**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

Case no: 741/12

**REPORTABLE**

In the matter between:

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| **CAESARSTONE SDOT-YAM LTD** | **APPELLANT** |

and

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| **THE WORLD OF MARBLE AND GRANITE 2000 CC** | **FIRST RESPONDENT** |
| **OREN SACHS** | **SECOND RESPONDENT** |
| **MATITYAHU SACHS** | **THIRD RESPONDENT** |
| **AMIR SHALOM SACHS** | **FOURTH RESPONDENT** |
| **ALON SACHS** | **FIFTH RESPONDENT** |
| **AVIV SACHS** | **SIXTH RESPONDENT** |

**Neutral citation:** *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite CC* (741/12)[2013] ZASCA 129 (26 September 2013)

**Coram:** MTHIYANE AP, MAYA, THERON et WALLIS JJA et VAN DER MERWE AJA

**Heard**: 16 September 2013

**Delivered**: 26 September 2013

**Summary:** Defence of*lis alibi pendens* – requirements – defence available whenever a plea of *res judicata* would be available from decision in other action – immaterial that party raising the plea is the plaintiff in the other proceedings – exercise of discretion – court's inherent power to regulate its proceedings.

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**ORDER**

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**On appeal from:** Western CapeHigh Court (Blignault J sitting as court of first instance):

(a) The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

(b) The order of the court below is set aside and replaced by the following order:

'1 The special plea of *lis alibi pendens*in relation to the first and second plaintiffsis upheld with costs, such costs to include those consequent upon the employment of two counsel.

2 The special plea of *lis pendens* is dismissed in relation to the third to sixth plaintiffs.

3 The Plaintiffs' action under WCHC Case No 10053/08 is stayed pending the final determination of the action instituted by the Defendant against the First and Second Plaintiffs in the Magistrates' Court, Haifa, Israel, under Case No A22497/07.'

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**JUDGMENT**

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WALLIS JA (MTHIYANE AP, MAYA and THERON JJA and VAN DER MERWEAJA concurring)

[1] The issue in this appeal is a preliminary question whether litigation commenced in Israel by the appellant, Caesarstone, justifies the stay of an action commenced by the respondents against Caesarstone in the Western Cape High Court, in accordance with the doctrine of *lis alibi pendens*.On

27 December 2007, Caesarstone instituted an action against the first respondent, to which I will refer as WOMAG, and the second respondent, Mr Oren Sachs, before the Magistrates' Court, Haifa in Israel. In June 2008, WOMAG and the members of the Sachs family, namely, Mr Oren Sachs, his father (the third respondent) and his three brothers (the fourth to sixth respondents)instituted an action in the Western Cape High Court against Caesarstone. Both actions arose out of the same agreement. Caesarstone's response to the Western Cape action was to deliver a dilatory plea of *lis alibi pendens* asking that the action be stayed pending the final determination of the action it had instituted in Israel.The parties agreed that this plea should be disposed of separately and to that end agreed a statement of facts for the purposes of its adjudication. Blignault J dismissed the plea and refused leave to appeal. The appeal is before us with leave of this court.

[2] As its name indicates, a plea of *lis alibi pendens* is based on the proposition that the dispute (*lis*) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach differing conclusions. It is a plea that has been recognised by our courts for over 100 years.[1]

[1]*Socratous v Grindstone Investments* 2011 (6) SA 325 (SCA) para 13. Its origins are to be found in the Digest 44.2 sv *De Exceptione Rei Iudicatae*.

[3] The plea bears an affinity to the plea of *res judicata*,which is directed at achieving the same policy goals. Their close relationship is evident from the following passage from*Voet*44.2.7:[2]

'*Exception of* lis pendens *also requires same persons, thing and cause.*-The exception that a suit is already pending is quite akin to the exception of *res judicata,* inasmuch as, when a suit is pending before another judge, this exception is granted just so often as, and in all those cases in which after a suit has been ended there is room for the exception of *res judicata* in terms of what has already been said. Thus the suit must already have started to be mooted before another judge between the same persons, about the same matter and on the same cause, since the place where a judicial proceeding has once been taken up is also the place where it ought to be given its ending.'

[4] That passage was adopted and approved by De Villiers CJ in *Wolff NO v Solomon*[3]and the requirements it spelled out for reliance on the plea have been reiterated on several occasions. For example, in rejecting a contention that proceedings before the Advertising Standards Authority and those before the Registrar of Patents warranted the invocation of the principle,Nugent AJA in *Nestlé (South Africa) (Pty) Ltd v Mars Inc*.[4]said:

'There is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of those elements there is no potential for a duplication of actions.'

[5] WOMAG and the Sachs family contended that the litigation in Haifa was not between the same parties as that in South Africa; that the cause underpinning the two actions was different; and, that the relief being sought was also different. They contended that none of the

[2] Johannes Voet *The Selective Voet being the Commentary on the Pandects* (Gane's translation, 1957) Vol 6 at 560. The passage appears in a chapter headed 'The Exception of *Res Judicata*'.
[3]*Wolff NO v Solomon* (1898) 15 SC 297 at 306-307.
[4]*Nestlé (South Africa) (Pty) Ltd v Mars Inc*. 2001 (4) SA 542 (SCA) para 17.

requirements for the successful invocation of *lis pendens* were satisfied. Blignault J accepted these submissions. Accordingly he did not address the question whether he should in any event have refused a stay of the Western Cape action in the exercise of his discretion.

