised', cannot easily make it a nullity and open the way for further appeals, every time on a different ground."[29]

[20] This accords with the public policy considerations underpinning criminal *res judicata*: to bring about finality to a conviction.[30] 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.

[21] 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 Mr Molaudzi's appeal were considered by this Court and ruled on.

Doctrine not to be rigidly applied

[22] Courts have, over time, expressed the view that the doctrine of *res judicata* should not be applied rigidly. The relaxation of the doctrine effectively started in *Boshoff*,[31] where it was held that the strict requirements for a plea of *res judicata* should not be understood literally in all circumstances and applied as an inflexible or immutable rule.[32] Despite debate as to the approach of Greenberg J in *Boshoff*,

[28] *Mpofu* above n 22 at para 14.

[29] Id at paras 13-4. In this case the applicant had already made application for leave to appeal twice to this Court regarding the sentence imposed on him by the High Court. He only raised a constitutional issue in his third application to this Court. In the first two applications this Court stated, in short reasons, that it was "not in the interests of justice" to hear the matters.

[30] Id.

[31] *Boshoff v Union Government* 1932 TPD 345.

[32] See also *Hyprop Investments Ltd and Others v NSC Carriers and Forwarding CC and Others* [2013] ZASCA 169; 2014 (5) SA 406 at para 14 and *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* [1994] ZASCA 19; 1995 (1) SA 653 (A) (*Kommissaris*) at 669F-H.

Botha JA in *Kommissaris* confirmed the correctness of the approach.[33] He added that in particular circumstances these requirements may be adapted and extended to avoid the unacceptable alternative that courts cling to old doctrines with literal formalism.[34]

[23] Following *Boshoff* and *Kommissaris*, Scott JA in *Smith* summarised the development of the law:

> "[T]he ambit of the *exceptio rei 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 . . . in both the case in question and the earlier judgment. . . . 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* . . . 'unless carefully circumscribed, [the defence of *res judicata*] is capable of producing great hardship and even positive injustice to individuals'."[35] (References and citations omitted.)

In *Bafokeng Tribe*, it was stated that the principle of *res judicata* "must be carefully delineated and demarcated in order to prevent hardship and actual injustice to the parties".[36]

International developments

[24] In developing exceptions to the *res judicata* doctrine it is instructive to look at the exceptions admitted by other jurisdictions. In *Amtim Capital Inc*[37] the Court of Appeal for Ontario, Canada, stated that the purpose of *res judicata* is to balance the public interest in finality of litigation with the public interest of ensuring a just result

[33] *Kommissaris* id.

[34] Id.

[35] *Smith v Porritt and Others* [2007] ZASCA 19; 2008 (6) SA 303 (SCA) at para 10.

[36] *Bafokeng Tribe* above n 22 at 566E-F.

[37] *Amtim Capital Inc v Appliance Recycling Centres of America* 2014 ONCA 62.

on the merits.[38] The Court found that the doctrine is intended to promote orderly administration of justice and is not to be mechanically applied where to do so would create an injustice.[39] In addition, rule 73(1) of the Rules of the Supreme Court of Canada provides for reconsideration of final decisions in "exceedingly rare circumstances".[40]

[25] In the United Kingdom, *res judicata* is known as cause of action estoppel or issue estoppel.[41] In rare instances the court may reconsider its own previous judgments. In *Pinochet*, the House of Lords observed:

> "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

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[38] Id at para 13. See also *Danyluk v Ainsworth Technologies Inc* 2001 SCC 44; [2001] 2 SCR at paras 80-1 where the Supreme Court of Canada, in evaluating whether the application of the doctrine would cause potential injustice, held:

> "As a final and most important factor, the Court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice. Rosenberg JA concluded that the appellant had received neither notice of the respondent's allegation nor an opportunity to respond. He was thus confronted with the problem identified by Jackson JA, dissenting, in *Iron v Saskatchewan (Minister of the Environment & Public Safety)* [1993] 6 WWR 1 (Sask CA) at 21:
>
> > 'the doctrine of *res judicata*, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard.'
>
> . . .
>
> On considering the cumulative effect of the foregoing factors it is my view that the Court in its discretion should refuse to apply issue estoppel in this case."

