THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 448/02
REPORTABLE

PRICE WATERHOUSE COOPERS INC	**FIRST APPELLANT**
HOEK WIEHAHN	**SECOND APPELLANT**
WIEHAHN MEYERNEL	**THIRD APPELLANT**
PRICE WATERHOUSE MEYERNEL	**FOURTH APPELLANT**
PRICE WATERHOUSE	**FIFTH APPELLANT**

and

NATIONAL POTATO CO-OPERATIVE LTD	**RESPONDENT**

Before: Harms, Cameron, Conradie, Lewis JJA and Southwood AJA

Heard: 11 May 2004

Delivered: 1 June 2004

Summary: Champerty – an agreement in terms of which a person provides a litigant with funds to litigate in return for a share of the proceeds of the litigation is not contrary to public policy or void – illegality of such agreement not a defence in the litigation – courts empowered to prevent abuse of process despite right of access in s 34 of Constitution – special order of costs against attorney ignoring agreements about record.

JUDGMENT

SOUTHWOOD AJA

[1] The question which arises in this appeal is whether an alleged champertous agreement between the respondent Co-operative (the plaintiff in the court below) and a third party to finance the respondent's

action against a firm of accountants, the appellants (the defendants in the court below) may be relied upon by the appellants as a defence to the respondent's claim. In this judgment, I shall refer to the appellants, individually and collectively, as 'Price Waterhouse' and to the respondent as 'the Co-operative'.

[2] The salient facts as they emerged from the Co-operative's evidence (Price Waterhouse did not tender any) are as follows: The Co-operative is a primary agricultural co-operative registered in terms of the Co-operatives Act, No 91 of 1981. During 1997 the Co-operative appointed Collett, Du Toit & Associates (Pty) Ltd ('CDA') to investigate certain irregularities allegedly committed by the Co-operative's then general manager, Mr Boonzaaier. Mr David Collett, a chartered accountant, was to conduct the investigation for CDA.

[3] Late in 1997, CDA submitted a draft preliminary report to the Co-operative's board of directors. In this report Collett listed the irregularities which he had found and expressed the view that Mr Boonzaaier was heavily involved in the commission of these irregularities. The report also referred to other matters which, in Collett's opinion, should have been detected and reported by the auditor. In November 1997, and apparently because of this report, Price Waterhouse resigned as the Co-operative's auditor at the annual general meeting.

[4] CDA continued to investigate the irregularities but by April 1998 the focus of the investigation had changed to the viability of a claim against Price Waterhouse. On 27 March 1998 Collett gave his findings to a senior advocate and requested him to furnish an opinion on the Co-operative's prospects of success if it were to institute an action against Price Waterhouse.

[5] The cost of CDA's investigation put a strain on the Co-operative's financial position and the Co-operative's management advised the board not to proceed with the investigation. The board chose instead to investigate alternative means of financing the litigation. Its initial proposal was to find a third party to finance the litigation in exchange for a share of the proceeds of a successful action. The proposal contemplated that the third party would contribute an amount of R1,5 million to the cost of prosecuting the action and the third party and the Co-operative would share the proceeds of a successful claim.

[6] On 17 April 1998, after consulting a number of the Co-operative's members who apparently supported the action contemplated, the Co-operative's board of directors resolved to sell the Co-operative's claim against Price Waterhouse to Unitrade 40 (Pty) Ltd (which later changed its name to Farmers Indemnity Fund (Pty) Ltd and will henceforth be referred to as 'FIF'). FIF had been incorporated on 29 October 1997 as a

shelf company. From 30 October 1997 until 13 May 1998 FIF's 100 shares were held by the Gerne Trust of which Mr Buitendag, the Co-operative's then attorney, and the Co-operative's present attorney of record, was the beneficiary.

[7] On 13 May 1998 the Co-operative entered into a written agreement (the 'sale agreement') with FIF in terms of which it sold its right, title and interest in the claim against Price Waterhouse to FIF for 50 per cent of the gross proceeds of a successful claim or settlement of the claim. The agreement recorded that as at 31 March 1998 the Co-operative had already contributed an amount of R1,1 million to pay for legal advice and the cost of CDA's investigation and that it would be liable for all costs incurred up to 30 April 1998. The parties agreed that the Co-operative's contribution would be deemed to be R1,5 million and that FIF also would contribute R1,5 million to pay for the costs of the investigation, the legal costs and the expert's fees and qualifying expenses necessary to institute the action against Price Waterhouse and bring the claim to finality. The parties also agreed that FIF would be liable for costs incurred after 1 May 1998, but that if the costs incurred after 1 May 1998 exceeded R1,5 million, the additional costs would be borne equally by FIF and the Co-operative.

[8] The preamble to the sale agreement recorded, and FIF and the Co-operative pertinently agreed, that the Co-operative was selling its claim to FIF because it was not able to finance the litigation contemplated against Price Waterhouse and regarded the sale as an alternative method of financing the action.

