Formal Regulation of Third Party Litigation Funding Agreements? A South African Perspective

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Abstract

In South Africa third party litigation funding agreement as a tool that provides access to justice is not legislated with regard to non-lawyers. This article is based on research conducted to determine whether regulating this type of agreement would facilitate in fostering the policy that favours access to justice. A brief comparative study showed that English law permits third party litigation funding agreements in the *Courts and Legal Services Act* 1990. However, unlike in South African law, English law also has a body that regulates the conclusion of third party litigation funding agreements. The Association of Litigation Funders introduced a voluntary Code of Conduct for Litigation Funders in 2011 and an updated one in 2016, which regulates the conclusion of third party litigation funding agreements. The Code of Conduct protects the litigant against abuse by the funder and the funder against non-compliance by the litigant. Despite being a "self-regulatory" legislative initiative that governs most of the funding agreements in England, this Code does not bind non-members of the Association. In South Africa there is no such voluntary regulation of third party litigation funding agreements. Consequently, litigants may be prejudiced by the litigation funder in instances where a funder receives a disproportionate percentage of the capital award. The study on which this article draws investigated whether there is a need for an effective legislative response that regulates third party litigation funding agreements in South Africa. It was found that there is a need for formal regulation with regard to third party litigation funding agreements because there are no clear guidelines on the conclusion of the agreements in South Africa.

Keywords

Access to justice; champerty; maintenance; non-lawyers; *pactum de quota litis*; public policy; third party litigation funding agreements.

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1 Introduction

Third party litigation funding agreements are defined as those agreements in terms of which a person (a non-lawyer funder or a layman) provides a litigant with funds to prosecute an action in return for a share of the proceeds of the legal action if the litigation is successful.[1] In South Africa the other known third party litigation funding agreements that are regulated are the contingency fee agreements. This kind of agreement is between a practising lawyer and a litigant, whereby a legal practitioner and the litigant agree on the payment of the legal fees only upon the achievement of success in the legal proceedings.[2] The contingency fee agreements are a sub-species of third party litigation funding agreements and are regulated by the *Contingency Fees Act* 66 of 1997. Contingency fee agreements can be defined as agreements whereby a legal practitioner and the litigant agree on the payment of the legal fees only upon the achievement of success in the legal proceedings.[3] (It is thus a "no success, no fee" agreement.)[4] This article will discuss the regulation of third party litigation funding agreements as they apply to non-lawyer funders which are unregulated by the *Contingency Fees Act* 66 of 1997.

In English law, contingency fee agreements as known in South Africa are known as conditional fee agreements.[5] Just like third party litigation funding agreements, the Courts and Legal Services Act regulate the other funding agreements that are utilised by lawyers, which are conditional fee agreements and damages-based agreements.[6] Also, in English law maintenance and champerty are terms associated with agreements which may contravene public policy as encouraging speculative litigation.[7] For the purposes of this article, the meaning of maintenance is limited to "the procurement or assignment, by direct or indirect financial assistance of

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1 *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd* 2004 6 SA 66 (SCA) 66 (Headnote) (Hereafter *Price Waterhouse Coopers*).

2 *The South African Association of Personal Injury Lawyers v The Minister of Justice and Constitutional Development (The Road Accident Fund Intervening)* 2013 2 All SA 96 (GNP) 98.

3 *The South African Association of Personal Injury Lawyers v The Minister of Justice and Constitutional Development (The Road Accident Fund Intervening)* 2013 2 All SA 96 (GNP) 98.

4 Section 2(1)(a) of the *Contingency Fees Act* 66 of 1997.

5 Section 58 of the *Courts and Legal Services Act,* 1990; also see Druker *Contingency Fees* 81.

6 *Courts and Legal Services Act,* 1990, ss 58B, 58 and 58AA.

7 Beatson, Burrows and Cartwright *Contract* 390.

another person to institute, carry on or defend civil proceedings without lawful justification."[8] Champerty is defined as "the support of litigation by a stranger in return for a share of the proceeds of the action."[9] Both of these agreements were considered to be contrary to public policy.[10]

Third party litigation funding agreements have been debated for centuries, especially regarding their legality. It is with the constant shift of attitudes that these agreements are now part of a policy that guarantees access to justice. Most of the common law jurisdictions allow financial assistance to be given to litigants by third party litigation funders with the condition that should the litigant succeed in the funded litigation the funder would deduct a certain specified percentage from the capital amount awarded to the litigant.