This was confirmed by the Canadian Supreme Court in *Penner v Niagara (Regional Police Services Board)* 2013 SCC 19; [2013] 2 SCR 125 at, for example, paras 36-9.

[39] *Amtim Capital Inc* id at para 14.

[40] Rule 73(1) of the Rules of the Supreme Court of Canada provides:

> "There shall be no reconsideration of an application for leave to appeal unless there are exceedingly rare circumstances in the case that warrant consideration by the Court."

[41] A distinction is made between "cause of action estoppel" and "issue estoppel". In the first case—

> "the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter." (*Arnold v National Westminster Bank* [1991] 2 AC 93 (HL) at 104.)

In the second case—

> "a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue." (*Arnold* at 105.)

> relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered.
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> . . .
>
> 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."[42]
> (References omitted.)

[26] Lower courts have later made similar findings. In *Taylor*, the civil division of the Court of Appeal held that—

> "The need to maintain confidence in the administration of justice makes it imperative that there should be a remedy. The need for an effective remedy in such a case may justify this court in taking the exceptional course of reopening proceedings which it has already heard and determined. What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy. The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations."[43]

After *Taylor*, the Civil Procedure Rules were adapted to explicitly provide for the reopening of "a final determination".[44]

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[42] *In re Pinochet* [1999] UKHL 1 (*Pinochet*).

[43] *Taylor v Lawrence* [2003] QB 528.

[44] Rule 52.17 provides:

> "(1) The Court of Appeal or the High Court will not reopen a final determination of any appeal unless—
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> (a) it is necessary to do so in order to avoid real injustice;
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> (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and
>
> (c) there is no alternative effective remedy.
>
> (2) In paragraphs (1), (3), (4) and (6), 'appeal' includes an application for permission to appeal."

[27] In Singapore, the Court of Appeal distinguishes between its powers regarding criminal and civil appeals. With regard to criminal appeals it appears to consider itself a creature of statute and not equipped with the power to revisit any final criminal decisions.[45] In respect of civil matters, it finds that it has inherent jurisdiction to achieve a variety of results.[46] This distinction has been criticised as artificial and without basis.[47]

[28] In India, article 137 of the Constitution provides:

> "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."[48]

[29] The Supreme Court of India has held that this power is reserved for the correction of serious injustice. It is for the correction of a mistake, not to substitute a view.[49] The ordinary position is that a judgment is final and cannot be revisited. The power to review is statutory. It can be exercised when there is a patent and obvious error of fact or law in the judgment.[50] The injustice must be apparent and should not admit contradictory opinions.[51]

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[45] See, for example, *Vignes s/o Mourthi v Public Prosecutor (No 3)* [2004] 4 LRC 30 at 32-4 where the Singapore Court of Appeal confirmed the finding in *Abdullah bin A Rahman v Public Prosecutor* [1994] 3 SLR 129 at 132H, that there is no statutory mechanism which provided the Court of Appeal with jurisdiction or power to reopen a case after the disposal of an appeal. The Court held at 133G that "Parliament has not defined the function of the [Court of Appeal] so as to maintain continuous supervision over convicted persons or to act after the event because of a change in circumstance". The Court did not find an inherent jurisdiction to intervene in these circumstances.

[46] In *Wee Soon Kim Anthony v Law Society of Singapore* [2001] 4 SLR 25, the Singapore Court of Appeal considered itself to have an inherent jurisdiction, outside of its statutory one, which must be exercised judiciously. The Court found that the inherent jurisdiction may be invoked when it would be just and equitable to do so "to prevent improper vexation or oppression and to do justice between the parties". In *Roberto Building Material Pte Ltd and Others v Oversea-Chinese Banking Corp Ltd and Another* [2003] 2 SLR 353 at para 17 the Court of Appeal held that the Court's inherent jurisdiction may only be invoked in "exceptional circumstances where there is a clear need for it and the justice of the case so demands".

