REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA, GAUTENG LOCAL DIVISION

Case No.: 48226/12

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHER JUDGES: YES/NO	
(3) REVISED	
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DATE	SIGNATURE

In the joinder application between:

GOLD FIELDS LIMITED	First Applicant
GOLD FIELDS OPERATIONS LIMITED	Second Applicant
NEWSHELF 899 (PROPRIETARY) LIMITED	Third Applicant
BEATRIX MINES LIMITED	Fourth Applicant
FARWORKS/682 LIMITED	Fifth Applicant
DRIEFONTEIN CONSOLIDATED (PROPRIETARY) LIMITED	Sixth Applicant
GFI MINING SOUTH AFRICA (PROPRIETARY) LIMITED	Seventh Applicant
GFL MINING SERVICES LIMITED	Eighth Applicant
GFI JOINT VENTURE HOLDINGS (PROPRIETARY) LIMITED	Ninth Applicant

And

MOTLEY RICE LLC	Respondent

In re

BONGANI NKALA

AND FIFTY-FIVE OTHERS (Case No 48226/12) Applicants in the Certification Application

And

HARMONY GOLD MINING COMPANY LIMITED

AND THIRTY-ONE OTHERS Respondents in the Certification Application

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JUDGMENT

MOJAPELO DJP:

Introduction

[1] This case raises the question as to whether the court should order the joinder of a non-party litigation funder as a party to the application for certification of a class action.

Background Facts and Issues

[2] Bongani Nkala and 55 others intend to institute a class action on behalf of mineworkers for damages arising from silicosis contracted by mineworkers through their employment on the mines. It is a prerequisite that prior to the institution of a class action, the intended plaintiffs should obtain an order from the court certifying a class of litigants on whose behalf the class action may be instituted.[1]

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[1] **Children's Resources Centre Trust and Others v Pioneer Food (Pty) Ltd and Others** 2013 (2) SA 213 (SCA) at paragraph [23]

[3] Bongani Nkala and fifty five others have therefore instituted an application under case number 2012/48226 for class certification. That is the main action. It is still pending and has not been heard. The intended action for damages has therefore also not been instituted.

[4] In the present application the first to ninth applicants ("Gold Fields") seek to join Motley Rice LLC ("Motley Rice") as a respondent in the class certification application for the purposes of seeking a costs order against Motley Rice if the certification application fails. The applicants in the certification application are hereafter referred to as the mineworkers.

[5] The present application has been brought as an interlocutory, one of many, in the pending class certification application.

[6] The mineworkers and their dependants are represented in the intended action for damages and in the pending class certification application by the firm Richard Spoor Inc ("Spoor").

[7] It has been suggested, and there is no reason to doubt the veracity of this suggestion, that the scope and magnitude of the proposed claim in the silicosis litigation is unprecedented in South African law. Should it proceed, the case will entail novel and complex issues of facts and law. However, the mineworkers and their dependants are themselves largely indigent and poorly educated and could not afford to run the litigation on their own. Spoor can also not afford to fund the proceedings on their behalf.

[8] Motley Rice has for this reason been approached and agreed to assist the mineworkers. Motley Rice is a law firm in the United States of America with extensive experience in personal injury class action litigation. It has agreed and is doing so in dual capacity. In the one capacity it acts as a consultant to Spoor providing advice and

professional services. In the second, Motley Rice is also the litigation funder. It has the financial ability to back and fund costly litigation.

[9] Because of the inability of the mineworkers to fund their own litigation, Spoor acts for them on a contingency basis in terms of an agreement concluded with each mineworker under the Contingency Fees Act, Act 66 of 1997. For its role in the litigation Motley Rice would be compensated by a share in the fees to be recovered by Spoor. Spoor and Motley Rice have concluded a fee sharing agreement for that purpose, which governs the relationship between the two law firms. I refer later to this agreement in this judgment.

[10] Gold Fields seek to join Motley Rice in the class certification application on the basis that Motley Rice is a non-party litigation funder against which the court ought to be in a position to make a costs order, if the certification application is unsuccessful. As I understand the applicants' case they base their assertion on two pillars: That as litigation funder Motley Rice (a) exercises substantial control over the litigation application and (b) has a financial interest in the proceedings. The litigation and proceedings in this case, as I shall explain, must refer to the pending certification application and not to the intended damages action as the latter has not yet been initiated. The applicants contend further that the joinder is necessary to facilitate the exercise of the court's supervision over the litigants before it. Their argument is that the joinder is necessary to bring Motley Rice under the supervisory powers of the court as it is based outside the Republic of South Africa and its members are not officers of this court.

[11] The respondent, Motley Rice, opposes the joinder on the basis that none of the factors which a court would take into account in the exercise of its discretion to order a non-party litigation funder liable for costs, are present, and accordingly, that the joinder for the purposes of rendering it (Motley Rice) susceptible to a costs order is not permissible.

[12] This case raises for consideration, on the one hand, the joinder of litigation funders to litigation for the purposes of costs orders, and on the other, the constitutional right of access to justice by poor litigants.

Certification Application and Class Action

[13] The basis for the class action that the miners intend to institute is provided for in section 38 of the Constitution which provides that anyone listed in the section has the right to approach a competent court alleging that a right has been infringed or threatened and the court may grant appropriate relief including a declaration of rights. The persons who may approach a court are, amongst others: "*anyone acting as a member of a class, or in the interest of, a group or class of persons" and "anyone acting in the public interest*".

[14] The Supreme Court of Appeal in **Children's Resources Centre Trust and Others v Pioneer Food (Pty) Ltd and Others**[2] specified the criteria which constitute the core considerations to be taken into account in a certification inquiry.

[15] Summons in a class action may be issued only once the court has granted an order certifying the class. This has not happened. What is pending before the court at the moment in the main application is the certification application. It is not ripe and has not yet been heard. There is and there can be no class action against the applicants until such time as and when the certification application has been granted. If the certification application is not granted, the class action will not be instituted.

[2] 2013 (2) SA 213 (SCA)

[16] The certification application is thus a jurisdictional hurdle or threshold which mineworker applicants must overcome before they may institute the class action.

[17] The two proceedings, i.e. the class certification application and the class action proceedings, are separate, and distinct, although the one may lead to the other. Each has its own legal requirements and will lead to its own judgment.

[18] In the heads of argument, counsel for the applicants did not make it clear, when referring to control of litigation or proceedings as to whether he referred to the certification application or the intended class action for damages. In argument before court he made it clear that he referred to both, as his argument was that they were in fact one, the certification being the threshold for the class action. Counsel for the respondent, however, argued that the applicants were conveniently conflating the two proceedings, i.e. those in the pending application and those in the damages action that still had to be instituted and would only be instituted if and when the class action certification was successful. He argued that those were two separate legal proceedings though one was a jurisdictional requirement for the initiation of the other. What is clear, however, is that it is the certification action to which the applicants seek the joinder. The action is not yet a reality and one cannot refer to it as the proceedings or litigation, although it is contemplated. It may not even begin. The joinder does not relate to the intended action. The litigation and proceedings in regard to which control and benefit have to be considered must refer to the litigation to which the joinder is sought, which is in existence and pending. It cannot be reference to the intended but not yet existing litigation. The applicants therefore have to prove that the respondent (Motley Rice) substantially controls and/or stands to benefit from the certification application.

[19] It is proposed to consider first (a) the legal basis for joinder of a non-party litigation funder to proceedings for the purposes of potential costs orders, and (b) the need for judicial supervision over legal representatives practising in this court – within the ambit of this case. If necessary, the court will thereafter weigh those considerations against (c) the constitutional rights to access to justice and how these should be balanced against each other.

The Legal Framework

[20] The legal framework within which the decision has to be considered relates to developments around litigation funding agreements, joinder of litigation funders, related costs orders and access to justice facilitated by such agreements. The legal framework is set out mainly in the context of particular cases that the applicants rely upon in their case.