However, in South Africa there is no legislation governing third party litigation funding agreements for non-lawyers. The Supreme Court of Appeal in *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd*[11] watered down the prohibition of third party litigation funding agreements for non-lawyers after being encouraged to do so by the legislature's regulation of contingency fee agreements through the *Contingency Fees Act*.[12] There thus seems to be limited academic literature available on third party litigation funding in South Africa. There has been no attempt by the legislature to formulate formal legislation dealing with third party litigation funding. In most constitutionally governed jurisdictions[13] it seems to be the commonly held position that access to justice will be strengthened if new forms of funding litigation are permitted to provide litigants with the possibility of pursuing their claims.[14] In South Africa the right to access to justice is enshrined in section 34 of the *Constitution of the Republic of South Africa*, 1996.

This article poses two main questions: firstly, whether the non-regulation of third party litigation in South Africa is appropriate, as the industry is still growing; and secondly, what the implications of regulating third party litigation funding might be for both the litigant and the defendant. These questions are answered by considering the purpose and implications of self-regulation by litigation funders and the government regulation of third party

8 Law Commission of England *Proposal for Reform* para [9].
9 Middleton and Rowley *Cook on Costs* 176.
10 *Price Waterhouse Coopers* 74.
11 *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd* 2004 6 SA 66 (SCA).
12 *Contingency Fees Act* 66 of 1997.
13 Eg Australia, New Zealand, England and Canada.
14 See eg Hurter 2011 *CILSA* 424.

litigation. The position in foreign jurisdiction is taken into consideration as it has persuasive force regarding the regulation of third party litigation funding agreements.[15] Specific comparison will be made between South African and English law.

This article contributes towards the development of a model that is better suited to address the pitfalls of third party litigation funding agreements. Part two of the article provides a brief historical overview of third party litigation funding agreements. Part three provides a discussion of third party litigation funding agreements in South Africa. Part four of the article compares the South African law position with the English law position regarding the regulation of third party litigation funding agreements. Recommendations are made and conclusions are drawn made in parts five and six of the article.

2 A historical overview of third party litigation funding agreements

South Africa has a mixed legal system consisting of Roman, Roman-Dutch and English law, which greatly influenced the development of third party litigation funding agreements. In Roman and Roman-Dutch law third party litigation funding agreements are known as *pactum de quota litis*. In terms of these agreements one party undertakes to provide funds for litigation by the other party in exchange for a share of the proceeds, should the case be successful.[16] The agreements were regarded with distaste as they were considered to encourage speculative litigation and thus amounted to an abuse of the legal process.[17] This adverse view was held, whether the funding was by lawyers or non-lawyers.

The earliest reported case in South Africa that applied the Roman-Dutch law authorities is *Hollard v Zietsman*.[18] In this case the advocate for the defendant argued that English law on champerty and maintenance is stronger than Roman law.[19] This may explain the tendency of the courts to apply English law in third party litigation funding arrangements. The purpose of the Roman-Dutch rule *pactum de quota litis* was to deter attorneys and advocates from speculating in litigation.[20] After both advocates for plaintiff and defendant had canvassed Roman and Roman-Dutch law authorities on

15 Section 39(1)(c) of the *Constitution of the Republic of South Africa*, 1996.
16 Hutchison and Pretorius *Contract* 183.
17 *Price Waterhouse Coopers* 74.
18 *Hollard v Zietsman* 1885 6 NLR 93.
19 *Hollard v Zietsman* 1885 6 NLR 93; also see *Price Waterhouse Coopers* 82.
20 *Hollard v Zietsman* 1885 6 NLR 93; also see *Price Waterhouse Coopers* 76.

litigation funding, the court concluded that it is not illegal to agree with another to bear part of that other's costs of litigation, but agreements to purchase the subject matter of a suit (*de quota litis* or champerty) are illegal.[21] English common law condemned champerty as protecting the integrity of the judicial system because of the fear that champertous agreements could give rise to abuse such as the inflation of damages, the suppression of evidence, and the suborning of witnesses.[22] In 1995 the English court in *Aratra Potato Co v Taylor Johnson Garrett*[23] found that it was champertous to agree on a differential fee arrangement depending on the outcome of the case. This view has also been expressed in early South African cases and more specifically in *Campbell v Welverdiend Diamonds Ltd,*[24] where the court stated:

> It is clear from the authorities that while a transaction of this kind may be properly entered into, and may be supported where it is a genuine case of assisting a litigant for a fair recompense, it cannot be supported in other cases; a court is not to give effect to arrangements which are made by persons who traffic in litigation.

In South Africa, however, it has long been accepted that an agreement to assist a litigant in exchange for a percentage of the proceeds (a *pactum de quota litis*) is lawful, provided that it was entered into in good faith, and with the object of assisting the litigant in the exercise of his rights.[25] The partial acceptance of third party litigation funding was foreshadowed in a paradoxical *dictum* in *Patz v Salzburg*,[26] where Innes CJ stated:

> [O]f course it is against public policy to traffic or gamble in lawsuits, or to maintain them for speculative or wrongful purposes. That is both English and Roman-Dutch law. But it is not unlawful *bona fide* and properly to assist a litigant to defend or establish his rights, even though the person so assisting may derive some benefit from the subject-matter of the action.

