THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 615/2016

In the matter between:

AON SOUTH AFRICA (PTY) LTD **APPELLANT**

and

CORNÉ VAN DEN HEEVER NO **FIRST RESPONDENT**

MARYNA ESTELLE SYMES NO **SECOND RESPONDENT**

GLENRAND MIB FINANCIAL SERVICES (PTY) LTD (IN LIQUIDATION) **THIRD RESPONDENT**

Neutral citation: *AON South Africa (Pty) Ltd v Van den Heever NO* (615/2016) 2017 ZASCA 66 (30 May 2017)

Coram: NAVSA, THERON, WALLIS, PETSE and ZONDI JJA

Heard: 19 May 2017

Delivered: 30 May 2017

Summary: *Res judicata* – requirements – issue estoppel – identity of interest between plaintiffs in the two actions sufficient to satisfy requirement of same party – identity of issues and claims in both actions

ORDER

On appeal from: Gauteng Local Division, Johannesburg of High Court (Moshidi J, sitting as court of first instance):

(1) The appeal is upheld with costs.

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

'(a) The special plea is upheld in relation to claims A, B and C.

(b) Claims A, B and C are dismissed.

(c) The plaintiffs are to pay the defendant's costs in relation to the defence of claims A, B and C including the costs consequent upon the separate determination of the special plea.'

JUDGMENT

Wallis JA (Navsa, Theron, Petse and Zondi JJA concurring)

Introduction

[1] This is the second occasion on which the events surrounding the collapse and liquidation of New Protector Group Holdings (Pty) Ltd (New Protector) have come before this court.[1] Both cases flowed from the acquisition by New Protector of the business of Protector Group Holdings (Pty) Ltd (Protector). The Industrial Development Corporation (IDC) financed that purchase. Prior to its liquidation New Protector paid Protector some R63 million in discharge of the purchase price of the

[1] The first occasion was in *Glenrand MIB Financial Services (Pty) Ltd and Others v Van den Heever NO and others* [2012] ZASCA 195; [2013] 1 All SA 511 (SCA), referred to hereafter as the 'previous judgment'.

business.[2] Of that sum, R50 million was paid to Glenrand MIB Financial Services (Pty) Ltd (Financial Services) as the purchase price of its 65 percent stake in Protector. That was sold to a company called Freefall Trading 65 (Pty) Ltd (Freefall), which held a 49 per cent stake in New Protector.

[2] Financial Services was a wholly owned subsidiary of Glenrand MIB Ltd (Glenrand) existing solely for the purpose of holding the 65 percent interest in Protector. It used the entire sum of R50 million to repay an existing indebtedness to Glenrand of some R38 million and a dividend to Glenrand of some R12 million. Both the previous action and the present one have been directed at recovering that sum for the ultimate benefit of New Protector's creditors, of which the IDC is by far the largest. The involvement of the appellant, AON South Africa (Pty) Ltd (AON), arose because, shortly before the previous action reached finality, it acquired Glenrand's business and assumed liability for any claims against Glenrand. It accordingly intervened in the previous action and was the defendant in the present case. Glenrand was deregistered in 2011.

[3] The previous litigation was brought by the liquidators of Protector and cited both Financial Services and Glenrand as defendants. At the end of the day, after the appeal to this court, the liquidators succeeded against Financial Services on the ground of enrichment alone. Within a few months of the previous judgment Financial Services was liquidated and its liquidators instituted proceedings against AON. This appeal arises from a special plea by AON flowing from the fact that the previous

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[2] We were informed that Protector guaranteed repayment of this loan, thereby giving the IDC a claim against Protector when that company was liquidated.

litigation against Glenrand, and therefore indirectly against AON, was resolved in its favour. It contended that it was not open to the present plaintiffs to commence proceedings in order to pursue what was in essence the same claim. In legal terms it said that the issues raised by the present case were resolved in its favour in the previous litigation and are *res judicata* as against Financial Services' liquidators. The form of *res judicata* on which it relies is commonly referred to as issue estoppel. The special plea was heard separately and dismissed by Moshidi J. This appeal is with his leave.