[6] Caesarstone contends that Blignault J erred. It contends that the litigation in Israel is between it and WOMAG and Mr Oren Sachs, representing the Sachs family, and that the express citation of Mr Oren Sachs's father and brothers in the Western Cape proceedings does not alter the identity of the litigating parties in the two actions. Alternatively it contends that there is a sufficient commonality of interest between Mr Oren Sachs and the other family members to satisfy this requirement. Second it contends that the substance of the causes of action in the two actions is the same because in both the central issue relates to the circumstances in which the agreement between the parties that gives rise to the dispute came to be terminated. Third it says that the relief being sought by the parties in the two actions (restitution by Caesarstone and damages by WOMAG and the Sachs family) is that which flows directly from the resolution of that central issue. In order to consider these contentions it is first necessary to deal with the facts.

**The facts**

[7] Caesarstone produces and markets quartz panels for use in the building industry. The panels are used in various environments, such as offices, kitchens and bathrooms, for counter tops, wall coverings and surrounds for domestic appliances such as baths. From 2004 WOMAG had been its agent,responsible for the distribution of its products in South Africa. That situation was changed in terms of the agreement that gives

rise to the present litigation in Israel and South Africa to which I will refer as 'the agency agreement'.

[8] The agency agreement was concluded on 21 September 2006. It records that it is a declaration of principles applicable to the appointment of WOMAG and the Sachs family, represented by Mr Oren Sachs, as the sole agent in the territory of South Africa for quartz surface products under the brand name of Caesarstone. On signature of the declaration of principles the existing distribution agreement between WOMAG and Caesarstone would terminate and Caesarstone would appoint a new distributor for its products in South Africa. Thereafter a detailed agreement based on the declaration of principles was to be signed covering two periods of five years each, with a possible further extension of five years on condition that the agent fulfilled its obligations under the detailed agreement. Under the detailed agreement WOMAG would receive a commission on the FOB price of all sales made by Caesarstone to the newly appointed distributor. In return for this commission it would act as Caesarstone's marketing advisor and representative, promoting its brand and products, assisting and overseeing the distributor. In addition WOMAG had the right in its own name to purchase slabs from Caesarstone – presumably for the purposes of its own business – in which event a commission would be paid to the Sachs family. Although the agency agreement does not spell this out the particulars of claim in the Western Cape litigation say that the Sachs family in terms of the agency agreement consists of Mr Oren Sachs, his father and his three brothers.

[9] The claim document in the action before the Haifa Magistrates' Court sets out the agreement and those of its terms that Caesarstone regard as important for its cause of action. It alleges that since the

conclusion of the agency agreement WOMAG and the Sachs family have failed to fulfil their obligations under the agreement and acted in a way that has created friction with Caesarstone's nominated distributor. On those grounds Caesarstone contends that the agreement was cancelled and lapsed in December 2007 and seeks an order to that effect and repayment of monies paid to WOMAG and the Sachs family in terms of the agency agreement.

[10] In their particulars of claim in the Western Cape action WOMAG and the Sachs family plead the conclusion of the agency agreement and identify those terms they regard as central to their claims, in which the remuneration provisions feature prominently. They allege that Caesarstone repudiated the agreement on 26 December 2007 by unlawfully contending it was entitled to cancel the agreement and commencing proceedings in Israel based on such cancellation. They plead that they accepted this repudiation and that as a result the agency agreement came to an end in January 2008. The particulars of claim then set out their respective claims for damages.

[11] It follows that the claims in both actions revolve around the agency agreement, the manner in which it was performed (or not performed, as the case may be) by the parties and the circumstances of its termination. In order to adjudicate on the respective claims of the parties, whichever court or courts undertake that task, it will be necessary to determine whether Israeli or South African law governs the agreement; to consider the manner in which the parties conducted themselves pursuant to the agency agreement;to determine whether there were, as alleged, defaults by either party; and, if so, the consequences of those defaults. At the end of the day it will be necessary to decide whether Caesarstone was entitled

to treat the agency agreement as having lapsed or to cancel it on 26 December 2007. If not, it will be necessary for the court to decide whether their conduct in purporting to cancel it constituted a repudiation of the agreement that has been accepted and gives rise to the claims for damages advanced by WOMAG and the Sachs family.

**Analysis**

[12] *Voet* said that there are three requirements for a successful reliance on a plea of *lis pendens*. They are that the litigation is between the same parties; that the cause of action is the same; and, that the same relief is sought in both. In *Hassan & another v Berrange NO*,[5] Zulman JA expressed these requirements in the following terms:

'Fundamental to the plea of *lis alibi pendens* is the requirement that the same plaintiff has instituted action against the same defendant for the same thing arising out of the same cause.'

That statement highlights a possible difficulty in the way of Caesarstone. Because it is the claimant in the Israeli action and the defendant in the Western Cape action, this is not a case of the same plaintiff instituting action against the same defendant. In addition the cause of action, whilst revolving around the same central issue, is necessarily different – in the one case based on a lawful cancellation of the agency agreement and in the other on a repudiation of that agreement – as is the relief sought. If the statement by Zulman JA is definitive of the scope of the plea of *lis pendens* it is fatal to Caesarstone's case.