In *Patz v Salzburg*[27] the court showed its disapproval of third party litigation funding agreements when applying the English common law rule of champerty. At the same time the court seemed to be willing to relax the rule

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21 *Hollard v Zietsman* 1885 6 NLR 93; also see *Price Waterhouse Coopers* 78.
22 *Re Trepca Mines Ltd* [1962] 3 All ER 351 355.
23 *Aratra Potato Co v Taylor Johnson Garrett* [1995] 4 All ER 695.
24 *Campbell v Welverdiend Diamonds Ltd* 1930 TPD 287.
25 See *Mayne v James & The High Sheriff* 1893 10 CLJ 61; *Hugo & Miller v The Transvaal Loan & Finance & Mortgage Co* 1894 1 OR 336 340; *Green v De Villiers; Dr Leyds & The Rand Exploring Syndicate Ltd* 1895 2 OR 289 294; *Schweizer's Claimholders' Rights Syndicate Ltd v The Rand Exploring Syndicate Ltd* 1896 3 OR 140 144; *Patz v Salzburg* 1907 TS 526 527; *Walker v Matterson* 1936 NPD 495 504; see also Scott 2004 *SA Merc LJ* 478.
26 *Patz v Salzburg* 1907 TS 526 527; see also *Walker v Matterson* 1936 NPD 495 504.
27 *Patz v Salzburg* 1907 TS 526 527.

by allowing such agreements where a *bona fide* third party who has no stake in such litigation finances the proceedings (maintenance), and also shares the proceeds (champerty). The *dictum* foreshadows a later development in South African law where the legality of agreements in which third parties fund litigation is recognised.[28] Evidently, there has been a steady development with regard to litigation funding arrangements in South Africa, following the English law authorities on the subject matter. The development is discussed below by looking into South African court cases that ruled on third party litigation funding.

3 Third party litigation funding agreements in South Africa

It is trite law by now that champerty and maintenance contracts were initially perceived as contracts injurious to the administration of justice and as a result were regarded as against public policy.[29] Christie and Bradfield argue that the civil courts are designed primarily for the settlement of *bona fide* disputes between litigants with or without the assistance of entirely disinterested members of the legal profession and those that do not have the right of appearance in court.[30] Furthermore, they argue that any contract that does not fit this pattern of litigation may contain the seeds of injustice and must therefore be closely scrutinised.[31]

The Supreme Court of Appeal in *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd*[32] held that third party litigation funding agreements are recognised in South Africa, because the civil justice system has developed its own inner strength. The court examined and endorsed some champertous agreements by holding that these agreements are not contrary to public policy or void, and that the illegality of these contracts is not a defence in action. The court further held that litigation pursuant to such a contract may where necessary constitute an abuse of process,

28 See *Contingency Fees Act* 66 of 1997 (which came into operation on 23 April 1999); *Price Waterhouse Coopers*; *De la Guerre v Ronald Bobroff & Partners Incorporated* 2013 JOL 30002 (GNP); see also Van Niekerk 2013 *De Rebus* 50.

29 See *Hollard v Zietsman* 1885 6 NLR 93; *Mayne v James & The High Sheriff* 1893 10 CLJ 61; *Hugo & Miller v The Transvaal Loan & Finance & Mortgage Co* 1894 1 OR 336 340; *Green v De Villiers; Dr Leyds & The Rand Exploring Syndicate Ltd* 1895 2 OR 289 294; *Schweizer's Claimholders' Rights Syndicate Ltd v The Rand Exploring Syndicate Ltd* 1896 3 OR 140 144; *Patz v Salzburg* 1907 TS 526 527; *Walker v Matterson* 1936 NPD 495 504; *Fender v St John Midway* [1938] AC 1 13; *Price Waterhouse Coopers* para 76.

30 Christie and Bradfield *Contract* 367.

31 Christie and Bradfield *Contract* 367.

32 2004 6 SA 66 (SCA) 76.

notwithstanding a litigant's right of access to the courts enshrined in section 34 of the *Constitution*.[33]

This was the position for almost nine years after this landmark decision on third party litigation funding (non-lawyers). In 2013 the Gauteng North High Court in *Price Waterhouse Coopers Inc v IMF Ltd*[34] further developed the landmark recognition of the Supreme Court of Appeal on champertous agreements. In short, the high court held that the litigation funder can be joined as a co-litigant in the litigation in order to be able to give a cost order against such a funder. The court regarded this to be a logical progression from the recognition that champertous agreements are lawful.[35] It added that the ability to hold the funder liable for costs is one of the measures that the courts could adopt to counter any possible abuses arising from the recognition of the validity of champertous agreements.[36]

Following the decision to join funders in the proceedings, the Western Cape High Court in *EP Property Projects (Pty) Ltd v Registrar of Deeds, Cape Town*[37] (hereafter *EP Property Projects*) applied the decision in *Price Waterhouse Coopers Inc v IMF Ltd*[38] by exercising its discretion to grant a cost order against a litigation funder who had been joined in the litigation. The court scrutinised the position in English law and other common law jurisdictions, observing that cost orders would generally not be granted against what it referred to as "pure funders". Pure funders are funders who do not seek to control the course of the litigation and lack any personal interest in the litigation.[39] However, where the funder controls the proceedings and has a personal interest in its being successful, then the funder is not so much facilitating access to justice as he is gaining access for his purposes, and becoming the "real" litigant.[40] It is then considered that he may be held liable for any adverse cost orders.