Developments concerning Funding Agreements

[21] The developments of litigation funding agreements, of the nature under consideration here, were aptly summarised in **Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd** (hereafter referred to as "**PWC 2004**").[3]

[22] Agreements in terms whereof one party (the funder) undertook to provide funds to enable the other (the litigant) to enable the latter to prosecute its case in return for a share in the proceeds of litigation go back to the Roman and Roman Dutch law period. Such agreements were called *pacta de quota litis* and were looked upon with disfavour. In South Africa the developments around such agreements received the influence of the English law where such contracts were referred to as "maintenance and champerty" agreements.

[3] 2004 (6) SA 66 (SCA)

[23] Prior to 1994 South African courts took a dim and uncompromising view of any agreements in terms whereof 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. These were/are called champertous agreements deriving the name from English law influence. The courts viewed such agreements as contrary to public policy and void. The courts consequently refused to enforce such agreements or to entertain litigation that flowed from them.[4]

[24] However, even in those early days, the courts always acknowledged one exception, namely that "*if anyone, 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*."[5]

[25] The exception recognised that injustice would be done if a poor litigant were not given financial assistance to conduct his case. In such circumstances champertous agreements were not against public policy and were protected and enforced.

[26] Prior to 2004 and in 1997, the Legislature of the democratic South Africa in fact foreshadowed the departure from the uncompromising view towards champertous agreements when for the first time it became possible to enter into a contingency fee agreement under the Contingency Fees Act, Act 66 of 1997 in terms of which legal representatives could validly do work on condition that their fees would be paid only if the action succeeds and out of the proceeds. In 2004 the Supreme Court of Appeal in **PWC 2004** reconsidered the unlawfulness of champertous agreements in the light of "changed circumstances and, in particular, in the light of the Constitution."[6] Having considered the

[4] See cases referred to in paragraph [26] of **PWC 2004** *supra*
[5] See **Thomas Hugo and Fred J Möller NO v The Transvaal Loan, Finance and Mortgage Company** [1894] 1 OR 339 at 340 referred to in **PWC 2004** *supra*
[6] See paragraph [29] at p 75 of **PWC 2004** *supra*

developments in English law, which increasingly recognised the important role played by champertous agreements in promoting access to justice, the Supreme Court of Appeal concluded that a clear departure from the past was required.

[27] The court then concluded that:

> *"…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."*[7]
>
> *"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.*"[8]

[28] The court recognised that there may, despite the departure from the past, still be exceptional circumstances in which champertous agreements may in fact constitute an abuse of process, in which case the court would not countenance them. This will be the case for instance where the litigation is frivolous, or vexatious or where litigation is being pursued for an ulterior motive. These are exceptions because "*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.*"[9]

Costs Orders

[29] The starting point for an analysis of the South African legal position for legal costs is the general rule that (a) in ordinary cases costs should follow the event – the successful party is ordinarily entitled to costs against the unsuccessful party; (b) costs are awarded in the discretion of the court which may in appropriate cases not award costs to a successful party or even award costs against such party.

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[7] See paragraph [44] of **PWC 2004** *supra*
[8] See paragraph [46] of **PWC 2004** *supra*
[9] See paragraph [50] at p 81F of **PWC 2004** *supra*

[30] In constitutional cases the general rule is almost the converse: namely that the unsuccessful litigant should ordinarily not be ordered to pay costs. The rule is based on the fact that the Constitution is the supreme law of the land and that everyone with a reasonably arguable point, should be free to invoke it without fear to be mulcted in costs, if unsuccessful. The discretion of the court is still not ousted; for instance, where an unsuccessful party in constitutional litigation is found to have abused the process, acted frivolously or vexatiously or in a manifestly inappropriate manner, the court may award costs against such party. Such a party "*should not expect that the worthiness of its cause will immunise it against adverse costs order*."[10]

[31] It has been said that the application of the general rule regarding costs in constitutional cases applies only "in proceedings against the State",[11] particularly where the dispute turns on whether a government agency has fulfilled its constitutional and statutory responsibility.[12] The principle does not apply to constitutional litigation between private parties.[13]

[32] The existence of the discretion of the court in all cases (constitutional and otherwise) ensures that the court is always in a position to balance the interest of the parties and to protect its own process, if necessary through costs orders. In this context there is no party which is *a priori* immune from the court's power to protect its process through costs orders.[14]

[33] It has also been held in the **Biowatch Trust v Registrar, Genetic Resources**[15] case (hereafter referred to as "**Biowatch**") that parties who act in public interest or who are indigent are not to be accorded privileged status when it comes to the proper approach to costs. Such parties are to

[10] See **Biowatch Trust v Registrar, Genetic Resources** 2009 (6) SA 232 (CC)
[11] See **Biowatch** *supra* at paragraph [21]
[12] See **Biowatch** *supra* at paragraph [28]
[13] See **Biowatch** *supra* at paragraph [26]
[14] See **Biowatch** *supra* at paragraph [18]
[15] 2009 (6) SA 232 (CC)

be held to the same standards as any other party particularly where they are represented.[16]

[34] The following passage in the **Biowatch** case[17], which is approached and interpreted differently by the applicants and the respondent, does not alter but rather emphasises the general approach to costs as set out above:

> *"Conversely, a party should not get a privileged status simply because it is acting in the public interest or happens to be indigent. It should be held to the same standards of conduct as any other party, particularly if it has had legal representation. This means it should not be immunised from appropriate sanctions if its conduct has been vexatious, frivolous, professionally unbecoming or in any other similar way abusive of the processes of the court." [My underlining]*

[35] However, significantly the judgment and indeed the quotation in **Biowatch** do not say whether a non-party litigation funder ought to be joined and made a party in a certification application. **Biowatch** does not deal with joinder and does not resolve the real issues in this case. The case dealt with issues concerning costs awards in constitutional litigation.[18] It also dealt with entities that were already parties to the litigation and not those proposed to be joined. When it refers to costs, therefore, it specifically deals with costs relative to parties.[19]

[36] The decision in **Biowatch** in my respectful view does not help the applicants at all.

[37] In the present application it is the applicants ("Gold Fields") which should make out a case (whether exceptional circumstances or ordinary circumstances) indicating why the court should join Motley Rice as a party to the certification application. The applicants have to bring Motley Rice within the ambit of a funder, which is potentially liable for costs. As I

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[16] See **Biowatch** *supra* at paragraph [18]
[17] See **Biowatch** *supra* at paragraph [18]
[18] See **Biowatch** *supra* at paragraph [14]
[19] In order to understand the full context and approach to costs in constitutional litigation one needs only read paragraph [14], and then paragraphs [16] to [18] of **Biowatch** *supra*

understand the applicants' case, it relies not so much on the absence of *a priori* immunity, but on the assertion that Motley Rice (a) controls the litigation and (b) stands to benefit financially from it. The applicants essentially rely on the terms of the association or fee sharing agreement between Motley Rice and Spoor[20], to which I shall revert later and which will be analysed in the context of the legal framework to establish control or benefit that the applicants rely upon for this application.

Joinder of Litigation Funders

[38] The judgment in **Price Waterhouse Coopers Inc and Others v IMF (Australia) Ltd and Another**[21] (hereafter referred to as "**PWC 2013**") is, as far as I am aware, the first South African case in which the court ordered the joinder of a litigation funder. The court in that case developed the common law and established that a litigation funder may be directly liable for costs and may be joined as a co-litigant to the funded litigation. It established that it is necessary to join the litigation funder to the proceedings in order to enable the courts to exercise its discretion regarding costs against the funder. I propose, this being the leading case on this subject, to deal with it a little closer and in some detail.

[39] In **PWC 2013**, the second respondent, an agricultural co-operative, had sued Price Waterhouse Coopers Inc (the applicant) for R500 million. The second respondent was funded in the litigation by IMF (the first respondent). The second respondent (the co-op) was thus the plaintiff in the relevant litigation.

