THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case Nos: 237/08 and 467/08

J H JANSE VAN RENSBURG NO	1st Appellant
P FOURIE NO	2nd Appellant
J L LUBISI NO	3rd Appellant
L M MALATSI-TEFFO NO	4th Appellant
E M MOTALA NO	5th Appellant
RM KGOSANA NO	6th Appellant

and

A J STEENKAMP	1st Respondent
N J JANSE VAN RENSBURG	2nd Respondent

AND

J H JANSE VAN RENSBURG NO	1st Appellant
P FOURIE NO	2nd Appellant
J L LUBISI NO	3rd Appellant
L M MALATSI-TEFFO NO	4th Appellant
E M MOTALA NO	5th Appellant
RM KGOSANA NO	6th Appellant

and

J J MYBURGH	1st Respondent
D M VAN DER MERWE	2nd Respondent
J P VAN DER WESTHUIZEN	3rd Respondent

Neutral citation: *Janse van Rensburg NO v Steenkamp* (237/08 and 467/08) [2008] ZASCA 154 (27 November 2008)

Coram: FARLAM, CAMERON, MTHIYANE, HEHER JJA and KGOMO AJA
Heard: 14 NOVEMBER 2008
Delivered: 27 NOVEMBER 2008
Corrected:
Summary: Practice – *res judicata* – liquidators' reliance on different sections of Insolvency Act 24 of 1936 in consecutive proceedings to set aside dispositions – not giving rise to issue estoppel – reliance on 'once and for all' rule – not justified.

ORDER

On appeal from: High Court, Pretoria (Basson, Mavundla JJ and Sithole AJ sitting as court of first instance, in appeal 237/2008; Murphy J similarly, in appeal 467/2008).

1. The appeals succeed in Appeal Nos 467/2008 and 237/2008.

2. The orders of the courts *a quo* are set aside.

3. For the order made in case no 18109/2005 there is substituted the following order:

‘ 1. An order is made in terms of paragraphs 1 and 2 of the notice of motion.

2. The respondents are ordered to pay the costs jointly and severally, the one paying the other to be absolved, including the costs of two counsel where employed.’

4. The respective orders made in case nos 14010/2005, 14428/2005 and 18764/2005 are substituted by the following orders:

‘ 1. The special pleas of *res judicata* and *lis alibi pendens* are dismissed.

2. The defendants are ordered to pay the costs jointly and severally the one paying the others to be absolved, including the costs of two counsel where employed.’

5. The costs of the respondents Steenkamp, Myburgh and Van der Merwe in their respective appeals are to be costs in the estate in liquidation. The respondent Van der Westhuizen is to pay the costs of the liquidators in respect of his appeal. No order is made in respect of the respondent Janse van Rensburg.

6. Any party aggrieved by the orders for costs may, within fifteen days after this judgment is delivered, on notice to all other parties, apply to be heard on the question of such costs.

JUDGMENT

HEHER JA (Farlam, Cameron, Mthiyane JJA and Kgomo AJA concurring):

[1] There are two appeals before us. In both the appellants are the liquidators of those entities through which the notorious Krion scheme was operated.[1]

[2] The common question is whether the liquidators should be permitted to proceed with actions against the respondents in reliance upon s 26 or s 29 of the Insolvency Act 24 of 1936 or whether they are barred from so doing by reason of their failed reliance on s 30 of that Act in the *Fourie* case and the order made on appeal there pursuant to s 26.

[3] There are five respondents, Messrs Steenkamp and Janse van Rensburg (in Appeal no 237/2008) and Messrs Myburgh, Van der Merwe and Van der Westhuizen (in Appeal no 467/2008).

[4] After judgment was delivered by this Court in the *Fourie* case all the respondents were served with civil summonses issued on behalf of the liquidators. The grounds of each action were substantially the same: the liquidators claimed an order in terms of s 26 setting aside dispositions made without value prior to six months before date of liquidation and an order in terms of s 29 setting aside dispositions made within six months of that date which had the effect of preferring the respondent above other creditors and payment of the amounts of the said dispositions.