The factual background

[4] The background was largely set out in the previous judgment of this court from which I have borrowed freely. The business of Protector in the health sector of the economy was markedly different from that of Glenrand. In 2003 Glenrand decided to dispose of its interest in Protector. In August 2003 two directors of Protector, Messrs Van Rensburg and Seelenbinder, indicated an interest in acquiring that interest. They already held, through Protector Group Management Company (Pty) Ltd (PGMC), the remaining 35 percent in Protector. On 10 November 2003 the board of directors of Financial Services adopted a resolution to dispose of that shareholding by entering into an agreement with 'Newco or its nominee'. An agreement to that effect was signed on 15 December 2003. The signatory on behalf of the purchaser was Mr Van Rensburg. The price payable to Financial Services was R 50 million and Glenrand was to be released from a suretyship obligation on behalf of Protector.

[5] On 4 March 2004 Messrs Van Rensburg and Seelenbinder purported to nominate Freefall as the purchaser in terms of this agreement. The previous judgment held that this nomination was

ineffective to create any obligation on the part of Freefall to pay the agreed purchase price for Financial Services stake in Protector, because the agreement itself was invalid and unenforceable.[3] Nonetheless it held that the payment of R50 million to Financial Services was made on the footing that it was in discharge of the purchase price payable by Freefall to Financial Services under the invalid agreement.

[6] Messrs Van Rensburg and Seelenbinder lacked the resources to purchase Financial Services' interest in Protector. They approached the IDC for a loan. The loan was approved on 25 November 2003 on condition that the transaction would be structured as a black empowerment transaction. That led, early in 2004, to the creation of New Protector, an entity in which Freefall would have a 49 percent stake, with the remaining 51 percent to be held by a black empowerment partner. Thereafter New Protector purchased the business of Protector as a going concern. This sale required the approval of the Competition Commission. On 5 March 2004, before that approval was obtained, the IDC released a little over R69 million to New Protector. From these funds an amount of R50 million was paid into the trust account of a firm of attorneys, to be held by it pending such approval and, on approval, to be paid to Financial Services.

[7] On 15 March 2004, after Competition Commission approval was obtained, the attorneys paid the R50 million, plus accrued interest of nearly R1 million, into Glenrand's bank account. Apparently Financial Services did not have its own bank account. Its books of account showed an historic indebtedness to Glenrand of a little over R38 million, incurred

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[3] Previous judgment paras 29 and 31.

when it acquired the 65 per cent stake in Protector. This indebtedness was set off against the R50 million. On 13 June 2005 Financial Services declared a dividend of nearly R12 million in favour of Glenrand and once again this was discharged by set-off. The historical debt and the dividend together totalled exactly R50 million. That amount, plus the interest accruing on it while it was held in trust, accordingly ended up in the hands of Glenrand. No underlying transaction has been identified justifying Glenrand in retaining the accrued interest as against Financial Services and this will need to be dealt with separately. For the present it can be ignored.

[8] The picture that emerges is that the IDC lent money to New Protector and R50 million of that money found its way by the route described above to Glenrand. The intermediaries, in the form of New Protector, Protector and Freefall, were all insolvent and unable to pay their debts when the business of New Protector failed in the second half of 2004.[4] Financial Services was a shell company with no assets after its disposal of its interest in Protector. Realistically the only prospect of recovering this R50 million was if liability could be laid at the door of Glenrand. That is what the liquidators of Protector set out to do in the first case and it is what the liquidators of Financial Services are seeking to do in this case.

[4] It was provisionally liquidated on 2 September 2004. The principal reason for this was the loss of its main money-generative contract as a medical scheme administrator. See *Phodiclinics (Pty) Ltd and Others and Protector Group Medical Services (Pty) Ltd (in Liquidation) and Others* [2007] ZACT 17 paras 54 to 66.

The previous litigation

[9] The liquidators of Protector brought an action against Financial Services, Glenrand, Freefall, Messrs Mansfield and Harpur, two of the directors of Glenrand, and Messrs Seelenbinder and Van Rensburg. During the course of the litigation Freefall was deregistered and Mr Seelenbinder sequestrated, but that did not affect the issues canvassed at the trial. Claims were advanced against Financial Services and Glenrand on five grounds and there was a separate claim against the four individuals. These aimed primarily at the recovery of the R50 million, but under some heads the claim was for the full amount of slightly more than R69 million released to New Protector by the IDC on 5 March 2004.