[13] In their heads of argument both sides said, without addressing the problems mentioned in the preceding paragraph, that it was not necessary, for a plea of *lis pendens* to succeed, that the party raising the plea should

[5] *Hassan & another v Berrange NO* 2012 (6) SA 329 (SCA) para 19 – the judgment was delivered in 2006 but only reported in 2012.

be the defendant in both sets of proceedings. In saying this they both relied on a judgment of Milne J in *Cook & others v Muller*.[6]However, the full implications of this approach werenot explored.The court asked for argument on the correctness of that judgment and whether it was consistent with the requirements of the plea as set out in the judgments of this court. In response to this request we heard full argument from counsel, with Mr Rose-Innes SC, for Caesarstone, contending that *Cook* was correctly decided and Mr Hodes SC, for WOMAG and the Sachs family, contending that it was wrong.

[14] There is a clear conflict between the statement in *Hassan & another v Berrange NO* that the same plaintiff must have instituted action against the same defendant, and the conclusion by Milne J in *Cook* that:

'… [I]t is quite clear that it is not necessary in order to raise a plea of *lis alibi pendens* that the person raising it should have been the defendant in the other proceedings.'

Which of these views is correct?

[15] In*Cook* an action was brought against Muller in the magistrates' court based on three dishonoured promissory notes. Muller pleaded that he was suing Cook and his co-plaintiffs in the Supreme Court for damages for breach of the underlying contract under which the promissory notes had been issued and that this action was still pending. He alleged that he had legitimately stopped payment of the promissory notes by virtue of the breach of the underlying contract. He accordingly contended that the action in the magistrates' court should be stayed pending the determination of the Supreme Court action. The magistrate dismissed an exception to this plea and the subject of the appeal was whether he was correct to do so.

[6]*Cook & others v Muller* 1973 (2) SA 240 (N) at 244E-246D.

[16] The appellants in *Cook*argued that only a person who was the defendant in both actions could properly raise a plea of *lis pendens*. Milne J recognised that no binding decision had previously been given on this point. He referred to *Wolff NO v Solomon*,supra, where the defence of *lis pendens* was raised in Cape proceedings on the basis of an action in the Witwatersrand High Court, in which Wolff had raised essentially the same claim by way of a counterclaim. However, that did not address the problem confronting him, because a counterclaim is a separate claim joined and disposed of, for the sake of convenience and judicial economy, in an existing action. Accordingly Wolff was in reality the plaintiff in both sets of proceedings, so far as the plea of *lis pendens* was concerned. Therefore this decision did not, as he apparently thought, support his conclusion. However, it was not the only reason he gave for that conclusion.

[17] Of greater relevance was the finding that, if Muller succeeded in his action in the Supreme Court, he would be able to raise a defence of *res judicata* to any claim based on the promissory notes. Milne J cited the passage from*Voet*quoted in para 3 above,and the statement by Greenberg J in*Marks and Kantor v Van Diggelen*[7]that:

‘It is clear from *Voet*, 44.2.7, that the requisites of the defence of *lis pendens* and *res judicata*, in relation to the identity of the issue and parties, are the same.’

He went on to adopt Greenberg J’s view that the defence of *res judicata* is cognate to the plea of *lis alibi pendens* so that the latter plea must succeed where a plea of *res judicata* could successfully be raised after the conclusion of the first action.In his view, if Muller succeeded with his claim for damages, he could raise a plea of *res judicata* against Cook’s

[7]*Marks and Kantor v Van Diggelen* 1935 TPD 29 at 37.

claims.Therefore, he held that the magistrate had correctly rejected the exception to Muller's plea.

[18] The pleas of *res judicata* and*lis pendens*are undoubtedly cognate pleas and it follows that the elements required to establish the one are the same as the elements required to establish the other. As *Voet* said in the passage quoted above concerning *lis pendens* 'this exception is granted just so often as, and in all those cases in which after a suit has been ended there is room for the exception of *res judicata*'. It is therefore necessary to decide whether Milne J was correct to say that on the facts in *Cook* Muller could have raiseda plea of *res judicata*had he been successful in his claim for damages in the Supreme Court.

[19] A strict application of the three requirements for that plea would generate a negativeresponse. If the party raising *res judicata* had been the plaintiff in the earlier litigation, that would necessarily mean that the cause of action and the relief sought in the later proceedings, where the plea was being raised, differed from the cause of action and the relief in the earlier proceedings. This is illustrated by the facts in *Cook*. In the Supreme Court, Muller was claiming damages for breach of the underlying agreement. His cause of action was based on the agreement and its breach. In the magistrates' court, Cook and his co-plaintiffs were seeking to recover the face value of the dishonoured promissory notes on the basis that they had been dishonoured on presentation. Those were different causes of action and the relief claimed in each was also different.

[20] Although not referred to by him, *Boshoff v Union Government*,[8] provided authority for Milne J's view in regard to the application of *res judicata*. Boshoff claimed damages from the government arising from the allegedly wrongful cancellation of a lease and his ejectment from a farm owned by the defendant. The plea of *res judicata* was based on proceedings for Boshoff's ejectment, founded on the lawful termination of his lease.After considering the authorities on what is meant by the 'same cause of action' Greenberg J concluded that this requirement would be satisfied in the circumstances described in the following passage from Spencer-Bower's *Res Judicata*:

'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 …'[9]

[21] On this basis the requirement of the same cause of action is satisfied if the other proceedings involve the determination of a question that is necessary for the determination of the case in which the plea is raised and substantially determinative of the outcome of that latter case. *Boshoff* was followed in a number of cases in provincial courts, but was regarded as controversial because it was thought to import into South African law the English principles of issue estoppel.[10] It is unnecessary to explore that controversy because this Court laid it to rest in *Kommissaris*

[8]*Boshoff v Union Government* 1932 TPD 345.
[9]Ibid350-351.
[10]D Zeffert 'Issue Estoppel in South Africa' (1971) 88 *SALJ* 312; P J Rabie in *Lawsa*, 1 ed, Vol 9 paras 363-365; Hoffmann & Zeffert *SA Law of Evidence* 4 ed (1988) 347-350. In the second edition of this work (1970) by Hoffmann alone it was accepted at 238 that the doctrine of issue estoppel is part of our law.The criticism in the later editions is therefore that of Professor Zeffertt alone. Its reception in South African law was described as a vexed question by Smalberger JA in *Horowitz v Brock & others* 1988 (2) SA 160 (A) at 179E-F.

