REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED (revised on 23 September 2021)

14 September 2019

DATE SIGNATURE

Case No.: 2020/42295

In the matter between:

MAXWELL MAVUDZI Applicant

and

DIRECTOR PUBLIC PROSECUTIONS
GAUTENG LOCAL DIVISION First Respondent

GAUTENG PROVINCIAL COMMISSIONER
SOUTH AFRICAN POLICE SERVICES Second Respondent

MR RAMOLEBANE N.O.
JOHANNESBURG CENTRAL MAGISTRATES COURT Third Respondent

JUDGMENT

This judgment was prepared and authored by Acting Judge Gilbert. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be the date it is uploaded to CaseLines (14 September 2021).

The judgment was revised on 23 September 2021 to correct the typographical error by substituting "De Villiers AJ" with "Du Plessis AJ" wheresoever it appears in the judgment.

Gilbert AJ:

1. The applicant seeks an order by way of motion proceedings declaring as null and void a warrant of arrest issued on 24 March 2015 by the third respondent authorising his arrest, and consequent thereupon that his arrest on the strength of that warrant on 31 July 2015 also be declared unlawful.

2. The first respondent opposed the proceedings and delivered an answering affidavit deposed to by Mr Marius Raymond Oosthuizen, an Acting Deputy Director of Public Prosecutions, Gauteng Local Division. The notice to oppose and the answering affidavit was late. The first respondent sought condonation for the late delivery. Although the applicant opposed the condonation application, I granted the application.

3. As will appear below, the applicant in his detailed founding affidavit makes the serious allegation that the state prosecutor Advocate Majola made certain misrepresentations to this court in previous proceedings. These misrepresentations constitute one of the two grounds upon which the

applicant founds his present relief challenging the lawfulness of the warrant of arrest.

4. The applicant challenges the admissibility of the evidence of Mr Oosthuizen for the first respondent on the basis that Mr Oosthuizen has no personal knowledge of the relevant facts, including of the misrepresentations and that in the absence of Advocate Majola giving evidence, the appropriate inferences are to be drawn against the first respondent and Advocate Majola. Advocate Majola did not depose to a confirmatory affidavit.

5. The applicant launched an application to strike out the answering affidavit of Mr Oosthuizen, alternatively portions thereof, on the basis that same constituted inadmissible hearsay evidence. A further reason advanced for the strike out was that, the applicant contended, as Mr Oosthuizen did not appear to have consulted with Advocate Majola and other necessary persons, the answering affidavit was probably prepared for signature by someone else and not Mr Oosthuizen. The applicant further argues that Mr Oosthuizen was substituted at some point as the signatory of the affidavit. The applicant's argument continues that in those circumstances the affidavit was effectively that of someone else, and not of Mr Oosthuizen, notwithstanding that he had signed the affidavit, and so effectively resulting in the answering affidavit being a "*misrepresentation of what it purports to be*" and a *"fraudulent misrepresentation"*. This further reason for the strike out is, in my view, an strongly worded extension of the challenge that Mr

Oosthuizen does not have the requisite personal knowledge to depose to the answering affidavit.

6. I dismissed the strike out application because at least certain portions of the answering affidavit are admissible. I also did not find it convenient to engage in a parsing exercise as to what portions of the answering affidavit may be inadmissible. I did make it clear though that the dismissal of the strike out application did not mean that I necessarily accepted what was stated by Mr Oosthuizen, particularly when it came to issues in respect of which he may not have had personal knowledge. As appears later in this judgment, I adopted a generally critical approach towards the answering affidavit.

7. A further preliminary objection, this time raised by the first respondent, was that the applicant's founding affidavit had not been properly commissioned. To address this difficulty, and without objection from the first respondent, the applicant, who represented himself personally and is incarcerated, was sworn in and under oath confirmed the contents of his founding affidavit and all other affidavits in these application proceedings.

8. This then disposed of the *in limine* or interlocutory issues.

9. Section 43(1) of the Criminal Procedure Act, 1977 ["CPA"] provides that:

> "*(1) Any magistrate or justice may issue a warrant for the arrest of any person upon the written application of an attorney-general, a public prosecutor or a commissioned officer of the police –*

(a) which sets out the offence alleged to have been committed;

(b) which alleges that such offence was committed within the area of jurisdiction of such magistrate or, in the case of a justice, within the area of jurisdiction of the magistrate within whose district or area application is made to the justice for such warrant, or where such offence was not committed within such area of jurisdiction, which alleges that the person in respect of whom the application is made, is known or is on reasonable grounds suspected to be within such area of jurisdiction; and

(c) which states that from information taken upon oath there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence."

10. The last requirement, in section 43(1)(c), features centrally in these proceedings, as it did in earlier proceedings before this court, as the applicant asserts that it is this requirement that was not satisfied, and so his arrest is unlawful. More specifically, the applicant asserts that there was not information taken upon oath from which the necessary reasonable suspicion could have been formed that he had committed an offence, with the dispute being what affidavit or affidavits (as that is where information would be found taken on oath), if any, existed when the warrant was applied for and were relied upon.

11. The applicant previously, before Du Plessis AJ, called upon this court to decide the same issue, and the court per Du Plessis AJ has done so, against

him. Unsurprisingly, the first respondent contends before me that the matter is *res judicata* and that the applicant cannot now seek, of this court, to determine the same issue between the same parties. The applicant's response is that he now relies on new grounds and so the matter is not *res judicata*, and that in any event the nature of the previous proceedings before this court precludes an application of the principle. If *res judicata* does apply, then, the applicant further argues, the interests of justice require the principle to be relaxed and that I must determine the issue afresh on the new grounds.