Another decision of importance is *Scholtz v Merryweather*.[41] The Western Cape High Court applied the distinction laid down in *EP Property Projects*

33 *Price Waterhouse Coopers* 82.
34 *Price Waterhouse Coopers Inc v IMF Ltd* 2013 6 SA 216 (GNP).
35 *Price Waterhouse Coopers Inc v IMF Ltd* 2013 6 SA 216 (GNP) 222.
36 *Price Waterhouse Coopers Inc v IMF Ltd* 2013 6 SA 216 (GNP) 222.
37 *EP Property Projects (Pty) Ltd v Registrar of Deeds, Cape Town* 2014 1 SA 141 (WCC).
38 *Price Waterhouse Coopers Inc v IMF Ltd* 2013 6 SA 216 (GNP).
39 *EP Property Projects* 162.
40 *EP Property Projects* 164.
41 *Scholtz v Merryweather* 2014 6 SA 90 (WCC).

(Pty) Ltd v Registrar of Deeds, Cape Town,[42] between the "pure funders" who are immune to adverse cost orders and controlling litigation funders who have personal interest and seek to control the litigation. The court held that the funder is liable jointly and severally with the litigant for the costs of the application because the funder had not only funded the litigation but had substantially controlled the proceedings by hindering the service of summons, consulting lawyers, and initiating the rescission application.[43] The funder also stood to benefit in that if the judgment could be rescinded, he would be relieved of his common-law obligation to support the litigant, who is his son.[44]

The distinction between "pure funders" and other funders as laid down in the *EP Property Projects*[45] was also applied by the Gauteng Local Division in *Gold Fields Ltd v Motley Rice LLC*.[46] The court held that the funder was a "pure funder" because the funder would get no financial gain if the litigation was successful, nor did he exercise substantial control of the litigation.[47] The funder was merely facilitating access to justice and not "gaining access to justice for his own purposes."[48]

Considering these developments it is prudent to look back at Wallis's remarks that funding provided by litigation investors clearly can be a viable way of providing some litigants with access to the courts, although restrictions on the types of cases which may be undertaken and potential ethical implications can be expected.[49] There seems to be a proliferation of litigation funding companies in South Africa, as outlined below.

In 2013 the first litigation funding company, called the South African Litigation Funding Company (SALFCO),[50] was established. Other companies of a similar nature include Astrea, Christopher Consulting, and Litigation FundingSA. There are a number of other companies that have shown interest in investing in South African cases, such as IMF Australia. IMF Australia was engaged as a funder in the high-profile case of *Price*

42 *EP Property Projects (Pty) Ltd v Registrar of Deeds, Cape Town* 2014 1 SA 141 (WCC).
43 *Scholtz v Merryweather* 2014 6 SA 90 (WCC) 114 (hereafter *Scholtz*).
44 *Scholtz* 113.
45 *EP Property Projects* 164.
46 *Gold Fields Ltd v Motley Rice LLC* 2015 4 SA 299 (GJ) (hereafter *Gold Fields*).
47 *Gold Fields* 324.
48 *Gold Fields* 324.
49 Wallis 2011 *Advocate* 35.
50 Cokayne 2013 http://www.salfco.com/docs/SALF%20launch%20%20Press%20Release%20Pretoria%20News%203%20June%2013.pdf; Burger 2014 http://www.werksmans.com/legal-briefs-view/let-litigation-funder-beware/.

Waterhouse Coopers Inc v IMF Ltd.[51] A London-based funder, Calunius Capital, is another company which has shown interest in operating in South Africa.[52] The emergence of these funding companies and individuals comes with many problems. These problems relate to issues of transparency, fairness to clients, the impact of the funder on the case, and the influence that the funder has on the overall decisions regarding the case. The problems that third party litigation funding agreements pose in England and in South Africa are similar. Beisner and Gary[53] have outlined some of the problems with regard to third party litigation funding agreements in the United States of America. Firstly, they argue that the proliferation of funders will increase the volume of uncertain litigation as disputes are investments to them. Secondly, funders may try to exert control over strategic decisions relating to the case. Thirdly, funders tend to prolong litigation by preventing the settlement of the case. Lastly, lawyers tend to give less attention to the interest of the litigant, as the aim is to retain future business with the funder.[54] The funders are not restricted to the percentage they generally charge clients, as in some cases they may charge beyond what is considered reasonable.

