THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1035/2019

In the matter between:

BOKONI PLATINUM MINES (PTY) LTD **APPELLANT**

and

ABRAM MOROPANE **RESPONDENT**

Neutral citation: *Bokoni Platinum Mines v Abram Moropane* (/1035/2019) [2020] ZASCA 168 (11 December 2020)

Coram: SALDULKER, MOLEMELA and NICHOLLS JJA and SUTHERLAND and UNTERHALTER AJJA

Heard: 04 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 11 December 2020.

Summary: Whether the judgment refusing the application for leave to amend plea and counterclaim was res judicata – whether the recusal of the judicial officer who granted the order refusing amendment, which recusal was based on bias, invalidates every aspect of a trial, including judgments and orders made in the course of the trial.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Muller and Kganyago JJA sitting as court of first instance): judgment reported *Bakoni Platinum Limited v Moropane* [2019] ZALMPPHC 30

1 The appeal is upheld.
2 The proceedings before Magistrate Malebane are set aside, including the judgment refusing leave to amend the plea and counterclaim.
3 The matter is remitted to a full court of the Limpopo Division of the High Court to adjudicate Acting Magistrate's Moyane's judgment on the merits of the application for leave to amend the plea and counterclaim.
4 Each party is to pay its own costs.

JUDGMENT

Nicholls JA (Saldulker and Molemela JJA and Sutherland and Unterhalter AJJA concurring):

[1] To suggest that this matter has a long and tortuous history would be an understatement. It merely needs to be stated that 6 years after the institution of summons in the magistrates court, a dispute involving a mielie farm worth R54 000 has now ended up with an interlocutory application for leave to amend a plea being adjudicated upon in this Court.

[2] In 2013 Bokoni Platinum Mines (Pty) Ltd (Bokoni), the appellant, decided to commence mining activities on Klipfontein Farm. Pursuant thereto, Bokoni concluded separate agreements with various members of the community (the farmers) who were farming small plots of mielies on the land in question. Bokoni was to pay each subsistence

farmer amounts of R18 000 over three years, totalling R54 000. These agreements spawned lengthy and costly litigation over a period of years. More than a hundred farmers issued summons against Bokoni out of the Praktiseer Magistrates Court seeking to vindicate their rights in term of their agreements. The same attorney represents all the farmers and the pleadings are substantially identical. There are over a hundred actions which have been consolidated, but for present purposes it is only necessary to deal with the claim of one of the farmers, the respondent, Mr Abraham Moropane.

[3] The issue purportedly before this Court is whether the judgment of Magistrate Malebane, of 13 March 2017, which dismissed Bokoni's application for leave to amend its plea and counterclaim, was res judicata. If so, was it permissible for res judicata to be raised mero motu by the full bench of the Limpopo Polokwane High Court (the high court)? The high court, having raised the issue, found that the matter was res judicata and dismissed the application for leave to amend on this basis. It also refused leave to appeal. The appeal comes before this Court upon Bokoni successfully petitioning for leave to appeal.

[4] It is necessary to briefly set out the history of the matter. The agreement allegedly concluded between Bokoni and Mr Moropane provided that an amount of R54 000 was to be paid in three annual instalments of R18 000 each, on April 2013, April 2014 and April 2015. The agreement recorded that the R54 000 was–

'[A] once-off compensation payment, in full and final settlement, for any actual or contingent losses or damages relating to subsistence farming on [the] Mieliefield located at Klipfontein Farm (465 KS).'

The first amount of R18 000 was paid in April 2013 but no further amounts were paid. This prompted Mr Moropane to sue for payments of the two remaining amounts of R18 000 in terms of the written agreement.

[5] In Bokoni's plea the written agreement was denied. In the alternative, it was pleaded that the agreement between the plaintiff and the defendant was partly oral and partly written, the written portion was attached to the particulars of claim. As a further

alternative, it was pleaded that the agreement contained a tacit term that the plaintiff was entitled to compensation only if he in fact farmed mielies on the farm. Bokoni's defence was that Mr Moropane did not farm mielies at the time of concluding the agreement and was therefore not entitled to payment. It instituted a counterclaim for unjust enrichment in respect of the R18 000 already paid in April 2013.

[6] On 1 September 2014, Bokoni sought to amend its counterclaim to the effect that the agreement between Mr Moropane and Bokoni was partly written, the written portion being the agreement annexed to Mr Moropane's particulars of claim. The oral part was agreed upon during March 2013 by representatives of the Plaintiff, duly authorised, and by Bokoni, represented by Andrew Letlapa, alternatively by a duly authorised representative. Despite opposition, the amendment to the counterclaim was granted on 28 November 2014.

