IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 17/05/2007

CASE NUMBERS: 14428/2005
14010/2005

18764/2005
REPORTABLE

In the matters between:

JACOBUS HENDRIKUS JANSE VAN RENSBURG N.O. ..... **1st** Plaintiff
PHILLIP FOURIE N.O. ..... 2nd Plaintiff
JACOB LUCIEN LUBISI N.O. ..... 3rd Plaintiff
LILY MAMPINA MALATSI-TEFFO N.O. ..... 4th Plaintiff
ENVER MOHAMMED MOTALA N.O. ..... 5th Plaintiff
RABOJANE MOSES KGOSANA N.O. ..... 6th Plaintiff

(in their capacities as joint liquidators of MP FINANCE GROUP CC (IN LIQUIDATION)

and

JOHANNES JACOBUS MYBURGH ..... Defendant

(14428/05)

and

DANIËL MARIUS VAN DER MERWE ..... Defendant
(14010/05)

and

JACOBUS PETRUS VAN DER WESTHUIZEN..... Defendant
(18764/05)

JUDGMENT

MURPHY J

1. These matters involve a further round of litigation between the liquidators and some of the investors in the now notorious Krion Pyramid Investment Scheme. The scheme was described succinctly, but with customary eloquence, by Conradie JA in *Fourie N.O. and others v Edeling N.O. and others* [2005] 4 All SA 393 (SCA) at 394 as follows:

> "The audacity of its perpetrators and the credulity of its participants combined to produce a gargantuan fraud notoriously known as the Krion Pyramid Investment Scheme. It was operated from the beginning of 1998 and, as all these schemes do, collapsed when the inflow of funds could no longer sustain the outflow of extravagant returns to participants. Each participant on average "invested" in the scheme three times. Its turnover was some R1.5 billion. In order to throw regulatory authorities off the trail it was at one time or another conducted by entities called MP Finance Consultants CC, Madicor Twintig (Pty) Ltd, Martburt Financial Services Ltd, M & B Koöperasie Beperk and Krion Financial Services Ltd. The

way in which the scheme was conducted made it attractive for investors to invest for periods as short as three months. When the loan capital with "interest" was repaid at the end of the agreed investment period, the investor would more often than not reinvest the capital and interest. The advantage for the investor of doing business in this way was of course that his already enormous interest was compounded. Typically an investor would invest an amount in the scheme having been promised a return of 10% per month, capital and profit repayable within three months. Until the collapse of the scheme, investors received repayment of their capital and their profit when due. Sometimes an investor would leave the capital and/or the profit in the scheme and this would then have been reflected by means of a book entry as a payment and a new investment. Other investors would take their capital and profit on the due date, some of whom returned after a while to reinvest a similar amount."

2. The plaintiffs are the duly appointed liquidators of the estates of various entities, namely MP Finance Consultants CC (in liquidation); Krion Financial Services Limited (in liquidation); Martburt Financial Services Limited (in liquidation); Madikor 20 (Pty) Ltd (in liquidation) and M and B Co-operative Limited Partnership. The first to fourth plaintiffs were joint provisional liquidators in *Fourie N.O. and Others v Edeling N.O. and others*. The estates of the various entities have been consolidated into a

single estate by an order granted on 4 February 2003 and the consolidated estate has been referred to in litigation since then consistently as the "Krion Scheme". The fifth and sixth plaintiffs have joined the first to fourth plaintiffs as the confirmed liquidators of the consolidated scheme.

3. The defendants, were investors in the scheme, and were cited in *Fourie N.O. and others* as respondents. When I reserved this judgement after hearing argument on 18 April 2007, only the case of the plaintiffs against JJ Myburgh, case number 14428/05 was before me. Subsequently, two other matters involving the plaintiffs and two further investors were allocated to me on 26 April 2007, namely case number 14010/05 in which the defendant is Mr DM van der Merwe and case number 18764/05 in which the defendant is Mr JP van der Westhuizen. During discussions held with counsel of all parties in chambers the parties were unanimous that I should decide all three actions simultaneously because the issues for determination in terms of the special plea filed by the defendants in each case are identical.