[10] Claim A sought to recover from Financial Services and Glenrand, together with all the other defendants, an amount of over R63 million, made up of three disbursements from the sum paid to Protector by New Protector and emanating from the IDC loan. The largest disbursement was the R50 million paid to Financial Services. It was alleged that Protector:

'in collusion with the Defendants conceived a scheme whereby, out of the funds paid to [Protector] for the sale of its business to [New Protector] … [Financial Services] would be paid R50 000 000,00 …'

The pleading alleged that the scheme was implemented and that, as a result, Financial Services, alternatively Glenrand, received R50 million. It claimed that the scheme fell within s 31(1) of the Insolvency Act 24 of 1936 (the Insolvency Act), which provides that:

'After the sequestration of a debtor's estate the court may set aside any transaction entered into by the debtor before the sequestration, whereby he, in collusion with another person, disposed of property belonging to him in a manner which had the effect of prejudicing his creditors or of preferring one of his creditors above another.'

Claim E was based on the same alleged scheme. The relevant allegation was that the scheme had been 'conceived and implemented with the intention of defrauding the general body of [Protector's] creditors'.

[11] Claim B was a claim that Financial Services, alternatively Glenrand, intentionally and unlawfully appropriated the amount of R50 million upon its transfer from the attorneys to Glenrand's bank account. In substance it was a claim that they stole the money. Like claims A and E, it involved allegations of dishonesty against Financial Services and Glenrand. The individuals allegedly responsible for such dishonesty were their co-defendants, Messrs Mansfield and Harpur, who were directors of all three companies involved in these allegations, namely, Financial Services, Glenrand and Protector. They had resigned as directors of Protector after the sale of the business of Protector to New Protector was approved on 2 March 2004 and before the IDC released part of the loan to New Protector.

[12] Claim C was based upon the proposition that payment of the sum of R50 million to Financial Services, alternatively Glenrand, was not due to either of them; was made at the expense of Protector; and resulted in one or other of them, in the alternative, being enriched. Lastly, so far as Financial Services and Glenrand were concerned claim D was based on s 26(1) of the Insolvency Act. It was alleged that the payment of the amount of R50 million to Financial Services, alternatively Glenrand, was a disposition by Protector of its property made without value and therefore recoverable by the liquidators of Protector. The further claim F was brought only against the four directors. It alleged a breach of their fiduciary duties to Protector, such breach being constituted by the alleged collusive scheme.

[13] In sum therefore, claims A, E and F were all based on the existence of a scheme that the liquidators of Protector contended was dishonest. The alleged scheme was said to be the brainchild of the four directors. Claim B was also based on dishonesty by the directors in the form of a theft of the money paid by New Protector to Protector. Only the enrichment claim and the claim under s 26(1) of the Insolvency Act were not founded on the dishonest conduct of the directors.

[14] A lengthy trial ensued before Monama J. Senior counsel appeared on behalf of the liquidators and two senior counsel appeared together on behalf of the defendants other than Van Rensburg, that is, Financial Services, Glenrand, and Messrs Mansfield and Harpur. By arrangement with these defendants Van Rensburg was not represented and testified for the liquidators. These defendants made common cause in their defence to the litigation. At the end of the trial claims A and E were abandoned by Protector's liquidators and they indicated that they were not seeking judgment against Glenrand. Notwithstanding that concession, Monama J entered judgment against Financial Services and Glenrand jointly and severally for repayment of the R50 million plus the interest accrued on that amount while the attorneys held it in trust. He did so on the basis that claims B (misappropriation of money), C (unjust enrichment) and D (disposition without value) were well founded. He also upheld claim F against the four directors personally.

[15] Prior to the appeal from that judgment the liquidators of Protector abandoned the judgment against Glenrand in its entirety. Nonetheless the present appellant, which had by then assumed Glenrand's liabilities and intervened in the proceedings, appeared in order to seek an order for costs. The appeal by Financial Services on the misappropriation claim

and the disposition without value were upheld, but the judgment against Financial Services was sustained on the grounds of unjust enrichment. As mentioned above, this was based on a finding that the contract in terms of which Freefall purchased Financial Services' stake in Protector was invalid and unenforceable. The appeal against the judgment on claim F also succeeded.

[16] When dealing with the misappropriation claim this court made a clear finding that there was no intention to defraud the creditors of Protector. In the light of that finding it was conceded that claim F, the claim that the directors had breached their fiduciary duties by colluding in the conception and implementation of the alleged scheme, also had to fail and the appeal against the judgment on this claim was upheld. In sum therefore, this court held on the basis of the full record of the trial, in which both Mr Harpur and Mr Mansfield gave evidence, that the liquidators of Protector had failed to prove the existence of a scheme as alleged or any dishonesty on the part of the directors.