*van Binnelandse Inkomste v ABSA Bank Beperk*.[11]There, Botha JA held that *Boshoff* was based on the principles of our law. He said that its *ratio* is that the strict requirements for a plea of *res judicata* of the same cause of action and that the same thing be claimed, must not be understood in a literal sense and as immutable rules. There is room for theiradaptation and extension based on the underlying requirement that the same thing is in issueas well as the reason for the existence of the plea.[12]

[22] Scott JA summarised the current state of our law on this subject in *Smith v Porritt & others*,[13] where he said:

'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 considerations will include questions of equity and fairness not only to the parties

[11]*Kommissaris van Binnelandse Inkomste v ABSA Bank Beperk* 1995 (1) SA 653(A).
[12] The key passage at 669F-G reads: '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.'
[13]*Smith v Porritt & others* 2008 (6) SA 303 (SCA) para 10.

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 *resjudicata*] is capable of producing great hardship and even positive injustice to individuals".'[14]

[23] The central feature of the decision in *Cook* was that the adjudication of the claims against Muller involved the same issue, namely whether there had been a breach of the underlying agreement entitling Muller to avoid payment of the promissory notes, as the adjudication of Muller's claim for damages. In the light of the principles discussed above, Milne J was correct therefore to say that the adjudication of the latter claim would give rise to *res judicata* in the adjudication of the claims on the promissory notes. The approach initially adopted by the parties, that it was immaterial to the plea of *lis pendens* that Caesarstone is the plaintiff in the Israeli action and the defendant in this action, was accordingly correct.The quoted passage from the judgment of Zulman JA in *Hassan* must be read as being no more than a general, but not definitive, description of the plea of *lis pendens*.A defendantcan raise the plea of lis pendens even though it is the plaintiff in the other proceedings on which the plea is based.[15]

[24] In para 11, supra, I described the central issues that will have to be determined in both the Israeli and these proceedings. If those issues are determined in favour of Caesarstone it will be entitled to the declaratory order it seeks that the agency agreement has either lapsed or been cancelled and to such consequential relief as may properly flow from that. If they are determined against Caesarstone it seems necessarily to follow

[14]*Prinsloo NO& others v Goldex 15 (Pty) Ltd & another*[2012] ZAASCA 28 is an illustration of circumstances in which considerations of justice and equity will preclude reliance on the plea of *res judicata*.
[15] Factually this was the situation in both *Boshoff* and *Marks and Kantor v Van Diggelen*, supra.

that WOMAG and the Sachs family can legitimately claim that there was a repudiation of the agency agreement[16] and recover from Caesarstone any damages they may have suffered as a result. Whilst the form in which those issues arise and the relief that is claimed consequent upon them differs in the two actions the central issue remains essentially the same. Whilst there is not strict compliance with the requirements for *res judicata* this is in my view a proper case to relax those requirements in accordance with the approach in *Kommissaris van Binnelandse Inkomste v ABSA Bank Beperk*.

[25] Counsel for the respondents contended that this was too broad an approach to the identification of the questions arising in the two cases giving rise to the plea that is before us. He founded his argument on the majority judgment of Olivier JA in *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd.*[17] As his opponent candidly conceded that it is difficult to reconcile the approach of Olivier JA with that of Botha JA in *Kommissaris van Binnelandse Inkomste v ABSA Bank Beperk* and Scott JA in *Smith v Porritt & others*,it is necessary to pause briefly to consider what was decided in that case.

[26] In *National Sorghum Breweries* the appellant had conferred distribution rights on the respondent in return for a payment of R150 000. The relationship soured and the respondent sued to recover the R150 000. It obtained judgment by default. Fortified by that judgment it then sued the appellant for damages for breach of the distributorship agreements. The appellant responded with a plea of *res judicata* and reliance on the

[16]*Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) para 16.
[17]*National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA).

'once and for all' rule that requires a claimant with a single cause of action to claim in one and the same action all remedies that the law affords in respect of that cause of action.[18] The defence failed.

[27] Olivier JA said that:

'The requirements for a successful reliance on the *exceptio* were, and still are: *idem actor, idem reus, eadem res* and *eadem causa petendi.* This means that the *exceptio* can be raised by a defendant in a later suit against a plaintiff who is "demanding the same thing on the same ground" (*per*Steyn CJ in *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 562A); or which comes to the same thing, "on the same cause for the same relief" (*per* Van Winsen AJA in *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462(A) at 472A-B; see also the discussion in *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* 1995 (1) SA 653 (A) at 664C-E); or which also comes to the same thing, whether the "same issue" had been adjudicated upon (see *Horowitz v Brock & others* 1988 (2) SA 160(A) at 179A-H).'[19]

Accordingly his approach to the basic applicable principles in relation to *res judicata*did not differ from that set out in the authorities cited earlier in this judgment. The only difference lay in his application of those principles to the case before the court. He held that the initial claim for restitution of what had been paid for the distributorships was 'clearly distinguishable' from a claim for damages for breach of the distribution agreements and therefore that the defence of *res judicata* and the invocation of the once and for all rule was misplaced.

