

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED

[Handwritten signature]
7/6/19

CASE NO: HCA02/2017

IN THE MATTER BETWEEN:

BAKONI PLATINUM LIMITED

APPELLANT

AND

ABRAM MOROPANE

RESPONDENT

IN RE:

BAKONI PLATINUM LIMITED

APPLICANT

AND

ABRAM MOROPANE

PLAINTIFF

AND

BAKONI PLATINUM LIMITED

DEFENDANT

JUDGMENT

MULLER J:

[1] This is a consolidated action in which the appellant, a mining company, is the defendant. There are 154 actions which were instituted against the appellant. These actions were consolidated by agreement into one action although the claims of each of the plaintiffs are separate claims. It must be made clear at the outset that although there are 154 plaintiffs, this appeal concerns only the plaintiffs under case no 609/2014; 827/2014 and 799/2014, collectively referred to in this judgment, as the respondent.

[2] The action had an unfortunate stop-start history, and not wholly without cause. A brief background of the developments leading up to the appeal is necessary.

[3] The respondent in the appeal before us, instituted action in the magistrate court at Praktiseer. The cause of action is premised on both a written agreement and a written amendment to the said agreement¹.

[4] The appellant, in defending the action, initially denied the existence of the agreement, but pleaded, in the alternative, that the agreement was partly written and partly oral. As a further alternative, the appellant pleaded that the agreement contained

¹ Hereinafter referred to as 'the agreement'.

a tacit term. The appellant, in addition, also instituted a counter-claim based on enrichment.

[5] The appellant on 1 September 2013 applied to amend paragraph 2 of its counter-claim. The amendment was granted on 28 November 2014.

[6] The consolidated action commenced before magistrate Malebana on the pleadings, and the amended counter-claim. Evidence was called at the trial. The magistrate delivered a written judgment dated 15 June 2016 named "JUDGMENT ON ABSOLUTION FROM THE INSTANCE AND/OR DISMISSAL." Nothing turns on this judgment but it is of importance in the sequence of the further developments in the action.

[7] After the commencement of the evidence and the judgment referred to above the appellant changed tack and applied on 27 October 2016 for an amendment of its plea and counter claim in respect of cases 709/14, 799/14, 609/2014 and 827/2014. It then sought an amendment to rely on the very agreements upon which the respondent rely in their particulars of claim the conclusion of which the appellant originally denied (in respect of case 609/2014 and 827/2014) and, alternatively, the appellant sought to rely on a tacit term.

[8] In respect of case 799/2014, the appellant still persisted with its denial that it concluded a contract with that plaintiff. It sought an amendment to introduce an alternative defence in respect of the interpretation of the contract and the tacit term as in the other two actions.

[9] The respondent objected to the proposed amendment. A substantive application by the appellant followed which was dismissed by the said magistrate Malebana on 13 March 2017.² A notice to appeal was served against this judgment.

[10] A party who desires to amend its pleading is obliged, if the amendment is opposed, to do so by way of notice supported by affidavit.³ Even though interlocutory, an order refusing such an application on the merits is final in effect and definitive of the issues. The order is not susceptible to be freely altered rescinded or amended which resulted in magistrate Malebana becoming *functus officio* in relation to the first amendment. His authority over the subject-matter has ceased.⁴ The appellant thereafter duly filed a notice of appeal against that order. It was said in *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd*⁵ with reference to the finality of preparatory or procedural interlocutory orders which include applications for amendments that:

“From the judgments of Wessels and Curlewis JJ.A, the principle emerges that a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to “dispose of any issue or any portion of the issue in the main action or suit” or, which amounts, I think, to the same thing, unless it “irreparably anticipates or precludes some of the relief which would or might be given at the hearing”.

[13] On 25 April 2017 an application was launched for the recusal of magistrate Malebana.⁶ The recusal application was successful.

² The first amendment.

³ Rule 55A(1) read with 55A(4).

⁴ *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 176, 187 and 192; *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC) 780C-F; *Adonis v Additional Magistrate, Bellville* 2007 (2) SA 147 (C) 153I-154B.

⁵ 1948 (1) SA 836 (A) 870.

⁶ Magistrate Malebana subsequently passed away.

[14] The appellant subsequently, and as a result of the recusal of magistrate Malebana, served a notice of withdrawal of the appeal noted against his order of 13 March 2017.

[15] The appellant then, after the recusal of magistrate Malebana, sought to amend its plea on exactly the same grounds as previously. The respondent again objected to the proposed amendment. The appellant then launched a substantive application to amend its plea and counter-claim on substantially the same grounds as in the previous application which had been dismissed. Magistrate Tubatse who was seized with the application for the second amendment dismissed it on 16 April 2018.⁷

[16] It is not disputed that the order of magistrate Tubatse, like the order of magistrate Malebana, is subject to an appeal. An appeal was duly noted by the appellant against the order of magistrate Tubatse which is the subject matter of the appeal before us.