12. The applicant has also set for himself the somewhat ambitious task of persuading a court to declare the issue of the warrant of arrest unlawful by way of motion proceeding. I say so because ordinarily this is usually done by action as factual disputes are readily anticipated. Those witnesses that typically feature in the process of issuing the warrant, such as the investigating officer and the person who applies for the warrant such as the state prosecutor, would not ordinarily be available to or readily cooperate with the plaintiff, and so would need to be subpoenaed and/or cross-examined. Motion proceedings do not lend themselves to resolving this kind of dispute. Nonetheless, the applicant elected not once, but twice, to seek declaratory relief by way of motion proceedings.

13. To appreciate these challenges and how the matter came before me, it is necessary to set out some facts.

14. The applicant was arrested on 31 July 2015 pursuant to a warrant of arrest that was applied for by Mr Advocate Majola as the state prosecutor on

17 March 2015 and issued by the magistrate on what appears to be 24 March 2015. Advocate Majola had applied for the warrant at the instance of the investigating officer Mr Gobozi. The warrant expressly records "*whereas from written application by Adv. S Majola there is reasonable suspicion that [the applicant] on the 31 day of August 2013 committed the crime of fraud, racketeering and money laundering*".

15. The applicant, together with co-accused, has been arraigned in this court on various serious offences including more than 4,000 counts of money laundering, more than 380 counts of fraud including forgery and uttering and/or contravening various provisions of the Value Added Tax, 1991 Act and/or Tax Administration Act, certain sections of the Prevention and Combatting of Corrupt Activities Act, 2004 and various other offences. The criminal trial is now, over five years later, at an advanced stage. Neither the seriousness of the charges and the advanced stage of the trial nor that the applicant has been incarcerated since July 2015 must be allowed to cloud the central issue, which is whether the warrant of arrest was issued lawfully.

16. The applicant had previously - before his most recent previous unsuccessful proceedings before Du Plessis AJ - applied, unsuccessfully, for bail, followed by unsuccessful applications for leave to appeal to the Supreme Court of Appeal and the Constitutional Court. Although the first respondent wished to make something of these previous unsuccessful applications preceding the proceedings before Du Plessis AJ and that those earlier proceedings also rendered the present matter *res judicata*, there is no evidence before me that

the lawfulness of the applicant's arrest featured in those early bail proceedings.[1] That the applicant may have engaged in several unsuccessful prior proceedings does not enable me to find that the present proceedings are abusive or for that reason alone are unmeritorious.

17. On 10 December 2019 the applicant launched further bail proceedings on what he contends were 'new facts'. Those are the proceedings that would be heard by Du Plessis AJ. The relief the applicant sought was two-fold. Apart from seeking bail, the applicant sought declaratory relief that the issue of the warrant of arrest was unlawful. The basis for the declaratory relief arose from the applicant's cross-examination of the investigating officer, Mr Gobozi during his criminal trial on 5 December 2019.

18. Mr Gobozi under cross-examination during the applicant's criminal trial had testified on 5 December 2019 that the information under oath that had been relied upon for purposes of section 43(1)(c) in applying for the warrant on 17 March 2015 were affidavits by Mr Motsoleni Setswane ("Mr Setswane") as complainant on behalf of the South African Revenue Services ("SARS"). Mr Gobozi testified that those affidavits were dated 10 April 2015. But the warrant of arrest had been applied for on 17 March 2015 and had been issued on 24 March 2015, and so the applicant challenged Mr Gobozi in cross-examination during the criminal trial that the April 2015 affidavits could not have been relied upon those affidavits to apply to the magistrate for the

[1] In any event, Du Plessis AJ found that those earlier proceedings were not *res judicata* of the issue whether the warrant had been lawfully issued, and so I cannot revisit that finding.

issue of the warrant as those affidavits did not yet exist. The applicant explains in his founding affidavit in these proceedings that when this incongruity was put to Mr Gobozi under cross-examination during the criminal trial, Mr Gobozi then claimed that he had rather relied upon affidavits made by the complainant dated 10 October 2014 and that it was these affidavits that constituted the information taken upon oath pursuant to which the reasonable suspicion was formed necessary to have enabled the warrant of arrest to have been applied for and issued in March 2015. The applicant's argument continued in those proceedings that when regard is had to the October 2014 affidavits, they were in any event insufficient to have justified the formation of the required reasonable suspicion because he was neither mentioned by name nor implicated in those affidavits.

19. Those proceedings were heard by Du Plessis AJ on 5 March 2020. The applicant was legally represented during those proceedings. Advocate Majola represented the first respondent.

20. An issue squarely raised by the applicant in the proceedings before Du Plessis AJ on 5 March 2020 was the lawfulness of the issue of the warrant based upon Mr Gobozi's apparent reliance upon the complainant's affidavits dated April 2015 and how this could not have been possible as the warrant had already been applied for on 17 March 2015.

21. Du Plessis AJ specifically enquired of Advocate Majola for the first respondent whether he had relied on any other information taken upon oath (i.e. other than the complainant's affidavits) for the reasonable suspicion

required for him to have applied for the warrant on 17 March 2015. Advocate Majola answered that he had also relied upon an affidavit by Mr Gobozi, as the investigating officer. It must be remembered that Advocate Majola is the prosecutor who applied for the warrant and therefore was informing the court what he had relied upon in applying for the warrant.