[40] The co-op (the plaintiff) had, earlier in the litigation, furnished security for costs for Price Waterhouse Coopers Inc ("PWC") but the company that had furnished security/finance had withdrawn as funder for the co-op (the plaintiff) and security was thus ineffective.

[20] The full heading of the agreement is "Co-Counsel Association Agreement"
[21] 2013 (6) SA 216 (GNP)

[41] During the trial, and on the "*eve of probably the last day that evidence will be heard*", PWC applied to join IMF (the litigation funder) as second plaintiff for the purposes of obtaining a costs order against it. IMF had in fact, in its funding agreement with the co-op (first plaintiff) undertaken to pay any adverse costs order that might be made against it (IMF).

[42] The High Court per Botha J ordered the joinder of IMF, the funder, as the second plaintiff with the co-op. The court accepted that, in principle, a South African court could and should make costs orders against a person who funds litigation. It specifically developed the common law in terms of section 173 of the Constitution to make a direct order for costs against a funder possible. To enable the applicant (PWC) to join the respondent (IMF), was a natural progression from the earlier SCA decision in **PWC 2004** that held that champertous agreements were now lawful. The court said that to allow litigants like the applicant (PWC) to hold funders directly liable for costs was one of the ways which courts could adopt to counter any possible abuses arising from the recognition of the validity of champertous contracts.[22]

[43] What the court in **PWC 2013** did not specify is: in what circumstances will a court order the joinder of a litigation funder as a party. Surely, it is not in every funded litigation that the litigation funder must be added. The guidance on this crucial question emerges from other decisions. It is a vexed issue in this litigation. The distinction that emerges is one between "pure litigation funder" and other litigation funders. I refer to this distinction later when I assess available case law on the aspect of control and benefit. The enquiry into the distinction is essentially a fact-specific one and the answer will depend on the level of control exercised by the funder or the benefit which the funder stands to gain.

[22] See **PWC 2013** *supra* at p 222D – G

[44] In **EP Property Projects (Pty) Ltd v Registrar of Deeds, Cape Town, and Another, and Four Related Applications**[23] (hereafter referred to as "**EP Property Projects**") the court in 2014 reaffirmed the principle that "a non-party funder such as the first respondent could be 'potentially liable', in the exercise of the court's discretion, for an adverse costs order made against the funded party."[24]

[45] The applicants in the present case focus on the expression "potential liability" and argue that this is enough for joinder. The applicants argue that it is enough that Motley Rice (the respondent) is not immune from costs and that consequently its joinder to the certification application ought to be granted.

[46] On the other hand, the respondent (Motley Rice) uses the same authority and quotation from the case to argue that the case established that costs orders are often made personally against non-parties; but that this is done in "exceptional circumstances" and in the exercise of the court's discretion.

[47] The facts in **EP Property Projects** were that one Marais was a losing party in arbitration proceedings involving the ownership of land. He then concluded an agreement with Naidoo under which Naidoo would fund review or appeal proceedings in return for part ownership of the property, in the event of success in the envisaged litigation. Marais ceded to Naidoo his interest in the litigation so that the proceedings would be pursued by Naidoo in the name of Marais. Naidoo was joined as a party to the resulting proceedings, and the issue was whether she would, as funder of the proceedings, be liable for adverse costs orders.

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[23] 2014 (1) SA 141 (WCC)
[24] See **EP Property Projects** *supra* at paragraph [79] at p 163

[48] The following considerations led to the conclusions that Naidoo should be held jointly and severally liable for any adverse costs order granted against Marais:

1. Marais had ceded to Naidoo his interest in the litigation. The litigation was thus pursued by Naidoo in the name of Marais. Naidoo was the "real party" to the litigation. She was not merely a funder, but had acquired a personal interest in the litigation, was in full control of it, and stood to benefit financially if the nominal party (Marais) was ultimately successful.
2. Naidoo took over the conduct of the litigation and appointed her own legal team to conduct the litigation on her and the party's behalf.
3. Since Naidoo was not a mere commercial funder of litigation, the potential chilling effect of an adverse costs order in commercial third party funding would not be a factor.
4. It was apparent that the funded party had acted fraudulently and in bad faith and that the funder was aware of that at the time of concluding the funding agreement. By funding and controlling the proceedings, the funder knowingly associated herself with the fraudulent and *mala fide* conduct of the funded party;
5. The application related to property in which Naidoo stood to acquire a share if the application was ultimately successful. [25]

[49] Naidoo had been joined as party to the proceedings. Joinder was thus an accomplished fact and not an issue before court. The issue before court was whether Naidoo, as funder, would be liable for costs orders. She was already a party.

[50] The next court decision of importance on this topic is **Scholtz and Another v Merryweather and Others**[26] (hereafter referred to as **"Merryweather"**). This case distinguishes between pure litigation funders and other types of litigation funders.

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[25] See **EP Property Projects** *supra* at paragraphs [71], [79] and [82] to [89]
[26] 2014 (6) SA 90 (WCC)

[51] The facts in this case were that Merryweather and Scholtz were involved in a fight which left Merryweather paralysed. Merryweather sued Scholtz for his damages and Scholtz failed to deliver a notice of intention to defend. Merryweather then obtained judgments by default both with regard to merits as well as quantum. Thereafter Scholtz applied to rescind both judgments. The court dismissed the application.

[52] Of importance for the present application is that **Merryweather's** case also concerned a court's discretion to award costs against a non-party funder of litigation. The court may, it was held, make such an award where the non-party substantially controls the litigation or is to benefit from it.[27] In that case the court ordered that Scholtz's father was liable jointly and severally with Scholtz for the costs of the application. He had funded his son's litigation and had substantially controlled the proceedings on his son's side hindering service of summons, consulting lawyers, and initiating the rescission application. He also stood to benefit in that if the judgment could be rescinded, he would be relieved of his common law obligation to support his son.

[53] The attitude of the parties as well as relevant circumstances are well captured in paragraphs [108] and [109] of the judgment. From these it appears that Scholtz, the son, did not file an affidavit in response to that filed in support of the application for joinder while Scholtz, the father, filed a notice to abide. Counsel were further in agreement with the approach in principle to the joinder of Scholtz Snr. It was said that as a person effectively controlling the litigation or as Mr Whitehead SC put it, "calling the shots", he was liable to be mulcted in costs attributable to his impecunious son. If on the other hand he was what has been termed a "pure funder" of the litigation, he was generally immune from such an order.

[27] See **Merryweather** *supra* at paragraphs [109] to [111]

[54] The control exercised over the litigation by Scholtz Snr was unambiguously direct and substantial.[28] He took over the control of litigation and was thus not a pure funder.

Access to Justice

[55] The positive impact of litigation funding agreements that no one can deny is that such agreements promote access to justice. The importance is elevated a step higher where the funded litigant is one who, because of poverty and lack of resources, would otherwise not have been able to litigate or access justice.

[56] Even prior to 1994 when champertous agreements, or the so-called *pacta de quota litis*, were regarded as being against public policy and of no force or effect, the one exception, as we have seen was that the courts acknowledged that if anyone, in good faith, gave financial assistance to a poor litigant and thereby helped him to prosecute an action in return for a reasonable compensation or interest in the litigation, the agreement would not be unlawful or void.[29]

[57] Hence the Privy Counsel in **Ram Coomar Coondoo and Another v Chunder Canto Mookrjee** (1876) 2 APPCAS 186 at 210 stated:

> *"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 will 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."*

[58] The attitude of the courts has thus, from time immemorial, always been that courts should go out of their way to accommodate the indigent or

[28] See **Merryweather** *supra* at paragraphs [113] to [115]
[29] **Patz v Salzburg** 1907 TS 526 at 527

poor litigant to access justice. This was done by way of recognising agreements to fund litigation where this was done in good faith and in order to assist the poor.