[47] Yihan "The Jurisdiction to Reopen Criminal Cases: A Consideration of the (Criminal) Statutory and Inherent Jurisdiction of the Singapore Court of Appeal" (2008) *Singapore Journal of Legal Studies* 395 at 410.

[48] Constitution of India, 1950.

[49] Choudhury "Review Jurisdiction of Supreme Court of India: Article 137" *Social Science Research Network* (4 April 2012), available at http://dx.doi.org/10.2139/ssrn.2169967.

[50] *A T Sharma v A P Sharma* AIR 1979 SC 1047. In this case the Supreme Court held:

[30] The general thrust is that *res judicata* is usually recognised in one way or another as necessary for legal certainty and the proper administration of justice. However, many jurisdictions recognise that this cannot be absolute. This is because "[t]o perpetuate an error is no virtue but to correct it is a compulsion of judicial conscience".[52]

This Court's power to revisit final orders

[31] Section 173 of the Constitution provides:

> "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 interests of justice."

In terms of section 173, each superior court is the master of its own process.[53] Jafta J stated in *Mukaddam*:

> "It is apparent from the text of the section that it does not only recognise the courts' power to protect and regulate their own processes but also their power to develop the common law where necessary to meet the interests of justice. The guiding principle in exercising the powers in the section is the interests of justice."[54]

> "It is true there is nothing in article 226 of the Constitution to preclude the High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits."

[51] *M/s Northern Indian Caterers (India) Ltd v Lt Governor of Delhi* AIR 1980 SC 674.

[52] The Indian Supreme Court in *M S Ahlawat v State of Haryana and Another* 1999 Supp (4) SCR 160.

[53] *Mukaddam v Pioneer Foods (Pty) Ltd and Others* [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) at para 32.

[54] Id at para 34.

[32] Since *res judicata* is a common law principle, it follows that this Court may develop or relax the doctrine if the interests of justice so demand.[55] 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.[56] Section 173 does not limit this power. It does, however, stipulate that the power must be exercised with due regard to the interests of justice.[57] Courts should not impose inflexible requirements for the application of this section.[58] Rigidity has no place in the operation of court procedures.[59]

[33] This inherent power to regulate process, does not apply to substantive rights but rather to adjectival or procedural rights.[60] A court may exercise inherent jurisdiction to regulate its own process only when faced with inadequate procedures and rules in the sense that they do not provide a mechanism to deal with a particular scenario. A court will, in appropriate cases, be entitled to fashion a remedy to enable it to do justice between the parties.[61] This Court held in *South African Broadcasting Corp Ltd*:

> "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. Said otherwise it is the authority to prevent any possible abuse of process and to allow a court to act effectively within its jurisdiction."[62]

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[55] *Children's Institute v Presiding Officer, Children's Court, Krugersdorp and Others* [2012] ZACC 25; 2013 (2) SA 620 (CC); 2013 (1) BCLR 1 (CC) at para 17, in the context of allowing *amici* to adduce evidence.

[56] *Children's Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd and Others* [2012] ZASCA 182; 2013 (2) SA 213 (SCA) at para 15.

[57] *Mukaddam* above n 53 at para 37.

[58] Id.

[59] Id at para 39.

[60] *Oosthuizen v Road Accident Fund* [2011] ZASCA 118; 2011 (6) SA 31 (SCA) at para 26 and *Children's Institute* above n 55 at para 35-8. In the latter case, this Court distinguished between the right of an *amici* to adduce evidence, which was a procedural right and therefore within the bounds of section 173, and the right of an accused to by-pass prescription of a claim, which this Court held to constitute a substantive right and thus could not be granted to a party in terms of this section.

[61] *Oosthuizen* id at para 20.

[62] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) at para 90.