22. The Gobozi affidavit was not available to the court and so Du Plessis AJ postponed the hearing to 12 March 2020 to enable the Gobozi affidavit to be located. Advocate Majola had informed the court on 5 March 2020 that the original affidavit should still be with the magistrate who ordinarily would keep the affidavit and that enquiries must take place at the magistrates' court. Advocate Majola also said that the State may have a copy, but it may be locked away in a storeroom and that it would be like *"looking [for] a needle in a haystack"*.

23. When the hearing resumed on 12 March 2020 before Du Plessis AJ, it transpired that the original Gobozi affidavit could not be found at the magistrates' court. Advocate Majola was nevertheless able to hand up a copy of the affidavit. It is not clear from the papers how Advocate Majola located the copy of the Gobozi affidavit, particularly given his expressed hesitation that it would be found. Although the papers before me included a transcript of the proceedings that took place before Du Plessis AJ on 5 March 2020, I was not furnished with a copy of the transcript of the proceedings of 12 March 2020.

24. But what the applicant states under oath is that Advocate Majola did hand up the copy of the Gobozi affidavit and notwithstanding objection from the applicant's then legal representative, Du Plessis AJ accepted the affidavit.

25. On 17 April 2020 this court per Du Plessis AJ ruled that:

> *"On a balance of probabilities, I am of the view that this warrant has been lawfully issued. I therefore rule that the point in limine is dismissed."*

26. It is clear that the point *in limine* that had been raised was the lawfulness of the warrant. The court accordingly has found against the applicant on that issue. It is the same warrant that the applicant now seeks to again challenge as having been unlawfully issued.

27. Du Plessis AJ also refused bail.

28. Du Plessis AJ in his judgment of 17 April 2020 does refer to and acknowledge that he had regard to the Gobozi affidavit, which is described as Exhibit B in his judgment. But it appears from the judgment that further documents had been placed before the court. These included the October 2014 complainant affidavits. Du Plessis AJ in his judgment, after referring to the Gobozi affidavit as Exhibit B, stated *"[w]hat was also submitted to me were affidavits by Mr Setswane from the South African Revenue Service (SARS) that was commissioned in October 2014 as part of his investigation on behalf of SARS. He is also the complainant in the trial."*

29. Du Plessis AJ continued in his judgment that:

> "*The warrant of arrest before me was issued by a magistrate on application by the prosecution long after October 2014. An allegation in the application for the warrant is to the effect that there is information under oath of a reasonable suspicion that the second applicant committed certain crimes or offences.*"

30. It is clear from the judgment that Du Plessis AJ did not rely only upon the Gobozi affidavit that had been handed to the court by Adv. Majola on 12 March 2020 but that he had regard to the October 2014 affidavits.

31. The applicant sought leave to appeal the judgment of Du Plessis AJ. The application for leave to appeal was subsequently heard, and dismissed on 20 August 2020.

32. Du Plessis AJ in refusing leave to appeal recorded in his judgment that:

> "*On 12 March 2020 I ruled that the [applicant] was arrested on a valid warrant of arrest. I therefore proceeded to hear the bail applications. On 19 March 2020 I dismissed his applications.*"

33. Du Plessis AJ specifically confirmed that he had decided the issue of the lawfulness of the warrant of arrest, albeit that the proceedings before him were bail proceedings.

34. The applicant applied unsuccessfully for leave to appeal to the Supreme Court of Appeal, but that application too was unsuccessful. The applicant informed me that he did not make an application to the Supreme Court of

Appeal for leave to adduce new or further evidence in support of the appeal but that instead he elected to rather approach this court with his now new evidence because of what he termed "*concurrent jurisdiction, of this court to consider that new evidence*." The first respondent's counsel had no objection to the factual accuracy of what was told to me by the applicant.

35. I now turn to what the applicant contends are those 'new' facts that he argues enables this court to now again consider the lawfulness of his arrest.

36. The first set of new facts is what the applicant describes as the evidence given by Mr Gobozi under cross-examination during the criminal trial on 5 December 2019 and 20 August 2020 that the information relied upon under oath to apply for the warrant in March 2015 was the April 2015 complainant affidavits. Clearly the cross-examination of 5 December 2019 cannot be 'new' – it had existed at the time for the proceedings before Du Plessis AJ and was pertinently relied upon by the applicant in those proceedings. These 'new' grounds then must be limited to the further cross-examination of Mr Gobozi, on 20 August 2020.

37. The second set of new facts that the applicant now relies upon is what he contends was a misrepresentation, effectively by omission, by Advocate Majola who argued the application on behalf of the first respondent before Du Plessis AJ on 12 March 2020.