The issue of concluding third party litigation funding agreements in South Africa has not yet been addressed, except for the aftermath of that agreement, when the matter is before the courts. The current state of third party litigation funding in South Africa is problematic in that it protects the funder more than the litigant as a client of the litigation funder. The litigant is not protected in terms of the *National Credit Act*[55] or the *Consumer Protection Act,*[56] as these agreements provide a wide scope of freedom of contract to the funder as the *qui contractus initiat*. In a case where the litigation is about land, for example, the litigant may end up losing half of the land due to the contract the litigant entered into with the funder. In terms of section 1 of the *National Credit Act*[57] the litigant is not a consumer, and the agreement does not amount to credit. The reason why the agreement cannot amount to a credit agreement is that the funder becomes entitled to payment only after achieving success in the litigation. This means that the funder will get professional disbursements and remuneration without interest in the ordinary sense but with an agreed upon percentage of the

51 *Price Waterhouse Coopers Inc v IMF Ltd* 2013 6 SA 216 (GNP) 222.
52 Vickovich 2012 https://www.africanlawbusiness.com/news/african-litigation-funding-market-a- hot-potato.
53 Beisner and Gary 2012 *ILR* 4-5.
54 Beisner and Gary 2012 *ILR* 4-5.
55 *National Credit Act* 34 of 2005.
56 *Consumer Protection Act* 68 of 2008.
57 *National Credit Act* 34 of 2005.

capital award only when the case is successful, which is akin to a success fee.

It is clear therefore that there is an imbalance in this form of agreement, where the funder can charge an exorbitantly high fee due to the risk undertaken, even though the case shows *prima facie* that it is meritorious. Although the *Contingency Fees Act* 66 of 1997 protects the litigants with regard to lawyers, third party litigation funding can result in unfair and abusive contract terms against litigants. This is so because the *Contingency Fees Act*[58] which regulates funding provided by lawyers to litigants does not apply. There is no limit to the amount a funder can draw after the finalisation of a matter she/he funded,[59] there are no mechanisms regulating how the fee agreement should be worded/the exact clauses that should feature in the agreement to avoid invalidity,[60] and there are also no legal consequences for a failure to adhere to established standards.[61] Although some practitioners seem to be confused about the application of the *Contingency Fees Act*,[62] the Act has clear guidelines regarding its applicability.

In the light of the above discussion of the academic literature and case law, it is apparent that third party litigation funding has recently become more acceptable in South African law and elsewhere. As a result, there is a need for a more robust regulatory scheme in South Africa. The discussion also indicates that the challenges that South Africa is currently facing regarding third party litigation agreements are similar to those in other jurisdictions. These include the involvement of cross-border funders who may influence our judiciary to view matters in a different light. It is worth noting that South Africa adopted some aspects – if not all – of third party funding from English law. A discussion of both jurisdictions regarding recent developments of this mode of funding follows below.

4 Lessons from England

It is not surprising that South African law was strongly influenced by English law as there are many similarities in the two jurisdictions with regard to the perceptions held in dealing with third party litigation funding agreements. This may be largely because of the common law system South Africa

58 *Contingency Fees Act* 66 of 1997.
59 *Contingency Fees Act* 66 of 1997 s 2 (1) and (2).
60 *Contingency Fees Act* 66 of 1997 s 3.
61 *Contingency Fees Act* 66 of 1997 s 5; *Price Waterhouse Coopers*) 78.
62 *Contingency Fees Act* 66 of 1997; also see De Broglio 2014 *De Rebus* 53.

subscribes to. In both of these jurisdictions the courts have been progressive, albeit gradually, in developing mechanisms to solve third party litigation funding agreement problems case by case. The research reflected in the preceding section has established that the reliance on the court's discretion is not enough in South Africa to regulate the third party funding environment.

The courts in both South Africa and England have consistently been antagonistically opposed to third party litigation funding agreements and considered them to be against public policy.[63] In the event the legislature decided to unmask these agreements indirectly by introducing what in England is the conditional fee agreement and in South Africa is a duplicate by the name of contingency fee agreements. These were attempts to further implement the principle of access to justice and led to the acceptance of third party litigation funding agreements.