The present litigation

[17] Financial Services was liquidated after the previous judgment was delivered. Although different individuals were appointed as liquidators to those appointed for Protector, they came from the same company, D & T Trust (Pty) Ltd, and the litigation they instituted was clearly driven by the creditors of Protector. The sole target of the action was AON by virtue of its having assumed the obligations of Glenrand. The claims being advanced were statutory claims arising under the Insolvency Act's provisions for attacking dispositions by insolvents. It is unclear on what basis AON can be pursued on these claims, but as no point has been taken in that regard I will assume, notwithstanding certain reservations, that

AON's assumption of liability for the obligations of Glenrand included the claims as formulated in these proceedings.[5]

[18] Turning to the pleadings the liquidators of Financial Services seek to recover the full amount of R50 million, plus the interest that accrued on it while it was in the attorneys' trust account, but they divide the claim into three separate components, namely the set-off component, the dividend and the interest. In all three instances the claim commences with the allegation that the entire amount of R50 million plus interest constituted property of Financial Services. In respect of the set-off of Financial Services historic debt of approximately R38 million, reliance is placed on s 30(1) of the Insolvency Act, which 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.'

In order to pursue this claim successfully the liquidators of Financial Services will need to prove that Financial Services contemplated liquidation and intended to prefer Glenrand over their other creditors, by permitting the amount of R50 million to be paid into Glenrand's bank account, so that set-off would occur by operation of law.[6]

[19] In regard to the dividend paid to Glenrand the liquidators of Financial Services adopt a twofold approach. They contend that the

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[5] The relevant sections provide for a court to set aside the disposition. The right to approach a court for the setting aside of the disposition vests in the first instance in the liquidator. Such claims arise on liquidation and have the effect of creating an indebtedness where none previously existed. See *Duet and Magnum Financial Services CC (in liquidation) v Koster* [2010] ZASCA 34*;* 2010 (4) SA 499 (SCA) paras 11-13. By the time any such right arose in this case and inhered in the liquidators, Glenrand had been deregistered. AON is a separate legal entity to Glenrand and it played no part in the transactions giving rise to this litigation. Hence my reservations. It is unclear whether the provisions of s 116(6)(b) and (7)(b) of the Companies Act 71 of 2008 operate to impose liability on AON in respect of dispositions, but that is not the case pleaded.

[6] *Pretorius NO v Stock Owners' Co-operative Co Ltd* 1959 (4) SA 462 (A) at 471B-472G; *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) paras 6-16.

payment was made with an intention to prefer Glenrand and falls to be set aside under s 30(1) of the Insolvency Act. To that extent the basis for the claim is the same as that in respect of the set-off amount. But they also contend that the payment was made pursuant to a collusive scheme conceived with the intention of defrauding and prejudicing Financial Services' creditors. Here the liquidators rely on s 31(1) of the Insolvency Act. Collusion in this context means an agreement between two or more parties that has a fraudulent purpose.[7] It is a conniving together of the insolvent and another to practise a fraud on the insolvent's other creditors.[8]

[20] The last claim by the liquidators of Financial Services is to recover the interest that accumulated on the sum of R50 million while it was held in the attorneys' trust account, during the period when the sale of business from Protector to New Protector was awaiting Competition Commission approval. This claim is not made in terms of the provisions of the Insolvency Act, but on the simple basis that the interest accrued in favour of Financial Services and neither the set-off in relation to its historic indebtedness to Glenrand, nor the payment of the dividend affected it. Accordingly it remained Financial Services money, albeit that it was being held on its behalf in Glenrand's bank account.

[21] The special plea is that the liquidators of Financial Services are not entitled to pursue these claims against AON in the light of the previous judgment. It proceeds as follows. In the previous litigation the substantial issue was the recovery from Financial Services and Glenrand of the

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[7] *Meyer NO v Transvaal Lewendehawe Koöperasie Bpk* 1982 (4) SA 746 (A) 771C-D.
[8] *Finn's Trustee v Prior* 1919 EDL 133 at 137 approved in *Gert de Jager (Edms) Bpk v Jones NO en McHardy NO* 1964 (3) SA 325 (A) 331A.

capital amount of R50 million and the interest accrued thereon. Financial Services and Glenrand made common cause in that litigation. The judgment granted against Glenrand in the high court was abandoned prior to the appeal to this court. The appeal to this court dismissed all claims based on dishonesty. In those circumstances and by reason of:

- considerations of public policy;
- the principles of fairness and particularly that AON should not be exposed to a second trial;
- the fact that the same sum of money paid in the same circumstances is in issue;
- the facts, evidence and the underlying cause of the claim being, by and large, similar to the facts, evidence and underlying cause of the first action; and
- the question of the payment of the money having previously been definitively disposed of;

AON contends that the liquidators of Financial Services are precluded by the *exceptio res judicata vel litis finitae*, or issue estoppel, from pursuing the present proceedings.

