THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 748/2023

In the matter between:

BOARD OF GOVERNORS OF MITCHELL HOUSE SCHOOL	**FIRST APPELLANT**
MITCHELL HOUSE SCHOOL	**SECOND APPELLANT**
STEPHEN LOWRY	**THIRD APPELLANT**

and

TSUNDZUKA KEVIN MALULEKE	**RESPONDENT**

Neutral citation: *Board of Governors of Mitchell House School and Others v Maluleke* (748/2023) [2025] ZASCA 15 (25 February 2025)

Coram: MAKGOKA and MEYER JJA and GORVEN, COPPIN and CHILI AJJA

Heard: Matter disposed of without oral hearing in terms of s 19(*a*) of the Superior Courts Act 10 of 2013.

Delivered: 25 February 2025.

Summary: Civil Procedure – re-adjudication of concluded application by same court – *functus officio* – *res judicata* principles – Judge re-adjudicating same application on same cause of action between same parties.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Mdhluli AJ, sitting as court of first instance):

1 The appeal is upheld with costs on the attorney and client scale.

2 The order of the high court is set aside and replaced with the following:

'The application is struck from the roll with costs on the attorney and client scale.'

JUDGMENT

Makgoka JA *et* Chili AJA (Meyer JA and Gorven and Coppin AJJA concurring):

[1] This appeal was disposed of without oral hearing in terms of s 19*(a)* of the Superior Courts Act 10 of 2013 (the Superior Courts Act). It is an appeal against the judgment and order of the Limpopo Division of the High Court, Polokwane (the high court). That court, per Mdhluli AJ, set aside the decision of the first appellant, the Board of Governors of Mitchell House School, to terminate its contract with the respondent, Mr Tsundzuka Kevin Maluleke, in respect of his children who were enrolled at the second appellant, Mitchell House School (the school). The effect of the school's decision was that Mr Maluleke's three children would not be enrolled at the school for the 2023 academic year because of Mr Maluleke's repeated failures to pay for his children's tuition fees at the school. The third appellant, Mr Stephen Lowry, is the headmaster of the school.

Factual background

[2] On 10 January 2023, Mr Maluleke, a legal practitioner, launched an urgent application in the high court for an order directing the school to allow the return of his three minor children, to the school. The application was heard by Muller J, who delivered his judgment on 11 January 2023. He set out the history of the dispute between Mr Maluleke and the school that led to the termination of the contract. The learned Judge considered the relationship between Mr Maluleke and the school in the

light of the leading authority on the matter, *AB v Pridwin*.[1] He concluded that the process which the school initiated in terminating its contract with Mr Maluleke was a fair one in the circumstances. He further held that the rights of the children had been properly considered by the school when it terminated the contract. Lastly, Muller J emphasised that the school was privately owned and depended on school fees to sustain itself. Given these considerations, the learned Judge dismissed the application and made no order as to costs.

[3] On 13 January 2023, Mr Maluleke filed a document titled 'Re: Enrolment Affidavit in Re: Urgent Interdict Application' (the re-enrolment affidavit). On the very same day, Mr Maluleke lodged an application for leave to appeal against the order of Muller J. However, that application was never pursued. In his 're-enrolment affidavit', Mr Maluleke stated that:

'The applicants have since filed an application for leave to appeal against the aforesaid order of Muller J granted on 11 January 2023, under case no: 68/2023.'

[4] The appellants opposed the 're-enrolled urgent application', which came before Mdhluli AJ on 16 January 2023. Having considered the same papers that had served before Muller J together with the 're-enrolment affidavit', Mdhluli AJ delivered her judgment *ex tempore* and granted an order directing the school to admit and enrol KK 'pending the determination of Part "B" of case number 6883/2021'. She subsequently dismissed the school's application for leave to appeal with costs. The school's appeal is with the leave of this Court.

Mootness

[5] In his heads of argument, Mr Maluleke asserted that the appeal was moot because all his children are no longer at the school. This point was not formally raised by way of an application to introduce new evidence. However, the school elected not to join issue with Mr Maluleke's assertion. Thus, we are prepared, for present purposes, to accept that none of Mr Maluleke's children still attend the school. On that basis, we are prepared to accept that the appeal is moot, and its outcome will have no practical effect.

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[1] *AB and Another v Pridwin Preparatory School and Others* [2020] ZACC 12; 2020 (5) SA 327 (CC); 2020 (9) BCLR 1029 (CC).

[6] Section 16(2)(*a*) of the Superior Courts Act provides that:

'(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.'

[7] Generally, courts do not decide issues of academic interest only.[2] A caveat to that principle is that a court has a discretion to enter into the merits of an appeal, notwithstanding the mootness of the issue as between the parties, when a discrete issue of public importance arose that would affect matters in the future and on which adjudication of the court is required.[3] In *Laugh It Off v South African Breweries*[4] the Constitutional Court decided to hear a matter which had become moot by the time it reached that court, as it considered the matter, among other things, to be of 'concern to the broader public'.[5] As will become clear below when we consider the merits, this is such a case.