38. The applicant states under oath, and this is supported by the transcript, that Advocate Majola assured Du Plessis AJ that the Gobozi affidavit existed and

that he relied upon it in applying for the warrant. This appears from the following exchange between the court and Advocate Majola on 5 March 2020, which was specifically extracted from the transcript and included in the body of the applicant's founding affidavit:

> *"COURT: Yes. So you say there was an affidavit and that affidavit on which the warrant was requested was an affidavit by the investigating officer Mr Gobozi?*
>
> *MR MAJOLA: Investigating officer, Mr Gobozi.*
>
> *COURT: Yes.*
>
> *…*
>
> *"COURT: But I have your assurance there was a warrant, there was an affidavit by the investigating officer and that was the affidavit on which the warrant was requested?*
>
> *MR MAJOLA: Correct, M'Lord and...*
>
> *…*
>
> *"COURT: But you say the original is in the possession of the Magistrate?*
>
> *MR MAJOLA: The magistrate keeps the original and then they give the.....(intervenes).*

COURT: Well obviously I would like to see the original.

Mr MAJOLA: Yes."

39. The applicant then further states in his founding affidavit that at the resumed hearing on 12 March 2020 Du Plessis AJ accepted the Gobozi affidavit into evidence on its mere production by Advocate Majola despite objections by his then legal representative, including to its authenticity and that no factual basis had been laid for it to be tendered from the bar. I repeat that have not been provided with the transcript of what took place on 12 March 2020 but in the absence of any evidence to the contrary I accept what the applicant says transpired on that day.

40. I have no reason to doubt the applicant's version that Advocate Majola persisted on 12 March 2020 in his assurance that he relied upon the Gobozi affidavit for the necessary reasonable suspicion so as to approach the magistrate for the issue of the warrant of arrest. Advocate Majola, who self-evidently has personal knowledge of what transpired both in relation to the issue of the warrant and what transpired before Du Plessis AJ on 5 and 12 March 2020, did not give any evidence to the contrary in these proceedings.

41. To repeat, the warrant was applied for on 17 March 2015 and appears to have been issued on 24 March 2015. So, the applicant argues, both him and his then legal representative assumed on 12 March 2020 when the hearing resumed before Du Plessis AJ that the Gobozi affidavit must have pre-dated

17 March 2015 as how else could Advocate Majola have relied upon that affidavit if it had not then already existed.

42. The applicant states in his founding affidavit that it was only after Du Plessis AJ "*had already finalised [his] applications*" and had dismissed them that he noticed that the Gobozi affidavit was dated 23 March 2015. The applicant states that this is the date of the Gobozi affidavit because that is the date reflected on the affidavit when the affidavit was deposed to before the commissioner of oaths.

43. The difficulty for the first respondent is now apparent. How could Advocate Majola have relied upon and have assured Du Plessis AJ that the Gobozi affidavit existed and that he had relied upon the Gobozi affidavit when applying for the warrant on 17 March 2015 if that affidavit had only been deposed to on 23 March 2015. The applicant squarely raises this in his founding affidavit in these proceedings and makes it plain that Advocate Majola should have informed the court on 12 March 2020 when he handed up the Gobozi affidavit that it was dated 23 March 2015 and that this would have immediately called into question how that affidavit could have been relied upon for the reasonable suspicion necessary in terms of section 43(1)(c) of the CPA for the issue of warrant on 17 March 2015. The applicant argues that as a officer of the court, Advocate Majola was duty bound to draw this difficulty in relation to the date to the court and that it could not have been reasonably expected of the applicant or his then legal representative in the

cut and thrust of the proceedings on 12 March 2020 to have noticed any discrepancy in the date.

44. The applicant then says as follows in his founding affidavit:

> "*69. From his exchanges with the learned Judge, as reflected in paragraphs 42 to 46 hereinabove, it is clear that Advocate Majola assured his Lordship that he relied on the [Gobozi affidavit] to sign the [application for the warrant of arrest] on 17 March 2015. On the facts it could not have existed.*
>
> *70. One cannot resist inferring that on the facts Advocate Majola misled the bail court or was reckless to the truthfulness or correctness of [the Gobozi affidavit].*"

45. These are extremely serious allegations being directed at Advocate Majola, who is both an advocate and a state prosecutor. It would have been expected of Advocate Majola to squarely deal with these serious allegations levelled against him. Instead, Advocate Majola did not give any version under oath in the proceedings before me. Instead, Mr Oosthuizen, who has no personal knowledge on this issue, filed an answering affidavit. Notably, no confirmatory affidavit was deposed to by Advocate Majola. In any event the transcription of 5 March 2020 speaks for itself. The applicant's evidence is left unrebutted as to the representations that had been made by Advocate Majola to the court.

46. This is what Mr Oosthuizen, who has no personal knowledge, had to say in response to these serious allegations:

"*53.1 The contents of these paragraphs are denied.*

53.2 It is inconceivable that the investigating officer would obtain the warrant for the arrest of the applicant where no case existed against him. The legal requirement in terms of section 43(1) is that there must exist a reasonable suspicion that an offence had been committed. Such information must be under oath. These requirements were complied with hence the issuing of the warrant of arrest by the magistrate."

47. This is obviously not a satisfactory response to the serious allegations. Mr Oosthuizen in his answering affidavit sidesteps the issue and instead advances reasons why the warrant of arrest was nonetheless lawfully issued and why the matter is in any event *res judicata*. That may be so but what is entirely lacking is any attempt to deal with these serious allegations directed against Advocate Majola.

48. I have only identified two paragraphs in the applicant's founding affidavit dealing with the averred misrepresentation by Advocate Majola to Du Plessis AJ. The thrust of the founding affidavit – the 'new evidence' that forms the primary basis of the application – is the averred misrepresentation. It is also the central feature in the applicant's replying affidavit and his heads of argument.