[28] The issue in that case was whether it was impermissible for the respondent to pursue the claims for restitution and damages in separate actions. In other words did the 'once and for all' rule preclude the institution of the second action? Whilst that rule and the defence of *res*

[18] *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) and *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A).
[19] Para 2, p 239.

*judicata* have the same rationale[20] they are different. Had the appellant in *National Sorghum Breweries* pleaded that the distributorship agreements had not been cancelled there can be no doubt that a replication that it was precluded by *res judicata* from advancing that contention would have succeeded. The decision does not therefore detract in any way from the approach to the principles of *res judicata* in *Kommissaris van Binnelandse Inkomste v ABSA Bank Beperk* and*Smith v Porritt & others*, which are the leading authorities in this field. Nor is the case of *Janse van Rensburg & others NNO v Steenkamp*,[21]on which the respondents placed great reliance, of any assistance to them. The issue there was whether an adverse decision on claims by liquidators under s 30 of the Insolvency Act 24 of 1936 precluded them from thereafter pursuing claims under s 29 of that Act. The court citedthe authorities in this court that I have already discussed and then applied them in the factual circumstances of that case. It did not purport to modify in any way what was said in the two leading cases.

[29] For those reasons I conclude that two of the three requirements for the successful invocation of *lis pendens* are satisfied in the present case. That leaves the third requirement that the two actions should be between the same parties. Here there appears to be a difference between the two actions. Caesarstone and WOMAG are parties to both. So is Mr Oren Sachs, although it is by no means clear on what basis he is cited in the Israeli action. He quite clearly signed the agency agreement as the representative of the Sachs family, that is, of himself, his father and his brothers, but is described in para 8 of the claim in Israel as 'the person with whom the Plaintiff [Caesarstone] was corresponding in all matters

[20]*Custom Credit Corporation (Pty) Ltd v Shembe*at 472A-E.
[21]*Janse van Rensburg & others NNO v Steenkamp& another: Janse van Rensburg & others NNO v Myburgh & others* 2010 (1) SA 649 (SCA).

related to the Heads of Agreement in this claim, as well as the General Manager of [WOMAG]'.[22]Curiously in the statement of defence filed on his behalf in those proceedings he does not object to his joinder, or draw attention to the fact that he signed the agency agreement on behalf of his family, or complain that in those circumstances the court cannot grant an order that the agreement has lapsed or been cancelled without joining the remaining family members. What is clear is that, whatever the basis of his joinder in the Israeli action and irrespective of whether he may have a valid defence to the claims raised against him in that action, he is before the Israeli court and his endeavours to secure his release from those proceedings have failed.

[30] I was initially attracted by the idea that, as the conclusion of the agency agreement was common cause and Mr Oren Sachs had signed it on behalf of the Sachs family, his joinder in the Israeli proceedings should be construed as a joinder of him in that representative capacity. On reflection, however, that conclusion is not open on these papers. Not only is there no allegation in the pleadings filed in Haifa that this is the basis for his joinder, but in the pleadings in this case Caesarstone does not advance such a contention. Instead in its special plea it avers that the parties to the Israeli action are itself, WOMAG and Mr Oren Sachs. That is repeated in para 1 of the agreed statement of facts. If it thought that the other members of the Sachs family were parties to the Israeli action, presumably it would have said so. In addition it seems clear that the other family members have not been served in those proceedings and without service our courts will not recognise a judgment by a foreign court even if that court would otherwise have jurisdiction over the person against

[22] This is the translation from the Hebrew annexed to the stated case. The translation annexed to the special plea is slightly different and says that he was the person that Caesarstone 'engaged on all matters related to the Agreement of Principles' and 'the CEO' of WOMAG.

whom the judgment is granted. Furthermore, it appears from the judgment of the Haifa Magistrates' Court on the application to set aside the proceedings and from the judgment of the Haifa District Court on appeal, that in Israeljurisdiction over a foreign defendant is acquired by service upon them while they are physically in Israel or by service outside the jurisdiction under rule 467of the rules governing these matters in Israeli courts. The absence of service is a fatal obstacle to the Israeli court exercising jurisdiction over the remaining family members. In those circumstances I conclude that it is not open to us to hold that the Sachs family as a body or the third to sixth respondents as individuals are parties to the Israeli proceedings.

[31] It was not submitted that we should strike out in a new direction and allow a relaxation of the requirement that the two sets of litigation be between the same parties, in the same way as the other requirements of *lis pendens* and *res judicata* have been relaxed. That leaves the contention that there is a sufficient commonality of interest between WOMAG and Mr Oren Sachs on the one hand, and the other members of the Sachs family on the other, that the plea of *lis pendens* is available against them.

[32] It is necessary at the outset to clarify an important issue. The argument proceeded with little or no regard for the fact that there are three separate claims in the Western Cape action.WOMAG and the Sachs family jointly advance the major claim for damages in respect of lost commissions, of some 11.5 million euros. The Sachs family alone advance the second claim for damages in respect of other lost commissions, in an amount of a little less than 900 000 euros. The third claim, of some 3 million euros, is solely a claim by WOMAG. These claims are separate and distinct and could have been pursued in three

separate actions. They are joined under the provisions of rule 10(1) of the Uniform Rules on the basis that substantially the same question (or questions) of law or fact would arise if they were pursued separately. This is undoubtedly correct because all three claims depend upon the same allegations of a repudiation of the agency agreement.