1 For particulars of which see *Fourie and others v Edeling and others* [2004] ZASCA 28 (1 April 2004); [2005] 1 All SA 393 (SCA).

[5] All the respondents pleaded to the claims. They placed in issue the right of the

liquidators to rely on either s 26 or 29 because of the judgment in the *Fourie* case and raised defences of *res judicata*, issue estoppel and *lis pendens* and 'election' (ie a combination of a decision taken prior to or during the *Fourie* litigation to found their claims on ss 26 and 30 to the exclusion of s 29 and an averment that the plaintiffs were bound to invoke all their remedies in one action).

[6] The present respondents were by no means the only objects of the liquidators' attention since the numbers of summonses issued exceeded 6000. Anticipating similar wide-spread resistance to their claims the liquidators were naturally disinclined to proceed further without testing the strength of the defences. After negotiation with attorneys representing Steenkamp they launched motion proceedings in the Pretoria High Court (under Case No 18109/2005) against him in which they claimed substantive relief in the following terms:

'1. It be declared that the Applicants (namely the liquidators of MP Finance Group CC (in liquidation)) are entitled to institute a claim against the defendant in terms of Section 29 of the Insolvency Act, 24 of 1936 (as amended) and are not precluded from doing so by the judgment of the Supreme Court of Appeal under SCA case number 522/2003.

2. It be declared that the fact that the Respondent may have been a party to proceedings under Transvaal Provincial Division case number 1288/03 does not preclude the Applicants from instituting a claim against the Respondent in terms of Section 29 of the Insolvency Act, 24 of 1936 (as amended), in this matter.'

[7] During the course of the proceedings Janse van Rensburg was joined as a respondent at his request. He traversed a number of additional defences in his answering affidavit which had no bearing on the scope of the intended test case. In its judgment the court *a quo* did not deal with the merits of those defences, a number of which were patently at odds with aspects of the judgment in *Fourie's* case.

[8] The application was argued on the basis of a statement of common-cause

facts:

'1. The Applicants are the liquidators of the Krion scheme – the consolidated entity referred to as MP Finance Group CC.

2. The Krion scheme was at all relevant times insolvent in that its liabilities exceeded its assets.

3. The scheme made certain dispositions to the Respondent and the relevant dispositions by the scheme were made within the period of six months before the date of winding-up.

4. The winding-up occurred on 4 June 2002.

5. The scheme was unlawful.

6. The dispositions made by the scheme were not made in the ordinary course of business.

7. The deposits by and payments to the Respondent are as set out in paragraph 14.2 of the founding affidavit.

8. Some depositors (also participants in the scheme) received payments during the six-month period, while others did not.

9. Case number 1288/03 did not deal with Section 29 claims and neither the Transvaal Provincial Division judgment nor the judgment of the Supreme Court of Appeal dealt with or referred to section 29.

10. A portion of the Applicants' claim against Respondent is made in terms of Section 29.'

[9] The court *a quo* made the following order:

'46.1 The applicants [the liquidators] are not entitled to institute a claim against the respondents in terms of Section 29 of the Insolvency Act and are precluded from doing so by the judgment of the Supreme Court of Appeal in *Fourie N.O. and others v Edeling N.O. and others* [2005] All SA 393 (SCA) *per* Conradie JA.

46.2 The fact that the respondents may have been party to proceedings in the Transvaal Provincial Division case number 1288/2003 precludes the applicants from instituting a claim against the respondents in terms of Section 29 of the Insolvency Act.

46.3 The application for a declarator is dismissed.

46.4 The applicants are to pay the respondents' costs, including the costs of two counsel.'

[10] The actions instituted by the liquidators against Myburgh, Van der Merwe and Van der Westhuizen proceeded to trial in the Pretoria High Court. The parties

agreed that all three should be decided together according to the issues raised in the (identical) special pleas without the assistance of evidence. In a carefully considered judgment Murphy J upheld the special plea of *res judicata* and dismissed the liquidators' actions with costs including those of two counsel.