[59] Post 1994, in a constitutional and democratic South Africa, this important right of access to justice is entrenched as part of the Bill of Rights in section 34 of the Constitution: Everyone has the right to have any disputes that can be resolved by application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum. The right is accorded to "everyone" and not to some, and in particular, not only those who can afford it. This important right is reinforced by another fundamental right, namely that everyone is equal before the law and has the right to equal protection and benefit of the law.[30] Equal protection of the law would be meaningless unless everyone, including the poor and indigent, can access justice.

[60] The protection of this right was taken a step further by the promulgation of the Contingency Fees Act which made it possible for litigants to enter into agreements with legal representatives in terms of which the legal representatives would get paid out of the proceeds of the litigation, if successful.

[61] On a number of occasions the Constitutional Court has emphasised the importance of this right. The right is of cardinal importance and requires active protection and courts have a duty to protect *bona fide* litigants.[31] The untrammelled access to courts is a fundamental right of every individual in an open and democratic society based on human dignity, equality and freedom.[32] It is the foundation for stability for an orderly society and it "*ensures the peaceful, regulated and institutionalised mechanism to resolve disputes, without resorting to self-help*." It is a "*bulwark against vigilantism, and the chaos and anarchy which it causes*."

[30] Section 9 of the Constitution
[31] See **Beinash and Another v Ernst & Young and Others** 1999 (2) SA 116 (CC)
[32] See **Moise v Greater Germiston TLC: Minister of Justice Intervening** 2001 (4) SA 491 (CC) at paragraph [23]

It is fundamental to a democratic society that cherishes the rule of law.[33] It is clearly better in a civilised society that people should be able to take their disputes to court in this way rather than not at all, even if they are poor. Just as access to justice is important, it is in my respectful view, important that ideally every party is adequately represented to articulate or assert his or her rights. No one should fail to access justice or fail in the case simply because of poverty.

[62] Within the context of the present matter, the right of a successful unfunded party to recover costs must be counterbalanced against the right of the funded party to access justice. These are two important rights. However, only the latter is a constitutional right under our law.

[63] It is common cause (a) that the applicants in the certification application as well as the class members are overwhelmingly poor and cannot contribute towards the costs of litigation, and (b) the proposed class action litigation is likely to invoke the determination of many complex and novel issues of fact and law and is unlikely to be settled soon. It is thus accepted by Gold Fields, Spoor and Motley Rice that, without the support of a large firm or organisation such as Motley Rice, the mineworkers' claims would not get off ground, and the mineworkers would accordingly be prevented from pursuing the silicosis litigation against Gold Fields and other mining companies.

Funder Control and Benefit under the Agreement

[64] It is now proposed to examine the extent to which Motley Rice (the respondent), as funder of the certification application, controls and stands to benefit from the litigation. The relationship between Motley Rice and Spoor as well as the relationship with mineworker litigants is key to such control and benefit.

[33] See **PWC 2004** *supra* at paragraph [43] and the authorities quoted in the said paragraph

The Agreement

[65] The agreement between Motley Rice and Spoor essentially comprises two parts:

1. The first part is the agreement for consulting services in which Motley Rice undertakes to provide services including overseeing case and document management systems to Spoor in order to assist in the running of the silicosis litigation in South Africa. In respect of these consulting services Motley Rice is remunerated in terms of the agreement on an hourly rate, if the claim is ultimately successful.

2. The second part is a funding agreement in which Motley Rice agrees to fund the certification application and the proposed silicosis litigation in exchange for a share of the ultimate contingency fee earned by Spoor in the silicosis litigation.

[66] The parties to the agreement are Motley Rice and Spoor. The mineworkers are therefore not parties to the agreement and there is no contractual nexus between the applicants in the certification application on the one hand and Motley Rice on the other. The actual nexus with mineworkers exists in terms of the contingency fees agreements which have been signed by Spoor with each one of the mineworkers.

[67] The agreement between Spoor and Motley Rice appear from pp. 53 – 61 of the record.

[68] The agreement provides in clause 1 thereof that it is "*contingent upon the approval from the South African Law Society for MR (Motley Rice) to share in fees and to advance the costs and expenses associated with the Pursued Claims*."

[69] As contemplated in clause 1 of the agreement, the agreement between Motley Rice and Spoor was approved by the Law Society by letter dated 26 April 2013[34] which records that the said agreement "*was considered by the Law Society and that the terms of such agreement (e.g. fee sharing) will not constitute a contravention of the relevant provisions of the Attorneys Act, 1979 (Refer Section 83(6)) and the Rules of the Law Society and that there is therefore no reason why this arrangement can not be concluded by Richard Spoor Inc*."

[70] The responsibilities of Spoor under the agreement are set out in clause 2(a) while those of Motley Rice are set out in clause 2(b) of the agreement.

[71] The responsibilities of Spoor under the agreement are:

> "*a. Spoor shall serve as local counsel and shall adequately staff, actively manage and handle the day-to-day activity in the Pursued Claims, including, but not limited to:*
>
> *i. Immediately incorporating his law firm and recruiting sufficient personnel to adequately support the Pursued Claims;*
>
> *ii. Servicing Miner Clients, including formalizing their retention of Spoor and MR by utilizing a written Retainer Agreement approved in advance by both Spoor and MR;*
>
> *iii. Providing MR with a copy of every signed Miner Client retention agreement and file closure letter;*
>
> *iv. Serving as the primary Miner Client contact and keeping the Miner Clients appropriately and adequately informed;*
>
> *v. Maintaining individual client files and records of correspondence with Miner Clients;*
>
> *vi. Collecting all damages and standing information for each Miner Client with MR;*
>
> *vii. Investigating the facts and developing admissible evidence with MR;*
>
> *viii. Participating in the formulation of litigation strategy, resolution strategy and settlement negotiation strategy;*

[34] See Record p. 62

ix. *Developing and implementing a supportive public relations campaign in relevant jurisdictions, calculated to facilitate the successful resolution of the Pursued Claims. Notwithstanding the foregoing, Spoor shall not engage in any advertising or public relations activities concerning Pursued Claims or Miner Clients without MR's express, prior, written approval. Moreover, all press conferences and press releases related to Pursued Claims or Miner Clients must be pre-approved by MR. These terms shall in no way require pre-approval for media interviews;*

x. *Advising all Miner Clients and obtaining any required consent to the association of all law firms and/or individual attorneys, solicitors, or barristers engaged to assist Spoor and MR in the representation pursuant to all applicable rules governing professional conduct;*

xi. *Handling all local legal issues;*

xii. *Making all necessary court filings;*

xiii. *Establishing any necessary local satellite offices needed to represent Miner Clients ('Local Offices') as determined by agreement of the Parties;*

xiv. *Supervising and liaising with all Local Offices and co-ordinating all of their activities;*

xv. *Propounding and responding to all written discovery;*

xvi. *Assisting with global and case-specific experts;*

xvii. *Assisting with trial preparation;*

xviii. *Ensuring compliance with all applicable statutes and rules governing professional conduct in South Africa, Lesotho, Mozambique and any other African country in which the Miner Clients reside;*

xix. *Keeping accurate expense records relating to the Pursued Claims and each Miner Client;*

xx. *Identifying appropriate barristers to associate on the Pursued Claims after consulting with and approval by MR;*

xxi. *Maintaining appropriate trust accounts and handling all disbursements to Miner Clients in accordance with procedures agreed to with MR;*

xxii. *Monitoring the court docket(s) and ensuring all litigation deadlines are met.*"

[72] The responsibilities of Motley Rice under the agreement are spelt out as follows:

> "*b. MR will collaborate as co-counsel and provide the following services:*
>
> *i. Participating in the formulation of litigation strategy, resolution strategy and settlement negotiation strategy;*
>
> *ii. Funding for Spoor to incorporate his law firm and recruit sufficient personnel to support the Pursued Claims ('Incorporation Expense');*
>
> *iii. Funding to establish necessary local satellite offices needed to represent Miner Clients ('Local Office Expense');*
>
> *iv. Funding necessary to pay Spoor a monthly advance against his fee interest with respect to the Pursued Claims in the amount of R50,000 (approximately $7,693.00 U.S.) to cover his time and office overhead expenses relating exclusively to the Pursued Claims;*
>
> *v. Providing and overseeing case and document management systems;*
>
> *vi. Consulting with Spoor on the damages and standing information needed for each Miner Client;*
>
> *vii. Consulting with Spoor on the necessary fact investigations;*
>
> *viii. Working with Spoor and the barrister(s) to develop admissible evidence and witness testimony;*
>
> *ix. Retaining and working with global and case-specific experts;*
>
> *x. Assisting with trial preparation; and*
>
> xi. *Actively participating in all settlement and strategic Pursued Claim resolution discussions.*"

Fees

[73] As has already been stated Spoor has a separate contingency fees agreement concluded with each of the mineworkers under the Contingency Fees Agreement. In terms of the said agreement his fees are capped at the lesser of 200% of the attorneys' normal fee and 15% of

the total amount awarded to or obtained by client in consequence of the proceedings where the client is successful.