4. It is common cause that the Krion Scheme conducted business in contravention of the provisions of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988 in that it constituted a multiplication scheme as

defined in Government Notice 1135 of 9 June 1997 by offering an annual interest rate to investors in excess of 20% above the repo rate as determined by the South African Reserve Bank and declared illegal in terms of section 12 of that Act. It is furthermore common cause that the scheme conducted the business of a bank in contravention of section 11(a) of the Banks Act 94 of 1990. The defendants do not deny that the scheme was a fraudulent scheme and admit that it has been declared unlawful by various orders of court. Finally, it is also common cause that the scheme has been declared to have been insolvent from 1 March 1999, by virtue of its liabilities exceeding its assets.

5. The defendants participated in the scheme, along the lines described by Conradie JA in the passage cited above, in accordance with a purported agreement in terms of which the defendants would pay over funds to the scheme from time to time which funds would be held and employed by the scheme, which would in turn pay the defendants interest on the sums invested at a rate of at least 10% per month.

6. In terms of quantification reports annexed to the particulars of claim, the defendants received amounts in excess of their investment in the scheme. The amounts received by the defendants from the scheme, according to the plaintiffs, exceeded their investments by various amounts representing

their profit earned by investing in the scheme. The defendants have admitted participating and investing in the scheme but denied the quantification of the capital and interest amounts and put the plaintiffs to the proof thereof.

7. The plaintiffs' cause of action, as set out in the particulars of claim, is that to the extent that payments to the defendants prior to the six months before date of liquidation exceeded the amount deposited by the defendants such payments constituted dispositions not for value in terms of section 26 of the Insolvency Act 24 of 1936 and are hence repayable by the defendants. It is alleged further that to the extent that any payment to the defendants was made within the last six months before the date of liquidation, such had the effect of preferring the defendants above other creditors and is liable to be set aside under section 29 of the Insolvency Act and is repayable. The plaintiffs thus seek the setting aside of the payments in terms of section 26 and section 29 and orders directing the defendants to repay the amounts together with interest *a tempore morae* to the date of payment.

8. With regard to the merits of the claim, the defendants have pleaded that throughout their participation in the scheme they had no knowledge of the unlawfulness of the scheme and were under the impression that its

activities were lawful. They however conceded that any payment made in excess of the investment within the relevant time period may be set aside in terms of section 26 of the Insolvency Act but denied ever having received any amount in excess of their investment and thus that they are liable to make any payments to the plaintiffs.

9. The defendants also raised three special pleas, namely *res judicata*, *lis pendens* and what they termed "election". Additionally, in the final paragraphs of the plea they further pleaded issue estoppel.

10. When the matter was enrolled before me on 18 April 2007, the defendant in case 14428/05 made application in terms of rule 33(4) for a separation of the questions raised by the special pleas from the merits. After hearing argument, I ruled that it was convenient to decide the special pleas before any evidence was led. After hearing the submissions of the parties regarding the special pleas, I reserved judgement and stayed the proceedings until the determination of the special pleas, at which point, if necessary, further directions could be given. With regard to the two other actions the parties agreed, presumably in the light of my ruling, that separation was appropriate.

11. The special pleas of *res judicata*, *lis pendens*, "election" and estoppel

arise in consequence of the proceedings and decision in *Fourie N.O. and others v Edeling N.O. and others* and relate to the facts and issues decided there. It is therefore necessary to give careful consideration to what was decided in that case. Much of what follows is spelt out in the reported judgement of Conradie JA, but it will assist in understanding this dispute to repeat the salient history in some fullness.

12. On 28 February 2003 Hartzenberg J made an order confirming in part a rule *nisi* issued pursuant to an application launched by the provisional liquidators of the scheme for orders under sections 26 and 30 of the Insolvency Act. He declared that the investment scheme was at all material times (from and after 1 March 1999) insolvent in that its liabilities exceeded its assets and that contracts concluded between the scheme and the investors in the scheme were illegal and null and void. The relevant part of the order reads as follows:

> "1. It is declared that the investment scheme [concluded] by Marietjie Prinsloo (formely Pelser) during the period 1998 to June 2002 under various names including MP Finance Consultants CC, Madikor Twintig (Pty) Ltd, Martburt Financial Services Limited, M & B Ko-operasie Beperk en 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 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.
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, 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."