[7] Before the trial commenced the separate actions were consolidated, although the claims of each plaintiff remained separate claims against Bokoni. The trial proceeded before Magistrate Malebane in 2016 on the pleadings as they stood at that time, including the amended counterclaim. At the start of the trial, it was submitted on behalf of Bokoni that the written agreements were denied and there existed tacit agreements, the terms of which would have to be proven.

[8] Mr Moropane testified, together with two other farmers who had also instituted actions against Bokoni. At the close of the plaintiffs' case, Bokoni brought an application for absolution against the 116 farmers who did not testify. On 2 August 2016, Magistrate Malebane dismissed thirteen of the actions but did not grant absolution in respect of the balance of the actions. The defence case then commenced with the testimony of Mr Pasha who was employed by Bokoni as a community liaison officer. Contrary to the plea, he admitted that written agreements had been concluded with the farmers. Once he had completed his testimony, the trial was postponed to 30 November 2016.

[9] Before that date, on 27 October 2016, Bokoni served another notice of intention to amend its plea and counterclaim in which the written agreement was admitted. Bokoni's attorney, Ms Deidre Venter, was the deponent to the founding affidavit in the application for leave to amend. She explained that after Mr Phasha's testimony, they consulted with Mr Letlapa who was employed by Bokoni as the socio-economic development co-ordinator at the time. It became apparent that it was he, not Mr Phasha, who was involved in concluding the agreements, and they were indeed written agreements. Bokoni intended calling him as a witness and in order that the pleadings were aligned with the evidence, sought to amend its pleas and counterclaims accordingly.

[10] Bokoni's case as amended was that written agreements were concluded, which properly interpreted, meant that the farmers would only be entitled to be compensated if they in fact had a mielie field at the time of the conclusion of the agreement. It was stated that whether they actually farmed mielies on the mielie field was irrelevant, except insofar as it may be evidence that they had a mielie field. The counterclaim was similarly framed that if any farmer did not have a mielie field at the time of the conclusion of the agreement, he was not entitled to the R18 000 paid to him and was unjustly enriched in this amount at the expense of Bokoni. In the specific case of Mr Moropane, the written agreement was still denied but it was pleaded that he did not have a mielie field at the time. This being so, he was not entitled to compensation.

[11] Mr Moropane's objections to the leave to amend were, inter alia, that Bokoni was attempting to introduce a defence not raised in its plea and only after their first witness had been cross-examined; that Bokoni sought to retract an allegation that the agreement was partly oral and partly written; and, it would be highly prejudicial to the plaintiffs to grant the amendment.

[12] After hearing a substantive application for amendment on 13 March 2017 Magistrate Malebane dismissed the application for leave to amend the plea and counterclaim. Bokoni lodged a notice of appeal against this decision. This was soon followed by Bokoni's application for the recusal of Magistrate Malebane on the grounds

of bias, pertaining to the manner in which he had conducted the trial thus far. On 25 April 2017 the recusal application was granted and Magistrate Malebane ordered that the matter start de novo before another magistrate.

[13] This prompted Bokoni to withdraw its appeal on 30 May 2017 as the effect of the recusal was that the appeal was now 'a nullity'. Instead, the next day on 31 May 2017, the third notice of amendment was served, in terms almost identical to the one that had been dismissed by Magistrate Malebane.[1] A similar objection was filed by Mr Moropane and Ms Venter again deposed to the founding affidavit.

[14] Another substantive application for leave to amend the plea and counterclaim was launched, this time before Acting Magistrate Moyane in the Tubatse Magistrate's Court. For reasons that are not germane to this appeal, he, like Magistrate Malebane, dismissed the application. Bokoni appealed Magistrate Moyane's refusal of the application for leave to amend in the high court. The appeal was dismissed by the high court.

[15] In the high court the issue of res judicata was raised by the high court for the first time. Up until that point, both parties had proceeded on the assumption that all Magistrate Malebane's judgments, including the judgment on absolution and the judgment on the application for leave to amend, had been set aside as a consequence of his recusal. The high court first considered whether Magistrate Malebane was entitled to order that the matter start de novo. It held that, as a creature of statute, Magistrate Malebane did not have that power, but because of the successful application for his recusal the evidence had to be adduced de novo before a different magistrate. This meant, said the high court, that 'the slate [was] wiped clean'. Despite this, the high court held that the judgment of Magistrate Malebane had not been nullified by his recusal. This judgment was still binding and to find otherwise would be 'tantamount to a procedure, other than an appeal or review, in terms whereof a final interlocutory

[1] It should be noted that in respect of Mr Moropane, the third amendment continued to deny the existence of a written agreement.

procedural order, is set aside by the magistrate who is functus officio'. Such a result could not be countenanced, and the appeal was dismissed on that ground.