[9] In the sale agreement the Co-operative and FIF also agreed how the shares in FIF were to be held. Members of the Co-operative were to be entitled to take up one third of the shares, Euro-Africa Investments (Pty) Ltd ('Euro-Africa'), a company controlled by a financier, Mr P S Schledorn, was to be entitled to take up one third of the shares and members of the Co-operative or other persons would be entitled to take up the remaining one third of the shares on a 'first come, first served' basis. If the Co-operative's members did not take up their allotted one third of the shares within 30 days of signature of the agreement the remaining shares could be taken up by any other person or body on a 'first come, first served' basis.

[10] The sale agreement provided that initially FIF's board would consist of four directors: one appointed by the Co-operative; one by Euro-Africa, one was to be a member of the Co-operative and one was to be appointed by the shareholders taking up the remaining one third of the shares. The first four directors were Mr D J Pieterse (appointed by the

Co-operative – also its chairman); Mr B C J van Rensburg (a member of the Co-operative – also its vice-chairman); Mr P S Schledorn (appointed by Euro-Africa) and Mr W J A Labuschagne (on behalf of the first come, first served shareholders – also a member of the Co-operative's board).

[11] The agreement recorded that FIF purchased the claim on the strength of research done in connection with the claim, that the claim appears from the Co-operative's records and that FIF would prosecute the claim at its own risk. The parties agreed that the Co-operative would co-operate fully with FIF for the purposes of the action and that FIF would appoint the professional team to conduct the litigation.

[12] On 12 May 1998 Mr Buitendag resigned as director of FIF and Messrs Pieterse, Van Rensburg and Labuschagne were appointed as directors. On 14 May 1998 FIF changed its main object and principal business to the acquisition of claims for litigation. It gave as the reason for this change that it would enable FIF to acquire a claim from the Co-operative for litigation.

[13] On 17 April 1998 FIF increased its authorised share capital of 1 000 one rand shares to 2 000 one rand shares. On 14 May 1998 FIF further increased its authorised share capital to 2 000 000 one rand shares. FIF did this so that it could issue shares to obtain the funds to finance the litigation.

[14] In May 1998, the Co-operative's members were invited to subscribe for shares in FIF. In August 1998, 1 664 400 shares were issued to 15 shareholders. According to the documents in the record these included four of the Co-operative's members, Mr Pieterse (the chairman – 100 000 shares); Mr Van Rensburg (the vice-chairman – 185 000 shares); Mr J D Van der Merwe (a director – 5 000 shares) and Mr G J Van Rooyen (100 000 shares). Euro-Africa (which later became NAK Financial Assistance (Pty) Ltd) took up 750 000 shares.

[15] The Co-operative's board was still concerned about the arrangements made to finance the action and decided to obtain legal advice on the question. In December 1998 a senior advocate advised the Co-operative's attorney, Mr Buitendag, that the sale agreement was champertous, accordingly against public policy and invalid and that it did not achieve its objective. He advised Mr Buitendag that the agreement should be cancelled and the claim ceded back to the Co-operative; that the claim should remain with the Co-operative; and that the Co-operative should be the plaintiff in the action. He also advised that a new agreement should be entered into in terms of which FIF would finance the litigation in return for 50 per cent of the proceeds of the litigation. He expressed the view that although the suggested arrangement could be a *pactum de quota litis* it would not necessarily be objectionable. However,

he warned that the proposed arrangement could be attacked, apparently because it might be seen to be of a ‘gambling character’. His concern was that if the Co-operative’s action failed, FIF would get nothing, whereas if it succeeded FIF would get 50 per cent of the proceeds. His view was that Price Waterhouse would not be able to rely on the arrangement as a defence (to an action instituted by the Co-operative) but that the agreement could create problems if a dispute arose between FIF and the Co-operative. During February 1999 this advice was conveyed to the Co-operative’s board, which was also informed that in accordance with the advice new agreements were being prepared to protect the investors’ interests.

[16] In October 1999 the Co-operative and FIF entered into two agreements: an agreement in terms of which they cancelled the sale agreement and an agreement in terms of which FIF undertook to provide financial assistance to the Co-operative to enable the Co-operative to pursue its claim against Price Waterhouse (‘the assistance agreement’). In the assistance agreement the parties recorded that the estimated cost of litigation to recover the claim amounted to R1,5 million; FIF undertook to provide assistance to the Co-operative in pursuing the claim against Price Waterhouse and as part of the assistance would contribute R1,5 million as from 1 April 1998; the parties agreed that if the litigation costs exceeded R1,5 million they would bear the excess equally; FIF’s board

would determine the funding requirements for litigation costs in excess of the R1,5 million and the amount, date and method of contribution (in excess of the R1,5 million) to be made by FIF's shareholders and the Co-operative. The assistance agreement further provided that in return the Co-operative would pay to FIF 45 per cent of the proceeds derived from the claim after certain agreed amounts had been deducted. As security for this obligation the Co-operative and FIF entered into an ancillary agreement in terms of which the Co-operative ceded to FIF 45 per cent of its right to the proceeds of the claim. The parties also entered into a further ancillary agreement in terms of which the Co-operative conditionally ceded to FIF its claim against Price Waterhouse. This cession would take effect in the event, inter alia, of the Co-operative not pursuing the claim to final judgment or not being able to do so. If this happened FIF undertook to pay to the Co-operative 20 per cent of the proceeds of the claim after deducting the litigation and other costs pertaining to the recovery of the claim.