[11] Both courts granted the liquidators leave to appeal to this Court. Before us the respondents Steenkamp, Myburgh and Van der Merwe were represented by Mr Strydom and Mr Van Tonder while Mr Van der Merwe appeared for Van der Westhuizen. There was no appearance for Janse van Rensburg. There was a substantial over-lapping of arguments for the respondents but it will not be necessary to distinguish between them for the purpose of reaching a decision.

[12] Because the judgments of the lower courts and the submissions on appeal proceeded on the basis of what this Court decided in the *Fourie* appeal, it will be appropriate to summarise briefly the main aspects of that judgment.

[13] *Fourie* was an appeal from a judgment of Hartzenberg J. The order made by the learned judge (in its final form) directed as follows:

'1. It is declared that the investment scheme [concluded] by Marietjie Prinsloo (formerly Pelser) during the period 1998 to June 2002 under various names including M P Finance Consultants CC, Madikor Twintig (Pty) Ltd, Martburt Financial Services Limited, M & B Ko-operasie Beperk and Krion Financial Services Limited ("the investment scheme") was at all material times from and after 1 March 1999, insolvent in that its liabilities exceeded its assets.

2. All contracts concluded between the investment scheme and investors in the scheme were illegal and null and void.

3. All actual payments from and after March 1999 by the aforesaid investment scheme to investors including the second and further respondents in so far as they exceed the investment of each particular investor are set aside as dispositions by the scheme to investors at times when its liabilities exceeded its assets with the intention of preferring the particular investor above other investors in terms of section 30 of the Insolvency Act, provided that a reinvestment is not to be

regarded as a payment and that the right of investors to rely on the provisions of section 33 of the Insolvency Act is in no way affected by this order; what is to be regarded as a re-investment is to be determined objectively in each case.

4. An inquiry is ordered into the details of the amounts of the aforesaid payments and the examination and investigation provisions of paragraph 38 of the scheme of arrangement[2], sanctioned on 22 November 2002 under case number 27035/2002, shall apply *mutatis mutandis* for the purposes of this inquiry.

5. The applicants may set the matter down for judgment against any investor, at any time, on the same papers, duly supplemented by evidence, as to the *quantum* of the claim.'

[14] The appeal in *Fourie* by the liquidators and the investor representative was limited to the order as I have quoted it. The investor respondents were in effect granted leave to cross-appeal against the order before the amendment of para 3 thereof. This Court held (per Conradie JA) that:

1. Service of the application in the court *a quo* on the overwhelming majority of investors 'fell gravely short of what would have been required to ensure that the investors receive a fair trial' (at para 21).

2. The investors' representative had not been competent to represent the investors or make admissions on their behalf (at para 11).

3. The appeal should be decided only on such factual material as was common cause between the parties to it (at para 13).

4. The gains derived by the investors from the Krion scheme were illegal and the investors could not retain them (at para 16).

5. The evidence did not establish that the gains made by the investors were paid to them with an intention to prefer one creditor above another any more than the investments were repaid with that intention and reliance by the liquidators (and the court *a quo*) on s 30 of the Act had therefore been misplaced (at para 16).

2 Para 38 of the scheme provided as follows:
'In order to limit the issues in dispute in the action, the liquidators and *investor* representative and their respective attorneys shall at the cost of the estate examine the books and records of M P Finance and conduct such further investigations as may reasonably be necessary with a view to verifying and reaching agreement on the particulars of the various transactions between M P Finance and investors. The liquidators are authorised to grant the *investor* representative unrestricted access to the books and records of M P Finance.'

6. Repayment of an investor's capital was not a disposition without value since the

investor had the right to recover such payment by condiction (paras 13, 19).

7. The court *a quo* could and should have made an order under s 26 in respect of profits, ie amounts paid to investors over and above repayment of capital contributions, because such payments had been made in pursuance of an illegal scheme, were themselves illegal and, therefore, not made for value (para 17 and Order 3).

8. Impliedly, the declaratory order issued would be binding on those respondents who defended the proceedings but not upon the general body of investors upon whom service was effected by publication of a rule *nisi*[3] (para 21).