The *exceptio rei judicata*

[22] As mentioned earlier the plea of *res judicata* in this case takes the attenuated form commonly referred to as issue estoppel. *Res judicata* deals with the situation where the same parties are in dispute over the same cause of action and the same relief,[9] and in the form of issue estoppel arises:

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[9] *National Sorghum Breweries (Pty) Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* [2000] ZASCA 70; 2001 (2) SA 232 (SCA) para 2 (per Olivier JA); *Prinsloo NO and Others v Goldex 15 (Pty) Ltd* [2012] ZASCA 28;2014 (5) SA 297 (SCA) (*Goldex)* para 23.

'Where the decision set up as a *res judicata* necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms …' [10]

[23] Although initially controversial that decision has subsequently been endorsed by this court as falling within the realm of *res judicata*.[11] The current state of the law was summarised by Scott JA in the following passage:[12]

'Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio res 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 quastio*) must arise. Broadly stated, the latter involves an enquiry 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 … Relevant

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[10] *Boshoff v Union Government* 1932 TPD 345 at 350-351 citing Spencer-Bower's *Res Judicata*.
[11] *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* [1994] ZASCA 144; 1995 (1) SA 653 (A) at 669F-G.
[12] *Smith v Porritt & others* [2007] ZASCA 19; 2008 (6) SA 303 (SCA) para 10.

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".'

[24] The high court held that the special plea failed on all three aspects of the defence of *res judicata*. It said that the parties were different because the plaintiffs in this case are the liquidators of Financial Services, whereas in the previous case the plaintiffs were the liquidators of Protector. As regards the causes of action it compared the relevant facts on which the claims in each case were based and held that they were entirely different. It is unclear on what basis it thought that the relief claimed was different, as it gave no explanation for that conclusion.

Discussion

[25] It is correct that there is a technical distinction between the plaintiffs in the present action and the plaintiffs in the previous action, but that is a matter of form not substance. The liquidators of Protector are the persons who sought and obtained the liquidation of Financial Services and they did so on the basis of the judgment they obtained in the previous action. As matters stand at present they are the only creditor of Financial Services.[13] The sole purpose of the litigation is to recover the amount of R50 million, in order that it can be distributed to Protector on the winding up of Financial Services. To all intents and purposes the liquidators of Financial Services are merely surrogates for the liquidators of Protector.

[13] There is a notional possibility, if this action succeeded, that AON might be able to prove a late claim for the historic debt that Financial Services owed to Glenrand but it was not suggested that this affected the position.

The fact that the liquidators of both companies are employees of the same firm of professional liquidators lends emphasis to this point.

[26] As far as the defendants in the two actions are concerned, Glenrand (in whose shoes AON stands) was a defendant in the previous action. It is true that at the end of the trial no relief was sought against it but that cannot matter, especially as the trial judge disregarded that and granted judgment against it. It was a party to the previous appeal, if only for the purpose of obtaining an order for costs, the judgment having been abandoned. The same attorneys and counsel represented it and Financial Services in that case. That emphasises the commercial reality that there was a complete identity of interests between it and Financial Services, both in the transactions that gave rise to that litigation and in the litigation itself. Financial Services was a special purpose vehicle that existed solely for the purpose of holding Glenrand's 65 per cent interest in Protector. The individuals whose conduct was examined in the previous case were directors of both Glenrand and Financial Services. In those circumstances it seems to me that there was a complete identity of interests between them and it would be artificial to say that findings against or in favour of Financial Services in the previous case would not be binding upon Glenrand.

[27] I do not think that this involves any significant development of the law in this regard. *Res judicata* has always been available as a defence against the privies of parties to earlier litigation. Voet's description of those who are the same parties for the purposes of *res judicata* goes well beyond those who are privies in the strict sense of deriving their rights

from a party to the original litigation.[14] In addition the joint stock company and similar entities, enjoying limited liability, were unknown to Voet, and the concepts he employed must be adapted to our modern commercial world. In *Goldex*[15] Brand JA said:

'In this case Prinsloo not only represented the trust, he was the controlling mind of that entity. It would therefore surprise me if the controlling mind were not bound by an earlier decision that he committed fraud, while the mindless body of the trust was held bound by that finding.'