[34] The power in section 173 must be used sparingly[63] otherwise there would be legal uncertainty and potential chaos.[64] In addition, a court cannot use this power to assume jurisdiction that it does not otherwise have.[65]

[35] This Court is empowered to vary orders in limited circumstances, essentially if the order was made in error, in terms of rule 42 of the Uniform Rules of Court, read with rule 29 of the Rules of this Court.[66] The Court has recognised various exceptions to the *functus officio* and *res judicata* doctrines by effecting minor alterations to final orders in order to clarify their true intention or vary consequential matters.[67] In addition, this Court has entertained an application for rescission of a final order on the

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[63] *Oosthuizen* above n 60 at para 19.

[64] See id at para 27, where the Supreme Court of Appeal found that the exercise of inherent jurisdiction to create new rights would open the door to uncertainty and potential chaos.

[65] Id at para 17. See also *National Union of Metalworkers of SA and Others v Fry's Metal (Pty) Ltd* [2005] ZASCA 39; 2005 (5) SA 433 (SCA) at para 40, citing *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* [1996] ZASCA 2; 1996 (3) SA 1 (A) at 7F.

[66] Rule 29 provides that select rules of the Uniform Rules of Court will apply to the proceedings in this Court, including rule 42. Rule 42 of the Uniform Rules of Court provides:

> "(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
>
> (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
>
> (b) An order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
>
> (c) An order or judgment granted as the result of a mistake common to the parties.
>
> (2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.
>
> (3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.

On the extent of this power, see *Glenister v President of the Republic of South Africa and Others* [2013] ZACC 20; 2013 (11) BCLR 1246 (CC) at para 6.

[67] *Zondi v MEC, Traditional and Local Government Affairs and Others* [2005] ZACC 18; 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC) at paras 28-36, confirming the exceptions to the doctrine in *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306H-7G. The doctrine of *functus officio* dictates that, generally, a judge has no authority to amend his or her own final order; while the doctrine of *res judicata* provides that a matter finally determined cannot be revisited. The rationale for both doctrines being, the public interest in bringing litigation to finality.

grounds that it was based on a misapprehension of the law.[68] However, the question of the full extent of this Court's powers in this regard, has been left open. In *Baphalane* Cameron J explained:

> "In invoking and applying rule 42, this Court has previously left open the question what power it may have as a court of final appeal to vary its past orders under the common law, or under its inherent power to protect and regulate its own process, or under its power to develop the common law, taking into account the interests of justice [in terms of section 173]. It has also left open the question whether section 172 of the Constitution confers additional powers on it to correct its own orders."[69] (Footnotes omitted.)

[36] In *Ka Mtuze*, this Court was faced with an application in terms of the common law "for reconsideration" of its earlier, final order.[70] The Court reiterated the position adopted in *Baphalane* that its power to revisit final orders or go beyond rule 42 has not been determined.[71] The Court contemplated the possibility of reconsidering an earlier final order, but stated that if it had such power, it would only be exercised in exceptional circumstances:

> "If the position were to be that this Court does have power outside of rule 29 read with rule 42 to reconsider and, in an appropriate case, change a final decision that it had already made, one can only think that that would be in a case where it would be in accordance with the interests of justice to re-open a matter in that way. The interests of justice would require that that be done in very exceptional circumstances. However, even if this Court had power to entertain the application if the interests of

[68] *Daniel v President of the Republic of South Africa and Another* [2013] ZACC 24; 2013 (11) BCLR 1241 (CC) at para 6. The Court ultimately found that there was no error and therefore declined to grant the relief sought. However, it did not find that the grounds upon which the rescission was sought were invalid.

[69] *Baphalane* above n 18.

[70] *Ka Mtuze* above n 22 at para 18.

[71] Id. The Court also reiterated the importance of the *functus officio* doctrine and the value of not revisiting previous decisions except to vary or rescind in terms of the Rules:

> "This is because it would be untenable if a court were free to reconsider and change its decisions as it pleases and if parties to disputes do not have the finality necessary for them to arrange their affairs appropriately."