[17] After the appeal had been argued before us we requested the parties to file supplementary heads of argument to deal pertinently with the question whether the order of magistrate Malebana dated 13 March 2017 is not *res judicata*. They have now done so.

[18] Mr Hollander appearing on behalf of the appellant advanced mainly three arguments in his supplementary heads of argument. The first is that as a result of the recusal of magistrate Malebana the order of 13 March 2017 has fallen away and became a nullity. The second is that the respondent did not raise a defence of *res judicata*, in the proceedings before magistrate Tubatse. And thirdly, flowing from the

⁷ The second amendment.

previous argument, it is contended that this court, as a result, is precluded from *mero moto* raising the *exceptio res judicatae*.

[19] At the time the first amendment was sought the pleadings had already been closed.⁸ *Litis contestatio* had been established, as far as the issues as defined by the pleadings are concerned.⁹ The rights of the parties were frozen. It will also be recalled that when the trial commenced and proceeded with the pleadings remained as they are at present after the dismissal of the first amendment.

[20] Subsequent to the dismissal of the first amendment and prior to the resumption of the part-heard trial, the appellant launched a substantive application for the recusal of magistrate Malebana. That application was granted on 25 April 2017. That order, regrettably, does not form part of the record, but Mr Hollander has stated in his heads of argument that magistrate Malebana issued an order to the effect that the pending actions (as consolidated) be heard *de novo* before another magistrate.

[21] A magistrate has neither the authority, as a creature of statute,¹⁰ to order that the trial start *de novo* before another magistrate, nor is a magistrate able to declare that a final order issued by him/her dismissing an interlocutory application for an amendment, is a nullity. In *S v Richter*¹¹ it was held:

"There is no statutory authority for a magistrate to order that the trial should be instituted *de novo* before another court. Accordingly when such a declaration is required, the matter should be referred to a High Court for the setting aside of the proceedings and a direction that it should proceed *de novo*. (See *S v Mbothoma en 'n Ander* 1978 (2) SA 530 (O) at 533; *S v Fourie* (*supra*); but cf; *S v Sass en Andere* 1986 (2) SA 146 (NC).) The only power that is vested upon a magistrate's court to order that proceedings commence *de novo* are those contained in s 93ter(5) of the Magistrates' Courts Act 32 of 1944 which provides that the provisions of s 147 of the

⁸ Rule 21A.

⁹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) par 15.

¹⁰ *SANTAM Insurance Co Ltd v Liebenberg NO and Another* 1976 (4) SA 312 (N) 323H.

¹¹ 1998 (1) SACR 311 (C) 313b-d.

Criminal Procedure Act shall *mutatis mutandis* apply where an assessor dies or becomes incapable of continuing to act as assessor. That section does not apply to the facts of the present case"

[22] However, the position when a magistrate recused himself after evidence had been adduced in a trial (as in this instance) is akin to a situation where the magistrate has died or has become incapacitated to continue with a part-heard case. It constitutes an absolute supervening impossibility which nullifies the part-heard proceedings before him.¹² It is unnecessary, in such a situation, to obtain an order from the High Court to set aside the part-heard proceedings.

[23] A similar approach was adopted in *South African Motor Acceptance Corporation (Edms) Bpk v Oberholzer*¹³ where it was held that a magistrate, when he/she recused himself/herself, for whatever reason should postpone the trial:

"In such a case he should not dismiss the summons but postpone the hearing of the case until another magistrate can be obtained, because it is not the fault of either party that the magistrate should have an interest in any particular case. (*Stutterheim Divisional Council v Giddy*, 6 EDC 99)'

Hierdie benadering behoort gevolg te word wat ookal die *justa causa recusationis*."

[24] I agree. With the recusal of the magistrate, the part-heard proceedings are aborted and the slate wiped clean. Evidence must be adduced *de novo*, before another presiding officer on the pleadings as they were at the time of his recusal.

[25] The interlocutory application in terms whereof a final order had been granted which is appealable cannot be nullified by the subsequent recusal of the presiding magistrate from the main action. It will be tantamount to a procedure, other than an appeal or review, in terms whereof a final interlocutory procedural order, is set aside by the magistrate who is *functus officio*. Such a result cannot be countenanced. That

¹² *S v Stoffels and 11 Similar Cases* 2004 (1) SACR 176 (C) par 4.

¹³ 1974 (4) SA 808 (T) 814B-C.

order is final and was appealable,¹⁴ which, as such, may only be set aside by invoking the prescribed process of appeal or review.¹⁵

[26] The argument by counsel for the appellant that the subsequent recusal of magistrate Malebana nullified the order dismissing the first amendment is untenable and is rejected.

