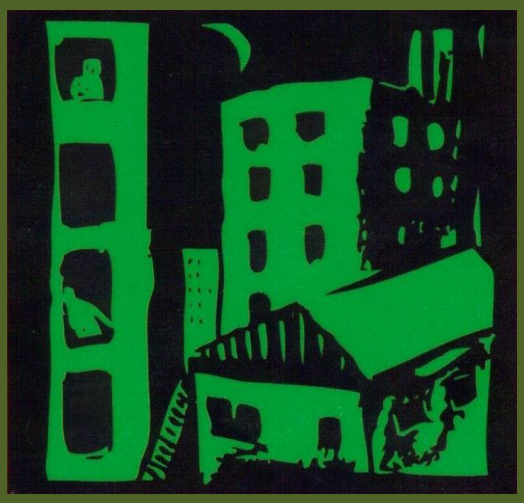
LAW
DEMOCRACY
& DEVELOPMENT



VOLUME 20 (2016)

DOI: http://dx.doi.org/10.4314/ldd.v20i1.10

ISSN: 2077-4907

The Application of the Doctrine of *Res Judicata* in Political Rights Cases: *National Freedom Party v Electoral Commission and Others* (2016)

ANGELO DUBE

Senior Lecturer, Department of Public Law and Jurisprudence, Faculty of Law, University of the Western Cape

MUSAVENGANA MACHAYA

Lecturer, Department of Private Law, Faculty of law, University of the Western Cape

1 BACKGROUND

On 5 August 2016, the Electoral Court delivered its judgment in the case of *National Freedom Party v The Electoral Commission and Others* (*NFP No 2*)[1] and dismissed an application by the National Freedom Party (NFP) to retrospectively amend the electoral timetable.[2] This second case followed an unsuccessful earlier attempt to seek a similar order in

[1] *National Freedom Party v The Electoral Commission and Others* (011/2016 EC); [2016] ZAEC 3.

[2] See paras 20 and 34.

the same court in the case of *National Freedom Party v Electoral Commission and Another* (*NFP No 1*).[3] In the case under discussion (*NFP No 2*), the second to seventh respondents were all registered political parties that indicated in their founding affidavit that they supported the cause of the NFP to be included in the 2016 municipal elections.

The NFP sought relief in court, in the form of a review of, alternatively an appeal against, a decision of the Electoral Commission in which it declined to exercise its discretion under section 11(2)(b) of the Local Government: Municipal Electoral Act 27 of 2000. The provision states that "the Commission may, by notice as required in subsection (1)(b), amend the election timetable if: (a) it considers it necessary for a free and fair election; or (b) the voting day is postponed".

The exercise of such discretion would lead to the extension of the time period within which political parties could pay the deposit required for them to participate in the August 2016 local elections. This would enable the NFP to participate in the elections. However, the Court proceeded to consider the matter as a review in terms of section 20(1)(a) of the Electoral Commission Act 51 of 1996 after counsel abandoned the appeal approach. Section 20(1)(a) deals with the powers, duties and functions of the Electoral Court and states that "the Electoral Court may review any decision of the Commission relating to an electoral matter".

2 BRIEF BACKGROUND OF THE INITIAL CASE

In the *NFP No 1* case, the NFP, a registered political party which intended to participate in the 2016 national municipal elections scheduled for 3 August 2016, sought an order compelling the Electoral Commission to publish a new Government Gazette effectively varying the electoral timetable. This followed the NFP's failure to pay the required registration fees by the cut-off date of 2 June 2016 as required by the law,[4] and as published in the Government Gazette by the Electoral Commission.[5] It emerged in court that the NFP had only made payment some three weeks later on 22 June 2016. This effectively meant that the NFP would not be able to participate in the 2016 municipal elections. The NFP then lodged an application before the Electoral Court in which it sought leave to appeal the decision of the Electoral Commission. After finding that there was no order made by the Electoral Commission which could form the basis of an appeal,[6] the Court turned to the question of the Commission's power to vary the electoral timetable. It found that the Electoral Commission had the power to vary the electoral timetable,[7] but that this must not be done in a way that prejudices other

[3] *National Freedom Party v Electoral Commission and Another* (006/2016 EC); [2016] ZAEC 2.