> justice so required, the applicant would have failed because a reading of his affidavit reveals no exceptional circumstances."[72]

[37] The incremental and conservative ways that exceptions have been developed to the *res judicata* doctrine speak to the dangers of eroding it. The rule of law and legal certainty will be compromised if the finality of a court order is in doubt and can be revisited in a substantive way. The administration of justice will also be adversely affected if parties are free to continuously approach courts on multiple occasions in the same matter. However, legitimacy and confidence in a legal system demands that an effective remedy be provided in situations where the interests of justice cry out for one. There can be no legitimacy in a legal system where final judgments, which would result in substantial hardship or injustice, are allowed to stand merely for the sake of rigidly adhering to the principle of *res judicata*.

[38] 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 is the general standard, but the vital question is whether there are truly exceptional circumstances.

[39] The parties agreed that apart from this Court reconsidering the appeal, there is no effective alternate remedy. If this Court could not entertain Mr Molaudzi's second application, this would deny him his right to equality before the law. His case is similarly situated to the related cases of Mr Mhlongo and Mr Nkosi – as with those applicants, his right to equality before law has also been infringed by the arbitrary

[72] Id at para 19.

distinction between confessions and admissions which has the consequence of rendering extra-curial admissions of an accused, admissible against a co-accused.

[40] The applicant is serving a sentence of life imprisonment, of which he has already served ten years. His co-accused, convicted on similar evidence, had their convictions and sentences overturned. A grave injustice will result 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. The interests of justice require that this Court entertain the second application on its merits, despite the previous unmeritorious application, and relax the principle of *res judicata*.

[41] In addition to the inherent power of courts to regulate their own process and to develop the common law if it is in the interests of justice, section 39(2) of the Constitution enjoins courts to develop the common law in line with the objects of the Bill of Rights.[73] Moseneke DCJ held in *Paulsen* that—

> "it is implicit in section 39(2) read with section 173 that, where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately."[74] (Footnotes omitted.)

[42] It is not ordinarily in the interests of justice for this Court to be a court of first and last instance. Indeed, the more important and complex the issues, the more

[73] See *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5 (*Paulsen*) at para 116. This Court held:

> "It is well within the place of courts to shape the common law in a way that advances constitutional values. The authority imposed upon courts by section 39(2) of the Constitution is thus extensive, requiring courts to be alert to the normative framework of the Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue."

See also *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) at para 17 and *Fourie and Another v Minister of Home Affairs and Others* [2004] ZASCA 132; 2005 (3) SA 429 (SCA); 2005 (3) BCLR 241 (SCA) at paras 39-40.

[74] *Paulsen* id, relying on *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 39.

compelling the need for the Court to be assisted by views of another court.[75] However, 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, this Court is required, even obliged,[76] to relax the doctrine to the extent necessary, to provide an appropriate remedy. The minority judgment in *Mpofu* contemplated this:

> "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."[77]

[43] Mr Molaudzi was unrepresented when he lodged his first application with the Court and was thus not alive to the full ambit of his constitutional rights. The constitutional arguments made in the second application were not previously before the Court and there is undisputed merit in these arguments as this Court has set aside the convictions of two of Mr Molaudzi's co-accused on the same grounds.[78]

Relaxing res judicata

[44] Mr Molaudzi's second application, as indicated earlier, raises issues that are in fact *res judicata*, despite different grounds of appeal having been raised in the first application. To find otherwise would place too great a burden on the administration of justice as an appeal court would then have to consider each new ground brought on

[75] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng and Others* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR (CC).

[76] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) at paras 30-4 and *Carmichele* above n 74 at paras 39-40.

[77] *Mpofu* above n 22 at para 15. While the majority of the Court in that case did not grant the applicant leave to appeal, it did not reject the principle of relaxing *res judicata* in exceptional circumstances. The majority ruled on the matter based on the prospects of success and the failure of the accused to establish the factual framework to support his claim.

[78] *Mhlongo* above n 16.

appeal (particularly in criminal convictions) to be a fresh appeal. This would jeopardise legal certainty to an unacceptable degree.

[45] 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[79] to revisit its past decisions. This requires rare and exceptional circumstances, where there is no alternative effective remedy. This accords with international approaches to *res judicata*. The present case demonstrates exceptional circumstances that cry out for flexibility on the part of this Court in fashioning a remedy to protect the rights of an applicant in the position of Mr Molaudzi.