Likewise the sole member of a close corporation has been held to be the privy of the corporation itself.[16] In the present case Glenrand, through its directors Messrs Mansfield and Harpur, was the controlling mind of Financial Services. It would be extremely surprising then to learn that, after a trial where the evidence of those two men had been heard, Glenrand could, in subsequent litigation, dispute findings made against Financial Services. In *Caesarstone*[17] I adverted to this type of situation and said:

'Subject to the person concerned having had a fair opportunity to participate in the initial litigation, where the relevant issue was litigated and decided, there seems to me to be something odd in permitting that person to demand that the issue be litigated all over again with the same witnesses and the same evidence in the hope of a different outcome, merely because there is some difference in the identity of the other litigating party.'

I conclude that the approach of the trial judge was incorrect. It focussed too much on the fact that the plaintiffs in the two actions were liquidators of two separate companies and insufficiently on the fact that there was a

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[14] Johannes Voet *The Selective Voet being the Commentary on the Pandects* (Gane's translation, 1957) 44.2.5, vol 6 at 558. He included a principal and agent; the pledgor and pledgee in relation to the right to possession of the thing pledged; two joint and several debtors or creditors in relation to a claim to a thing, and a surety and the principal debtor as falling within the concept of 'the same parties' for the purposes of *res judicata*.

[15] *Prinsloo & others v Goldex* supra para 15.

[16] *MAN Truck & Bus (SA) (Pty) Ltd v Dusbus Leasing CC and Others* 2004 (1) SA 454 (W) paras 38-39.

[17] *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others* [2013] ZASCA 129; 2013 (6) SA 499 (SCA) para 43.

complete identity of interests between the two sets of liquidators and a similar identity of interests between the defendants in both actions.

[28] In fairness to counsel for the respondents I did not understand him to challenge this approach. His focus lay on the next issue, namely whether the decision in the previous case involved a finding on an issue that would be determinative of the outcome of the present case. That turned largely on the following two paragraphs from the previous judgment dealing with the misappropriation claim:

'The IDC knew that Glenrand MIB was selling its 65 per cent shareholding in Protector and the IDC intended, when its board approved the financing on 25 November 2003, that the proceeds of the loan would be applied towards settling the purchase price of the sale of shares of Glenrand MIB and PGMC. The IDC's recognition that the proceeds of the loan would immediately be applied towards paying for Glenrand MIB's shares in Protector, was in full knowledge of the IDC's decision that ultimately the business of Protector would be located in a new vehicle, which would represent a consortium led by a BEE shareholder.

There is no evidence to suggest that the IDC, and all the other relevant parties, in agreeing or arranging that the proceeds of the loan should be paid to the shareholders of Protector, intended to defraud the creditors of Protector. The common intention of Glenrand MIB, the IDC, and of Seelenbinder and Van Rensburg, was that the money should be applied to discharge Freefall's indebtedness arising from the sale of shares by Glenrand MIB and PGMC. In the circumstances, the respondents have not made out a case for dishonesty on the part of Harpur and Mansfield [the two relevant directors of Glenrand and Financial Services]. It was not established that, in arranging that part of the proceeds of the IDC loan be paid to Financial Services, they had the subjective intention to steal the money. It follows that the claim of theft cannot be sustained.'

The existence of a collusive scheme was not canvassed separately in the High Court judgment from which this appeal lay because judgment was not sought or granted on claims A and E. But this reasoning is entirely

inconsistent with the existence of such a scheme. Counsel very properly accepted that the effect of the abandonment of these claims was that they stood on the same footing as if they had been dismissed.

[29] Starting with the claim to recover the dividend on the basis that it was paid pursuant to a collusive transaction between Financial Services and Glenrand, that case requires the liquidators to prove that the decision by Glenrand, as the sole shareholder of Financial Services, to declare a dividend was the product of a fraudulent agreement between the two companies, represented by Messrs Mansfield and Harpur, directed at defrauding the other creditors of Financial Services. Bearing in mind that Financial Services was not a trading entity it had no other creditors save, for the purposes of this argument, Protector in respect of its enrichment claim. So any collusive arrangement had to be one dishonestly determined with a view to defeating that enrichment claim.