[33] So far as the plea of *lis pendens* is concerned the position is as follows. In respect of the third claim by WOMAG alone the requirement of *lis pendens* that there be an identity of parties are satisfied. There is a partial identity of parties in respect of the main claim. The only identity of partiesin respect of the claim by the Sachs family arises from the citation in the Israeli action of Mr Oren Sachs in an obscure capacity. How is this to be dealt with? Does this diversity defeat the plea of *lis pendens* in its entirety?

[34] Insofar as WOMAG is concerned, all the requirements for a valid plea of *lis pendens* are satisfied in respect both of its individual claim and in respect of the claim that it pursues jointly with the Sachs family. The plea can only be rejected if the court, in the exercise of its discretion, declines to grant a stay. The evidential burden of establishing facts justifying the court in exercising that discretion in favour of a plaintiff against which a plea of *lis pendens* has properly been raised, lies with theplaintiff, in this case WOMAG.

[35] The position is the same in relation to Mr Oren Sachs with regard to his interest in the main claim and the claim by the family for lost commissions. Although, as I have said, the basis for his joinder in the Israeli action is obscure, the reality is that he is a party to those proceedings and his attempts to avoid that situation have been rebuffed

by the Israeli courts. Accordingly he is a party to proceedings before the courts of that country in which the central issues described above in para 11 fall to be determined. Like WOMAG he bears an evidential burden to establish a factual basis for the court to exercise its discretion to refuse a stay in his favour.

[36] In exercising its discretion considerations of fairness and convenience are fundamentally important.[23] I agree with Coetzee DJP in *Kerbel v Kerbel*[24] that once the requisites for a plea of *lis pendens* are established the court should be inclined to uphold it, because it is undesirable for there to be litigation in two courts over the same issue. That was the approach of De Villiers CJ in *Wolff NO v Solomon*,[25] when he said:

'I am not prepared to say that the plea of *lis pendens* in a foreign state would be a good defence in every case in which the plea of *res judicata* in such foreign state would have been a good answer. But I do hold that the fact that a suit has been commenced by a plaintiff, and is still pending in the Court of a foreign state having jurisdiction over the defendant, affords, *primâ facie*, a good ground for a plea in abatement to an action instituted in this Court by the same plaintiff against the same defendant, for the same thing, and arising out of the same cause, in the absence of proof that justice would not be done without the double remedy.'

In my view that is the correct approach.

[37] WOMAG and Mr Oren Sachs advance several reasons in support of their contention that the Western Cape action should in any event not be stayed. First they say that for them to pursue their claims against Caesarstone in Israel would be prohibitively expensive because they would be required to pay court fees that they estimate at nearly R3

[23] *Van As v Appollus & andere* 1993 (1) SA 606 (C) at 610F.
[24] *Kerbel v Kerbel* 1987 (1) SA 562 (W) at 567F-G.
[25] Supraat 307.

million and would probably be required to provide security for costs. The answer to this is that they are not obliged by a stay to pursue their claims by way of a counterclaim in the Israeli action. Their action would simply be stayed until the Israeli proceedings were complete. They would then be free, if successful in resisting Caesarstone's claims, to set their action down, with the advantage of being able to plead *res judicata* if Caesarstone sought to re-litigate the issues already determined against it.

[38] The second argument was that the Israeli action was not *bona fide*. That is a heavy onus to discharge and I am not satisfied that it has been discharged in this case. Its foundation is that Mr Oren Sachs was lured to Israel under the pretext of a meeting to discuss payments to WOMAG and was then presented with a notice of cancellation and the summons. It was claimed that the latter was served in circumstances constituting an abuse of process. Whilst the Haifa Magistrates' Court upheld this argument, on appeal to the Haifa District Court, sitting as the court of civil appeal, it was rejected and leave to appeal to the Supreme Court was refused.It is an argument that has already been advanced and argued three times before the courts in Israel and the higher courts rejected it. I have examined the judgments of those courts from which it is clear that the higher courtsdid not agree with these contentions. As they relate to proceedings in Israel, we should only depart from their view of whether proceedings before their courts constitute an abuse of process in a very clear case. This is not such a case, based as it is largely on a handful of passages in evidence in interlocutory proceedings. In addition a reading of the entire record of that evidence discloses that there are significant disputes of fact over the circumstances in which Mr Oren Sachs went to Israel and met with Caesarstone's representatives in December 2007.

[39] The third contention by the respondents was that Cape Town was the more natural jurisdiction to hear and determine the disputes between the parties. At the heart of this contention was the proposition that the bulk of the relevant evidence needed to determine the disputes was in South Africa, because it was in this country that the agency agreement was to be performed and the reports that apparently play a significant role had to be prepared in South Africa and related to events in this country. The difficulty in this regard is that what is essentially a *forum non conveniens* argument must be founded on evidence[26] and the agreed statement of facts contains no facts concerning the number or identity of witnesses that will have to give evidence in relation to the central dispute between the parties or the nature and extent of their evidence.

[40] Caesarstone's witnesses thus far have, with one exception, come from Israel and testified in Hebrew. The exception is the representative of their distributor in South Africa and he appears to be content to give evidence in English in Israel. Mr Oren Sachs has given evidence on behalf of WOMAG and himself, and has done so in Hebrew. Other witnesses that WOMAG has indicated should be called include two Israelis and a South African architect. In the latter's case it has been held that his evidence can be given on affidavit and he can be cross-examined by means of a video conference link. It is not suggested that there would be any difficulties of translation. The central issues will revolve around the terms of the agency agreement, which is also in Hebrew, andwhat occurred at the meeting on 26 December 2007.That meeting took place in Israel, appears to have been conducted in Hebrew and had as the only South African participant Mr Oren Sachs, who is also an Israeli citizen.