Merits of the second application

[46] Mr Nkosi and Mr Mhlongo were convicted on a very similar basis to Mr Molaudzi.[80] In the case of all three, the only evidence against them at the close of the State's case was the extra-curial statements of the co-accused. This evidence was held to be inadmissible in *Mhlongo*.[81] If the trial court had correctly declared the evidence inadmissible, Mr Molaudzi may have been entitled to be discharged at that stage. As counsel for the State conceded, the evidence as a whole was still insufficient to ground Mr Molaudzi's conviction.[82]

[79] Rule 29 of this Court's Rules incorporates rule 42(1) of the Uniform Rules of Court.

[80] *Mhlongo* above n 16 at paras 41-3.

[81] Id at paras 38, 41 and 44.

[82] Trial court judgment at 46:

> "Now as I have already stated the evidence of the State in this matter is mainly based on the statements that were made by the accused to the magistrate and the pointing out."

Later at 69, the trial court reiterates that "the State's evidence is dependent on the statements that have been admitted which are not confession statements". In the trial court's critical evaluation of the evidence against the accused at 68-76, the evaluation appears to depend almost exclusively on the extra-curial statements of the co-accused. However, in the Full Court judgment at para 40, the Court only states that *part* of the evidence upon which Mr Mhlongo, Mr Nkosi and Mr Molaudzi were convicted, are the extra-curial statements of Mr Matjeke, Mr Makhubela and Mr Khanye. However, this does not accord with the emphasis of the trial court judgment.

[47] As with Mr Mhlongo and Mr Nkosi, the remainder of the evidence against Mr Molaudzi consisted of the oral testimony by two of the applicants' co-accused, Mr Matjeke and Mr Makhubela.[83] For the reasons set out in paragraphs 41 to 43 of *Mhlongo*,[84] the in-court testimony of these accused was inherently problematic but was also not corroborated by any other independent evidence and thus cannot justify his conviction.

Conclusion

[48] The merits of the second application warrant the same finding as in the related cases of Mr Mhlongo and Mr Nkosi.

Order

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order under case number CAF 08/2012 of the Full Court of the North West High Court, Mafikeng, is set aside to the extent set out below:
   (i) The appeal by the fifth appellant against his convictions and sentences on counts 1, 2, 4 and 5 is upheld.
   (ii) His convictions and sentences on those counts are set aside.

[83] Mr Matjeke first testified that Mr Molaudzi's name had been given to him by the police (trial court judgment at 63). Then, in his second in-court testimony (which was drastically different from his previous statements), he and Mr Makhubela (who testified straight after this amended version came to light) both testified that Mr Molaudzi was one of the men who went inside the deceased's premises during the shooting (at 61-3 and 65, respectively). The trial court dismissed Mr Molaudzi's alibi as "convenient" (trial court judgment at 73) and the Full Court found that it could not be reasonably possibly true (Full Court judgment at para 38).

[84] *Mhlongo* above n 16. This Court held at para 42:

> "The remainder of the evidence consisted of the oral testimony by two of the applicants' co-accused, Mr Matjeke and Mr Makhubela. Having regard to the cautionary rule, the evidence should have been corroborated by independent evidence. This is due to the fact that both the trial court and the Full Court were of the view that their testimony was inconsistent with their extra-curial statements and previous oral evidence. In addition, the trial court did not believe large portions of their evidence and concluded that they were unreliable witnesses. Both sets of testimony were treated with caution but instead of corroborating these versions with independent evidence, they were used to corroborate each other. The Full Court's conclusion that, because the various inconsistent versions confirmed each other in certain respects, this constituted sufficient evidence to implicate the applicants, must be rejected." (Footnotes omitted.)

4. The applicant must be released from prison immediately.

For the Applicant:	D Jordaan at the request of the Court.
For the Respondent:	N Carpenter instructed by the Office of the Director of Public Prosecutions, North West.