[30] Such a claim is entirely inconsistent with the findings by this court in the previous judgment. Two findings in particular are important. The first is that all the parties to the payment by Protector to Financial Services were aware of the payment and intended that it be made in precisely the manner that in fact occurred. A finding in the present litigation that Messrs Mansfield and Harpur were aware of the existence of an enrichment claim by Protector to recover the payment made by it to Financial Services would fly in the face of that. The second, and even more important finding, was that there was no evidence of an intention to defraud the creditors of Protector and no evidence of dishonesty on the part of Messrs Mansfield and Harpur. If they were not dishonest in securing that Protector paid Financial Services R50 million, they could not possibly have been dishonest in securing that Financial Services,

itself merely a vehicle for holding Glenrand's interest in Protector, paid that amount by lawful means to Glenrand.

[31] Counsel sought to circumvent this difficulty by compartmentalising (as he put it) the period leading up to the payment to Financial Services and the subsequent period when the set-off occurred and the dividend was paid. In so doing he sought to contend that although the previous judgment effectively rejected the notion that the payment to Financial Services was a product of the fraudulent and collusive scheme originally pleaded, there remained scope for a different collusive scheme conceived and concluded at a later stage. He placed the dividing line between the compartments at 5 March 2004 when the IDC released the funds to New Protector. However, nothing occurring between that date and 22 June 2004, when payment was made to Glenrand, warranted drawing a line at the earlier date. Indeed, until the latter date, the absence of Competition Commission approval for the sale of Protector's business to New Protector meant that Financial Services had no claim to the R50 million. The enrichment claim could only arise once payment was made on 22 June 2004.

[32] If there is to be a compartmentalisation, the defining line between the two must be drawn as at 22 June 2004, the date on which Financial Services was paid. In regard to the period after that date the dividend was paid over nearly a year later on 13 June 2005. The allegation in the particulars of claim in the present litigation was that, in the intervening period, the leading individual behind the BEE partner in New Protector approached Mr Harpur and accused Financial Services of having stolen the purchase price of R50 Million. This caused Mr Harpur to enquire from Mr Seelenbinder how the funds flowed from Protector into the

attorneys' trust account. The plaintiffs allege that, in the light of the explanation he received, Mr Harpur became aware that Financial Services had no entitlement to the payment of the R50 Million, alternatively he became aware that Protector had a claim to recoup this amount. That formed the basis for the allegation that the payment of the dividend was part of a collusive scheme 'conceived with the intention of defrauding and prejudicing' Financial Services' creditors, in other words, Protector.

[33] There are overwhelming difficulties confronting this argument. It sought to excise a component of the claims of collusion and dishonesty made in the first action and to characterise it as a separate collusive transaction. It aimed at revisiting issues already dealt with in the previous case and was inconsistent with the findings in the previous judgment. Financial Services had contended in relation to the enrichment claim that it had bona fide disgorged the R50 million by way of the set-off and payment of the dividend. In rebuttal the liquidators of Protector referred to the approach to Mr Harpur, the allegation that the money had been stolen and Mr Harpur's enquiry to Mr Seelenbinder in regard to the flow of funds. The manner in which this court dealt with that evidence refutes the claim of collusion that the present plaintiffs seek to advance.

[34] The present claim depends upon a finding that Mr Harpur knew when the dividend was paid that Protector was entitled to its repayment by Financial Services. That is inconsistent with the finding this court made in relation to this evidence. It highlighted the fact that in Mr Seelenbinder's explanation it emerged that the funds advanced to New Protector and paid to Protector had been routed via a firm of accountants in Namibia which paid the R50 million into the attorneys' trust account. The reason given for adopting this course was a concern that otherwise

the payment might have involved a contravention of s 38 of the Companies Act 61 of 1973. Mr Harpur testified that he thought there was nothing untoward in this and disputed the suggestion that he must have known that something was amiss and that Financial Services was not entitled to retain the money.

[35] This evidence was not rejected. The previous judgment accepted that there was no evidence of dishonesty on the part of Mr Harpur in receiving payment of the R50 million. On this issue it held that, as an experienced CEO of the company, he 'should have been alerted to a possible contravention of s 38 of the Companies Act' and 'should have investigated the validity of Seelenbinder's claim that this had been averted by directing the funds through Namibia'. Its conclusion, in rejecting the defence of non-enrichment, was that "Financial Services and Harpur should have been aware that Financial Services had been enriched sine causa at the expense of Protector'. That is inconsistent with a finding that Mr Harpur was in fact aware that Protector had a valid enrichment claim against Financial Services.