49. Advocate Majola has not taken this court into his confidence and informed the court of his version. No reason is given why Advocate Majola, who should be the central witness, did not depose to the answering affidavit, or at the very least furnish a confirmatory affidavit.

50. The applicant submitted that I am to draw the appropriate negative inferences against Advocate Majola and the first respondent and to find that the misrepresentations asserted by him in his founding affidavit as having been made by Advocate Majola are well-founded.

51. There may be an innocent explanation. It may be that the date of commissioning of the Gobozi affidavit of 23 March 2015 was a typographical error and that it had been deposed to earlier, particularly as there is a typed date on the affidavit of 23 February 2015. There is also the evidence of the further cross-examination of Mr Gobozi by the applicant on 20 August 2020 during the course of the trial and which the applicant has disclosed in his founding affidavit. Mr Gobozi was again challenged on 20 August 2020 as to the date of his affidavit, and appears to advance a version that the date of 23 March 2015 "*might be an error*" and that the correct date was 3 February 2015, which would obviously pre-date 17 March 2015. But the typed date is 23 February 2015 and not 3 February 2015 and the commissioning is reflected to have taken place on 23 March 2015. It would have been expected of both, or at least either, of Advocate Majola or Mr Gobozi to have given their version under oath in these proceedings on this central issue as to the date of the Gobozi affidavit that features squarely in the representations made by Advocate Majola to the court on 5 and 12 March 2020, and which is also the focus on the present proceedings before me.

52. The situation faced by this court is that the two central witnesses involved in the process of issuing the warrant of arrest, namely Advocate Majola who

applied for the warrant on 17 March 2015 and Mr Gobozi on whose affidavit Advocate Majola apparently relied in applying for the warrant have not given any evidence. Particularly disconcerting is the failure of Advocate Majola to do so given that he is a officer of the court and where he has been accused of serious misrepresentations.

53. In the circumstances, and for purposes of these proceedings, I accept that the applicant has established the misrepresentations upon which he relies. These are motion proceedings and the only version placed before me is that of the applicant. A bare denial in an answering affidavit by someone with no personal knowledge does not suffice to create a genuine factual dispute.[2] A denial will particularly be inadequate for creating a genuine dispute of fact where the person making the denial has in his or her possession the relevant facts to amplify the denial,[3] which in this instance is in the form of Advocate Majola's personal knowledge of what happened. The applicant's version is not so inherently improbable or untenable that I can reject it – to the contrary, it is consistent with such other evidence as there is, including the transcription of the court proceedings on 5 March 2020 and such other material as has been placed before the court by the applicant in his affidavits.

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[2] As held in *Room Hire Co (Pty) Limited v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162-1163: *"If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to Court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a device."*

[3] *Wightman trading as JW Construction v Headfour (Pty) Limited and another* 2008 (3) SA 371 (SCA) at 375G-376B

54. Having now found for purposes of these proceedings that the applicant has established the misrepresentations, the next question is whether those can now be relied upon by the applicant to seek of this court to find that his arrest was unlawful.

55. This requires a closer consideration of the challenge raised by the first respondent that the judgment of Du Plessis AJ is *res judicata* of the matter before me.

56. *Res judicata* means 'a matter judged'. It is in the public interest that once a matter has been judged, it cannot be judged again. Claassen defines *res judicata* as:

> *"[a] case or matter is decided. Because of the authority with which in the public interest, judicial decisions are invested, effect must be given to a final judgment, even if it is erroneous. In regard to* res judicata *the enquiry is not whether the judgment is right or wrong, but simply whether there is a judgment."* [4]

57. For the defence of *res judicata* to succeed i.e. to find that a matter has already been adjudged, and so cannot be adjudged again, the matter must

[4] Claassen *Dictionary of Legal Words and Phrases* (Butterworths, Durban 1977), cited with approval *in S v Molaudzi* 2015 JDR 1315 (CC), para 14. (Also cited as 2015 (8) BCLR 904 (CC), 2015 (2) SACR 341 (CC).

be *"between the same parties, in regard to the same thing, and for the same cause of action"*.[5]

58. The courts recognise that application of *res judicata* has the potential to work injustice. In order to avoid injustice, in certain instances the court stresses that the three requirements must be strictly satisfied.[6] In other instances, the requirements are relaxed, and an absolute identity of relief and the cause of action is not required, in what is known as issue estoppel.[7] But in turn the relaxation of the three requirements too can work hardship, and so *"[e]ach 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 party themselves but also to others…"* [8]

59. In the circumstances, the three requirements for *res judicata* must not be read overly literally or applied dogmatically. For example, in *Fidelity Guards Holdings (Pty) Ltd v PTWU & others*[9], in relation to the requirement of *"the same cause of action"*, Myburgh JP for the Labour Appeal Court held that:

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[5] *Bertram v Wood* (1883) 10 SC 177 at 181.

[6] For example, *Bertram v Wood* referred to with approval in *Molaudzi*, para 15.

[7] *Hyprop Investments Ltd and Others v NSC Carriers and Forwarding CC and Others* 2014 (5) SA 406 (SCA), para 14, citing with approval *Prinsloo NO and Others v Goldex 15 (Pty) Ltd and another* 2014 (5) SA 297 (SCA).

[8] *Smith v Porritt* 2008 (6) SA 303 (SCA), para 10, cited with approval in *Hyprop*, para 14.