[74] In terms of the agreement between Motley Rice and Spoor, the attorneys' fees so generated are divided among the attorneys as follows: 25% to Spoor and 75% to Motley Rice; provided that all litigation costs (including payment to barrister(s)) shall be reimbursed prior to payment of any attorneys' fees. In other words, Motley stands to gain a maximum success related fee of 11.25% of the claims, once all other disbursements and costs have been paid. This is the payment which is to be made to Motley Rice and which is referred to as the success fee.

[75] The other payment that may be made to Motley Rice in terms of the agreement relates to what is termed "disbursements" representing work done in respect of expert consulting services provided to Spoor. This payment or disbursements, as it is called, is not success related, although it will not be paid unless and until there is success in the silicosis litigation.

[76] The "*disbursements representing [Motley Rice] normal hourly rate for work done and which are not success related*" constitutes what one may call the normal professional fees for Motley Rice. They do not come out of a share of fees earned or generated by Spoor. This is what counsel for the respondent has referred to as "consulting fees". The share in the fees generated by Spoor is described by counsel for the respondent as the return on the investments made by Motley Rice in the litigation as a funder. This is the financial return on investment of the funder.

[77] The consulting fee payable to Motley Rice clearly does not constitute a financial interest in litigation that would render Motley Rice susceptible to a costs order. It is the kind of fees that attorneys in South Africa who act on behalf of clients regularly earn and do not constitute "financial

interests" in the litigation of their clients. It does not, in and of itself, expose the attorney to potential liability for costs.

[78] It does appear that Motley Rice does not stand to earn any success fee at all from the grant of the certification application or to receive any return on its funding of the application upon the grant of the certification application. Motley Rice is only entitled to a success fee if the proposed silicosis litigation is instituted and is ultimately successful in due course, and then only in relation to any award made in that further litigation.

Termination

[79] The agreement specifically provides that either Spoor or Motley Rice may terminate same. Motley Rice may do so at any time and for any reason and Spoor may do so "for cause". I do not believe that much turns on the rights to terminate the agreement as spelt out in the agreement itself. Counsel for the applicants contends that the fact that Motley Rice has the right to terminate the agreement "for any reason" while Spoor may only do so "for cause" demonstrates or denotes that Motley Rice has negative control of the litigation. However, it does not appear to me that Motley Rice has by virtue of its powers to terminate the agreement the type of control of litigation of the nature referred to in the case law which is analysed more fully later in this judgment. There is nothing extraordinary or exceptional in the respective rights of the parties to terminate the agreement.

Assessing Control and Benefit

[80] In three of the South African cases referred to earlier in this judgment and which are relied upon in this case, the court ordered the joinder of the litigation funder.[35] It is thus proposed to look closely at the factual matrix

[35] The cases are **PWC 2013**, **EP Property Projects** and **Merryweather** referred to and discussed in this judgment

of each case and endeavour to establish or answer the vexed question: under what circumstances do courts find the control and benefit of the funder sufficient to warrant the funder being joined as a party to the proceedings?

[81] In **PWC 2013** the following peculiar facts paint the circumstances:

1. The furnishing of security had earlier been compelled, but the company that had furnished security had subsequently withdrawn and the security had become ineffective.

2. IMF, the litigation funder, had in its agreement undertaken not just to fund the litigation but also to pay any adverse costs orders that might be made directly against it. There was thus already available the relief of direct costs orders (based on the undertaking) at a later stage (not through the joinder).

3. The co-operative (the funded plaintiff) was no longer operating its business anymore and was kept alive only for the purposes of pursuing the funded claim against PWC;

4. The main interest in the case was held, not by the plaintiff, but by the funder (IMF);[36]

5. The co-op (the first plaintiff) was alleged to have a bad case and was an empty shell;

6. There were existing costs orders against the co-op that had not been met;[37]

7. The funder (IMF) stood to gain the most in an award of damages to the plaintiff in the action in which it (the funder) was sought to be joined;[38]

[36] See **PWC 2013** *supra* at p 217A – B
[37] See **PWC 2013** *supra* at p 217I – J

8. The main action was pending and the applicant also sought an amendment of its plea to include a prayer for costs against the funder.

9. The first respondent (IMF) was "*fully prepared to be exposed to adverse costs orders in those jurisdictions where the courts had the powers to grant such orders*."[39]

10. The court found that the order for joinder, at that stage, even before the end of litigation, was "apposite" because, as it stated, "*after all, the first respondent (the funder) is a co-owner of the claim.*"[40]

11. The timing of the joinder was "*most convenient, now, just before the parties will start to prepare their heads of argument*."[41] The joinder was thus considered and ordered just before the question of actual liability for costs was considered and not just potential liability.

[82] Although the order for joinder itself was made based on the court's decision to develop the common law in logical progression from the recognition of validity of champertous (funding agreements), the factors listed above and which were present in the case, were certainly relevant considerations. These are commutatively, having regard to the legal developments up to then, the circumstances in which the court ordered the joinder of IMF as the non-party litigation funder.

[83] None of the circumstances listed above, which were present in **PWC 2013**, are present in the case before this court.

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[38] See **PWC 2013** *supra* at p218E
[39] See **PWC 2013** *supra* at p 219H – I
[40] See **PWC 2013** *supra* at p 222H
[41] See **PWC 2013** *supra* at p 222H

[84] In **EP Property Projects** the court found that there was no reason why, in the light of the fact that costs *de bonis propriis* against non-parties such as legal representatives and public officials are sometimes made, why the law should not be that a non-party funder could be "potentially liable", in the court's discretion, for an adverse costs order made against the funded party. Firstly the court equated potential liability for costs *de bonis propriis* to the potential liability for costs against the non-party litigation funders. The potential liability of legal representatives and public representatives for adverse costs orders were placed at the same level with costs against litigation funders. These are costs orders which are only granted in exceptional circumstances and not as a general rule or in the ordinary course. The judgment thus confirmed the principle that costs orders are not ordinarily and often made against a person who is not a party to the litigation before court in his personal capacity. Only in exceptional circumstances, and in the exercise of a court's discretion, will courts consider ordering a non-party to pay costs *de bonis propriis*. These include attorneys of a party, liquidators, administrators, municipal councillors and officials, and employees of government departments and public officials. Such potential costs orders are made in the face of some or other impropriety in the conduct of those who attract such liability.

[85] It is clear from the decision too that the court considering joinder of a funder needs only concern itself with whether "potential liability" for costs exists. It need not concern itself with actual liability which could arise at the conclusion of the proceedings.