13. As is explained in the judgement of Conradie JA, paragraph 3 of the order gave rise to interpretational problems and the parties approached Hartzenberg J to seek clarification of its terms. The difficulty arose from the ambiguity of the expression "all actual payments" in the opening sentence of paragraph 3 of the order. It was not clear whether the learned judge had intended to set aside all payments to investors, including capital repayments or whether the order was restricted to only the gains (profit, interest or dividend) of each investor. There was consensus, however, on all sides that 'book-entry type reinvestments" that were simply rolled over in the scheme's books, not being actual payments, did not qualify as dispositions and were therefore untouched by the order. On 10 November 2003 Hartzenberg J issued an order amending paragraph 3 of the order of 28 February 2003 to read as follows (with the changes italicised).

> "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*."

The amended order made it clear that only the amount which exceeded the investment of each investor, that is the profit, gain or dividend, was set aside in terms of section 30(1) of the Insolvency Act and recorded that whether a reinvestment qualified as a new investment was to be determined according to the facts of each case.

14. At the same time Hartzenberg J granted leave to appeal and cross appeal with the practical effect that the first order became open for reconsideration before the Supreme Court of Appeal - see *Fourie N.O. and Others* at 396 para [8].

15. Conradie JA, on behalf of a unanimous court, concluded that Hartzenberg J had erred in setting aside the gains of each investor under section 30(1) of the Insolvency Act because there was no evidence that the gains were paid over with the intention to prefer one creditor above another any more than that the investments were repaid with that intention (at 400 para [16]). Section 30(1) deals with undue preferences and reads:

> "If a debtor made a disposition of his property at a time when his liabilities exceeded his assets, with the intention of preferring one of his creditors above another, and his estate is thereafter sequestrated, the court may set aside the disposition."

The provision stipulates no time frame, other than to provide that any intentional preference of a creditor at anytime when the debtor was insolvent is impeachable, the onus in that respect being on the plaintiffs.

16. In reaching the conclusion that no intention to prefer had been established on the evidence Conradie JA had some critical things to say about the first respondent in that matter, namely Edeling, the so-called "investor representative", who had been able to assume this fiduciary position despite shortly before having been struck from the roll of advocates. In order to prove that Prinsloo, the directing mind of the scheme, had the

intention to prefer one creditor above another, the liquidators relied upon a report from Edeling to the Master, dismissed by the appeal court as fatuous. The court was critical of his appointment not only because no legislation authorised the Master to make such appointment, but also because, given his striking off, Edeling should not have been entrusted with a fiduciary position and more importantly was faced with a significant conflict of interest which disqualified him from making any admission on behalf of the investors that Prinsloo had the intention to prefer some creditors above others. Thus the learned judge of appeal stated (at 398) :

> "Leaving aside that fact and the grave doubt whether the mandate given to the first respondent by investors was broad enough to permit him to make admissions on behalf of those whose agent he professed to be, the most fundamental objection to the first respondent's representation of a large body of scheme investors is that in discharging what was after all a fiduciary duty he was faced with a major conflict of interest between those investors who had lost money in the liquidation of the scheme and therefore were creditors of the scheme and those who were not."

17. On this basis the court considered that Edeling would not have had authority to act on behalf of the investors who had put money into the scheme, taken their gains and wisely not reinvested. As I will discuss

more fully later, Mr van Coller, who appeared for the plaintiffs, tried to make something of the appeal court's expressed reservations about Edeling to contend that the judgement in that matter was neither final nor binding upon some of the thousands of respondents who were served by substituted service. Suffice it for present purposes to say that whatever the full extent of the implications of the findings regarding Edeling's role, the court was not prepared to attach any weight to his claim that Prinsloo, acting for the scheme, had intended to prefer some creditors above others.

18. Therefore, choosing to ignore that evidence, the court relied exclusively on the common cause facts (as did Hartzenberg J) which supported a finding that the scheme's liabilities exceeded its assets on and after 1 March 1999. It held that the nature of the scheme dictated its insolvency, because the scheme had no assets of any importance and huge liabilities, all of which were due and payable (under the *condictio ob inustam causam*) and very few of which could be met except by incurring further liabilities. The lack of assets was the result of the scheme's use of the cash investments to meet the extravagant returns. However, the court held a liquidator cannot show an intention to prefer simply by proving insolvency and then seek to rely on an inference that the insolvent debtor must have intended the natural consequences of an act of disposal.