[9] [1998] 10 BLLR 995 (LAC)

> *"The cause of action is the same whenever the same matter is in issue:* Wolfaardt v Colonial Government *(1899) 16 SC 250 at 253. The same issue must have been adjudicated upon. An issue is a matter of fact or question of law in dispute between two or more parties which a court is called upon by the parties to determine and pronounce upon in its judgment and is relevant to the relief sought: Horowitz v Brock and others 1988 (2) SA 160 (A) at 179F–H."*

60. In determining whether the present matter has already been adjudged by Du Plessis AJ, in both proceedings the applicant seeks the same thing: he seeks that the issue of the warrant for his arrest issued on 24 March 2015 be declared invalid and so that his arrest is unlawful. It is based on the same cause of action: in both matters, the applicant relies upon the requirement of section 43(1)(c) of the CPA not having been fulfilled. To use the phraseology from *Fidelity Guards*, the "*same issue [-] the same matter of fact or question of law"* is in dispute.The applicant asserted both in the previous proceedings and these proceedings that there was no information taken upon oath from which the necessary reasonable suspicion could have been formed, in particular what affidavit or affidavits (as that is where information would be found taken on oath), if any, existed when the warrant was applied for and were relied upon.

61. The applicant does not raise an new cause of action or a new issue, as properly understood, for purposes of avoiding the matter being *res judicata*.

That Mr Gobozi subsequently testified on 20 August 2020 in the applicant's criminal trial and the applicant now wishes to use that evidence to set aside the same warrant of arrest on the same basis – alleging non-compliance with section 43(1)(c) – does not constitute a new issue or create a new cause of action. Rather it is further evidence in support of the same relief based upon the same cause of action. Reliance on further or new evidence does not overcome the matter being *res judicata*. To the extent that the applicant wished to rely on that evidence, his remedy was to seek to place that evidence before an appeal court.[10]

62. Similarly that Advocate Majola misrepresented by omission to Du Plessis AJ that the Gobozi affidavit predated the issue of the warrant does not constitute a new issue or create a new cause of action. Rather it is a further ground to contend that the warrant was unlawfully issued as section 43(1)(c) had not been satisfied. Again, if the applicant wished to rely on that "new" evidence, his remedy was to seek to place that evidence before an appeal court. To the extent that the applicant contends that the misrepresentation effectively resulted in the judgment of Du Plessis AJ being the product of and so vitiated by fraud, that too does not make the issue not adjudged, whatever effect that misrepresentation may have for founding rescission of the judgment.

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[10] The applicant submits that the judgment of the High Court of Swaziland in *Moyo v Rex* [2016] SZHC 35 is authority for the broad proposition that new facts or circumstances are a basis to impugn the operation of *res judicata*. I disagree that the judgment is authority for that proposition, which proposition is unsound, at least where there are other avenues to introduce those new facts or circumstances.

63. The applicant argued that the parties are different and so the matter cannot be *res judicata*. This is because, the applicant argues, Du Plessis AJ determined the issue in what were bail proceedings, and so only the State was an opposing party to those proceedings. In contrast, the applicant argues, in the present proceedings he has in addition cited the second and third respondents (with the State in the bail proceedings being the first respondent in the present proceedings). In my view, the additional citation of the second and third respondents in the present matter does not render the matter not *res judicata*. As appears above, the requirements for *res judicata* must not be applied mechanically. Du Plessis AJ in dismissing the declaratory relief and this court in finding that the matter has already been adjudged, prejudices neither the second nor third respondents as the warrant and the arrest stands.

64. The applicant also argues that the principle of *res judicata* cannot apply because the nature of these proceedings and those before Du Plessis AJ are different, as are the courts. The applicant argues that these are civil proceedings before a civil court whereas the proceedings before Du Plessis AJ were bail proceedings before a criminal court.

65. I do not understand the applicant's argument to be that *res judicata* cannot apply as a matter of principle in criminal cases. *Res judicata* applies in both civil matters and criminal cases. As observed in *Molaudzi*,[11] while in civil

[11] Para 19.

matters the 'cause of action' must be the same, in the criminal context the 'cause of action', is more aptly regarded as the conviction or sentence as a whole, and so "*the general principle of res judicata in the criminal context is that once the application for leave to appeal is dismissed, this is a judicial decision, which is final and determinative… an accused who has been convicted and sentenced, generally may not appeal against the decision more than once – despite changing the grounds of appeal."*

66. Rather I understand the applicant's argument to be that a determination in criminal proceedings as to the lawfulness of the warrant cannot be *res judicata* in relation to a determination of the same issue in civil proceedings. This argument rests on the proposition that a determination in criminal proceedings of an issue cannot be *res judicata* of the same issue in civil proceedings, and *visa versa*.

67. The parties describe the proceedings before Du Plessis AJ as bail proceedings. In *S v Botha en 'n ander* 2002 (2) SA 680 (SCA) the Supreme Court of Appeal had to decide whether bail proceedings were civil proceedings. Vivier AJA referred to the following dicta from *Sita and Another v Olivier NO and Another* 1967 (2) SA 442 (A) at 449B - E:

> *"It is in my view not the form of the procedure adopted but the subject-matter of the proceedings which determines their character as either a civil or criminal matter. . . . Nor in my view does the fact that the relief was sought by way of a declaratory order, interdict and*

mandamus make the proceedings before the Court a quo a civil matter originating in that Court."