[27] That brings me to the next issue which was raised by the court whether the principles relating to the *exceptio res judicatae* are applicable.

[28] The *exceptio res judicatae* which has its roots in the common law is a defence based on considerations of public policy and good faith which require that a defendant should not be twice harassed upon the same cause.¹⁶ It is raised if the same dispute has previously been finally decided upon in a suit between the same parties.¹⁷ In *African Farms & Townships v Cape Town Municipality*¹⁸ it was held:

"In regard to the requirement that the ground of the demand must be the same, the authorities refer to the *causa petendi* or *origo petitionis*. According to Voet, 44.2.4, it is not the form of action which determines the sameness of the *causa petendi*, but the identity of the question which is again raised or set in motion.... The rule appears to be that where a court has come to a decision on the merits of a question in issue, that question, at any rate as a *causa petendi* of the same thing between the same parties, cannot be resuscitated in subsequent proceedings."

[29] It has been held that the *exceptio* must be pleaded and proved by the party raising it.¹⁹ The reason for the *exceptio* to be pleaded is that the authority of *res judicata*

¹⁴ *South British Insurance Co Ltd v Glisson* 1963 (1) SA 576 (D & CLD) 578D-E.

¹⁵ An appeal was noted but withdrawn. Different procedures are permissible to rescind final orders in terms of section 36 and rule 49 of the Magistrates' Court Act 32 of 1944 the applicability of which are irrelevant to the present appeal.

¹⁶ *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) 472A-D.

¹⁷ *Exceptio rei iudicatae vel litis finitae*.

¹⁸ 1963 (2) SA 555 (A) 562A-D.

¹⁹ *Lowry v Steedman* 1914 AD 532 at 539.

induces a presumption, which is premised on public policy, that the judgment upon a claim submitted to a court is correct and excludes proof to the contrary.²⁰

[30] It is important to note that the appellant, in the same pending action, resuscitated its previous application (the first amendment) which was dismissed on the merits, on exactly the same grounds. Both the evidence and pleadings in the first application together with the written judgment of magistrate Malebana (the first amendment) as well as the evidence and the pleadings in the second application together with that judgment (the second amendment) are part of the papers before us.

[31] In *Loesch v Crowther (2)*²¹ the plaintiff applied to amend his replication before the Judge-President. The amendment was granted after several objections which were raised and dismissed, which included an argument that an application to strike out should be allowed. Thereafter an application to strike out was brought before another Judge. The application was dismissed on the basis that:

"It is futile, therefore, to contend that the JUDGE-PRESIDENT had to decide an application for leave to amend, whereas I am asked to strike out pleadings. In both disputes the identical questions of procedural law and fact were raised, and crisply raised. The JUDGE-PRESIDENT has held that the replication tendered was a good one. I am not prepared to entertain what is virtually an appeal against his decision."

[32] It seems that the court rejected the application for two reasons. The first is that the decision by the Judge-President was *res judicata* and the second was that the application was an abuse of process.

[33] In *Blaikie-Johnstone v P Hollingworth (Pty) Ltd and Others*²² the court raised the question of *res judicata mero moto* in an application for default judgment for the balance of an amount claimed in the summons after judgment on confession was

²⁰ *Bertram v Wood* (1893) 120 SC 177 at 180.

²¹ 1947 (3) SA 251 (OFS).

²² 1974 (3) SA 392 (N) 395D-G.

granted for an amount less than the claimed amount. The court, had knowledge of the facts of the case, and was not prepared to grant default judgment on the papers because the judgment would lead to an injustice if the defendants were deprived of the opportunity to raise such a defence. The court considered it to be the interests of justice to order the plaintiff to serve the application for default judgment on the defendants. It stated:

"There is no question that of the defendants pleading the defence of *res judicata* in this case for they are in default of delivery of notice of intention to defend. In any event the defence has only arisen as a result of the judgment to which they consented. Because it was granted in this very action the Court has knowledge of the previous judgment, and knows that if the plaintiff were to institute a fresh action for the recovery of the balance of its claim it could, and probably would, be met by a plea of *res judicata*. If the present application were to be granted that situation would be circumvented and the defendants would have been deprived of the right to raise a defence based upon a rule which is recognised by the Appellate Division as being part of the very foundation of our law. (See *Custom Credit Corporation (Pty) Ltd v Shembe, supra, loc cit.*). In my view the Court should not countenance such a procedure, and I therefore make no order on this application. This leaves it open to the plaintiff, if so advised to renew the application after giving proper notice to the defendants."

[34] In *Boland Bank Konstruksie Maatskappy (Edms) Bpk v Petlen Properties (Edms) Bpk* (2)²³ the court was called upon in an application to grant condonation for the failure to comply with the rules of court. The respondent did not file any opposing affidavits but raised the defence *res judicata* for the first time during argument. The applicant objected to the failure by the respondent to raise the defence properly on the papers. The court in an *obiter dictum* mentioned that:

²³ 1974 (4) 980 (K).