[17] Various provisions of the assistance agreement emphasise FIF's interest in the claim and the proceeds of the claim. The Co-operative was not permitted to sell or cede its right, title and interest in the claim to any third party without the written consent of FIF and the Co-operative was not permitted to accept an offer of settlement or make a counter-offer

without consulting FIF. There were also detailed provisions for the payment to FIF of its share of the proceeds.

[18] CDA's investigation revealed that the damages recoverable by the Co-operative from Price Waterhouse could be very large. When the Co-operative first sold the claim to FIF the damages recoverable were thought to exceed R100 million.

[19] During November 1999 the Co-operative instituted an action against Price Waterhouse in the Pretoria High Court claiming damages in the sum of R283 490 742,19 on the grounds of breach of contract. It alleged that during the period 1983 to 1998 Price Waterhouse breached the contracts in terms of which they acted as the Co-operative's auditors by failing to carry out the audits properly in accordance with the relevant common law and statutory rules. Later, the Co-operative increased the amount claimed to R353 890 045,72.

[20] In 2002, the matter came to trial before Hartzenberg J. During cross-examination of the first witness Price Waterhouse were granted an amendment to their plea and the Co-operative was permitted to file a replication in answer. The amendment to the plea raised two issues: first, that during 1998 the Co-operative had ceded its right, title and interest in the claim against Price Waterhouse to FIF, that the purported cancellation of this cession was invalid and accordingly that Price Waterhouse had no

locus standi in respect of the claim; second, that the Co-operative was prosecuting the action pursuant to an agreement which was champertous and contrary to public policy and accordingly that the Co-operative's claim should not be upheld. The Co-operative's reply was that the parties to the cession of the Co-operative's claim had effectively cancelled the cession and that the second agreement in terms of which the Co-operative arranged for the action to be financed was not champertous and contrary to pubic policy. The trial proceeded on these limited issues.

[21] The court below found against Price Waterhouse on both issues raised in the amendment to the plea. Although Price Waterhouse appealed against the whole judgment their counsel did not make any submissions on the first issue. It is accordingly not necessary to consider this issue further. What remains to be considered is whether the arrangements made by the Co-operative to finance its litigation against Price Waterhouse are contrary to public policy and, if so, whether this will constitute a defence to the Co-operative's claim.

[22] The issue has three separate elements. First, what is the public policy regarding the financial support of a litigant by a stranger to the litigation. Second, whether an agreement in terms of which FIF undertook to contribute funds to the Co-operative in return for a share of the proceeds of the action is contrary to public policy and therefore void.

Third, whether that fact constitutes a defence to the Co-operative's claim against Price Waterhouse.

[23] At common law agreements that are contrary to public policy are void and not enforceable. While public policy generally favours the utmost freedom of contract it does take into account the necessity for doing 'simple justice between man and man'. Therefore, when a court finds that an agreement is contrary to public policy it should not hesitate to say so and refuse to enforce it. However, the court should exercise this power only in cases where the impropriety of the transaction and the element of public harm are manifest. It is an important consideration that there be certainty about the validity of agreements and that this certainty could be undermined by an arbitrary and indiscriminate use of the power to declare agreements contrary to public policy (see *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 7I-J and 9A-C; *Botha (now Griessel) and another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) at 782J-783B; *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 94; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) para 8).

[24] What public policy is and when an agreement is contrary to public policy are often difficult and contentious questions. Since the advent of the Constitution public policy is rooted in the Constitution and the fundamental values it enshrines (*Brisley v Drotsky* supra para 91; *Afrox*

Healthcare Bpk v Strydom supra para 18). The fundamental values enshrined in the Constitution and the interests of the community or the public are accordingly of the utmost importance in relation to the concept of public policy. Therefore an agreement will be regarded as contrary to public policy when it is clearly inimical to these constitutional values, or the interests of the community, whether it be contrary to law or morality or runs counter to social or economic expedience (*Sasfin (Pty) Ltd v Beukes* supra at 8C-D; *Botha (now Griessel) and another v Finanscredit (Pty) Ltd* supra at 782I-J). It is important to bear in mind that views about what public policy entails are constantly evolving (*Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 891H) and the court must be careful not to conclude that an agreement is contrary to public policy just because some of its terms offend against its sense of propriety and fairness (*Sasfin (Pty) Ltd v Beukes* supra at 9B-C). It is also important to bear in mind that to decide whether an agreement is against public policy a court must look at the tendency of the proposed transaction, not its actually proved result (*Sasfin (Pty) Ltd v Beukes* supra at 8G-9B; *Eastwood v Shepstone* 1902 TS 294 at 302).