19. In considering whether an intention to prefer has been shown a court will consider all relevant facts including whether the insolvent at the time of the disposition contemplated insolvency and whether the insolvent's subjective dominant, operative or effectual intention in making the disposition was the intention to prefer, in the sense of resolving to disturb what would be the proper distribution of assets in insolvency (see *Pretorius N.O. v Stock Owners' Co-Operative Co Ltd* 1959 (4) SA 462 (A) at 472 E-G; *Cooper and another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) at 1206G; and *Gert de Jager Edms Bpk v Jone NO and McHardie NO* 1964(3) SA 325 (A) at 331 E-F). Relying on these principles applied to the evidence as shored up by the probabilities, Conradie JA concluded (at 400):

> "It seems that Prinsloo knew that continuing to make dispositions to creditors was the only way to give credibility to the scheme and so keep it afloat and that this was her dominant intention. She envisaged not the liquidation but the continuation of her fraudulent business."

20. Consequently, absent an intention to prefer, the transactions could not be set aside under section 30(1) and Hartzenberg J had erred to that extent. The court however held that an order could have been made under

section 26 of the Insolvency Act. Section 26(1) reads:-

> "Every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent-
>
> (a) more than two years before the sequestration of his estate, and it is proved that immediately after the disposition was made, the liabilities of the insolvent exceeded his assets;
>
> (b) within two years of the sequestration of his estate, and the person claiming or benefited by the disposition is unable to prove that immediately after the disposition was made, the assets of the insolvent exceeded his liabilities."

21. In *Estate Jager v Whittaker and another* 1944 AD 296, the then Appellate Division, dealing with the payment of usurious interest, held that no obligation of any sort to pay a higher rate of interest than that permitted by law can arise from a promise to pay a higher rate, with the result that such a promise is "a mere nullity", and any payment of such a higher rate in pursuance of such promise is in effect a donation, or disposition not made for value. Conradie JA hence concluded that any payment of a profit or interest to an investor would constitute a disposition not made for value. However, this proposition required a measure of qualification. Having accepted that a "repayment" of capital retained in the scheme by way of a book entry reinvestment did not qualify as a disposition, by the same token the "payment" of gains retained in the scheme could not be a disposition either. Only the *actual* payment of accumulated gains would be a disposition without value. The actual repayment of an investor's

capital was not a disposition without value because the investor's entitlement to sue under the *condictio* for unjustified enrichment prevented it from taking on that character. A disposition of capital to an investor must be considered to have been made in discharge of an obligation to return the illegal payment and would therefore have been made *for* value and not without value.

22. In a nutshell, only *actual* payments (as opposed to book entry reinvestments) of *gains* (as opposed to capital repayments) qualified as dispositions without value under section 26. Payments of either (that is capital or gains) did not constitute undue preferences under section 30(1) because the evidence on the probabilities failed to establish any intention to prefer on the part of Prinsloo.

23. The court accordingly set aside paragraph 3 of the order of Hartzenberg J and replaced it with the following:

> "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."

24. Against this lengthy, but necessary, rendition of the background to this dispute, it is possible to consider and determine the special pleas raised by the defendants in the present action. The pleas of *res judicata*, "election" and estoppel are in my opinion interwoven and will best be discussed together. I will return to the plea of *lis pendens* later.

25. The defendants' plea of *res judicata* is to the effect that they were among the further respondents sued by the same plaintiffs in *Fourie NO and others v Edeling NO and others*, that the plaintiffs' cause of action in the present case is the same as that in the *Fourie* case, involves the same subject matter and has been determined by the final judgement of the Supreme Court of Appeal which ordered that all actual payments of profit or interest made by the scheme to them as "further respondents", in so far as they exceeded their investments, were dispositions without value which could be recovered in terms of the recovery procedure stipulated in paragraphs 4 and 5 of the order of Hartzenberg J.

26. The plea of "election" pleaded by the defendants as a special plea is in fact more akin for the so-called "once and for all" rule that in principle should be regarded as an integral part of, or at least an adjunct to, the

doctrine of *res judicata*. On this score the defendants plead that the plaintiffs elected in the *Fourie* matter to pursue their remedy under section 26 and section 30, but not section 29, in respect of which they have obtained a final judgement and are accordingly barred from pursuing in a subsequent action a remedy which they ought reasonably to have pursued at the time. The rule bears some relation to the doctrine of issue estoppel. The plea of estoppel pleaded by the defendants is to the effect that the Supreme Court of Appeal ordered that the defendants were obliged to repay only any amounts paid to them in excess of their investment in the scheme and hence that the plaintiffs are estopped from alleging and leading evidence that any payments other than such gains are liable to be set aside.