[86] The facts and peculiar circumstances in the case of **EP Property Projects** which led to the adverse costs order against the funder were set out earlier in this judgment.[42]

[42] See paragraph [48] of this judgment

[87] Significantly, and having regard to those considerations, the facts in **EP Property Projects** are distinguishable from the present case and Motley Rice's funding agreement in that:

1. Motley Rice is not the owner of any part of the mineworkers' claim in terms of the agreement;

2. Motley Rice does not stand to benefit from the certification application even if the certification of the class action is successful;

3. Motley Rice has not taken over the conduct of the litigation; and

4. There is no evidence of any *mala fide* conduct on the part of the mineworker claimants, Spoor or Motley Rice in the conduct of the litigation.

[88] The peculiar circumstances in the **Merrywheather** case were, *inter alia*, that Merryweather's own legal position "was dire" and necessitated *pro bono* assistance on a contingency basis. Scholtz's (the son's) financial position was analogous to that of an insolvent. Scholtz Snr effectively took the position of the litigant. He did not just fund but substantially controlled the rescission application. He was the litigant in important respects *inter alia* consulting with lawyers alone, i.e. initiated the rescission application and kept vital information away from his son. It may rightly be said that he was the active litigant while his son, the funded, was totally inactive and took no control. Scholtz Snr also behaved negligently and was responsible for the protraction of the matter.

[89] Furthermore as in **EP Property Projects**, the joinder as such was not contested in **Merryweather's** case. Joinder was not an issue in that case.

[90] It was in these circumstances that Scholtz snr was found to have exercised control over the litigation and costs were accordingly ordered against him and his son jointly and severally.

[91] The cases of **PWC 2013**, **EP Property Projects** and **Merryweather,** relied upon by the applicants, are clearly distinguishable from the present case. In the last two, joinder was not even an issue, as it was in **PWC 2013** and in the present case. The distinguishing features of the last two cases from the present one are fairly strong and have a compelling force for the decisions made in those cases.

[92] The **PWC 2013** case is clearly the leading and direct authority for establishing, for the first time in South Africa, the legal basis for the joinder of an outside litigation funder or outside party to the litigation. However, what the case did not specify are the circumstances which a court shall take into consideration in deciding whether or not to order the joinder of a non-party litigation funder. The basic principles indicate that the degree of control of the litigation and/or the benefit derived by the funder is foundational to such an order. But in what circumstances is the degree of control and/or benefits sufficient for a court to order joinder? The facts and circumstances of each and every case will have to be considered with this question in mind.

Pure Funder and Other Funder

[93] Repeated distinction is made in the case law and was made in the litigation before this court between “pure funders” of litigation and other funders. It is important to examine this: This is done on the basis of the case law dealt with in this case.

[94] Pure funders have no personal interest in the litigation. They do not stand to benefit from it and they do not fund litigation as a matter of business. They do not seek to control the course of the litigation that they fund. Common law and English authorities indicate that the courts do not

exercise their discretion in respect of costs against such funders.[43] One may say such funders fund litigation as a pure financial investment, and like any other ordinary investor, do not seek to control the enterprise in which they invest.

[95] The other type of litigation funder is distinguished from the "pure funder" described above. I shall call this second type of funder the "controlling funder" or "funder-for-own-interest" to distinguish it from the "pure funder" of litigation. The controlling litigation funder does not merely fund litigation proceedings, but substantially also controls the proceedings that it funds, or at any rate stands to benefit from them. Justice ordinarily requires that, if the proceedings fail, this second type of funder will pay the successful party's costs. The non-party funder in such a case is not so much facilitating access to justice by the funded as himself gaining access to justice for his own purpose.[44] Funders of this latter category are not just funders, they are the real litigants themselves except in name. The controlling funder or funder-for-own-interest funds for his own interest and therefore seeks to control the litigation which he/she or it funds.

[96] In **Carborundum Abrasives Ltd v Bank of New Zealand (No 2)**[45], Tompkins J stated:

> *"In many cases a major consideration will be the reason for the non-party causing a party, normally but not always an insolvent company, to bring or defend the proceedings. If the non-party does so for his own financial benefit, either to gain the fruits of the litigation or to preserve assets in which the person has an interest, it may, depending upon the circumstances, be appropriate to make an order for costs against that person. Relevant factors will include the financial position of the party through whom these proceedings are brought or defended and the likelihood of it being able to meet any order for costs, the degree of possible benefit to the non-party and whether, in all the circumstances,*

[43] See **Dymocks Franchise Systems (NSW) Pty Ltd v Todd and Others** [2005] 4 All ER 195 at 204 paragraph [25]; **Hamilton v Al Fayed (No 2)** [2002] All ER 641 at paragraph [40], [2003] QB 1175; See also **EP Property Projects** *supra* at 162E – F, paragraph [75]; **Merryweather** *supra* at paragraph [111] at p. 113G

[44] See **Dymocks Franchise Systems** *supra* at p 204c – d, paragraph [25]; judgment in the High Court of Australia in **Knight v FP Special Assets Ltd** (1992) 107 ALR 585, (1992) 174 CLR 178; **EP Property Projects** *supra* at p 162G, paragraph [75]

[45] [1992] 3 NZLR 757 at 765

the bringing or defending of the claim – although in the end unsuccessful – was a reasonable course to adopt."

[97] In the High Court of New Zealand case of **Arklow Investments Ltd v MacLean** (19 May 2000, then unreported), Fisher J stated:

"*[19] The guiding principle here is that costs orders against third parties are exceptional but that they are warranted in cases where there would otherwise be a situation in which a person could fund litigation in order to pursue his or her own interests and without risk to himself or herself should the proceedings fail or be discontinued.*"

[98] The consideration or distinction as to whether the funder funds for his interest or the interest of the funded litigant is of cardinal importance when it comes to costs liability and therefore to liability to be joined as a party. The mere fact that the funder receives a return for investment or a fee, is, however, not conclusive of the fact that the funder is himself the litigator. The funder operates for his own interest when he takes an active interest in and substantially controls the litigation. He does so for himself though it may in appearance look as if it is the funded litigant who litigates. In reality it is in fact the funder who litigates; and does so for own interest but in the name of the funded. The funder in such a case litigates for himself with the funded serving no more than as the face of litigation.

[99] In paragraphs 23 and 24 of the answering affidavit[46] the respondent gives an apt description of a litigation funding industry or business which, I think will fall in the category of controlling funders of litigation, as opposed to pure funders:

"*23 There are, of course, companies which have been created to fund litigation. These funding companies typically enter into agreements with clients to advance all litigation expenses and to insure against any adverse cost orders. In exchange for such an agreement, litigation funding companies purchase a share of each client's case directly. These contracts typically provide for a 40% or more recovery of the settlement or judgment after the return of expenses. In other cases, funding company returns are negotiated as a multiple of the amounts invested. Returns of five*

[46] See Record pp. 116-7

> *to ten times the amounts invested are typical, after the return of expenses. The amount recovered by the funding company is independent of the client's attorney fees. The sum paid to the litigation funder is paid out of the client's recovery and not out of the attorney's recoverable fee.*
>
> *24 Litigation funding companies typically do not invest in personal injury actions, but usually invest only in large commercial cases where damages are liquidated or more quantifiable from the outset. Litigation funding agreements specifically include the right of the funder to recover a portion of the corpus of the lawsuit from each client.*"

[100] The deponent concludes by stating that no funding agreement of that nature was entered into by the mineworkers litigants with Motley Rice (the respondent). This is common cause. The mineworkers litigants in this case have not entered into an agreement with the respondent and have no contractual nexus with Motley Rice. Their contracts are with Spoor who is their lawyer and legal representative. Motley Rice is a consultant for Spoor which also funds and supports Spoor in the litigation of the claims of the mineworkers.

[101] This court has full supervisory powers over the professional conduct of Spoor, the legal representative of the mineworkers. It is supported and assisted in the exercise of that power by the statutory law society of which he is a member. He is the link between the mineworker litigants and this court, without whom the case of the mineworkers could not be prosecuted. The agreement between him and the respondent was conditional upon the approval of the statutory law society which has granted such approval. Furthermore all counsel who shall appear on behalf of the litigants are subject to the supervisory powers of this court. No good reason has been advanced why the supervisory powers over these legal representative is not adequate in the context of this case. The legal representatives are not at liberty to follow the direction of the respondent contrary to those of their controlling professional bodies and of this court. I find accordingly that there is no deficiency over the supervisory controlling powers of this court over the legal representatives

that need to be augmented by the joinder of the litigation funder in the context of this case.