[15] At para 22 of the *Fourie* judgment this Court said:

'Section 32(3) of the Insolvency Act is in these terms-

"When the court sets aside any disposition of property under any of the said sections [which include s 26], it shall declare the trustee entitled to recover any property alienated under the said disposition or in default of such property the value thereof at the date of the disposition or at the date on which

the disposition is set aside, whichever is the higher".

Para 5 of the order confirming the rule envisages recovery proceedings. Any investor against whom

such recovery proceedings are brought would be free to maintain that he or she is, for lack of notification or by reason of having been misled by the terms of the publication, not bound by the order of Hartzenberg J. It may be that fresh setting aside proceedings against such an investor would then have to be combined with the recovery proceedings. It seems unlikely that it will come to this since an investor would have to deny that the gains paid out by the scheme were dispositions without value, a proposition that has not been challenged by any of the parties and one that I consider to be correct.'

[16] The order (in so far as is now relevant) that this Court made in the *Fourie*

3 Which included the respondents in the present appeal.

appeal was the following:

‘ A. The appellants’ and the first respondent’s appeals are dismissed with costs that include the costs of two counsel.

B. The cross-appeals of the third, fourth and fifth respondents succeed with costs that include

the costs of two counsel. Paragraph 3 of the order is set aside and replaced by the following paragraph:

“3. All actual payments, whether as profit or interest, from and after 1 March 1999 by the aforesaid investment scheme to the second, third, fourth, fifth and further respondents, in so far as they exceed the investment of each particular investor are set aside, under s 26 of the Insolvency Act as dispositions without value by the scheme to investors at times when its liabilities exceeded its assets, provided that the right of investors to rely on the provisions of s 33 of the Insolvency Act is in no way affected by this order.”’

[17] Murphy J interpreted the judgment and order in *Fourie* as embodying a final judgment binding upon the general body of investors until set aside. I am by no means sure that that is the right construction to place on it[4]. In addition each of the respondents in the present appeal initially denied that he had received notice of the proceedings in *Fourie* or was bound by the judgment. Thereafter, almost certainly for reasons of expediency, all ‘elected’ to be bound. I doubt that such an *ex post facto* submission can render a judgment not otherwise binding *res judicata* as against them or the other parties involved. But as these issues were not fully argued before us I am content to leave them open and to decide the appeal on the basis argued by the respondents, *viz* that each of the parties to the present appeals was also a party to *Fourie*.

[18] Murphy J held that the action before him related to the same subject matter (*eadem res*) and the same cause of action (*eadem petendi causa*) as those determined in *Fourie*. He upheld the plea of *res judicata* but limited the

4 I particularly have in mind such cases as *Dada v Dada* 1977 (2) SA 287 (T) and the authorities cited there (at 288C-F).

liquidators' exercise of the recovery process under s 32(3) of the Act to the recovery of actual payments of profits in the relevant period according to the procedure mandated in para 4 of the order of Hartzenberg J. He also found that the 'once and for all' rule (about which more below) applied to the institution of the liquidators' actions under s 29 and barred such actions. Counsel for the respondents adopted his reasoning. By contrast counsel for the liquidators submitted that a cause of action arising from s 29 was not the same as one derived from either s 26 or 30, that the Court in *Fourie* was not called upon to pronounce on s 29 and did not do so and, further, that there was no issue common to the proceedings which would justify an application of the principles of issue estoppel. They contested the appropriateness of the 'once and for all rule' in the context of the present appeals.

[19] As I understood the respondents' counsel (and as I interpret the judgment of Murphy J) they concede that *res judicata* in its classic formulation does not apply. That concession is obviously justified because a simple comparison of the elements of each section shows no commonality of cause of action. The legislation was clearly designed to provide remedies sufficient to meet the different circumstances envisaged in each of the sections. But, so they argue, *eadem petendi causa* bears a more flexible meaning which embraces issue estoppel; and the common issue between secs 29 and 30 is an intention to prefer, a matter that was resolved, finally, against the liquidators in the *Fourie* judgment. (The last leg of the contention is, as I have noted, correct.) But even if the flexibility of the doctrine proves inadequate, a proper application of the once and for all rule will, they submit, bring their clients home.