"Mnr Hodes, namens respondent, het dit toegegee maar die Hof genooi om *mero moto* op te tree en die beswaar van *res judicata* te opper. Onder die omstandighede van die saak meen ek dat selfs al was die beswaar regtens gegrond, dit nie in belang van die reg sal wees nie dat die Hof die beswaar *mero moto* opper nie.²⁴

[35] The court rejected the invitation by the respondent for the court to raise the defence *mero moto* but nevertheless allowed the respondent to raise and argue the objection of *res judicata* despite the objection by the applicant. The court, it seems to me, allowed the defence to be raised without any pleadings, in the interests of justice, and then expressly rejected the defence.²⁵

[36] In *Botha v Botha*²⁶ the applicant applied for the sequestration of his son. A provisional order was granted but was discharged on the return date by Daffue J. Thereafter, the applicant launched another sequestration application before another Judge on virtually the same facts relied upon in the first application. The court raised the question of *res judicata mero moto* on the basis that it was in the interests of justice, on the facts placed before the court, not to allow a litigant to continue with litigation which had been adjudicated upon previously. It is unclear from the judgment how the facts in relation to the first application came to the knowledge of the learned Judge in the second application.

[37] The courts, over the years, have also extended the ambit of the *exceptio res judicatae* by relaxation of the common law requirements in appropriate circumstances where equity and fairness so demanded.²⁷

²⁴ 982G.

²⁵ 982E.

²⁶ FB (unreported Case no 2406/17 dated 15 June 2017).

²⁷ *Smit v Porritt and Others* 2008 (6) SA 303 (SCA) par 10.

[38] It is apparent that a court is not precluded from raising a defence of *res judicata mero moto*, if equity or fairness so requires in the absence of the required pleadings. It is also clear from the judgment in *Boland Bank Konstruksie Maatskappy (Edms) Bpk v Petlen Properties (Edms) Bpk* (2) *supra* that a departure from the general rule is permissible when public policy considerations require a court to raise the defence *mero moto* in the interests of justice to prevent a repetition of the same issue in subsequent proceedings:

“Die benadering van die geleerde skrywers is na my mening regtens juis want aan die een kant moet die Hof belet dat dieselfde geskil by hehaling voor die Hof kom; aan die ander kant, waar die wesenlike geskil nog nie deur die Hof beslis is nie moet niks gedoen word wat dit belet nie.”²⁸

[39] It is as much in the interests of justice to prevent the repetition of disputes on the same subject which have been finally disposed of, on the one hand, as it is to prevent an abuse of process, on the other, where a court is seized with all the relevant evidence to make a decision. A court should, however, only exercised its discretion to *mero moto* raise the defence of *res judicata*, if the undisputed evidence of the pleadings and the judgment are properly before it for a proper determination to be made.²⁹ I am unable to think of any prejudice that any of the parties might suffer in such a situation.

[40] It is common cause, and counsel for the appellant did not advance any argument to the contrary, that the parties are the same and that subject matter in relation to both first and second amendments are similar and that both the first amendments were

²⁸ 982B-C.

²⁹ *Pretorius v Barkley East Divisional Council* 1914 AD 407 at 409; *Van Niewenhuizen v Richards* 1959 (2) SA 686 (T) 687A, 687F.

dismissed on the merits. The correctness of the final order of magistrate Malebana is presumed.

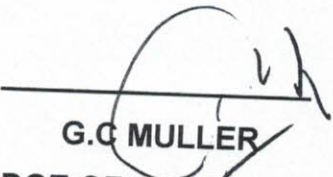
[41] I have come to the conclusion that this court is entitled to raise the *exceptio res judicatae* in the present appeal *mero moto* in the interests of justice. Having considered the facts I am of the view that the order of magistrate Malebana has not been nullified by his recusal, is final and is *res judicata*.

[42] I wish to add, before I conclude, that the application for the second amendment before magistrate Tubatse is an abuse of process.

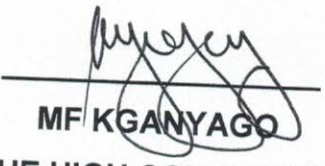
In the result, it follows, therefore, that the appeal falls to be dismissed.

ORDER

The appeal is dismissed with costs.


G.C. MULLER
JUDGE OF THE HIGH COURT LIMPOPO
DIVISION: POLOKWANE

I agree


MF KGANYAGO
JUDGE OF THE HIGH COURT LIMPOPO
DIVISION: POLOKWANE

APPEARANCES

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Represented by **Adv: L Hollander**

For the Respondents: Molefe Attorneys

Represented by **Adv. S.J Phaladi**

Date heard: 10 May 2019

Date of judgment: 07 June 2019