27. In their reply to the special plea of *res judicata* the plaintiffs replied that no judgement relevant to the cause of action in terms of section 29 of the Insolvency Act was handed down by Hartzenberg J or Conradie JA in the *Fourie* matter. In argument, it was further submitted, somewhat obliquely, that the parties in the present action might be considered as not being the same and that the judgement of Conradie JA has not finally disposed of the cause of action.

28. Section 29(1) of the Insolvency Act deals with another category of

impeachable transactions namely voidable preferences. It reads in so far as it is relevant:

> "Every disposition of his property made by a debtor not more than six months before the sequestration of his estate.... which has had the effect of preferring one of his creditors above another, may be set aside by the Court if immediately after the making of such disposition the liabilities of the debtor exceeded the values of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another."

The provision differs from section 30 in that if the disposition occurs within 6 months of insolvency it is sufficient for the plaintiff to establish that it had the effect of preferring one of the creditors, and the onus then shifts to the defendant to establish that there was no intention to prefer and that the disposition was made in the ordinary course of business. As I understand the plaintiffs' reply to the special plea, while Conradie JA has determined that the liabilities of the scheme exceeded its assets at the relevant time and that there was no intention to prefer some of the creditors above others, there has been no determination of whether the dispositions of capital and gains had the effect of preferring some of the creditors, nor

whether such dispositions were made in the ordinary course of business. Accordingly, they submit the plea of *res judicata* should not be upheld.

29. There have been many judicial and academic pronouncements concerning the requirements and scope of the doctrine of *res judicata* in our law that have both added to and detracted from clarity. The most lucid exposition of the doctrine of *res judicata* within our system of Roman-Dutch law was that propounded by Greenberg J (as he then was) in *Boshoff v Union Government* 1932 TPD 345. The plaintiff in that case claimed damages from the defendant on the ground that the defendant had unlawfully cancelled a contract of lease of land from which he had ejected him. The defendant had effected the ejectment by instituting action and obtaining default judgement against the plaintiff. The defendant, by way of special plea, raised the defence of *res judicata* claiming that the cancellation of the contract had been in issue in the ejectment proceedings. Greenberg J upheld the plea. In reaching his conclusion, he expounded upon the law as follows:

> "The question I have to decide is whether the same matter is in issue in such a way as to give the defendant the benefit of the plea of *res judicata*. The civil authorities lay down two requirements for this plea, namely that the proceedings on which reliance is placed must be between the same parties and

> that the same question, *eadem quaestio*, must arise.... In Roman-Dutch law the requisites have been split into three.... According to Voet (44.2.3) the rule is that the exception can only be employed when an action which has been once terminated is again set in motion by the same parties, about the same thing, and based on the same cause of action..... It does not appear to me that where Voet (in 44.2.3) speaks of the same cause of action, he means the cause of action in the narrow sense in which it is used by us as a term of pleading. It appears from Voet (44.2.4) that, to use his own words, "where it is competent to employ both the redhibitory action and the action *quanti minoris* on account of the article purchased being tainted with such a defect that the buyer would for that reason not have purchased it...." then if one action is used, the subsequent action can be met by the pleading of *res judicata*. Now the redhibitory action and the *quanti minoris* action are different causes of action and it appears to me, therefore, that Voet cannot be using the words 'cause of action" or *eadem petendi causa* in the narrow pleading sense that they are sometimes used in our courts."

30. This pronouncement in fact involved a notable modification of our law in that it relaxed the requirements of the doctrine of *res judicata* that the judgement must relate to the *eadem petendi causa* (the same cause of action) on the basis that "the rule of estoppel by judgement, is said to be that of public policy, it being in the interest of the state that there should be an end of litigation, and also on the ground of hardship for the defendant, namely that he should not be vexed twice for the same cause" - (*Boshoff at page 350*).