The merits

[8] The issue is whether it was competent for Mdhluli AJ to entertain Mr Maluleke's application at all, given the doctrine of *res judicata* that bars continued litigation for the same cause, between the same parties, and where the same thing is demanded.[6] 'The underlying rationale of the doctrine of *res judicata* is to give effect to the finality of judgments'[7] and 'an avoidance of a multiplicity of litigation or conflicting judicial decisions on the same issue or issues'.[8] In *Firestone South Africa (Pty) Ltd v Gentiruco AG*,[9] Trollip JA remarked as follows:

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[2] *Radio Pretoria v Chairman, Independent Communications Authority of South Africa, and Another* [2004] ZASCA 69; 2005 (1) SA 47 (SCA); [2004] 4 All SA 16 (SCA) para 41.

[3] *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* [2012] ZASCA 166; 2013 (3) SA 315 (SCA) para 5.

[4] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC).

[5] Ibid para 30.

[6] *Molaudzi v S* [2015] ZACC 20; 2015 (2) SACR 341 (CC); 2015 (8) BCLR 904 (CC) (*Molaudzi*) para 14. See also *Royal Sechaba Holdings (Pty) Ltd v Coote and Another* [2014] ZASCA 85; 2014 (5) SA 562 (SCA); [2014] 3 All SA 431 (SCA) (*Royal Sechaba*).

[7] *Molaudzi* para 16.

[8] *Royal Sechaba* para 21.

[9] *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A).

'The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes *functus officio* : its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased.'[10]

[9] The doctrine of *res judicata* and its application are well-settled in our law and can hardly be considered to be novel. However, by ignoring it in the present matter, Mdhluli AJ has created an untenable situation in the Limpopo Division by considering herself entitled to overrule an order granted by another Judge. Needless to say, that is a recipe for disaster for judicial comity and jurisprudential coherence. Furthermore, there seems to be a problem in the Limpopo Division about the observation of the *res judicata* doctrine. In two recent cases, this Court has had to pronounce itself on the same issue.

[10] The first one is *Thobejane v Premier of the Limpopo Province*,[11] where the court dismissed a preliminary point of misjoinder and proceeded to hear the merits of the application. Subsequently, the Judge delivered judgment in which she upheld the very same preliminary point she had dismissed earlier, and struck the application from the roll with costs. On appeal, this Court held that it was not open to the high court to revisit the point it had dismissed earlier, as in relation thereto, it had become *functus officio* and that its second order undermined the principle of finality of litigation.[12] The first order dismissing the preliminary point was final and therefore the second order was a nullity which fell to be set aside.

[11] In *Hulisani Viccel Sithangu v Capricorn District Municipality*[13] the trial court heard argument on a special plea of misjoinder and reserved its ruling and proceeded to hear the evidence and argument on the merits. Thereafter, it dismissed the special plea, but at the same time relied on the facts sustaining the special plea to dismiss the action. This Court held that the two orders were mutually exclusive, and explained:

'It was not open to the trial court to non-suit the applicant based on the point on which it had earlier found in his favour. The ruling of the trial court on the special plea effectively meant that

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[10] Ibid at 306F-G.
[11] *Thobejane and Others v Premier of the Limpopo Province and Another* [2020] ZASCA 176.
[12] Ibid para 6.
[13] *Hulisani Viccel Sithangu v Capricorn District Municipality* [2023] ZASCA 151.

the correct defendant was before it, and from then onwards, the identity of the defendant was no longer in issue. The order dismissing the special plea was final in effect, and accordingly it was not competent for the trial court to revisit it when it considered the merits. In relation to that issue, the trial court had become *functus officio* as its authority over the subject matter had ceased.'[14] (Footnotes omitted.)

[12] This is therefore a third case from the Limpopo Division in which it appears that there is some difficulty in applying the principle of *res judicata*. If not corrected, Mdhluli AJ's order could have practical implications for coherence in the workings of the Limpopo Division as it could be followed in the future, unless another Judge considers it to be clearly wrong (which it is). It therefore behoves this Court to reiterate the need to observe the doctrine of *res judicata* and the importance of doing so. On these considerations, we exercise our discretion to hear the appeal, despite its mootness.

[13] It is clear from the record that the 're-enrolled urgent application' that served before Mdhluli AJ was identical, in respect of the parties and the cause of action, to the application that had been finalised by Muller J in his judgment delivered barely 5 days earlier, on 11 January 2023. There is no debate that Muller J's order was final, the learned Judge having considered the merits of the application and having dismissed it. It had the three attributes identified in *Zweni v Minister of Law and Order*[15] as it was: (a) final in effect and not susceptible to alteration by the high court; (b) definitive of the rights of the school and Mr Maluleke; and (c) dispositive of the relief claimed by the school. The common cause facts clearly indicate that Mdhluli AJ was alive to this fact when entertaining Mr Maluleke's 're-enrolled urgent application'.