[36] The collusion case that the liquidators of Financial Services now seek to run would involve a reconsideration of this very evidence. The court would be required to find that Mr Harpur knew, as a matter of fact, that the payments were made in circumstances amounting to a contravention of s 38 and that he deliberately thereafter secured the declaration and payment of the dividend in order to defeat Protector's enrichment claim. That would be inconsistent with the findings in the previous case. To achieve that result the trial court would have to hear the evidence of the same witness, Mr Harpur, and conclude that he was lying

if he repeated his previous testimony. That is precisely the situation that the recognition of the defence of *res judicata* is intended to prevent.

[37] The compartmentalisation argument also underpinned the contention that the statutory claims to set aside both the set-off and the payment of the dividend as undue preferences were not defeated by reliance on *res judicata* in the form of issue estoppel. To recapitulate, those claims required proof of the intention to prefer, as shown by proof that liquidation was contemplated and that the payment in question was made with the intention to prefer Glenrand over Protector. But central to such a case was the proposition that Glenrand, through Mr Harpur, was aware of the existence of Protector's enrichment claim. A finding to that effect would be inconsistent with the findings made by this court in the previous judgment.

[38] Even on its own terms therefore the compartmentalisation argument cannot succeed. But its own terms are entirely artificial and contrary to the evidence that led this court to hold, in the passages cited in [28] above, that all the parties were aware of the payments to be made using the funds provided by the IDC and in particular were aware that the price of R50 million that Financial Services required for its 65 per cent stake in Protector would be paid from these funds. The previous judgment held that Messrs Harpur and Mansfield were not guilty of fraud in relation to that payment and were not dishonest. The reason is not far to seek. It was that the transaction originated in the decision by Glenrand to dispose of its interest in Protector. Central to that decision was that Financial Services would no longer serve any purpose. Retaining the proceeds of the sale in its books, but not its bank account because it had none, would serve no useful or conceivable purpose.

[39] From the outset the entire transaction was posited on Glenrand receiving the proceeds of the disposal. In the first instance they would be used to recoup the initial cost of the investment in Protector, as reflected in Financial Services' historical indebtedness to Glenrand. Set-off occurred the moment the funds arrived in Glenrand's bank account. There could be no question of compartmentalisation in that situation as the argument based on it depended upon events subsequent to the receipt of the funds. As far as the dividend was concerned this was nothing more than the mechanism whereby receipt of the balance of the proceeds by Glenrand would be reflected in the books of account of Financial Services as having passed to Glenrand. The notion that it occurred in consequence of a collusive agreement between Financial Services and Glenrand is wholly inconsistent with the factual findings underpinning the previous judgment.

[40] My conclusion is that the claims advanced in these proceedings by the liquidators of Financial Services involve the reconsideration of the very evidence and issues that were the subject of determination in the previous action. Insofar as the relief was concerned it was not suggested that it was not the same in both actions. Both were directed at recovering from Glenrand the R50 million paid to Financial Services as the price for its 65 per cent stake in Protector. With respect, the court below erred in holding otherwise by looking mechanically at the elements of the causes of action in the two cases, instead of examining the issues that had been determined in the previous case and comparing them with the issues that would need to be determined if the present case went to trial.

[41] The elements of *res judicata* in the form of issue estoppel were accordingly satisfied and the special plea should have been upheld.

During the course of argument it was pointed out to counsel that the special plea could not have any application to the claim in respect of the interest that accrued on the sum of R50 million while it was held in the trust account of the attorneys pending the decision by the Competition Commission. For some reason, possibly oversight, neither the set-off nor the dividend included this amount. It accordingly remained an amount to which Financial Services was entitled, albeit that it was held in Glenrand's bank account. Whether AON has some other ground for resisting this claim is not an issue for determination in this appeal and must be left for the further conduct of the proceedings.

Result

[42] The appeal must succeed and the order made by the high court must be set aside. It will be replaced by a suitable order upholding the special plea in regard to claims A, B and C, but not D. The costs of the appeal and the determination of the special plea must follow the result.

[43] I make the following order:

(1) The appeal is upheld with costs.

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

> '(a) The special plea is upheld in relation to claims A, B and C.
>
> (b) Claims A, B and C are dismissed.
>
> (c) The plaintiffs are to pay the defendant's costs in relation to the defence of claims A, B and C including the costs consequent upon the separate determination of the special plea.'

M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant:	R Stockwell SC
Instructed by:	Fluxmans Inc, Johannesburg;
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For respondent:	P F Rossouw SC
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