[25] The agreement in issue in the present case is an agreement between the Co-operative and FIF in terms of which FIF undertook to provide the Co-operative with funds to enable the Co-operative to prosecute its case against Price Waterhouse in return for forty five per

cent of the proceeds. Such agreements, called *pacta de quota litis*, were known to Roman and Roman-Dutch law and have been looked upon with disfavour ever since the days of the Roman Empire. The reason for this was that they were considered to encourage speculative litigation and consequently amounted to an abuse of the legal process (*Wessels The Law of Contract in South Africa* 2 ed by AA Roberts vol 1 paras 510-511). From the 19th Century our law has often referred to such a contract as 'maintenance and champerty' and adopted some of the rules of English law without attempting to reconcile these rules with the principles of Roman-Dutch law. In English law, maintenance and champerty are two distinct concepts. Maintenance is the improper assistance by one person of litigation conducted by another, in which the former has no legitimate interest, without just cause or excuse. Champerty is an aggravated form of maintenance and occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit. (*Trendtex Trading Corp v Crédit Suisse* [1980] 3 ALL ER 721 (CA) at 749.) Not all such agreements were objectionable, but when they were found to be contrary to public policy, they were regarded as illegal and unenforceable.

[26] A number of cases decided in South Africa in the last years of the 19th and the early part of the 20th Century show that the courts took an uncompromising view of agreements which I shall call champertous (ie any agreement whereby an outsider provided

finance to enable a party to litigate in return for a share of the proceeds of the action if that party was successful or any agreement whereby a party was said to 'traffic', gamble or speculate in litigation), and refused to entertain litigation following on such agreements or to enforce them (see *Green v De Villiers, Dr Leyds, N.O., and The Rand Exploring Syndicate* [1895] 2 OR 289 at 293-294; *Thomas Hugo and Fred J Möller NO v The Transvaal Loan, Finance and Mortgage Company* [1894] 2 OR 336 at 339-341; *Schweizer's Claimholders' Rights Syndicate, Limited v The Rand Exploring Syndicate, Limited* [1896] 2 OR 140 at 144-5; *C.V.J.J. Platteau v S.P. Grobler* [1897] 4 OR 389 at 394-396; *Campbell v Welverdiend Diamonds, Ltd* 1930 TPD 287 at 292-4).

[27] However, it is clear that the courts acknowledged one exception. It was accepted that if any one, in good faith, gave financial assistance to a poor suitor and thereby helped him to prosecute an action in return for a reasonable recompense or interest in the suit, the agreement would not be unlawful or void (per Kotze CJ in *Thomas Hugo and Fred J Möller NO v The Transvaal Loan, Finance and Mortgage Company* supra at 340: *Schweizer's Claimholders' Rights Syndicate Limited v The Rand Exploring Syndicate, Limited* supra at 144: *Patz v Salzburg* 1907 TS 526 at 527). In a number of these early cases the courts adopted and

applied statements pertaining to maintenance and champerty made by the Privy Council in *Ram Coomar Coondoo and another v Chunder Canto Mookerjee* 1886 2 AC 186 at 210. The Privy Council said that –

‘a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se* opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner’.

However, it warned –

‘that agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made not with the *bona fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy – effect ought not to be given to them’.

(See *Platteau v Grobler* supra at 394-395; *Thomas Hugo and Fred J Möller NO v The Transvaal Loan, Finance and Mortgage Company* supra at 340; *Schweizer’s Claimholders’ Rights Syndicate, Limited v The Rand Exploring Syndicate Limited* supra at 144-5; *Patz v Salzburg* supra at 527-528; *Campbell v Welverdiend Diamonds, Ltd* supra at 290-1.) This was early recognition that in a case where an

injustice would be done if a litigant was not given financial assistance to conduct his case a champertous arrangement would not be contrary to public policy.

[28] Although the number of reported cases concerned with champertous agreements diminished, courts have still adhered to the view that generally they are unlawful and that litigation pursuant to such agreements should not be entertained (see eg *Lekeur v Santam Insurance Co Ltd* 1969 (3) SA 1 (C); *Goodgold Jewellery (Pty) Ltd v Brevadau CC* 1992 (4) SA 474 (W)).

[29] The reasons for champertous agreements being considered to be contrary to public policy have not, so far, been reconsidered or tested by the courts in the light of changed circumstances and, in particular, in the light of the Constitution. It is instructive to have regard first to the position in English law.

[30] English common law condemned champerty out of a concern for the integrity of the judicial system; the fear that champertous agreements may give rise to abuses such as the inflation of damages; the suppressing of evidence and the suborning of witnesses (Re *Trepca Mines Ltd* [1962] 3 ALL ER 351 at 355: *Giles v Thompson and related appeals* [1993] 3 ALL ER 321 (CA and HL) at 331g-j per Steyn LJ).