31. There has been some divergence of opinion about whether the decision in *Boshoff* introduced issue estoppel in our law, such being a precept of English law of somewhat different import. In *Horowitz v Brock and others* 1988(2) SA 160 (A), Smalberger JA stated that the difference between issue estoppel and *res judicata* was that the former did not require that the same thing (*eadem res*) or the same relief be demanded. If that indeed is the only variance, then the decision in *Boshoff* clearly accommodates that principle. In my opinion, Prof Zeffert (*Issue Estoppel in South Africa* (1971) 88 *SA*LJ 312) gave a fuller account of the ambit of the principle of issue estoppel, when he described it thus:

> "What must be grasped at the outset is that this English doctrine has the effect that where one cause of action has been the subject of final adjudication between parties, those determinations of particular issues which are its essential foundation, without which it could not stand, may be used as the basis of issue estoppels between the same parties when *another* cause of action is set up."

32. Applying that doctrine to the present action, the parties would be estopped for instance from denying that the scheme's liabilities exceeded its assets or from again claiming that Prinsloo intended to prefer some of the

creditors above others. The determination of both those issues form part of the integral or essential foundation of the judgement of Conradie JA that section 30(1) was not of application while section 26 was. However, the parties have made no such denials.

33. The real question for determination between the parties in the present action is whether the so-called "once and for all" rule is of application so as to bar the plaintiff from instituting action under section 29. The starting point is to recognise that such rule finds support in the modification to the doctrine of *res judicata* introduced by Greenberg J in *Boshoff*, particularly in his understanding of Voet's use of the words *eadem petendi causa*, the public policy imperative that there should be an end to litigation and that a defendant should not be vexed twice for the same cause of action, in the broad sense of that term.

34. The Appellate Division has also understood as much and gave clear directions in that respect in *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* 1995(1) SA 653 (A) at 669 F-H where Botha JA observed:

> "Die ware betekenis van *Boshoff v Union Government* is dat die beslissing ingehou het dat die streng gemeenregtelike vereistes vir 'n verweer van *res*

judicata (in die besonder: *eadem res* en *eadem petendi causa*) nie in alle omstandighede letterlik verstaan moet word en as onwrikbare reëls toegepas moet word nie, maar dat daar ruimte is vir aanpassing en uitbreiding, aan die hand van die onderliggende vereiste van *eadem quaestio* en die *ratio* van die verweer."

35. Later in his judgement (at 670J - 671A) Botha JA expressed the compelling sentiment that it is unnecessary to import into our law English terminology in relation to issue estoppel in light of the doctrinal modification introduced in *Boshoff v Union Government*. As he put it:

"Dit is wenslik om iets verder te sê oor terminologie. Soos nou al reeds geblyk het, kan dit misleidend wees om met betrekking tot ons reg te praat van die 'leerstuk' van geskilpunt-estoppel. Ons kan selfs klaarkom sonder die uitdrukking 'geskilpunt-estoppel'. Terselfdetyd sou dit puntenerig wees om kapsie te maak teen die gebruik van daardie uitdrukking, bloot omdat dit uit die Engelse reg afkomstig is. Dit is reeds ingeburger in ons praktyk en dit is 'n gerieflike tiperende beskrywing van gevalle waar daar streng gesproke nie aan die tradisionele vereistes van *res judicata* voldoen word nie omdat in die twee betrokke gedinge nie dieselfde regshulp gevorder word op dieselfde eisoorsaak nie, maar waar die verweer tog suksesvol kan wees. Ek gaan dus voort om 'geskilpunt-estoppel' op daardie beskrywende wyse te gebruik. Ek glo nie Voet sal in sy graf omdraai omdat ek na sy voorbeeld van die *actio redhibitoria* en die *actio quanti minoris*, wat ek vroeër genoem het,

verwys as 'n geval van geskilpunt estoppel nie."

36. These *dicta*, it would seem to me, contemplate a doctrine of issue estoppel, going beyond that envisioned by Smalberger JA in *Horowitz v Brock and others,* allowing for a form of the "once and for all" rule to be termed as issue estoppel. Whatever the terminological niceties, the point remains that ever since *Boshoff v Union Government* a flexible approach to the requirements of *res judicata* has been permitted on public policy grounds to provide for the requirements of new factual situations. Each case must be decided in accordance with its own facts (see *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* at 669 H-I).