[20] The application of the principles of *res judicata* in the form of issue estoppel was discussed in *Kommissaris van Binnelandse Inkomste v Absa Bank*

Bpk 1995 (1) SA 653 (A) at 666D-670C. This Court affirmed that the source of the finding by Greenberg J in *Boshoff v Union Government* 1932 TPD 345 (that in order to uphold a defence of *res judicata* the cause of action need not be precisely the same in both actions) lay in our own common law authorities rather than English law and that 'Voet's example' [concerning reliance on the *actio redhibitoria* and the *actio quanti minoris* as the same causes] 'and the acceptance by Greenberg J of a broader meaning of *petendi causa* both carry the necessary implication that for a defence of *res judicata* it is not an immutable requirement that the same thing must be claimed.' (My translation.)

[21] Botha JA nevertheless added the following cautionary remarks in opposition to the suggestion that South African courts have taken over the English doctrine of 'issue estoppel' lock, stock and barrel (at 669F-670C):

'Consequently it is inappropriate to posit that this Court should decide whether the doctrine of issue estoppel has become part of our law. The question simply does not arise. The true meaning of *Boshoff v Union Government* is that the judgment has the effect that the strict requirements of the common law for a defence of *res judicata* (in particular, *eadem res* and *eadem petendi causa*) should not be understood literally in all circumstances and applied as inflexible rules, but there is room for adaptation and extension, according to the basic requirement of *eadem quaestio* and the *ratio* of the defence. Seen in this light, there can, I think, be no reason in principle to fault the approach of the court in *Boshoff v Union Government*. The unacceptable alternative would be to cling with literal formalism to propositions in the old authorities, which would be at odds with the vigorous development of the law to provide for the demands of novel factual situations. It is however inappropriate to express an opinion on the question as to whether the actual outcome was satisfactory on the facts of that case, because the facts of the present matter, are, as will presently appear, wholly different. Each case must be decided according to its own facts. It is not practical to try to formulate guidelines in abstract terms which can be made applicable to all situations. For example, one of the facts in *Boshoff v Union Government* was that default judgment was taken in the previous case. From a passing remark of Greenberg J at 351 it appears that that fact was not raised by the plaintiff in answer to the defence of *res judicata*. In a future case it may well be necessary to consider whether it is

advisable to recognise an extended application of the defence in such circumstances. But it is not for this Court to reflect on that question in the present case because it does not arise here. We have to deal with a particular set of facts to which the court *a quo* applied the line which was taken in *Boshoff v Union Government* and which was followed in a series of cases afterwards. That direction, as I have tried to show, is not of itself objectionable in principle. Our task is merely to determine whether its application to the present facts is justified.' (My translation.) '

[22] Finally, in rejecting the submission that the parties were bound by a general practice in respect of something not in issue in earlier proceedings and about which it had been unnecessary to make a finding, Botha JA said (at 676B):

'To allow the defence of *res judicata* in the form of issue estoppel in these circumstances, would be to go further than has previously happened, whether in cases at provincial level or in England. It would be unfair to the Commissioner and run counter to the considerations of fairness which underpin such a defence. The common law requirements of the defence of *res judicata* were strictly circumscribed, precisely to avoid injustice (see eg *Bertram v Wood* [(1893) 10 SC 177 at 180)]. Considerations of fairness are also of decisive importance in the application of issue estoppel in the English case-law (see eg *Re State of Norway's Application (No 2)* [[1989] 1 All ER 701 (CA) at 714j]. Consequently the possibility of extending the principles of *res judicata* to any particular case of issue estoppel must be approached with great circumspection..' (My translation.)

[23] The question arose once more in *National Sorghum Breweries Ltd (t/a Vivo African Breweries v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA). Olivier JA (writing for the majority) referred to the previous authorities but limited his formulation of the question before the court to the following statement (at 239H-I):

'[3] The fundamental question in the appeal is whether the same issue is involved in the two actions: in other words, is the same thing demanded on the same ground, or, which comes to the same, is the same relief claimed on the same cause, or, to put it more succinctly, has the same issue now before the Court been finally disposed of in the first action?'