[4] Sections 14 and 17 of the Local Government: Municipal Electoral Act 27 of 2000 require that parties intent on participating in municipal elections should pay a stipulated deposit to the Electoral Commission, within a particular time period as published by the Electoral Commission in a Gazette.

[5] "Election Timetable" in Government Gazette 564 of 24 May 2016.

[6] *NFP No 1* para 19.

[7] The Electoral Commission can amend the timetable as provided for in s 22(1)(b) of the Local Government: Municipal Electoral Act.

parties,[8] and that the timetable should not be changed at the whim of an individual or party.[9] The Court emphasised the need to guard against abuse of the extension process as this may lead to an increase in *ad hoc* extensions.[10] The Court also dealt with the question of referring the matter "back" to the Electoral Commission for it to consider the inclusion of the NFP in the list of contesting parties, despite the latter's failure to comply with the election timetable. It found that the Commission has no such power. It therefore dismissed the matter with costs.[11]

3 THE APPLICATION OF THE *RES JUDICATA* DOCTRINE IN ELECTORAL CASES

As stated earlier, the reliance on the defence of *res judicata* arose as a result of the matter being heard and adjudicated in the same court on 1 July 2016 (*NFP No 2*).[12] Section 14(1) of the Local Government: Municipal Electoral Act states:

> A party may contest an election in terms of section 13(1)(a) or (c) only if the party by not later than a date stated in the timetable for the election has submitted to the office of the Commission's local representative (b) a deposit equal to a prescribed amount, if any, payable by means of a bank guaranteed cheque in favour of the Commission.[13]

Section 17(2) of the same Act deals with the requirements for ward candidates to contest elections and states that "[t]he following must be attached to a nomination when the nomination is submitted to the Commission: (d) a deposit equal to a prescribed amount, if any, payable by means of a bank guaranteed cheque in favour of the Commission."[14] The parties were supposed to pay the relevant deposit by 1700hrs on 2 June 2016. The NFP only paid the deposit on 22 June 2016.

In their submissions, the Electoral Commission and the Inkatha Freedom Party (IFP) raised the issue that since the same matter, involving essentially the same parties, had been dealt with in the *NFP No 1* case, it was now *res judicata*. It could therefore not be re-opened before or re-adjudicated by the Court. Although in the first matter only the IFP was cited whilst the second matter cited six additional political parties, the subject matter remained essentially the same.

Res judicata is the legal doctrine that bars continued litigation of the same case, on the same issues, between the same parties. The Court, relying on the case of *Molaudzi v S*,[15] explained the doctrine of *res judicata* as "the legal doctrine that bars continued litigation of the same case, on the same issues, between the same parties". This is so because of the authority with which, in the public interest, judicial decisions are invested. Therefore effect must be given to a final judgment, even if it is erroneous. In

[8] *NFP No 1* para 32.
[9] At para 30.
[10] At para 33.
[11] At paras 40 and 42.
[12] *NFP No 2* para 8.
[13] Section 14(1)(b) of the Local Government: Municipal Electoral Act 27 of 2000.
[14] Section 17(2)(d) of the Local Government: Municipal Electoral Act 27 of 2000.
[15] *Molaudzi v S* [2015] ZACC 20 para 14.

this regard the enquiry is not whether the judgment is right or wrong, but simply whether there is a judgment.[16] It also relied on Claassen's definition, that *res judicata* essentially means "the case or matter is decided".[17] Claassen's definition is echoed by Sinai, who asserts that the term *res judicata* refers to the various ways in which one judgment exercises a binding effect on another.[18]

The Court stated that the doctrine is foundational to the rule of law, to the certainty and finality that must accompany legal determinations, such as court judgments. As such, it is necessary for legal certainty and the proper administration of justice. It further limits the possibility of needless litigation. The doctrine, the Court opined, traces its history from Roman Law, in particular the *Digest* 50.17.207, in terms of which once a matter is adjudged, it is accepted as truth.

