

LITIGATE ONCE AND FOR ALL – WHEN CAN THAT BE RELAXED?

Introduction

In order to unpack the technical principle of *res judicata* and when or if it can be relaxed, a definition is needed:

“The principle of *res judicata* is well-established in our law: essentially it means that parties to a dispute have only one metaphorical "bite at the cherry". The "bite" can entail appealing through the hierarchy of courts, but once the parties have exhausted their appeals, they cannot re-litigate the same dispute.”¹

It is an interest-of-justice to prevent litigants from re-litigating the same dispute. However, the rule can be relaxed in certain circumstances.

Ilima Projects (Pty) Ltd v MEC Gauteng Department of Infrastructure Development²

Facts of the case:

“The defendant was the defendant in two cases instituted by different plaintiffs, first by Country Cloud (C) and secondly by Ilima, the present case. Both cases were concerned with whether defendant had lawfully cancelled a contract with Ilima – the defendant’s defence that the contract was justifiably cancelled by it was dismissed in the C case. When it was raised against Ilima in second case issue, issue estoppel was pleaded.

The notion that the “once and for all” rule was applicable in this situation and that a party “could and should” have pleaded every defence in round one was rejected because that rule was not designed to do more than prevent a litigant being harassed by grasshopper litigation which would constitute an abuse of the process, whereas on the facts in this case no mala fides was demonstrated on the part of the defendant.

¹ <http://www.saflii.org/za/journals/PER/2016/33.html>; accessed 23 November 2019.

² (25981/2011) [2019] ZAGPJHC 384 (9 October 2019)

The facts were novel – Ilima had a contract with defendant in which an obligation existed by the defendant to pay an upfront sum for Ilima to establish a site for a construction project. Before due date to pay, defendant cancelled the contract alleging breaches by Ilima. Meanwhile, Ilima had borrowed money from C and the scheme of the arrangement was that C would be repaid from the upfront payment by defendant to Ilima. C instituted an action in delict averring that defendant's cancellation was unlawful and such conduct was wrongful towards C. That case went through three courts. At each stage the case was dismissed for want of wrongfulness. In the SCA findings were also made that the grounds relied upon to justify the cancellation were rejected. The Constitutional Court upheld those findings.

Thereafter, Ilima sued for specific performance of the upfront payment relying on an unlawful cancellation as held in the SCA. When defendant pleaded the cancellation was lawful, Ilima replicated a res judicata riposte.”

The requirements of res judicata are:

1. Different causes of action;
2. The relief is different;
3. One of the parties is different.

The court held that:

“The circumstances warrant a relaxation of the res judicata requirements because a fact specific analysis reveals that the defence, common to both cases, warrants recognition and also the concomitant identity of interests between Ilima and Country Cloud in that regard.

The grounds of defence to the allegation of an unlawful cancellation of the contract raised in the Country Cloud Case cannot be revisited because the consequence would be a literal re-litigation involving the same persona testifying on the same facts.

The grounds which were not ventilated in the Country Cloud Case may be ventilated in pleading a defence to Ilima's claim because these grounds have not been the subject matter of judicial pronouncement.

To apply the once and for all rule would be inappropriate in the circumstances because the mischief for which that rule exists is, on these facts, absent.”

Molaudzi v S³

In the case of *Molaudzi v S*, the appellant attempted to appeal to the Constitutional Court twice: the first time the application for leave to appeal was dismissed; the second time the application was granted and the appeal upheld.

Within days of the hearing of other matters involving *Mhlongo v S*; *Nkosi v S*, the Constitutional Court granted leave to appeal to these applicants, vitiated their convictions and sentences, and ordered their immediate release. However, reasons for the judgement were reserved.

In truly exceptional cases where the interests of justice so demand, an appeal can be entertained despite the fact that the appeal is *res judicata*.

Conclusion

Although it remains important that when litigating the entire aspect of the case is litigated in order to prevent the rule of *res judicata* to prevail, the rule may be relaxed. It is not recommended though to litigate on any basis where there is a presumption that this would apply. Contact SchoemanLaw for all your dispute resolution needs – we view each dispute as deserving of our best efforts and to present it most comprehensively.

³ [2015 2 SACR 341](#) (CC)