[31] Notwithstanding this concern and fear the law of maintenance and champerty has undergone many changes, particularly in the course of the 20th Century. In *Giles v Thompson and related appeals supra* the Court of Appeal and the House of Lords dealt with these changes in some detail (per Steyn LJ in the Court of Appeal at 328a-333b and per Lord Mustill in the House of Lords at 350h-351f and 360a-h).

[32] The law of maintenance and champerty developed out of a need to protect the system of civil justice; and as the civil justice system has developed its own inner strength the need for the rules for maintenance and champerty has diminished – if not entirely disappeared.

[33] Lord Mustill observes that in mediaeval times the mechanisms of justice lacked the internal strength to resist the oppression of private individuals through suits fomented and sustained by unscrupulous men of power. Champerty was particularly vicious because the purchase of a share in litigation presented an obvious temptation to the suborning of justices and witnesses and the exploitation of worthless claims which the defendant lacked the resources and influence to withstand. Two important factors contributed to the growth of these abuses; first, there was no

independent judiciary (‘detachment and disinterestedness was not the hallmark of the mediaeval judiciary’) and second, the civil justice system was not developed and was not capable of exposing abuses of legal procedure and giving effective redress. To deal with these abuses a number of statutes created the offences of maintenance and champerty. Gradually these conditions disappeared and by the beginning of the 19th Century England had an independent judiciary (‘the cold neutrality of the impartial judge became the established convention’) and after the procedural reforms of the 19th Century there was an effective civil justice system. Despite these changes the offences and torts of maintenance and champerty lingered on in atrophied form for more than a century after any public interest in preserving them had disappeared.

[34] In 1967 after an investigation and recommendation by the United Kingdom Law Commission (*Proposals for Reform of the Law relating to Maintenance and Champerty*: Law Com no 7) the Criminal Law Act of 1967 was passed. In terms of s 13(1) and 14(1) of the Act the offences and torts of maintenance and champerty were abolished but s 14(2) preserved the status quo regarding contracts. It provided expressly that the abolition of criminal and civil liability for maintenance and champerty would not affect any rule of

that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.

[35] The United Kingdom Law Commission also considered the effect of illegality of champertous agreements on the practice of solicitors. It stated that the question whether solicitors should be permitted to enter into contingency fee agreements (involving payment to the solicitor of an agreed percentage of compensation recovered) required further study. The public policy condemning contingency fee agreements then became a matter for public debate.

[36] In 1989 the United Kingdom government published a Green Paper on *Contingency Fees* (Cm 571) and after the consultation process proceeded to consider (a) the introduction in England and Wales of speculative actions on the Scottish model, that is on a ‘no win, no fees’ basis and (b) the validation of agreements for an uplift (ie increase) in percentage terms in the costs payable, to encourage lawyers to undertake speculative actions, such uplift being unrelated to the amount of the damages or property recovered. This was followed by a White Paper (*Legal Services: A Framework for the Future* (Cm 740)) in which the government proposed the removal of

the prohibition on these fee arrangements in all cases except criminal and family proceedings.

[37] These proposals led to the enactment of s 58 of the United Kingdom Courts and Legal Services Act 1990. This permitted speculative actions in accordance with the Scottish practice and rendered enforceable, subject to certain conditions, a conditional fee agreement. The most important condition was the strict regulation of the percentage whereby the fee was to be increased. The Lord Chancellor was to be given the power to regulate the increase. At the time of the judgment the Lord Chancellor had not yet exercised that power.

[38] The importance of this change was emphasised by Steyn LJ in *Giles v Thompson and related appeals* supra at 331d-f. He pointed out that the ability to recover fees beyond what was otherwise reasonable was intended to be an incentive to lawyers to undertake speculative actions. Such agreements were still unlawful in the absence of the Lord Chancellor's order. Nevertheless it was a clear departure from the rationale of the common law rule that such agreements cause the duty and interest of solicitors to conflict, with a resultant risk of abuse of legal procedure. It clearly recognised that the abuses associated with champerty are not the inevitable result of

all varieties of contingency fee agreements. This, he said, was cogent evidence of a change of public policy.

[39] These developments in English law are mirrored in South African law. The judiciary is independent. Its independence is guaranteed by the Constitution. The civil justice system is regulated by the state and has the necessary mechanisms to withstand the abuses perceived to flow from champertous agreements. There are trained and disciplined legal professionals who are subject to strong ethical codes. And there are pre-trial procedures such as discovery to ensure that evidence is not fabricated or suppressed. There is also the trial itself where the veracity of the evidence can be properly tested. There is also the cost of losing. This is a great disincentive to the dishonest litigant.

[40] After the South African Law Commission investigated and reported on the question (South African Law Commission Project 93 '*Speculative and Contingency Fees*' November 1996: the Commission recommended that contingency fee agreements should be legalized in South African law and that common law prohibitions on such fees should be removed), our legislature followed the English example of permitting contingency fee arrangements – 'no win, no fees' and increased fees in case of success – but subject to

strict controls. As in England this represented a watershed in public policy and was brought about by the view that it is in the public interest that litigants be able to take their justiciable disputes to court for adjudication. (A system of contingency fees 'can contribute significantly to promote access to the courts' and 'such a system is desirable' – *Summary of Recommendations and Draft Bill, SA Law Commission Project 93*.)