The underlying rationale for 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 in a previous action, 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 some matters that have been decided by the courts.[19] *Res judicata* thus plays an important role in promoting legal certainty and the proper administration of justice. Corbett JA, as he then was, had the following to say about such a plea in *Evins v Shield Insurance Co* Ltd:[20]

> Closely allied to the 'once and for all' rule is the principle of *res judicata* which establishes that, where a final judgment has been given in a matter by a competent court, then subsequent litigation between the same parties, or their privies, in regard to the same subject-matter and based upon the same cause of action is not permissible and, if attempted by one of them, can be met by the *exceptio rei judicatae vel litis finitae*. The object of this principle is to prevent the repetition of lawsuits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions.

The doctrine is based on three maxims, namely: (a) *nemo debet bis vexari pro una et eadem causa* (no man should be punished twice for the same cause); (b) *interest reipublicae ut sit finis litium* (it is in the interest of the State that there should be an end to a litigation); and (c) *res judicata pro veritate occipitur* (a judicial decision must be accepted as correct). From the above discussion, the question that begs an answer is whether or not the doctrine of *res judicata* is absolute? We canvas a few points below, which address this issue.

---

[16] *NFP No 2* para 14.

[17] Claassen RD *Dictionary of legal words and phrases* (South Africa: LexisNexis 1997).

[18] Sinai Y "Reconsidering *res judicata*: a comparative perspective" (2011) 21 *Duke Journal of Comparative Law* 353.

[19] *NFP No 2* para 16.

[20] *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) 835F-G.

4 IS THE DOCTRINE OF *RES JUDICATA* ABSOLUTE?

To remedy the injustice which would occur from the inability to overturn an erroneous decision, the doctrine of *exceptio rei judicatae* was developed. Essentially, this is premised on the understanding that the doctrine of *res judicata* cannot be absolute. Indeed in *Molaudzi*,[21] the Court stated that since *res judicata* is a common law principle, it follows that courts have the power to develop or relax the doctrine if doing so would be in the interests of justice. Courts are empowered by section 173 of the Constitution "to protect and regulate their own process, and to develop the common law, taking into account the interest of justice". This inherent power of courts to regulate their own process is aimed at curing inflexibilities of the justice system, and it does not apply to substantive rights but to adjectival or procedural rights.[22] However, section 173 limits these powers only to the Constitutional Court, the Supreme Court of Appeal and the High Court.[23] It does not extend them to the Electoral Court. Counsel did not, correctly so, rely on section 173 since on the face of it, it does not apply to the Electoral Court.

It is, however, our argument that counsel should have approached the Court on a basis analogous to section 173 of the Constitution. Section 18 of the Electoral Commissions Act 51 of 1996 establishes the Electoral Court as a specialist court with the highest authority on matters relating to elections. It has the same status as the High Court and is subordinate only to the Constitutional Court. Section 20(1)(a) of the same Act provides that the Electoral Court "may review any decision of the Commission relating to an electoral matter", whilst subsection (3) provides that "the Electoral Court may determine its own practice and procedures and make its own rules". This basically means that the powers of the Electoral Court in electoral matters are wide-ranging. The Electoral Court has already pronounced on its far-reaching powers in *African Christian Democratic Party and Others v The Chairperson, Independent Electoral Commission.*[24] *In casu,* the main contention had been that the Electoral Court had no jurisdiction to deal with a matter which the Commission refused to deal with. This was so because the Court was a creature of statute and only derived its jurisdiction from the statute creating it, unlike the Supreme Court which had inherent jurisdiction.[25] In dismissing that argument, the Electoral Court placed emphasis on the wording of section 18 of the Electoral Commission Act, which explicitly accords the Court the status of the Supreme Court (now the High Court).[26] The Court also opined that whilst there may be merit in the argument that it does not have inherent powers akin to those of the High Court, it does enjoy extensive powers in electoral matters, since it is the final court of appeal or review in all such matters. It is our argument that a reliance on sections 20(1)(a) and (3) read together with section 18 of the Electoral Commission Act would have advanced the case for the applicant.