[14] It is not clear from Mdhluli AJ's judgment as to the basis upon which she considered herself competent to hear the application, especially in the light of the defence of *res judicata* being raised before her on behalf of the school.[16] Not anywhere in her judgment does the learned Acting Judge refer to Muller J's earlier order dismissing the application. In a perfunctory *ex tempore* judgment, Mdhluli AJ referred

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[14] Ibid para 16.
[15] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 536B; [1993] 1 All SA 365 (A) at 368. Although the *Zweni* test has undergone some modifications over the years, those relate mainly to whether, in a particular case, the order is appealable. That does not arise in the present case.
[16] *Tzundzuka Kevin Maluleke obo KK v The Board of Governors of Mitchell House School and Others*, (Limpopo Division of the High Court, Polokwane, Unreported case no: 68/2023 (2023-01-16)).

to s 28(2) of the Constitution[17] regarding the interests of minor children, and to the contractual disputes between Mr Maluleke and the school. She then alluded to possible irreparable harm to the child should she not intervene. The learned Acting Judge concluded as follows:

'What gives me comfort . . . is that both parties agree that the order of 23 September 2021 spoke of the children staying at the school pending the 6883, which both parties have confirmed or record that is still to be determined. As a result, this court finds that the minor child [KK] who is doing grade 8 must be able to return to school on the strength of the order of 23 September 2021, which this court is also extending based on what it heard this afternoon. That will be the order of this court.'

[15] It seems, with respect, that Mdhluli AJ misconstrued her powers in respect of the application before her. She predicated her judgment on the interests of the children. But, as mentioned, Muller J had considered that issue in his judgment, despite which he dismissed the application. By traversing the issue again, Mdhluli AJ impermissibly positioned herself as a court of appeal over Muller J's judgment. The fact of the matter is that the very same application, involving the same parties and the same cause of action, had already been decided by Muller J. Accordingly, the matter was *res judicata*. The high court was *functus officio* and Mdhluli AJ had neither the jurisdiction nor the competence to entertain the 're-enrolled urgent application'. She erred in doing so. The appeal should accordingly succeed.

Costs

[16] Costs should follow the result. The ordinary rule is that the successful party is awarded costs on the scale as between party and party. Counsel for the school contended in his heads of argument that costs should be ordered against Mr Maluleke on a punitive scale of attorney and client. It is that issue that requires determination, to which we turn. About costs on an attorney and client scale, the following was stated in *Nel v Davis*:[18]

'A costs order on an attorney and client scale is an extra-ordinary one which should not be easily resorted to, and only when by reason of special considerations, arising either from the circumstances which gave rise to the action or from the conduct of a party, should a court in a

[17] Section 28(2) of the Constitution provides that '[a] child's best interests are of paramount importance in every matter concerning the child'.
[18] *Nel v Davis N O and Another* [2016] ZAGPPHC 596; [2017] JOL 37849 (GP).

particular case deem it just, to ensure that the other party is not out of pocket in respect of the expense caused to it by the litigation.'[19] (Footnotes omitted.)

[17] Mr Maluleke's application was not properly before court for the simple reason that it was re-enrolled based on an affidavit that should never have been allowed by the high court. There is no indication on record that he had sought and was granted leave by the court to file this affidavit.[20] As a legal practitioner Mr Maluleke must have known that his application was not properly before court. Furthermore, the conduct of Mr Maluleke resulted in the school receiving two conflicting judgments from Judges of the same Division, within the space of five days, which could lead to confusion on the part of legal practitioners. It is unbecoming of legal practitioners to conduct themselves in the manner Mr Maluleke did. His conduct is reprehensible, and worthy of a punitive costs order – both in this Court and in the high court.

Order

[18] In the circumstances the following order is made:

1 The appeal is upheld with costs on the attorney and client scale.

2 The order of the high court is set aside and replaced with the following:

'The application is struck from the roll with costs on the attorney and client scale.'

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T MAKGOKA

JUDGE OF APPEAL

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N E CHILI

ACTING JUDGE OF APPEAL

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[19] Ibid paras 25-26, affirmed by the Constitutional Court in *S S v V V-S* [2018] ZACC 5; 2018 (6) BCLR 671 (CC) para 39.

[20] See rule 6(5)*(e)* of the Uniform Rules of Court. See also *James Brown & Hamer (Pty) Ltd (Previously named Gilbert Hamer & Co Ltd) v Simmons NO* 1963 (4) SA 656 (A) at 660D-H; *Hano Trading CC v JR 209 Investments (Pty) Ltd* [2012] ZASCA 127; 2013 (1) SA 161 (SCA); [2013] 1 All SA 142 (SCA) paras 13-14.

On record:	
For appellants:	
Heads of Argument:	HF Marx
Instructed by:	Ehlers Law Incorporated, Polokwane
	Symington De Kok Attorneys, Bloemfontein
For respondent:	
Heads of Argument:	In person
Attorneys:	Ntsako Phyllis Mbhiza Attorneys, Pretoria
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