[16] To justify its decision the high court concluded that where equity and fairness demanded, the courts have over the years relaxed the common law requirement that res judicata had to be pleaded.[2] It, therefore, found that the high court was entitled to raise the issue of res judicata and that the application for amendment before Magistrate Moyane amounted to an abuse of the process of court. The high court concluded that 'the order of Magistrate Malebane ha[d] not been nullified by his recusal, is final and is res judicata'.

[17] Bokoni, in line with the judgment of the high court, identified three issues that this Court should deal with on appeal, namely, whether the judgment of Magistrate Malebane was res judicata; whether res judicata could be raised by the high court mero motu and, if so, was it appropriate in the circumstances of this case; and finally, the merits of the application for leave to amend. But was this the correct enquiry in light of the recusal of Magistrate Malebane?

[18] The starting point should, in my view, have been the legal effect of the recusal. By embarking upon the issue of res judicata the high court misconstrued the enquiry. The question to be determined, in the light of Magistrate Malebane's recusal, was the status of the interlocutory judgment in which he dismissed the application for leave to amend the plea and counterclaim. Did his recusal extinguish the entire proceedings, including the interlocutory judgment or merely the evidence that had been led? If the former, this is dispositive and the question whether the judgment was res judicata does not arise.

[19] The recusal was sought, and granted, on the grounds of bias, or a reasonable apprehension thereof. Whether Magistrate Malebane's decision to recuse himself was

[2] For this proposition the high court placed reliance on *Boland Konstruksie Maatskappy (Edms) Bpk v Petlen Properties (Edms) Bpk* 1974 (4) 980 (C).

correct, or whether the bias alleged warranted the recusal, is not for this Court to determine. It suffices that the application for his recusal was granted.

[20] It has long been accepted by our courts that a decision maker should be unbiased and impartial. This common-law right is now buttressed by the fair trial rights in the Constitution.[3] Impartiality is the cornerstone of any fair and just legal system and an impartial presiding officer in every judicial proceeding or tribunal is an absolute requisite of fairness.[4] The rule against bias requires the recusal of a presiding officer where there is bias or a reasonable perception thereof. Once the conduct of a judicial officer is tainted with bias, this vitiates the proceedings. The law reports are replete with criminal matters where the entire proceedings were rendered a nullity upon a presiding officer having recused him or herself.[5] The reason for this is straightforward. Unbiased adjudication is fundamental to a fair hearing: it is an irreducible prerequisite. Once an adjudicator recognises his or her own bias, recusal must follow. But so too does the consequence that the proceedings cannot stand. They are set aside because we do not ask whether a biased adjudicator came to a correct decision. Rather, the law adopts the position that a biased adjudication will not be countenanced because it is so inimical to what fairness requires that the decisions rendered by it may not stand.

[21] There is a dearth of authorities in respect of civil matters but there are no coherent reasons why civil litigants have a lesser claim to an unbiased hearing. Nor why the principle of nullity should not apply to them.[6] In principle there appears to be no distinction. The reported cases that there are, have, in the main, involved tribunals. If nullity is visited upon the proceedings of an administrative tribunal where the taint of bias is established, how much more so in a court of law. In *Moch v Nedtravel (Pty) Ltd t/a American Express*

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[3] Section 34 of the Constitution provides that:
'Everyone has the right to have any dispute which can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. See also *Bernert v Absa Bank Ltd* [2010] ZACC 28; 2011 (3) SA 92 (CC) para 28.
[4] *South African Catering and Allied workers Union v Irvin and Johnson* 2000 (3) SA 705 (CC) para13.
[5] *R v Mhlanga* 1959 (2) SA 220 (T); *S v De Koker* 1978 (1) SA 659 (O); *S v Molowa* 1998 (2) SACR 422 (O); *S v Polelo* 2000 (2) SACR 734 (NC).
[6] *Brooks and Others v S* 2019(1) SACR 103 (NCK) para 26 where it is stated that the authorities are clear, once a presiding officer recuses himself, the trial is a nullity and this applies to both criminal and civil matters.

Travel Service[7] the dispute concerned the appealability of an acting judge's refusal to recuse himself in a sequestration application. This Court found that all proceedings conducted after the recusal were a nullity. This may suggest that any proceedings before the recusal are unaffected but on a proper reading it appears that this Court accepted that once there is bias, the proceedings are a nullity from the start. Moch[8] invoked the earlier authority of *Council of Review, South African Defence Force v Monnig*[9] dealing with a military tribunal where Corbett CJ said:

'What must be remembered is that in the present case we are concerned with proceedings of what is in substance a court of law . . . .If, as I have held, the court martial should have recused itself, it means that the trial which it conducted after the application for recusal had been dismissed should never have taken place at all. What occurred was a nullity. It was not, as in many of the cases quoted to us, an irregularity or series of irregularities committed by an otherwise competent tribunal. It was a tribunal that lacked competence from the start. The irregularity committed by proceeding with the trial was fundamental and irreparable. Accordingly there was no basis upon which the council of review could validate what had gone before. The only way the council of review could have cured the proceedings before the court martial would have been to set them aside.'