---

[21] *Molaudzi v S* [2015] ZACC 20 para 32.

[22] *Oosthuizen v Road Accident Fund* [2011] ZASCA 118 para 26.

[23] Du Bois F *Wille's Principles of South African law* 9 ed (Cape Town: Juta and Company Ltd 2007) 93.

[24] *African Christian Democratic Party and Others v The Chairperson, Independent Electoral Commission* [2004] ZAEC 2.

[25] At para 12.

[26] At para 13.

In *Molaudzi*, the Constitutional Court had to reverse its own decision, issued earlier in which it dismissed Mr Molaudzi's appeal against his conviction by the trial court 10 years earlier.[27] The earlier application had been dismissed on the basis that it did not raise a proper constitutional issue, and further that it did not bear reasonable prospects of success. Pursuant to directions issued by the Constitutional Court, Mr Molaudzi brought a further application (second application) for leave to appeal, and this time around he raised constitutional issues.

The Electoral Court, referencing the Constitutional Court in *Molaudzi,*[28] stated that exceptions to *res judicata* are necessitated by the fact that "to perpetuate an error is no virtue but to correct it is a compulsion of judicial conscience". The Court went on to make a finding that the case before it did not exhibit any of the requisite elements to warrant a departure from the doctrine of *res judicata.* This was because the applicant did not allege that any injustice existed which needed to be corrected. In the Court's opinion, the NFP's application was not based on any allegation of fraud or sabotage that could warrant abandoning the *res judicata* principle. According to the Court, the matter was an application for condonation of the NFP's failure to pay the required deposit on time. The requirement of an egregious element was stated by the Constitutional Court in *Molaudzi* [29] where it was held that for the Court to depart from the doctrine of *res judicata*, the case at hand must "demonstrate exceptional circumstances that cry out for flexibility on the part of the Court" and that the interests of justice require the relaxation of the legal principle. The Electoral Court concluded that pursuant to the above, the matter was *res judicata,* and dismissed the application.

5 ALLEGATIONS OF FRAUD AND SABOTAGE

The Court did, however, proceed to examine other grounds upon which the application could be refused. The first was the fact that there was no room for condonation of late payments. For instance, the law does not envisage the payment of fines for late payments, neither does it envisage an application for an extension of time. This position the Court had already laid down in the previous application (in *NFP No 1*). The Court reiterated its view that, once published, the electoral timetable becomes subordinate legislation and binds all parties. It too does not provide for condonation of non-compliance therewith. Further, that relief for varying of the election timetable cannot be granted to an individual party.

The Court also found that there was no evidence of fraud or sabotage, even though this was raised by the NFP to justify the application to re-open the case. The Court took issue with the fact that in the first application the NFP had attributed the failure to pay the deposit to a mistake on the part of its treasurer, yet it was now suggesting that this was part of an elaborate scheme to sabotage the NFP. The Court opined that the legal principles pertinent to the matter at hand do not allow for a

[27] *Molaudzi v S* [2014] ZACC 15.

[28] *Molaudzi v S* [2015] ZACC 20 para 30.

[29] At paras 37 and 46.

different conclusion even in the event of sabotage. The evidence before the Court did not support the allegation of sabotage or fraud.

Sworn affidavits had been submitted to the Court, stating that the treasurer had been approached by the IFP on 8 March 2016 and sought to persuade him to join their ranks, and this was put forward as evidence that the treasurer deliberately sabotaged the NFP as part of his deal to join the IFP. The Court rejected this argument, holding that this incident occurred well before the question of the payment of the deposit. Further, that there was no causal nexus between the payment or non-payment of the deposit and the discussion between the two.