37. The "once and for all" rule was commented upon in *Union Wine Ltd v E Snell and Co Ltd* 1990(2) SA 189 (C) at 196E, as follows:

> "Although it is not clear from the cases whether the "once and for all" rule is just a manifestation of the *exceptio rei judicatae* or whether it has a wider range than the latter, it is settled practice in South Africa that where a cause of action gives rise to more than one remedy a plaintiff who pursues one of those remedies and has obtained a judgement thereupon can be met with a plea of *res judicata* if he should institute a second action to pursue one of the other remedies."

38. In *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (2)* 2005 (6) SA 23 (c) at 46H, Blignaut J pointed out that the English courts have for many years recognised the principle that *res judicata* does not only cover the express judicial declaration in the earlier proceedings, but also points that should have been raised but were omitted to be raised in the earlier proceedings. The learned judge referred to *Henderson v Henderson* (1843) 3 Hare 100 (67 ER 313) at 114 -15 where the following was said:

> "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 matters 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 judgement, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at that time."

39. I agree with Blignaut J that the *Henderson* principle is not in conflict with

the approach of Botha JA in *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* and that logic and equity will justify its application in appropriate cases.

40. I turn now to apply these principles to the present matter. When the plaintiffs brought forward their case in *Fourie NO and others v Edeling NO and others,* invoking their remedies under section 30 and section 26 of the Insolvency Act, in pursuit of their cause of action to set aside the impeachable transactions and to recover amounts paid to the investors; they should have invoked all of their remedies including those under section 29. Although, it is true, that a suit under section 26 may be a different "cause of action" to one instituted under section 29, in the narrow pleading sense, they nevertheless were *eadem petendi causa* in the sense used by Voet (44.2.3) and as confirmed in *Boshoff v Union Government*. In terms of the *Henderson* principle the plaintiffs were required to bring their whole case. Whether the dispositions had the effect of preferring some creditors above others, and the contention that from the plaintiffs' perspective such could not have been within the ordinary course of business, within the meaning of those precepts as used in section 29, and irrespective of where the onus of proof or evidentiary burden may have rested, these were all points that properly belonged to the subject of the earlier litigation which the plaintiffs ought reasonably to have brought

forward at that time.

41. The particulars of claim in all three matters seek furthermore the setting aside of payments made in the period before 6 months prior to the liquidation date as dispositions not for value in terms of section 26. The particulars draw no distinction between capital repayments and profits. There can be no doubt at all that the judgement of Conradie JA has adjudicated these issues. The judgement held explicitly that capital repayments are not dispositions not for value because they must be considered to have been made in discharge of an obligation to return the illegal payment (under the *condictio*) and therefore would have been made for value. Insofar as the claim in the particulars is for the recovery of profits, the *ratio decidendi* of the judgement is that such amounts are recoverable under section 26 and should be recovered in terms of the procedure stipulated in paragraphs 4 and 5 of the order of Hartzenberg J. The conclusion of Conradie JA in respect of the distinction between capital and profits, if not pronouncements upon the *eadem res* or *eadem petendi causa*, were determinations of issues which form part of the essential foundation of the judgement admitting therefore a plea of issue estoppel.

42. In the premises, I am satisfied that the present action relates to the *eadem res* and the *eadem petendi causa* determined by the judgement of

Conradie JA in *Fourie NO and others v Edeling NO and others.*

43. The plaintiffs however have questioned whether the judgement may be regarded as binding on all the parties and hence whether it is a final judgement, such being a primary requirement for the application of the plea of *res judicata*. Unfortunately Mr van Coller did not file written heads of argument. However, as I understand his point, he relied upon the reservations expressed by Conradie JA about the effectiveness of service on the thousands of respondents to argue that the judgement could not be regarded as final and on that ground alone the plea should fail. Although this ground was not pleaded in the reply, the issue is most obviously deserving of consideration.