Access to Justice and Costs for Unfunded Litigants

[102] In the present case the mineworkers are funded to proceed with the certification application and damages claims against Gold Fields and other mining companies that employed the mineworkers.

[103] Litigation funding advances access to justice. The joinder of the litigation funder in this case is sought in order to make it possible for the court to make a costs order.

[104] Considerations of access to justice come against those of potential costs in favour of the unfunded litigant (the mining companies), if the litigation (certification application) is unsuccessful.

[105] The desperate position of the mineworker litigants is captured in the following paragraph of the answering affidavit[47], which is not disputed:

> "*25 Gold Fields is well aware that the gold miners it employed live in rural communities with limited access to health care. Gold Fields is also aware that many of these clients are illiterate and extremely impoverished. Absent legal representatives, such as Spoor, willing to pursue litigation on their behalf on a contingency fee basis, these sick gold miners would not have access to justice.*"

[106] At the centre of the enquiry in this case is whether the respondent litigation funder (Motley Rice), is a "pure funder" of litigation which is immune from costs, or is a controlling litigation funder against whom the court should be in a position to order costs and who should be joined to the proceedings for that purpose.

[47] See Record p. 117 paragraph 25

[107] In **Dymocks Franchise Systems (NSW) Pty Ltd v Todd and Others**[48] (hereafter referred to as "**Dymocks**") the Privy Council set out guidelines derived from English and common law for the exercise of a court's discretion to make costs orders against non-parties to the litigation:

> "*(1) Although costs orders against non-parties are to be regarded as 'exceptional', exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such 'exceptional' case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against.*
>
> *(2) Generally speaking the discretion will not be exercised against 'pure funders', described in* Hamilton v Al Fayed (No 2) *[2002] 3 All ER 641 at [40], [2003] QB 1175 as –*
>
> > *'those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course.'*
>
> *(3) Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is 'the real party' to the litigation, a concept repeatedly invoked throughout the jurisprudence (see, for example, the judgments of the High Court of Australia in* Knight v FP Special Assets Ltd *(1992) 107 ALR 585, (1992) 174 CLR 178 and Millett LJ's judgment in* Metalloy Supplies Ltd (in liq) v MA (UK) Ltd *[1997] 1 All ER 418, [1997] 1 WLR 1613). Consistently with this approach, Phillips LJ described the non-party underwriters in* TGA Chapman Ltd v Christopher *[1998] 2 All ER 873 at 883, [1998] 1 WLR 12 at 22 as 'the defendants in all but name'. Nor, indeed, is it necessary that the non-party be 'the only real party' to the litigation in the sense explained in* Knight v FP Special Assets Ltd*, provided that he is 'a real party…in very important and critical respects' (see* Arundel Chiropractic Centre Pty Ltd v Deputy Comr of Taxation *[2001] HCA 26 at [37], (2001) 179 ALR 406, referred to in* Kebaro Pty Ltd v Saunders *[2003] FCAFC 5 at 32-33, 35, 37). Some reflection of this concept of 'the real party' is to be found in CPR 25.13(2)(f) which allows a security for costs order to be made where 'the claimant is acting as a nominal claimant.'*" [My underlining]

[48] [2005] 4 All ER 195 at pp. 203-4, paragraph [25]

[108] The respondent (Motley Rice) in this case funds Spoor for the purpose of bringing the certification application and ultimately the class action for damages suffered by the mineworkers, who contracted silicosis in their work. The mineworkers are clients of Spoor, who is their legal representative and attorney of record in the certification application. Both Motley Rice (the respondent) and Spoor are legal firms. In addition to providing funding, the respondent (Motley Rice) also acts as a consultant for Spoor in the certification application and the intended class action.

[109] There is no suggestion of impropriety on the part of the respondent (Motley Rice) or Spoor.

Conclusion

Financial Benefit

[110] One of the important considerations to determine whether a funder is liable to be joined to proceedings, is the benefit which the funder stands to gain from the litigation. Such benefits were clear in **PWC 2013**, **EP Property Projects** and **Merryweather**. The litigation and proceedings to which the applicants seek to join the respondent is the pending certification application.

[111] In terms of its agreement with Spoor, even if the certification application is granted, the respondent will not receive any success related fee. The respondent will also not benefit financially from the certification of the class and will in particular not be entitled to claim any “disbursements” as a result of the certification. The respondent will receive a benefit in relation to the certification application only if a class action is instituted and succeeds in due course. Even then, such benefit will be limited to the “disbursements” incurred by the respondent in relation to the certification application. It will not include any fee in relation to the success thereof. There is thus no financial benefit that the respondent will get in the certification application. The financial benefit to the respondent is only

payable at the end of the damages action, if that action succeeds. In the circumstances, the joinder application is premature. There are no recognised grounds for the recovery of costs from the respondent (the funder) at the certification stage. The joinder of the respondent, at this stage, to the certification application, will not render or make it a defendant or plaintiff in the proposed silicosis action, if and when it is instituted. It might well be that the applicants may desire to join the respondent, or other funder to the action at that stage. That is, however, a separate application which is not before me. I am satisfied that, to the extent that the application for joinder relies on the fact that the respondent shall receive a benefit from this litigation, that there is no financial benefit due to the respondent from the certification application, and accordingly that the applicants fail to establish that requirement.

Control

[112] As a consultant to Spoor, the respondent (Motley Rice) provides certain services and charges an hourly fee, which in the agreement is termed “disbursements”. As a funder, Motley Rice shares in the contingency fee that is charged by Spoor to his clients. Spoor remains the attorney for all the clients. The relationship between Spoor and the respondent is one which gives Spoor the necessary back-up without displacing him as the attorney for the mineworkers or applicants in the main action. If anybody controls the litigation at a professional level, Spoor exercises that role. The position of mineworkers as clients and litigants is unaffected by the relationship between Spoor and the respondent. They remain in control of the litigation and have not contracted with anybody to share that control. They have also not instructed or contracted with anybody in a manner that takes away from them the control of the litigation as clients in any manner. This is a major distinguishing factor from the cases of **PWC 2013**, **EP Property Projects** and **Merryweather** where the funder had displaced the client either completely or in substantial or material respects. The agreement concluded by the respondent does not give the respondent a right to any part of the mineworkers’ claims.

[113] Motley Rice charges a professional fee as a consultant and beyond that it is to be paid a share out of the contingency fees earned by Spoor. What is more, Spoor has not inflated his contingency fees to accommodate what he has to pay to the respondent. The respondent can thus not be said to be "the real party" to the litigation, the "*party in all but name*". It can also not be said that the respondent is "*a real party in…very important and critical aspects*". The respondent is not a party and has no attributes of a party. The respondent, through its relationship with Spoor, facilitates access to justice by the mineworker clients of Spoor. It would be absurd to suggest that Motley Rice (the respondent) in this case is "*himself gaining access to justice for his own purposes*." It promotes access to justice and has not taken any interest in the *corpus* of the litigation.

[114] The respondent accordingly has the essential attributes of a "pure funder". The fact that the respondent at the same time consults for the mineworkers' attorney is irrelevant, because what it receives as a consideration for that is a professional fee and not part of the *corpus* of the litigation. The respondent is a United States of America based law firm which gives their South African counterpart the technical and financial back-up to handle a complex and novel litigation on behalf of those who cannot do so on their own. The *bona fides* of the funding and consultant relationship has not been questioned. Nor is there any suggestion that the dominant motive is anything but to help the helpless to access justice. The fact that the respondent facilitates access to justice by the mineworkers for a consideration for itself does not detract from the nature of the relationship. Public interest cries out for the desperate mineworkers to be assisted to access justice. I conclude accordingly that in this case priority must be given to the public interest in the funded party getting access to funding over that of the unfunded party recovering its costs, if it succeeds.