The NFP had also unsuccessfully tried to rely on *Electoral Commission v Mhlophe*,[30] where the Constitutional Court stated that courts have power under section 172(1)(b) of the Constitution to grant remedies that are just and appropriate, even in cases that seem beyond resolution. These orders, which must be just and equitable, flow from considerations of justice and equity, and may allow the Court to issue an order in the interests of justice and equity, even though the matter flows from conduct which is patently unlawful. This could be done, for instance, to prevent a constitutional crisis. The NFP was basically urging this Court to find that, even though the Electoral Commission did not make a decision, and has no power to vary the electoral timetable, the order sought by the NFP would lead to justice and equity, because not granting it would have far-reaching implications.

The Electoral Court was not convinced by this argument, holding that this case must be distinguished from *Mhlophe.* This is so because in *Mhlophe*, the Constitutional Court's conclusion was premised on a finding in terms of section 172(1)(a) of the Constitution that the conduct of the Commission was inconsistent with the Constitution and therefore invalid. In the current case, the Court continued, there was no such conduct, and as such, a finding of inconsistency could not be arrived at. Thus, the reliance on section 172(1)(b) was misplaced.

6 THE CASE'S CONTRIBUTION TO SOUTH AFRICAN CONSTITUTIONAL JURISPRUDENCE

The Court made it clear in this case that there is no place for *ad hoc* extensions of the electoral timetable, as this would prejudice other parties. It is only where the extension would benefit all the parties and independent candidates that it can be envisaged.[31] This is necessary for the integrity of the electoral process. It influences whether the election outcome would be perceived as legitimate or not, whether the process will be found by all in an open democracy to have been free and fair.

The case also gave guidance in the event of legislative silence regarding condonation following non-compliance. The Court opined that there is no provision which enables it to grant condonation for non-compliance with the provision of the

[30] *Electoral Commission v Mhlophe* [2016] ZACC 15 para 132.

[31] *NFP No 2* para 20.

relevant legislation, neither is there any provision for the Electoral Commission to grant condonation to anyone regarding non-compliance with the law. It stated further that there is no sanction for non-compliance other than placing oneself outside the contest due to non-compliance. In other words, the only outcome for non-compliance was that the party failing to pay the electoral deposit would not be able to participate in the elections.

The case also ventilated the issue of exceptions to the doctrine of *res* judicata, the so-called *exceptio rei judicatae*. What came out firmly was that a court will depart from this doctrine if doing so will be in the interests of fairness and equality. However, such consideration does not merely mean fairness only to the party seeking such an order, but means fairness to all parties concerned. As the Court put it, the doctrine cannot be invoked whimsically. Indeed this resonates with De Villiers CJ's assertion in *Bertram* that, "unless carefully circumscribed, the defence of *res judicata* is capable of producing great hardship and even positive injustice to individuals".[32] It would seem, even in the case at hand, that the Court exercised extreme caution and decided to lean more towards the *res judicata* argument in order to avoid injustice to all parties involved. This cautionary approach resonates with the Court's sentiment in the *Bafokeng Tribe* case, that the principle of *res judicata* "must be carefully delineated and demarcated in order to prevent hardship and actual injustice to the parties".[33]

7 CONCLUSION

The *NFP No 2* case, apart from expanding on the *res judicata* principle, also illuminated several key points in relation to political rights and the rights of political parties to participate in free and fair elections as enumerated above. The case also brought to the public domain what goes on behind the scenes ahead of an election, thereby allowing the electorate to fully appreciate what free and fair elections actually mean. It also brought into sharp focus the powers and limitations of the Electoral Court and the Electoral Commission.,

[32] *Bertram v Wood* (1983) 10 SC 177 180.

[33] *Bafokeng Tribe v Impala Platinum Ltd and Others* 1999 (3) SA 517 (SCA) 566B-F.