In both English and South African law, a litigation funder other than a "pure funder" can in certain circumstances be joined as a co-litigant in the litigation in order for the court to be able to give a cost order against such a funder.[64] This development minimises the risk of the abuse of the justice system in both countries. In South Africa this has been effected in recent cases such as *Price Waterhouse Coopers Inc v IMF Ltd*,[65] *EP Property Projects (Pty) Ltd v Registrar of Deeds, Cape Town*,[66] *Scholtz v Merryweather*,[67] and *Gold Fields Ltd v Motley Rice LLC*.[68]

The English law position can be established through a consideration of the findings of the research conducted by Lord Rupert Jackson in his review of

63 See *Hollard v Zietsman* (1885 6 NLR 93; *Mayne v James & The High Sheriff* 1893 10 CLJ 61; *Hugo & Miller v The Transvaal Loan & Finance & Mortgage Co* 1894 1 OR 336 340; *Green v De Villiers; Dr Leyds & The Rand Exploring Syndicate Ltd* 1895 2 OR 289 294; *Schweizer's Claimholders' Rights Syndicate Ltd v The Rand Exploring Syndicate Ltd* 1896 3 OR 140 144; *Patz v Salzburg* 1907 TS 526 527; *Walker v Matterson* 1936 NPD 495 504; *Price Waterhouse Coopers*; *Master v Miller* (1791) 4 Term Rep 320 340; *Wallis v Duke of Porland* (1797) 3 Ves 494; *Alabaster v Harness* [1895] 1 QB 339; *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006; Winfield 1919 *LQ Rev* 54; Law Commission of England *Proposal for Reform* para [9]; *Giles v Thompson* 1994] 1 AC 142 161; *Aratra Potato Co v Taylor Johnson Garrett* [1995] 4 All ER 695; Tolhurst *Contractual Rights* 189.

64 See *Arkin v Borchard Lines* [2005] EWCA Civ 655 para [41]; *Price Waterhouse Coopers Inc v IMF Ltd* 2013 6 SA 216 (GNP).

65 *Price Waterhouse Coopers Inc v IMF Ltd* 2013 6 SA 216 (GNP).

66 *EP Property Projects (Pty) Ltd v Registrar of Deeds, Cape Town* 2014 1 SA 141 (WCC).

67 *Scholtz v Merryweather* 2014 6 SA 90 (WCC).

68 *Gold Fields Ltd v Motley Rice LLC* 2015 4 SA 299 (GJ).

civil litigation costs.[69] In concluding his research Lord Jackson noted that the regulation of third party funding agreements was insufficient and that there were few players in the funding industry.[70] This led to the creation of a self-regulated organisation called the Association of Litigation Funders. This organisation provides guidelines on how to finance litigation through its Code of Conduct,[71] which is not legislation *per se* but provides clarity on these kinds of agreements.

The perception in both jurisdictions has been that third party litigation funding is nascent, and as such it does not need to be legislated.[72] This opinion is largely shared by the litigation funders themselves. They argue that parties who use third party litigation funding are generally commercial or similar enterprises with access to full legal advice.[73] This argument does not highlight the historical context in which litigation funders have been operating. Third party litigation funding has been an issue since the time of Rabin[74] and Winfield.[75] However, recent case law and academic discourse, especially that which is related to proponents of a free-regulation industry that operates beyond the compass of the law, treat this as a new phenomenon.[76] Most cases in South African and English law that deal with third party litigation funding agreements indicate that these agreements are not new and that they create problems when they are not regulated.

In English law, however, third party litigation funding agreements are not entirely unregulated. The *Courts and Legal Services Act*[77] allows the third party litigation agreements and includes the definition of a funder. The Act also provides conditions applicable to the funding agreements and requires the approval of the Secretary of State or a prescribed person for certain funders. Key amongst these conditions is that the funding agreement must be in writing.[78] Section 58B of the *Courts and Legal Services Act*[79] also

69 Jackson *Review of Civil Litigation Costs.*
70 Jackson *Review of Civil Litigation Costs* 119.
71 *Code of Conduct for Litigation Funders*, 2011; *Code of Conduct for Litigation Funders*, 2016.
72 "The point was made that third party funding is still nascent in England and Wales at the moment and that nothing more formal is required." Jackson *Review of Civil Litigation Costs* 119.
73 Jackson *Review of Civil Litigation Costs* 119.
74 Rabin 1935 *Cal L Rev* 48.
75 Winfield 1919a *LQ Rev* 235.
76 Eg Jackson *Review of Civil Litigation Costs* 119: "I accept that third party funding is still nascent in England and Wales and that in the first instance what is required is a satisfactory voluntary code, to which all litigation funders subscribe."
77 *Courts and Legal Services Act*, 1990 s 58B.
78 *Courts and Legal Services Act*, 1990 s 58B(2)(b).
79 *Courts and Legal Services Act*, 1990.

empowers the Secretary of State to make regulations after consulting with judges, the General Council of the Bar, the Law Society, and other appropriate bodies. The regulations have not been implemented yet. Thus there is still a vacuum in the proper regulation of third party litigation funding in English law. The litigation funding environment is still largely self-regulated by the Code of Conduct of Association of Litigation Funders 2016 in English law. The recommendations discussed below could provide more clarity on regulating third party litigation funding agreements in South Africa.