[41] The Contingency Fees Act 66 of 1997 (which came into operation on 23 April 1999), provides for two forms of contingency fee agreements which attorneys and advocates may enter into with their clients. The first, is a 'no win, no fees' agreement (s 2(1)(a)) and the second is an agreement in terms of which the legal practitioner is entitled to fees higher than the normal fee if the client is successful (s 2(1)(b)). The second type of agreement is subject to limitations. Higher fees may not exceed the normal fees of the legal practitioner by more than 100 per cent and in the case of claims sounding in money this fee may not exceed 25 per cent of the total amount awarded or any amount obtained by the client in consequence of the proceedings, excluding costs (s 2(2)). The Act has detailed requirements for the agreement (s 3), the procedure to be followed when a matter is settled (s 4) and gives the client a right of review (s 5). The professional controlling bodies may make rules

which they deem necessary to give effect to the Act (s 6) and the Minister of Justice may make regulations for implementing and monitoring the provisions of the Act (s 7). The clear intention is that contingency fees be carefully controlled. The Act was enacted to legitimise contingency fee agreements between legal practitioners and their clients which would otherwise be prohibited by the common law. Any contingency fee agreement between such parties which is not covered by the Act is therefore illegal. What is of significance, however, is that by permitting 'no win, no fees' agreements the legislature has made speculative litigation possible. And by permitting increased fee agreements the legislature has made it possible for legal practitioners to receive part of the proceeds of the action.

[42] As in England, this Act is designed to encourage legal practitioners to undertake speculative actions for their clients. The legislature was obviously of the view that the conflict between the duty and interests of legal practitioners would not lead to an abuse of legal procedure. It clearly considered that it is better that people be able to take their disputes to court in this way rather than not at all.

[43] In my view this approach is consistent with the right enshrined in s 34 of the Constitution: everyone has the right to have any

dispute that can be resolved by the application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum. On a number of occasions the Constitutional Court has emphasised the importance of this right: it is of cardinal importance and requires active protection and courts have a duty to protect *bona fide* litigants (*Beinash and another v Ernst & Young and others* 1999 (2) SA 116 (CC) para 17); the 'untrammelled access to the courts is also a fundamental right of every individual in an open and democratic society based on human dignity, equality and freedom' (*Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)* 2001 (4) SA 491 (CC) para 23); it is the foundation for stability of an orderly society and it 'ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self help': it is 'a bulwark against vigilantism, and the chaos and anarchy which it causes' (*Chief Lesapo v North-west Agricultural Bank and another* 2000 (1) SA 409 (CC) para 22); it is fundamental to a democratic society that cherishes the rule of law (*First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa and others*; *Sheard v*

Land and Agricultural Bank of South Africa and another 2000 (3) SA 626 (CC) para 6).

[44] In my view, upholding agreements between a litigant and a third party who finances the litigation for reward is also consistent with the constitutional values underlining freedom of contract. Cameron JA summarised the position in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 94 –

> '(T)he constitutional values of dignity, equality and freedom require that the Courts approach their task of striking down contracts or declining to enforce them with perceptive restraint … contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity.'

(See also *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) paras 22-23.)

[45] The legislature has expressly recognised that the civil justice system is strong enough to withstand the abuses which could arise as a result of contingency fee agreements between legal practitioners and their clients and it has made such agreements legal within carefully circumscribed limits and subject to regulation by the professions' controlling bodies and the Minister of Justice. This is a significant change in view of the fact that dishonest legal practitioners conducting the lawsuit would be in the best possible

position to manipulate the facts to get a favourable outcome in the suit.

[46] In my view it must also be recognised that the civil justice system is strong enough to withstand the perceived abuses which could arise if civil litigation is made possible by financial support given by persons who provide such support in return for a share of the proceeds. Accordingly it must be held that an agreement in terms of which a stranger to a lawsuit advances funds to a litigant on condition that his remuneration, in case the litigant wins the action, is to be part of the proceeds of the suit, is not contrary to public policy. Price Waterhouse are therefore not entitled to base a defence on the assistance agreement.

[47] In the court below the case proceeded differently since both parties accepted, as did the trial judge, that champertous agreements are void. In view of my conclusion, that assumption was erroneous. Because Hartzenberg J found that the assistance agreement did not conflict with public policy and was accordingly not unenforceable, it was not necessary for him to consider whether the invalidity of the agreement would afford the respondent a defence. Since this question may arise in cases where an attorney's contingency fee agreement is unlawful I shall deal with it.

[48] The fact that a litigant has entered into an unlawful agreement with a third party to provide funds to finance his case is a matter extraneous to the dispute between the litigant and the other party and is therefore irrelevant to the issues arising in the dispute, whatever the cause of action. Accordingly, the illegality of the agreement between a plaintiff and his legal representatives cannot be a defence to the action (compare *Fouché v The Corporation of the London Assurance* 1931 WLD 146 at 153; *Lekeur v Santam Insurance Co Ltd* 1969 (3) SA 1 (C) at 6D-F; *Giles v Thompson and related appeals* supra at 336h-g (per Steyn LJ) 340d-341a (per Gibson LJ), and 348j-349e (per Bingham MR)).