[26]*Weissglass NO v Savonnerie Establishment* 1992 (3) SA 928 (A) at 939F-G. That a *forum non conveniens* argument must be based on facts is clear from the speech of Lord Goff of Chieveley in *Spiliada Maritime Corp v Cansulex Ltd; The Spiliada* [1986] 3 All ER 843 (HL) at 854-856, which has been cited with approval a number of times by South African courts dealing with such an argument.

Overall I am not satisfied that it has been shown that Cape Town is a more appropriate[27] forum than Haifa.

[41] In all the circumstances neither WOMAG nor Mr Oren Sachs have advanced adequate reasons for the Western Cape action not to be stayed as against them. The possibility of this conclusion being reached was recognised in the respondents' heads of argument where it was contended that 'at the very least, the plea of *lis pendens* cannot be raised successfully' against the other members of the Sachs family. However, that raises the undesirable possibility of both actions continuing with Mr Oren Sachs being a litigant in Israel and the most important witness for the plaintiffs in Cape Town. I did consider whether that possibility was of itself a reason for the court to exercise its jurisdiction to refuse a stay,[28] but in the light of what follows that difficulty does not arise.

[42] As I have mentioned Caesarstone submitted that while the remaining family members were not parties to the proceedings in Israelthere was a sufficient commonality of interestbetween them and WOMAG and Mr Oren Sachs to satisfy the requirements of the plea of *lis pendens*. The argument commences with a reference to *Voet* 44.2.5,[29] where *Voet* gives examples of what is meant by the 'same person' in the context of a plea of *res judicata*. Whilst the rule is often stated as being that it covers only those who are privies in the sense of having derived their rights from a party to the original litigation,[30] it is by no means clear that *Voet* confined it that narrowly. He includes a principal and agent; the pledgor and pledgee in relation to the right to possession of the thing

[27] The word '*conveniens*' means appropriate, not convenient. *Société du Gaz de Paris v Société Anonyme de Navigation des Armateurs Francais* 1926 SLT 33 at 34 *per* Lord Dunedin.
[28] See *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1983 (4) SA 321 (A).
[29] Gane's translation, supra, at 558.
[30] Hoffmann, *Law of Evidence* 2 ed (1970) 238; P J Rabie in *Lawsa* 2 ed (2005) Vol 9 para 637.

pledged; two joint and several debtors or creditors in relation to a claim to a thing and a surety and the principal debtor. In practice it has been held to include the sole member of a close corporation.[31] In *Prinsloo NO v Goldex 15*,[32] Brand JA refrained from deciding whether this approach was correct but 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.’

[43] It may be that the requirement of ‘the same persons’ is not confined to cases where there is an identity of persons, or where one of the litigants is a privy of a party to the other litigation, deriving their rights from that other person. 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. This case provides an illustration of that type of problem. The agency agreement was negotiated on behalf of WOMAG and the Sachs family by Mr Oren Sachs. His authority to represent the family is undisputed. His evidence before the Magistrates’ Court in Haifa was that he was authorised by the other family members to bring the attachment application that commenced the present litigation and to bring this action. It is true that there is not the slightest indication that anyone, save his father, the third respondent, has played any active role in matters concerning the business relationship with Caesarstone. Nonetheless the

[31] *Man Truck & Bus (SA) (Pty) Ltd v Dusbus Leasing CC & others* 2004 (1) SA 454 (W). Curiously in that case it was held not to extend to a surety notwithstanding the high authority of *Voet* to the contrary.
[32] Suprapara 15.

other family members are clearly fully aware of what is happening in both sets of litigation as they are parties to the agreed statement of facts. We have not been told of their precise connection with the business of WOMAG, but as they were to receive substantial commissions from its dealing with Caesarstone it would be surprising to learn that they are remote from and ignorant of its business. It would be a most impractical situation were the position to be that, after a trial in Israel, the court's decision on the central issue of whether the contract lapsed, or was lawfully cancelled by Caesarstone, or came to an end by virtue of a repudiation by Caesarstone accepted by all the respondents, bound WOMAG and Mr Oren Sachs, but not the remaining members of the family. That would particularly be the case if they play an active role in the business of WOMAG. I would be very surprised if, after a decision favourable to them,they did not seek, in pursuing their claim for damages in South Africa, to contend that the favourable Israeli decision bound Caesarstone.

[44] However, I need not reach a final conclusion on that point in the light of another consideration. I have already concluded that in relation to WOMAG and Mr Oren Sachs the requirements of the plea of *lis pendens* have been satisfied and that there are no grounds for the court to exercise its discretion to refuse a stay of the Western Cape action as far as they are concerned. That would leave the Western Cape action in a limping condition akin to *Hamlet* without the prince or, in the title of Donald Howarth's play presented at the Space Theatre in Cape Town during the dark days of apartheid, *Othello slegs blankes*. This would be most unsatisfactory.