5 Recommendations

In view of the problems facing third party litigation funding agreements in South Africa it is imperative that statutory regulation be considered instead of relying on self-regulation by litigation funding investors as in English law. Just as in England, the industry has outgrown self-regulation, as the regulation is binding on members of the association of funders only, and non-members have no obligation to abide by the self-regulation. The third party litigation funding has already reached the critical point referred to in the Jackson Report of 2009:[80] a point where regulation is necessary. If left ungoverned, South African third party litigation funding, like its counterpart in England, will constitute a risk to the market and to litigation.[81]

To provide access to justice and minimise injustice to litigants the legislator must find means to regulate third party litigation funding properly. This is also in line with the principle of Ubuntu in the light of transformative constitutionalism in South Africa. This is also to meet the need for general fairness and in accord with the "restorative" spirit of the South African Bill of Rights. Surely third party litigation agreements have to be strictly regulated as a matter of fairness to avoid the disproportionate charging of litigants. Although this article does not intend to provide a blueprint to be followed in drafting a solution, the article shows the need to regulate third party litigation funding agreements.

The recommendations that apply in South Africa are as follows:

a) The South African jurisdiction should either utilise the *Consumer Protection Act*,[82] or the *National Credit Act*[83] (hereafter the *National*

80 Jackson *Review of Civil Litigation Costs.*
81 Justice not Profit 2015 http://www.justicenotprofit.co.uk/wp-content/uploads/2015/09/Final-TPLF-Paper.pdf.
82 *Consumer Protection Act* 68 of 2008 (hereafter the *Consumer Protection Act*).
83 *National Credit Act* 34 of 2005.

Credit Act) in addressing issues with regard to third party litigation funding agreements, or introduce separate legislation. A schedule in the *National Credit Act* could be added in order to regulate third party litigation funding agreements. The rationale behind this recommendation is that third party litigation funding agreements are *sui generis*, but have some characteristics of agreements regulated by the *National Credit Act*. This is so because third party litigation funding agreements are concluded on the basis that should a litigant become successful in the litigation, the third party litigation funder will be entitled to his disbursements and a risk fee or interest calculated as a percentage. This form of credit advanced to a consumer should be within the control of the *National Credit Act,* because the agreement has the potential of containing abusive and/or unfair provisions which are unjustifiably harsh on the litigant to the extent that a successful litigant might end up with much less money than in the event of failure. A national regulatory scheme for litigation funding agreements should also require that litigants disclose the source of their funding so as to allow opponents to defend their cases adequately. This is to be done in order to grant the defendant an opportunity to know who is guiding the litigation strategy and taking the decisions on the other side (as it is naïve to assume funders will not take control of litigation where they have invested funds). Contracts of this nature are usually secretive, making it unfairly difficult to mount an adequate defence. In this regard the disclosure requirements would solve this problem.[84] The court rules should require disclosure to all intimate parties of the means by which the litigation is being funded on the outset of the litigation proceedings, as recommended by the Institute for Legal Reform and the Scotland review.[85]

b) The provisions regulating third party litigation funding should protect litigants who have inadequate income, are illiterate, and have little bargaining power, as well as small businesses, as they are susceptible to abuse by third party funders. The criteria for equity,[86] fairness and reasonableness (the principles of Ubuntu) for both the litigant and the funder should be addressed by the regulatory scheme in the *National*

84 Beisner and Gary 2012 *ILR* 14.

85 Beisner and Gary 2012 *ILR* 14; Taylor 2013 http://www.gov.scot/Publications/2013/10/8023/27.

86 This is contemplated by s 3(d) of the *National Credit Act* 34 of 2005, where it provides that the purpose of the Act is to provide equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers.

Credit Act. The schedule wod take into account the socio-economic circumstances of South African litigants as consumers.

c) The regulations should also address concerns about new entrants to the market developing business practices which bring the industry into disrepute or increase the potential for harm or loss to be caused to claimants. This could be achieved by compelling funders to register at a selected government agency such as the National Credit Regulator. The agency would then oversee their operations and review some of the unethical behaviours associated with third party funding and non-compliant funders. This would strengthen accountability for the funders and provide litigants with a less expensive and more efficient way of addressing issues regarding the ethics of funders.

d) The regulation of third party funding should be comprehensive to cover not just the relationship between the lawyer-funder and the client, but also the integrity of funding agreements, and it should supply protection from external challenges.[87]

e) The regulation should oblige lawyers to advise clients who cannot fund their litigation to apply for third party funding in addition to other funding options. The lawyer should also advise litigants on the implications of sourcing a litigation funder. The kinds of litigation that are eligible for funding should be clearly outlined. These should be such cases as commercial disputes involving a capital claim of more than R2 million.