[115] In my view, the applicants have failed to prove that the respondent stands to benefit from the certification application or that it substantially controls the proceedings in it. In the premises they have not established a basis for the joinder of the respondent to the certification application.

Striking Out

[116] The respondent has given notice to the applicants and applied at the hearing of the application for striking out portions of the applicants' affidavit, mainly in the replying affidavit, but also some parts in the founding affidavit. The striking out is sought on several grounds including the usual grounds that the impugned parts contain matter which is scandalous, vexatious or irrelevant. The respondent contends also that some parts are argumentative, constitute hearsay and are impermissible and inadmissible in application proceedings.

[117] The application is brought in terms of Rule 6(15) of the Uniform Rules of Court which provides that:

> *"(15) The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted."*

[118] The respondent also seeks to invoke the inherent power of the court at common law to strike out matters, including matters which ought to have appeared in the founding affidavit, and which are inappropriately sought to be introduced through the replying affidavit and other subsequent affidavits.

[119] The last sentence in Rule 6(15) is of importance as it places substance over form.

[120] The rationale behind the striking out jurisdiction of the court is sound. It promotes orderly ventilation of the issues, promotes focus on the real issues, prevents proliferation of issues, unnecessary prolix and irrelevancies that unduly burden records in application proceedings.

[121] The applicant is therefore obliged to make out its case in the founding affidavit and to stand and fall by it.[49] The case in the founding affidavit is the one on which the applicant brings the respondent to court. That is the case that the respondent must respond to; and the applicant must, at the hearing, succeed or fail on the case in the founding affidavit.

[122] The respondent is given one opportunity only, to deal with the applicant's cause of action and present evidence in opposition in the answering affidavit. The applicant is then afforded an opportunity in the replying affidavit to reply only to what the respondent has stated and may not raise new matter or new issues. The three affidavits, founding affidavit, answering affidavit and replying affidavits (with such supporting affidavit as may be necessary for each) then conclude the essential affidavits, and thus close the pleadings and evidence in motion proceedings.

[123] There is no automatic right to file the fourth and further affidavits. Additional affidavits should be allowed only in exceptional circumstances and only with the leave of court.

[124] It is unfortunate that a practice of laxity and non-adherence to the rules regarding the three essential affidavits, and the strict contents of each, has been allowed to develop in motion court. Parties regularly go beyond the legitimate scope of their affidavits, file the fourth and further affidavits pleading over and over again over issues which are not germane to the cause of action as originally pleaded and appropriate response to it.

[49] See **Director of Hospital Services v Mistry** 1979 (1) SA 626 (A)

Voluminous impermissible affidavits are often filed without leave of the court raising and debating collateral and non-material issues, which ultimately make the volume of papers on collateral issues longer than the papers dealing with core issues. Motion court papers are often voluminous, not because of the basic essential affidavits on core issues, but because of collateral and sometimes irrelevant issues in a plethora of affidavits exchanged without leave of court, often tendered subject to leave of court. In effect leave of the court is simply assumed.

[125] The most important consideration of all, in adhering to the strict rule concerning affidavits is that adhering to the principles ensures that disputes between litigants are resolved in terms of a procedure which is just, orderly and well recognised.[50]

[126] The applicants' cause of action, in this interlocutory application for joinder of the respondent, as appears from the founding affidavit and as argued before this court, is fairly straight and focused. The applicants seek the joinder of the respondent on the basis that the respondent is a litigation funder with certain attributes (control and financial benefits) and that the respondent is therefore "potentially liable" for costs. The applicant was able to set out its cause of action with supporting evidence in 18 pages with 57 paragraphs – excluding annexures. The replying affidavit is, however, three times longer than the founding affidavit with 157 paragraphs over 51 pages excluding annexures. Granted, it was not only necessary for the applicants, in reply, to deal with the main answering affidavit of 18 pages, but also with further supporting affidavits. However, the replying affidavit also contains argumentative material and goes further than what is strictly necessary. I do not deem it necessary to deal with each and every complaint raised or to raise every aspect of the replying affidavit worthy of a complaint, because of the view I take as to

[50] See **Union Finance Holdings Ltd v I S Mirk Office Machines II (Pty) Ltd** 2001 (4) SA 842 (W) at 847J – 848E

the proper outcome of the application to strike out. I mention only a few points to demonstrate this:

(a) In paragraphs 70 and 75 of the replying affidavit, the applicants (Gold Fields) raise the validity of the agreement(s) and states: "*The validity of the 'fee sharing agreement between Spoor and Motley Rice' is an issue for this court's determination.*" This is not part of the applicants' case and raises an entirely new issue for determination by the court.

(b) The applicants also raise what is essentially legal arguments in the replying affidavit with reference, some time, to decided cases which are cited with full citation and for instance:

(i) In paragraph 25,[51] the applicants' state: "*The* locus classicus *on costs in this country is the Constitutional Court's judgment in* Biowatch Trust v Registrar, Genetic Resources *2009 (6) SA 232 (CC). It holds that irrespective of however praiseworthy their cause, everyone should be treated equally.*"

(ii) In paragraph 70[52] the applicants state again: "*This court, the Supreme Court of Appeal and the Constitutional Court have all agreed that some of the Law Society's past routine approvals were clearly wrong.*"

While it is sometimes necessary to refer to the legal position in order to make a particular point or factual assertion, a replying affidavit should not be used to advance argument which rightfully belongs to heads of argument.

[127] As I have stated it is not necessary, because of the conclusion I reach on the application, to strike out (itself an interlocutory within an interlocutory), or to deal with the entirety of the complaint or exhaustively

[51] Record, p. 243
[52] Record p. 258

with its merits and demerits. I pointed out also to counsel at the hearing that in my view both sides have taken too much time dealing with the profile, history and character of the respondent. It is in this field also that reliance was placed on sources from the public media without an attempt to accredit the source or confirm the content. Some information about the identity of parties may be necessary, but not to the extent that peripheral untested issues should cloud core issues.

[128] The reason for not going into the details of the complaint appears from the last sentence of Rule 6(15). Although this court has read whatever was placed before it in evidence, the weight to be placed on what is in the affidavits, depends on relevance and admissibility. The decision of this court on the joinder application, is based on an assessment of the cause of action as set out in the founding affidavit and assessment of available evidence in support or against such case. The court has not allowed collateral, inadmissible or irrelevant issues to cloud its view of the real issues. The respondent has therefore not been prejudiced in this court's consideration of the case,[53] and furthermore not much time was taken in argument dealing with the striking out application. The attitude of this court towards the striking out would have been different if that application was moved prior to the hearing of the joinder application and as a separate and in consequence of which further papers might or might not be filed.

[129] In their heads of argument, the applicants accuse the respondent for having not pleaded over to the alleged new matters raised in the replying affidavit. I do not agree that there was any impropriety in not pleading over. The raising of the complaint in the manner in which it was raised promotes the strict adherence referred to above and reduces undue prolixity.

[53] See **Beinash v Wixley** 1997 (3) SA 721 (SCA) at 733J – 734B

[130] The respondent was not prejudiced in its case, whatever the merits or demerits of the striking out application. It is therefore not necessary to grant any part of the application to strike out. Justice will further be properly served if the costs of the strike out application are part of the costs in the joinder application.

[131] Counsel are agreed that whichever way the costs goes, such costs should include the costs for two counsel. I agree.

[132] In the result I make the following order:

1. The application for the joinder of Motley Rice LLC in the certification application is dismissed with all the ancillary relief sought with such joinder.
2. The applicants shall pay the costs of the application, including the costs of two counsel.

_____

P. M. MOJAPELO
DEPUTY JUDGE PRESIDENT
HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

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Argument took place on 24 February 2015
Date of judgment: 19 March 2015