68. In *S v Mohamed* 1977 (2) SA 531 (A) the Appellate Division, applying *Sita*, found that bail appeal proceedings, although civil in form, were criminal in substance as those proceedings *"orginate in and are closely associated with the accused's arrest, detention and prosecution of a criminal offence".* Similarly in *S v Absalom* 1989 (3) SA 154 (A) the court found that a condonation application for the late filing of an appeal was so closely associated with the accused's conviction, sentence and appeal that it constituted criminal proceedings.

69. Vivier AJA in *Botha*, applying *Mohamed* and *Absalom* found that bail proceedings did not constitute civil proceedings.[12]

70. I therefore accept that bail proceedings are criminal proceedings.

71. Although section 6(1) of the Superior Courts Act, 2013 provides for a single High Court of South Africa, consisting of various Divisions, the Act does distinguish the constitution of the High Court as a court of first instance when arriving at a decision in a civil matter (when it is to before a single judge, subject to certain exceptions)[13] and the constitution the High Court as a court of first instance when arriving at a decision in a criminal case (when the court

[12] At 684I – 685A.

[13] Section 14(1)(a).

is to constituted in the manner prescribed in the applicable law relating to procedure in criminal matters).[14] As Du Plessis AJ was hearing the applicant's bail application as a court of first instance, for which provision is made in the Criminal Procedure Act, I am also prepared to accept that Du Plessis AJ was sitting as a court of first instance in a criminal case.

72. But does it make any difference that Du Plessis AJ made the determination of the issue of the lawfulness of the arrest in criminal proceedings? In my view not, at least on these facts in this instance. Whatever the form or nature of the proceedings before Du Plessis AJ, the applicant chose to place the issue of the lawfulness of his arrest squarely before that court to decide, and it decided the issue. The applicant cannot complain at any prejudice he may have suffered because he sought that determination of a judge sitting in a criminal matter[15] rather from a judge sitting in a civil matter. The applicant did not seek the determination as an ancillary part of the bail proceedings, but as distinct relief, which if granted would have rendered the bail proceedings academic as the applicant sought his release from custody if his arrest was declared unlawful.

73. The applicant is not entitled, in my view, to have two bites at the cherry – he cannot seek in criminal proceedings an order declaring his arrest unlawful based upon section 43(1)(c) not having been satisfied, and when he fails in

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[14] Section 14(2).

[15] Such as Du Plessis AJ invoking the provisions of section 60(3) of the CPA to adjourn the hearing from 5 to 12 March 2020 to enable the Gobozi affidavit to be located.

those proceedings, to seek the same relief again based upon section 43(1)(c) not having been satisfied in civil proceedings. Consider the position if the applicant had succeeded before Du Plessis AJ and his release was ordered. The State could not contend that because those were criminal proceedings, the judgment is of no consequence and could be ignored. The parties would be bound such a judgment, as they are now bound by the judgment that found that the arrest was lawful.

74. If there is a difficulty with Du Plessis AJ having determined the issue in criminal proceedings (and in respect of which I cannot and do not make a finding as I am not a court of appeal), the order stands and cannot be ignored. I am also mindful that the principle of *res judicata* must not be applied rigidly where it may work an injustice, which is considered more closely below. But I do not find that applying the principle in respect of the issue adjudged in the criminal proceedings to the present civil proceedings will work an injustice.

75. A further ground relied upon by the applicant why the issue of the lawfulness of the issue of the warrant can be revisited is that this is a suitable case to relax the application of *res judicata*. The applicant submits that the new facts or evidence that he relies upon, constituted by the misrepresentation of Advocate Majola, are sufficient to allow this court to find that the application of *res judicata* must not preclude this court, in the interests of justice, from revisiting the issue.

76. In *Molaudzi*[16], Theron AJ for the Constitutional Court emphasised that *"[t]he interests of justice is the general standard, but the vital question is whether there are truly exceptional circumstances"*.[17]

77. Theron AJ held:

> *"Where significant or manifest injustice would result should the order be allowed to stand, the doctrine ought to be relaxed in terms of sections 173 and 39(2) of the Constitution in a manner that permits this Court to go beyond the strictures of rule 29 to revisit its past decisions. This requires rare and exceptional circumstances, where there is no alternative effective remedy. 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."*[18]

78. *Molaudzi* was truly exceptional as in that matter there simply was no option open to the applicant in order to obtain appropriate relief other than a relaxation of the principle of *res judicata*.

79. As appears above, the applicant seeks to adduce further grounds or evidence why the warrant of arrest was unlawfully issued because of non-compliance with section 43(1)(c).

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[16] Above.

[17] At para 38.

[18] Para 45. My emphasis.

80. In *R v D and another* 1953 (4) SA 384 (A), the then Appellate Division found, in the context of a dismissal of an appeal against conviction and sentence, that the decision is final and cannot be reopened, except, possibly, on the ground that it was obtained by fraud and that decision stands until reversed or varied by the appeal court.[19] The Appellate Division went further and pointed out that the proper course to adopt is for the appellant to apply to the appeal court for leave to adduce further evidence before that appeal court and to set down that application and the appeal together for hearing.[20]

81. Section 19 of the Superior Courts Act, 2013 in setting out the powers of the Supreme Court of Appeal in exercising appeal jurisdiction expressly provides that the appeal court can receive further evidence. Section 17(2)(f) of the Superior Courts Act provides for a reconsideration of the refusal by the Supreme Court of Appeal of an application for leave to appeal by the President of the Supreme Court of Appeal in exceptional circumstances, which may include upon the basis of new evidence even after the application has been dismissed,[21] in both civil and criminal matters.[22]

82. The applicant argued that exceptional circumstances are present as the order was procured by fraud. A criminal matter cannot be reopened once the appeal has been disposed of except, possibly, when a fraud had been

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[19] At 390F and at 391A.