f) The structure that the legislation should assume should resemble that of the English Code of Conduct for Litigation Funders.[88] However, the legislation should be pertinent to the South African context. The preamble should emphasise the importance of the right to access justice. This should also indicate the necessity of prosecuting meritorious claims by funders.

g) The legislature should incentivise funders to provide funding to a wide variety of claims, not only to commercial claims. This expansion of the possibility of litigation by litigation funders is also contemplated by Justice Jackson in his report, when he states that "… if the use of third party funding expands, then full statutory regulation may well be required, as envisaged by the Law Society."[89] Funders should also be

87 Hodges, Peysner and Nurse *Litigation Funding Status* 151.
88 *Code of Conduct for Litigation Funders*, 2016.
89 Jackson *Review of Civil Litigation Costs* 119.

encouraged to fund personal injury cases, so that in addition to contingency fee agreements, litigants can have the option to have their litigation funded by litigation funders. The funders should be restricted in the amount of success fees[90] they may be entitled to, depending on the type of cases undertaken. There should be guidelines on the complexity and risk taken by funders in a case, as this will affect the success fee.

h) In addition, the legislature should state clearly that the funder will be liable to pay adverse costs should the litigation fail. Although this requirement is contemplated by the courts in South Africa to afford more protection to the litigant, it should be one of the consequences that the litigant cannot waive.

In view of the overwhelming criticism of the English Code of Conduct for Litigation Funders,[91] it would be prudent for South Africa to regulate third party litigation funding agreements to avoid abuse – especially by new funders emerging with own practices that may result in exploiting litigants. The above recommendations could assist in providing guiding legislation that will enable both litigants and funders to operate fairly in dealings with each other. The regulation of third party agreements would not only provide the courts with oversight as in the case of contingency fee agreements, but would also foster transparency and prevent the overcharging of clients.[92] The research in formulating these recommendations is mindful of the surrounding legal framework and socio-economic circumstances in foreign jurisdictions and their difference from those that prevail in the South African context.

6 Conclusion

It is evident that the history of third party litigation funding agreements and contingency fee agreements is interrelated. Both of these agreements were prohibited in countries that were influenced by the English common law. It is also evident that there is growth in litigation funding agreements, as the article has shown that the growing number of third party litigation funders poses problems for the courts. Having considered the earlier and more recent research conducted on the subject, this article has shown in the

90 "The higher fee is also referred to as the success fee" - *Masango v Road Accident Fund* 2016 6 SA 508 (GJ) 513.

91 *Code of Conduct for Litigation Funders*, 2016.

92 Justice not Profit 2015 http://www.justicenotprofit.co.uk/wp-content/uploads/2015/09/Final-TPLF-Paper.pdf.

recommendations section that it would be beneficial to regulate third party litigation funding The article has also highlighted that new mechanisms fostering access to justice have proved to be useful. However, they should be looked at with particular care as they also pose potential risks if not properly regulated. Considering the rise in the number of reported cases, it is clear that funding for meritorious cases is in demand, and may give rise to abuse.

The research shows that relevant legislation should provide guidelines on how to deal with cases where the identity of funders is not disclosed, and how to ensure fairness in the levying of funders' fees. The element of the control of litigation by the funder should be regulated. This regulation should benefit both the funder and the litigant with regard to the control of the litigation. Disclosing the involvement of a third party funder to the other party to the litigation would change the dynamics of the litigation and in most cases balance the scales with regard to access to justice. There should be an incentive for funders to fund the meritorious claims of individuals who are unable to access justice due to monetary constraints, and the funding of litigation should therefore not be limited to commercial cases.

This article indicates the need for the courts and the legislature to find means beyond those recommended in this article to properly limit the effects of third party litigation funding agreements. As indicated, a good starting point to look at for the reform of third party litigation funding agreements is English law. England is the only country that currently has a mechanism to regulate third party litigation funding agreements, although the system of doing so is flawed. It is also concluded that third party litigation funding should be fully regulated by legislation to protect the interests of litigants and defendants. The proposed legislation could resemble the Code of Conduct in England by the Association of Litigation Funders. The legislation should provide measures including but not limited to transparency in litigation funding agreements. Third party litigation funding and its subspecies contingency fee agreements have developed and are strengthening the right of many litigants to have their disputes adjudicated by the courts. It is suggested that there should be further research by the Reform Commission on the area of third party litigation funding. This can be done by drawing comparison with countries contemplating legislating third party litigation funding in order to implement better measures and further the public policy on access to justice. The doors for justice have been opened and a lack of funding is no longer a barrier to engaging in litigation.

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List of Abbreviations

Cal L Rev	California Law Review
CILSA	Comparative and International Law Journal of South Africa
ILR	Institute for Legal Reform
LQ Rev	Law Quarterly Review
SA Merc LJ	SA Mercantile Law Journal