[24] In *Smith v Porritt* 2008 (6) SA 303 (SCA) at 307J Scott JA summarised the

law:

'[10] Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio rei judicata* has over the years been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of *res judicata* is raised in the absence of a commonality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 669D, 670J-671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of *res judicata*. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis. (*Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* (supra) at 670E-F.) Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others. As pointed out by De Villiers CJ as long ago as 1893 in *Bertram v Wood* (1893) 10 SC 177 at 180, "unless carefully circumscribed, [the defence of *res judicata*] is capable of producing great hardship and even positive injustice to individuals".'

[25] It is apparent that the first duty of the Court is to compare the relevant facts of the two cases upon which reliance is placed for the contention that the cause of action (in the extended sense of an essential element) is the same in both.

[26] As I have noted, counsel for the respondents submitted that the essential element common to both ss 29 and 30 is the intention of the insolvent to prefer; in order for the liquidators to rely on s 29 they would now have to deny the finding in *Fourie* that no such intention existed. I disagree. Such a denial is not necessary to found an action based on s 29 and indeed, the liquidators have not

contradicted that finding in the actions instituted against the respondents. They needed only to allege and prove a disposition which 'had the effect of preferring one creditor above another'. It is true that the defendants were entitled to and did plead that the insolvent had no such intention. That, however, was of itself insufficient to meet the liquidators' case in full. The defendants had also to plead and prove that the assailed disposition was made in the ordinary course of business. So, although the finding of absence of intention in *Fourie* created an issue estoppel to that limited extent and the liquidators would not be permitted to counter the respondents' averment that such intention was absent, that minor triumph will not avail the respondents, because a plea of *res judicata* (whether in its classical or extended form) cannot succeed unless it nullifies the legal force of the cause of action (put otherwise, it cannot be raised successfully if it leaves the plaintiff with a viable cause of action). That being the result here, the respondents did not, on the first ground, set up a sustainable answer to the relief claimed by the liquidators.

[27] The scope of the 'once and for all' rule was said in the *National Sorghum* case at 241D-E to require that all claims generated by the same cause of action be instituted in one action. As I have already found that the respective sections do not create the same cause of action, even in the extended sense, it is difficult to justify the applicability of the rule to the facts of these appeals. Murphy J was however persuaded by a dictum from *Henderson v Henderson* (1843) 3 Hare 100 at 114-115, [1843-1860] All ER Rep 378 at 381-2 (and the Full Court in Case No 18109/2005 agreed with him), as follows:

'In trying this question, I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the

subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable dilgence, might have brought forward at the time.'

[28] Murphy J expressed the view (in concurrence with that of Blignaut J in *Consol Glass v Twee Jonge Gezellen* (2) 2005 (6) SA 23 (C) at 46H) that 'the *Henderson* principle' is not in conflict with the approach of Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk (supra)* and that 'logic and equity will justify its application in appropriate cases'. While that may be so, I think that any such application must depend on an understanding of its true foundations.

[29] In *Arnold v National Westminster Bank plc* [1991] 3 All ER 41 (HL) at 48j Lord Keith pointed out that, although Henderson's was a case of action estoppel, the statement of the law has been held to be applicable also to issue estoppel. The learned law lord had earlier referred (at 48e) to *Brisbane City Council v A-G for Queensland* [1978] 3 All ER 30 (PC) at 35-36; [1979] AC 411 at 425, where Lord Wilberforce said

'The second defence is one of res judicata. There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, [1843-60] All ER Rep 378 and its existence has been reaffirmed by this Board in *Hoystead v Taxation Comr* [1926] AC 155, [1925] All ER Rep 56. A recent application of it is to be found in the decision of the Board in *Yat Tung Co v Dao Heng Bank* [1975] AC 581. It was, in the judgment of the Board, there described in these words (at 590): ". . . there is a wider sense in which the doctrine may be appealed to, so that it becomes an

abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings." This reference to "abuse of process" had previously been made in *Greenhalgh v Mallard* [1947] 2 All ER 255 at 257 per Somervell LJ, and their Lordships endorse it. This is the true basis of the doctrine and it ought only to be applied when the facts are such as to amount to an abuse, otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation.'