[49] Price Waterhouse referred, however, to cases decided in South Africa where courts had non-suited plaintiffs because they were being assisted in the litigation pursuant to a champertous agreement, (see eg *Thomas Hugo and Fred J Möller NO v The Transvaal Loan, Finance and Mortgage Co* [1894] 1 OR 336 at 340-1; *Green v De Villiers, Dr Leyds, NO and The Rand Exploring Syndicate* [1895] 2 OR 289 at 293-4; *Schweizer's Claimholders' Rights Syndicate, Limited v The Rand Exploring Syndicate, Limited* [1896] 3 OR 140 at 144-5; *Campbell v Welverdiend Diamonds, Ltd* 1930 TPD 287 at 294). However, none of these cases explained how the fact that the agreement between the third party and the

plaintiff was illegal could be a defence to the plaintiff's claim against the defendant, or where the court derived the power to dismiss or refuse to entertain a plaintiff's action on this ground. In my view there was no basis for finding that the illegal agreements were a defence or a ground for refusing to entertain the actions. These cases were accordingly incorrectly decided. Although based on different grounds Hartzenberg J's conclusion was therefore correct.

[50] An agreement in terms of which a person provides funds to enable a litigant to prosecute an action in return for a share of the proceeds may be relevant in the context of abuse of process. It has long been recognised in South Africa that a court is entitled to protect itself and others against the abuse of its process (see *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 271; *Corderoy v Union Government (Minister of Finance)* 1918 AD 512 at 517; *Hudson v Hudson and another* 1927 AD 259 at 268; *Beinash v Wixley* 1997 (3) SA 721 (A) at 734D; *Brummer v Gorfil Brothers Investments (Pty) Ltd en andere* 1999 (3) SA 389 (SCA) at 412C-D), but no all-embracing definition of 'abuse of process' has been formulated. Frivolous or vexatious litigation has been held to be an abuse of process (per Innes CJ in *Western Assurance v Caldwell's Trustee* supra at 271 and in *Corderoy v Union Government (Minister of Finance)* supra at 517) and it has been said that 'an attempt made

to use for ulterior purposes machinery devised for the better administration of justice' would constitute an abuse of the process (*Hudson v Hudson and another* supra at 268). In general, legal process is used properly when it is invoked for the vindication of rights or the enforcement of just claims and it is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. The mere application of a particular court procedure for a purpose other than that for which it was primarily intended is typical, but not complete proof, of *mala fides*. In order to prove *mala fides* a further inference that an improper result was intended is required. Such an application of a court procedure (for a purpose other than that for which it was primarily intended) is therefore a characteristic, rather than a definition, of *mala fides*. Purpose or motive, even a mischievous or malicious motive, is not in general a criteria for unlawfulness or invalidity. An improper motive may however be a factor where the abuse of court process is in issue. (*Brummer v Gorfil Brothers Investments (Pty) Ltd en andere* supra at 412I-J; 414I-J and 416B). Accordingly, a plaintiff who has no *bona fide* claim but intends to use litigation to cause the defendant financial (or other) prejudice will be abusing the process (see *Beinash and another v Ernst & Young and others* 1999 (2) SA 116 (CC) para 13).

Nevertheless it is important to bear in mind that courts of law are open to all and it is only in exceptional cases that a court will close its doors to anyone who wishes to prosecute an action (per Solomon JA in *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 273-274). The importance of the right of access to courts enshrined by section 34 of the Constitution has already been referred to. However, where a litigant abuses the process this right will be restricted to protect and secure the right of access for those with *bona fide* disputes (*Beinash and another v Ernst & Young and others* supra para 17).

[51] In the present case, there is no suggestion that the Co-operative's claim is not *bona fide*. Before instituting the action the Co-operative employed a chartered accountant to investigate the facts and appointed two senior counsel to investigate and advise on the law. It is highly probable that the Co-operative would have instituted the action against Price Waterhouse without the assistance of FIF had the Co-operative been in a position to do so. There is no suggestion that the Co-operative wishes to do more than to recover damages for the breach of contract which it has alleged. Clearly the position would be different if the Co-operative's claim was not *bona fide* and was brought simply to cause Price Waterhouse embarrassment or financial harm.

[52] To summarise:

(1) an agreement in terms of which a person provides a litigant with funds to prosecute an action in return for a share of the proceeds of the action is not contrary to public policy or void;

(2) the illegality of such an agreement or an attorney's contingency fee agreement would not be a defence in the action;

(3) litigation pursuant to such an agreement may constitute an abuse of the process which in appropriate circumstances a court may prevent notwithstanding a litigant's right of access to the courts enshrined in s 34 of the Constitution.