[20] At 391C/D.

[21] *Liesching and others v S and another* 2017 (4) BCLR 454 (CC), para 46, 54 and 61.

[22] *Liesching,* para 57.

practised on the court.[23] This is in accordance with the established principle in our law that a judgment can be set aside on the ground of fraud provided that the applicant can prove the requirements to do so.[24] Senior counsel for the first respondent made the point that this avenue was open to the applicant, through the making of a substantive application for rescission.

83. In my view, the applicant has not made out truly exceptional, or even exceptional, circumstances for the relaxation of the principle. As appears above, and accepting that the applicant has for present purposes established the misrepresentation upon which he relies, there were or are avenues available to the applicant to make use of that additional evidence as well as the additional evidence given by Mr Gobozi during the criminal trial on 20 August 2020. As appears above, the applicant chose not to make an application to adduce such further evidence on appeal when applying to the Supreme Court of Appeal for leave to appeal.

84. I do not suggest that such additional evidence is sufficiently cogent to persuade an appeal court to entertain the fresh evidence or for a court to find that the judgment of Du Plessis AJ is to be rescinded. Rather the point is that there were or are avenues open to the applicant. This can be contrasted to *Molaudzi* where there was no other remedy.

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[23] *R v D* above at 391A.

[24] See the discussion in *Erasmus: Superior Court Practice*, RS 16, 2021, D1-564.

85. The applicant, perhaps realising his difficulty late in the day, sought of this court to rescind and set aside the order of Du Plessis AJ. This reformulated relief appears for the first time in the most recent draft order uploaded by the applicant to the electronic court file. It does not feature in the notice of motion, or any intended amendment of the notice of motion. No substantive application has been made for rescission. As stated, the relief that the applicant seeks in his application is a declarator as to the lawfulness of the warrant and his arrest.

86. The applicant argued that provided the appropriate factual basis had been made out in his founding affidavit, it did not matter that he did not specifically in his notice of motion ask for rescission of the judgment based upon, for example, fraud. In my view, it would be prejudicial to the first respondent to treat the applicant's application as one for rescission. A rescission application, based upon fraud or otherwise, has its own distinct requirements and those have not been properly ventilated.

87. The interests of justice do not cry out in the present circumstances for the application of *res judicata* to be relaxed. The order of Du Plessis AJ stands unless and until set aside.

88. I therefore find that the matter of the lawfulness of the issue of the warrant of arrest on 24 March 2021 has already been adjudged i.e. is *res judicata*.[25]

89. In the circumstances, the application is to be dismissed.

90. The first respondent's senior counsel submitted that costs should follow the result and that the applicant should be ordered to pay the costs.

91. In my view, the conduct of the first respondent is regrettable. As I have emphasised, serious allegations were directed at Advocate Majola's conduct and which went substantively unchallenged. This allegations featured centrally in the applicant's founding affidavit. That Advocate Majola was being called upon to explain himself is clear from the applicant's affidavits and heads of argument. The applicant's challenge to Mr Oosthuizen's evidence as being hearsay was not a technical objection but went to the heart of the applicant's case, which was that Advocate Majola as a central witness was not giving his version in response to the allegations that he had misrepresented by omission to Du Plessis AJ that the Gobozi affidavit

[25] The applicant argued, with reference to *Woji v Minister of Police* [2015] 1 All SA 68 (SCA), para 22 that this court was free to decide the issue of unlawfulness afresh, without setting aside the order Du Plessis AJ. In *Woji* the SCA, following the Constitutional Court in *Minister of Justice and Constitutional Development and another v Zealand* [2007] 3 All SA 588 (SCA), found in para 22 to 27 that notwithstanding that there are orders in place remanding the accused in custody, the detention of the accused can, without setting aside those orders, be unlawful. The applicant's reliance on W*oji* is misplaced as the order of Du Plessis AJ is not an order remanding the accused in custody that need not be set aside to determine the issue of unlawfulness, but an order consequent upon the determination of the very issue of the lawfulness of the arrest and detention. Further, the application of *res judicata* did not feature in *Woji.*

predated the application for the warrant. Neither the first respondent nor Advocate Majola has engaged with these serious allegations.

92. In my discretion, although the first respondent has succeeded in resisting this application, I find that the first respondent should not be entitled to any costs.

93. I also intend directing that a copy of this judgment be made available by the Registrar to the Director of Public Prosecutions. As stated, there may be an innocent explanation as to the date of the Gobozi affidavit, but neither the first respondent nor Advocate Majola have proffered any explanation.

94. The following order is made:

94.1. The application is dismissed, no order as to costs.

94.2. The Registrar is directed to forward a copy of this judgment to the Director of Public Prosecutions within thirty days of the order.

B M Gilbert

Acting Judge of High Court

Date of hearing:	19, 25 August 2021
Date of judgment:	14 September 2021
Date of revision:	23 September 2021

Applicant:	In person
Counsel for the First Respondent:	Mr RN Rathidile SC
Instructed by:	The State Attorney, Johannesburg