[30] I respectfully agree. The identification with abuse of the process accords with the policy expressed in the maxim *nemo debet bis vexari pro una et eadem causa* which underlies the principle of *res judicata*. As was said in the *National Sorghum* case (at 241D-E) the abuse arises when the same cause of action is raised against a defendant a second time. But what is to be noted from both the *Henderson* and *Brisbane City Council* cases is the additional emphasis on the facts of each matter, for how else should a court determine whether the conduct of a party has reached the level of being an abuse? That being so it is for the party who relies on the application of the rule pertinently to plead such reliance and lay a foundation in fact which would enable the opposing parties to deal with such reliance. In the context of the present appeal that required that the respondent had to lay a basis for barring the liquidators from carrying out what was prima facie their right and duty to employ the remedy created by s 29 of the Act. But I find no such evidence in the record of either appeal. On the contrary, the equities clearly favoured the liquidators in two important respects (which, being matters of common sense, arise from the proven facts). These are—

1. To uphold the plea would be to defeat an equitable redistribution among creditors of the estate because the liquidators were unduly cautious (or even mistaken) in enforcing their remedies consecutively rather than in a single action, and even though the defendants made no attempt to show that they would suffer any prejudice beyond the normal incidence of litigation.

2. The defendants were debtors of the estate who were unaware of the

proceedings against them in *Fourie* and took no part in defending those proceedings. That they should now receive the benefit of the judgment on the highly artificial basis that they choose to be bound by it would be absurd. Therefore, even if, as Murphy J found, all the elements of s 29 were 'points that properly belonged to the subject of the earlier litigation', that would not have been enough to justify invocation of the rule.

[31] The final matter which requires consideration is *lis alibi pendens*. In this regard Murphy J (whose approach was espoused by the respondents' counsel) said the following:

'48. In the light of that conclusion there is strictly speaking no need to determine the merits of the special plea of *lis pendens*. There may be some advantage though in making one or two observations about it in the hope of assisting the liquidators and the investors in bringing the process to finality. In paragraph 4 and 5 of his order Hartzenberg J established a recovery procedure that clearly met with the approval of the Supreme Court of Appeal, subject of course to the reservations just discussed. The plea of *lis pendens* is to the effect that the attempt to recover the gains from the investors by means of the present action duplicates unnecessarily that procedure. It would seem that in the earlier proceedings the plaintiffs were the ones who proposed the recovery procedure. The claims made in the reply that the freshly instituted actions are pursued as a matter of convenience and as a less costly process, frankly ring hollow. The appropriate course of conduct will be for the liquidators to proceed by the special recovery procedure.'

[32] While this approach possesses a superficial attraction it ignores a consideration which the liquidators have said, in the motion proceedings, played an important role in the decision to institute the actions, *viz* the serious reservations (to put the matter at its lowest) expressed by Conradie JA as to whether the general body of investors was truly involved in the *Fourie* case (as opposed only to their 'representative')and the offer his judgment extended to them to distance themselves from its consequences. The liquidators were

accordingly faced with the real problem that should they follow the recovery procedure ordered by Hartzenberg J (in itself derived from an agreement by the investors' representative which Conradie JA said the investors could not be held to) there was no certainty that that procedure would be effective against any of the investors or that any of them would recognise any of the findings by this Court in *Fourie*. For that reason alone the liquidators' decision to initiate actions under ss 26 and 29, making all necessary averments as if for the first time, was sensible and reasonable.

[33] There is a further respect which bears upon the reasonableness of the liquidators' conduct. The recovery procedure was inextricably bound up with the appointment and functions of the investors' representative, Mr Edeling. Following the *Fourie* judgment's expressions of doubt concerning the competence of any appointment of that nature and the adverse remarks relating to decisions taken by him, so we were informed by counsel, Edeling resigned. He purported to cede the investors' right to another umbrella body. He has not been replaced. Whether or not the special recovery procedure was capable of practical implementation without the role of the investors' representative was a matter of obvious concern to the liquidators. In the circumstances they could fairly believe that the interests of creditors would best be served by taking action afresh against individual debtors of the estate.