[53] Price Waterhouse's appeal must therefore be dismissed.

COSTS

[54] Unfortunately it is necessary to comment on the Co-operative's attorney's attempts to supplement the record.

[55] For purposes of the trial the parties agreed that, in the absence of objection, copies of documents could be used and that the documents were what they purported to be. The parties also agreed that no document would be admissible unless it had been referred to in evidence.

[56] After leave to appeal was granted Price Waterhouse's attorney, Deneys Reitz, and the Co-operative's erstwhile attorney, MacRoberts,

agreed to restrict the record to the evidence relevant to the limited issues. Deneys Reitz prepared the appeal record and served it on MacRoberts on 13 February 2003 and shortly thereafter lodged copies of the record with the registrar of this court.

[57] At the end of February 2003 the Co-operative terminated MacRoberts' mandate and on 16 April 2003 appointed Buitendag's Attorneys as its attorney. The Co-operative had been in possession of the record (then approximately 1 000 pages) since about 7 April 2003. On 22 April 2003 Mr Buitendag of Buitendag's Attorneys initiated correspondence expressing his dissatisfaction with the record. Mr Buitendag's complaints related primarily to the accuracy of the record. However he also complained that some documents had been wrongly included or excluded. Deneys Reitz pointed out that the contents of the record had been agreed upon with MacRoberts and that the minor errors could be brought to the attention of the court in argument. Nevertheless Deneys Reitz suggested that a meeting be held to resolve the problem. A meeting was arranged for 23 June 2003.

[58] Prior to that meeting Deneys Reitz took steps to correct the errors in the transcript and requested an extension of the period in which Price Waterhouse were to file their heads of argument. An order was made that the period be extended to 31 July 2003 (on the assumption that the parties had agreed on the record by not later than 30 June 2003) and

that, if no agreement was reached by 30 June 2003, either party was entitled to approach the court for further directions or extensions.

[59] Despite reaching agreement on 23 June 2003 about the matters to be rectified Mr Buitendag continued to express dissatisfaction about the record. The basis for the complaint also shifted. He demanded that certain documents which had not been handed in as exhibits be incorporated. He said that certain documents in the record created a misleading impression because they had not been incorporated in their proper factual context, that Price Waterhouse's legal representatives withheld these facts from the court and that there was a duty on Price Waterhouse's legal representatives to place before this court all documents relevant to the issues. Mr Buitendag contended that certain documents obtained by Price Waterhouse's legal representatives by means of subpoenas had not been disclosed to the court. Deneys Reitz correctly responded that documents not referred to in evidence should not be included. Deneys Reitz asked the registrar for a ruling on the issue.

[60] On 23 August 2003 the court ordered Price Waterhouse to lodge the agreed record within one month and directed that if the Co-operative wished to add to the record it should do so by lodging a supplementary record and addressing the issue in its heads of argument. The court also

directed that an additional volume of all correspondence regarding the issues around the record be lodged.

[61] Pursuant to the order Deneys Reitz prepared a volume containing the correspondence (124 pages). Mr Buitendag was not satisfied with this bundle of correspondence and prepared a bundle of correspondence and a bundle of documents which he maintains should be included in the record. The bundle of correspondence runs to 373 pages and fills three volumes. It needlessly included every letter in Price Waterhouse's bundle. The bundle of documents runs to 268 pages and also fills three volumes.

[62] It is plain that the agreement about the documents and the agreement about the record govern the contents of the record filed. This was not disputed by Mr Buitendag. He was entitled to insist on compliance with these agreements but no more than that. The clear purpose of the second agreement was to limit the appeal to what was essential. Neither party was free to disregard the agreements and attempt to place before this court documents which had not been placed before the trial court. Mr Buitendag apparently thought that he was entitled to do so. Not only did he attempt to have other documents included in the record but he also filed affidavits dealing with these documents and what had been given to Price Waterhouse's legal representatives. The result is another seven volumes of record, largely

irrelevant, and of no use to this court. This is due to Mr Buitendag's obstinate adherence to a clearly erroneous view.

[63] The additional seven volumes have imposed upon the members of this court a considerable and unnecessary burden. It is appropriate that the Co-operative bear the costs associated with these volumes. In addition, and as a mark of the court's displeasure at the conduct of Mr Buitendag, it will be ordered that he is not to receive a fee for perusing the record.

[64] The following order is made:

(a) The appeal is dismissed.

(b) The respondent is ordered to pay the costs of the 4 volumes of correspondence and the 3 volumes of additional documents including the appellants' attorney's fee for perusing these volumes.

(c) The appellants are ordered to pay the costs of the appeal (excluding the costs referred to in para (b)) such costs to include the costs consequent upon the employment of two counsel.

(c) It is ordered that Mr Buitendag, the respondent's attorney of record, is not to receive a fee for perusing the record from either the appellants or the respondent.

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B R SOUTHWOOD

ACTING JUDGE OF APPEAL

CONCUR:

HARMS JA

CAMERON JA

CONRADIE JA

LEWIS JA