[22] To the extent that there may be some ambiguity in *Moch* and *South African Defence Force* that it is only the proceedings after recusal that are a nullity, this was put to rest by this Court in *Basson v Hugo*.[10] There the primary issue was whether the appellant was obliged to exhaust all internal remedies before launching an application to set aside a decision of the Health Professions Council refusing an application for recusal of two of its members serving on the relevant disciplinary committee. This Court, relying on *Moch* and *Monnig*, held that if it were found that the members should have recused themselves, the bias would permeate all the proceedings, including any appellate proceedings. One cannot cure a nullity observed Shongwe AP before ordering a remittal back to the high court to determine the review.

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[7] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (SCA).
[8] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (SCA) at 9D-G.
[9] *Council of Review, South African Defence Force and Others v Mönnig and Others* 1992 (3) SA 482 (A) at 495A-D.
[10] *Basson v Hugo and Others* [2018] ZASCA 1; 2018 (3) SA 46 para 21.

[23] Similarly in *Ndimeni v Meeg Bank Ltd (Bank of Transkei)*[11] the failure of an acting judge in the labour court to recuse himself, resulted in the court proceedings being declared a nullity.

[24] Therefore, as a general rule, a recusal on the basis of bias will permeate and invalidate every aspect of a trial, including the judgments and orders made in the course of the trial. There are those unique circumstances where the rationale for the recusal has limited impact and to nullify the entire proceedings would not be in the interests of justice. In *Le Car Auto Traders v Degswa*[12] the appellant, aggrieved by the court's judgment, made an application for the recusal of the presiding judge shortly before the application for the leave to appeal was to be heard. The basis for the application was that the respondents had behaved unconscionably by making contact with the judge's registrar regarding the date of the hearing for leave to appeal. The obviously unmeritorious application was dismissed. The court's further observations that the effect of a recusal could only be in respect of prospective or current proceedings which did not nullify the judgment were in relation to the very special facts of that case. Apart from being obiter dictum they have no bearing on the current case as the refusal of the amendment order formed part of a trial proceeding still underway.

[25] The limitation on the principle of nullity was not argued before us and this is not a case where it would have application. To find that the recusal nullified the evidence given before Magistrate Malebane as well as the judgment on absolution from the instance but not the interlocutory judgment given by him, is an unsustainable proposition. It cannot be that the bias wiped the slate clean as far as the evidence goes but did not infect any interlocutory judgment given on the basis of the same evidence. Once Magistrate Malebane recused himself, this vitiated the entire proceedings, including his judgment on the application for leave to amend. The inevitable consequence was that the

[11] *Ndimeni v Meeg Bank Ltd (Bank of Transkei)* [2010] ZASCA 165; 2011 (1) SA 560 (SCA).
[12] *Le Car Auto Traders v Degswa 10138 CC and Others* [2012] ZAGPJHC 286.

trial would have to start de novo. The judgment became a nullity upon his recusal. Having made this finding, the issue of res judicata becomes irrelevant.

[26] To this extent, the appeal against the decision of the high court to dismiss Bokoni's application must succeed, although on entirely different grounds. However, insofar as the merits of the application for leave to amend are concerned, the high court has not pronounced on the judgment of Acting Magistrate Moyane. Therefore, the appropriate course of action is to remit the matter to the high court for a hearing on the merits of the application for leave to amend the plea and counterclaim.

[27] As regards costs, it was not the fault of either party that the high court misconstrued its enquiry and did not deal with the merits of the appeal before it. Although Bokoni has been successful in its appeal it was not on the grounds argued by it. It follows that the most equitable order would be for each party to pay its own costs.

[26] In the result I make the following order:

1 The appeal is upheld.
2 The proceedings before Magistrate Malebane are set aside, including the judgment refusing leave to amend the plea and counterclaim.
3 The matter is remitted to a full court of the Limpopo Division of the High Court to adjudicate Acting Magistrates Moyane's judgment on the merits of the application for leave to amend the plea and counterclaim.
4 Each party is to pay its own costs.

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CH NICHOLLS

JUDGE OF APPEAL

APPEARANCES:

For appellant:	L Hollander
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For respondent:	DB Tshabalala
Instructed by:	Molefe Attorneys, Polokwane
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