[45] The solution lies in a point made by Milne J in *Cook*, when he said:[33]

‘Even if this does not strictly constitute a defence of *lis alibi pendens*, it is clear that the Court may, in the exerciseof its discretion in controlling the proceedings before it, debar a person from ventilating a dispute already decided against him under the guise of an action against another party. See *Burnham v Fakheer*, 1938 N.P.D. 63. Although the previous proceedings had not even been between the same parties, the Court there held that for the respondent to attempt to re-try an issue which had already been decided merely by changing the form of his action was an abuse of the processes of the Court, and was vexatious. See also *Niksch v Van Niekerk and Another*, 1958 (4) SA 453 (E) at p. 456, and the English decision of *Reichel v. Magrath*, (1889) 14 A.C. 665 (H.L.).’

[46] The case of *Burnham*, to which Milne J referred, is illuminating. Burnham was an attorney who had drafted an agreement of sale in respect of two properties on behalf of Mr Fakheer. When the purchaser sought to enforce the contract Mr Fakheer raised the defence that he did not understand the contract, which had not been explained to him, and had never intended to enter into an agreement of sale in respect of the properties. This defence was rejected after a full trial in which Mr Burnham gave evidence concerning Mr Fakheer’s grasp of the English language, the fact that the agreement had been read out to the parties before signature and any explanations sought were given and that the agreement had been drawn by him in accordance with his instructions. His evidence was accepted and that of Mr Fakheer rejected. When the latter then sued him for damages for drafting the agreement contrary to his instructions and allowing him to sign it when he knew that he (Fakheer) did not understand or agree with its contents, Burnham

[33] At 245H-246B.

successfully applied to have the claim struck out as an abuse of the process of the court.

[47] The importance of *Burnham* for present purposes is that Burnham was not a party to the previous litigation between Fakheer and the purchaser of the properties, but it was held that it would be an abuse of process to permit Fakheer to relitigate the same issues in an action against Burnham. The same situation had arisen in *Reichel v Magrath*which Carlisle J followed in *Burnham*. Reichel, a vicar, had brought an action against his bishop contending that he had not resigned his benefice and that an instrument of resignation he had executed was void. He lost, the court holding that he had resigned with the consent of the bishop. The new incumbent of the benefice was forced to bring an action against Reichel to compel him to give up the vicarage and the glebe lands. Once again Reichel claimed that he had not resigned. That defence was struck out as an abuse even though the new vicar had not been a party to the previous action between Reichel and the bishop. The court held that it was vexatious and frivolous and an abuse of process to seek to relitigate a matter that had already been determined in another action. Similarly in *Niksch v Van Niekerk*it was held to be vexatious for a witness, who had already testified in a motor collision case that the accident that had occurred was occasioned by the negligence of the driver of the vehicle in which he was a passenger, to bring an action against the driver of the other vehicle involved in the collision in which he alleged that the accident had been caused by that driver’s negligence.

[48] I stress that I am not saying that it would be an abuse of the process of the court for the other members of the Sachs family to try and pursue the Western Cape action, when that action has been stayed insofar as

WOMAG and Mr Oren Sachs are concerned. However, the practical difficulty of their doing so, when their right to pursue those claims is joint with the persons in relation to whom the action has been stayed, requires the court to exercise the inherent discretion of which Milne J spoke, in order to avoid those difficulties. That discretion is now confirmed in s 173 of the Constitution.

[49] The only sensible way in which to address the problem is for the court also to stay the proceedings as against the remaining members of the Sachs family, not on the basis of *lis pendens*, but in the exercise of its inherent powers to regulate its own procedures. Once the Israeli proceedings are complete and a final judgment has been given it will be open to them, together with WOMAG and Mr Oren Sachs, to resume the Western Cape action. Whether any question of *res judicata* or abuse of process will then arise will depend on the outcome of the Israeli action. It may then be necessary to resolve the interesting question raised, but not decided, in para 43 above. In addition, if any party to that action seeks to relitigate issues already dealt with in Israel the court will no doubt be called upon to decide whether that constitutes an abuse of process in accordance with the cases mentioned by Milne J and discussed in paras 46 and 47.

[50] In the result the appeal must succeed and the Western Cape action be stayed. That order will be made against all of the respondents, but for different reasons as between WOMAG and Mr Oren Sachs on the one hand and the other members of the Sachs family on the other.The plea of *lis pendens* must be dismissed against the third to sixth respondents, but as the action is in any event to be stayed against them for other reasons, their primary aim of avoiding a stay has failed. They made common

cause with WOMAGand Mr Oren Sachs, and were represented by the same legal team. In the circumstances the limited success they have achieved does not warrant an order for costs in their favour. I make the following order:

(a) The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

(b) The order of the court below is set aside and replaced by the following order:

'1 The special plea of *lis alibi pendens* in relation to the first and second plaintiffsis upheld with costs, such costs to include those consequent upon the employment of two counsel.

2 The special plea of *lis alibi pendens* is dismissed in relation to the third to sixth plaintiffs.

3 The Plaintiffs' action under WCHC Case No 10053/08 is stayed pending the final determination of the action instituted by the Defendant against the First and Second Plaintiffs in the Magistrates' Court, Haifa, Israel, under Case No A22497/07.'

M J D WALLIS

JUDGE OF APPEAL

Appearances

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|---|---|
| For appellant: | L A ROSE-INNES SC (with him B J VAUGHAN) |
| Instructed by: | Bernadt Vukic Potash & Getz, Cape Town<br>Lovius Block Attorneys, Bloemfontein |
| | |
| For respondent: | P B HODES SC (with him D GOLDBERG) |
| | Instructed by: |
| | Rubensteins Attorneys, Cape Town |
| | E G Cooper Majiedt, Bloemfontein. |