[34] Finally, in relation to *lis alibi pendens*, there are considerations of convenience and cost which favour the institution of the actions against individual debtors. Murphy J thought that the liquidators' argument 'rings hollow' but I do not agree with him. I quote from the heads of argument of their counsel before us:

'Case 1288/2003,in its entirety encompasses some 1 400 to 1 500 pages. If the procedure envisaged in paragraph 5 of the Hartzenberg J order were followed, it would mean that each one

of these pages would have to be copied and served on each of the defendants in each of the Krion matters. As appears from the papers some 6 000 claims have been instituted. That amounts to some 9 million pages. In terms of rule 70, an attorney can charge R1.25 (see rule 70 section D, item 1) per copy. That amounts to some R11 million. . . .". Furthermore, it could reasonably be expected that there would be a number of default judgments in the 6 000 matters instituted. In those circumstances the registrar of the High Court and/or a Judge of the High Court would be required to read 1 500 pages all of which however have been summarized in the 7 page particulars of claim. This waste of judicial time would hardly have been approved by the Courts. . . . [T]he institution of an action comprising some 7 page particulars of claim is the very contrary of vexatiousness. . . . It is aimed at saving costs.'

[35] *Lis alibi pendens* is a discretionary remedy. It requires a balance of the interests of the affected parties to achieve a fair result: cf *Van As v Apollus* 1993 (1) SA 606 (C) at 610D-G. Because of the failure of the lower courts to take the material considerations that I have identified in the preceding paragraphs into account, we may properly exercise the discretion ourselves. Since I can discern no particular inconvenience or disadvantage to an affected investor in having to face the liquidators in a trial action designed to recover assets for the benefit of creditors, the liquidators' decision should prevail. I therefore conclude that the plea of *lis alibi pendens* should not be sustained.

[36] The respondent Janse van Rensburg brought a counter-application for a declaration in Case No 18109/2005. The court *a quo* did not consider it or make a costs order relating to it. The liquidators' notice of appeal was not directed to either aspect. It is accordingly inappropriate for this Court to do so either, despite submissions made in the heads of argument for the liquidators seeking dismissal of the counter-application on grounds of non-joinder of the general body of investors in the scheme.

[37] The costs order which follows is derived from my understanding of the

substance of an agreement between certain of the parties (as it was communicated to the Court by appellants' counsel during the appeal hearing). *Ex abundante* I have added a rider based on dicta in *Estate Garlick v Commissioner for Inland Revenue* 1934 AD 499 at 505.

[38] In the result the following order is made:

1. The appeals succeed in Appeal Nos 467/2008 and 237/2008.
2. The orders of the courts *a quo* are set aside.
3. For the order made in case no 18109/2005 there is substituted the following order:

'1. An order is made in terms of paragraphs 1 and 2 of the notice of motion.

2. The respondents are ordered to pay the costs jointly and severally, the one paying the other to be absolved, including the costs of two counsel where employed.'

4. The respective orders made in case nos 14010/2005, 14428/2005 and 18764/2005 are substituted by the following orders:

'1. The special pleas of *res judicata* and *lis alibi pendens* are dismissed.

2. The defendants are ordered to pay the costs jointly and severally the one paying the others to be absolved, including the costs of two counsel where employed.'

5. The costs of the respondents Steenkamp, Myburgh and Van der Merwe in their respective appeals are to be costs in the estate in liquidation. The respondent Van der Westhuizen is to pay the costs of the liquidators in respect of his appeal. No order is made in respect of the respondent Janse van Rensburg.
6. Any party aggrieved by the orders for costs may, within fifteen days after this judgment is delivered, on notice to all other parties, apply to be heard on the question of such costs.

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J A HEHER
JUDGE OF APPEAL

APPEARANCES:

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FOR RESPONDENTS:	Steenkamp (in appeal 237/08), Myburgh and Van der Merwe (in appeal 467/08: T Strydom (with him T van Tonder) Van der Westhuizen (in appeal 467/08): M P van der Merwe No representation for Janse van Rensburg (in appeal 237/08).
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