44. The order of Hartzenberg J of 28 February 2003 was preceded by two orders in case number 21098/02 (a rule *nisi* by Jordaan J dated 6 August 2002 and a final order by Hartzenberg J dated 4 February 2002) consolidating the estates and facilitating the process of liquidation. The rule *nisi* provided for service in seven newspapers across the country and the applicants were ordered to publish a short motivation explaining the reach of the order. Regrettably neither representative drew my attention during argument to the motivation that was published. Nevertheless, from the papers filed in the *Fourie NO* matter, and the judgement of Conradie

JA, I have a sense of the gist of it, as well as the objectionable nature of it, giving, as it apparently did, an unjustifiable role and prominence to Edeling, the so-called "investor representative". Furthermore, the order of Hartzenberg J on 28 February 2003, being the order at issue in *Fourie NO*, was preceded by a rule *nisi* issued by Hartzenberg J on 21 January 2003 returnable on 25 February 2003 (the rule was presumably extended) calling on the listed respondents to show cause why an order on the terms of that granted on 28 February 2003 should not be granted. The applicants were directed to publish the order in the Sunday Times, Rapport and Beeld. Perhaps conscious of the shortcomings in the appointment of Edeling, Hartzenberg J made a further order appointing senior counsel from the Pretoria Bar, Mr MC Maritz SC as an *amicus curiae* "to argue the case for the investors on the return day".

45. I have already spoken about the concerns regarding the appointment of Edeling. Conradie JA made the following comment in relation to the ameliorating role played by the *amicus curiae* (at 398) :

> "The difficulty around the first respondent's conflict of interests did not pass unnoticed. The court *a quo* sought to address it by appointing an *amicus curiae*. The latter made submissions to the court *a quo* and presented helpful argument to this court; but his appointment could not overcome the fundamental

flaw that the first respondent was not empowered to make the admissions that he purported to make."

These *dicta*, while bemoaning the restricted role of the *amicus curiae* as a representative able to bind the investors in respect of any admissions made by the investor representative or otherwise, do not amount to a ruling or pronouncement that the listed respondents were not parties in the application or not properly before court. However, Conradie JA did have something to say in this latter regard in paragraphs [21] and [22] of the judgement, which read:

"[21] The order granted by the court below purported to bind all investors, or at least all those whose names appeared as respondents on a list appended to the notice of motion, on the footing that a rule *nisi* was issued and published according to directions from the Court calling upon those respondents who wished to do so to object to confirmation of the rule on the return day. Normally, citing multiple parties and serving an application by publication in the manner adopted here might have sufficed. In the present case, however, service fell gravely short of what would have been required to ensure that the investors receive a fair trial. The publication as ordered by the court described the role and set out the recommendations of the first respondent who was held out to be the "investors" representative'. There is in this scenario a great danger that investors might have considered their interests to be adequately

represented by a court-appointed guardian and for that reason might have neglected to take steps to put their views before the Court or even to obtain legal advice. The sad truth of the matter is that those investors who were informed of the application were probably at the same time discouraged from defending the proceedings. The third, fourth and fifth respondents do not fall into this category. They defended the proceedings; they did not suffer from any misunderstanding that their interests would be protected by the first respondent; there is no reason why they should not be bound by a declaration of this Court that places no reliance on any contribution to the proceedings made by the first respondent.

[22] Section 32(30 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 section 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".

Paragraph 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 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."

46. Mr van Coller submitted that these *dicta* in particular disqualified the judgement as a final judgement in that investors would be free to challenge its binding nature upon them, compelling the plaintiffs to institute fresh setting aside proceedings. I think not. First of all, it is clear from the terms of the order setting aside and substituting paragraph 3 of the order made by Hartzenberg J that all actual payments made to the "*further respondents*" were set aside under section 26. Furthermore, and in any event, the defendants have pleaded that they are bound by the order. Additionally, the fact that the investors against whom recovery proceedings are brought in terms of paragraphs 4 and 5 of the order of Hartzenberg J may seek to have the judgement against them rescinded does not disqualify the judgement as a final judgement. The judgement is final and binding until set aside. The prospects of an investor succeeding in a rescission application, in view of the circumscribed nature of the judgement, was recognised by Conradie JA to be unlikely because he or she would have to establish the payment was not a disposition without value, something which is unassailable. In the result, there can be little or

no doubt that the judgement of Conradie JA was intended to be and in fact is a final judgement.

47. It follows therefore that the plea of *res judicata* should succeed.

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.

49. In the final analysis the upshot of my findings is that the liquidators will be

restricted to recovering the actual payments of profits made to the investors in the relevant period and that their means of doing so will be the procedure mandated in the order of Hartzenberg J.

50. In the premises the special plea of *res judicata* is upheld and the actions of the plaintiffs are dismissed with costs, including where applicable the costs of employing two counsel.

JR MURPHY
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