Comparative Notes on the Use of Commercial Litigation Funding in Insolvency: Australia and South Africa

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Abstract

This article explores the application of third-party litigation funding (TPLF), also referred to as commercial litigation funding, in insolvency litigation by way of a comparison of the legal position in Australia and South Africa. It proposes that TPLF could offer significant benefits by enabling liquidators of insolvent estates to pursue and enforce claims through civil proceedings with the aim of swelling the assets of the insolvent estate, ultimately to the advantage of the creditors. Since both jurisdictions share elements of English law, both were confronted with the English law doctrines of champerty and maintenance initially being regarded as impediments to the development and/or use of TPLF. Currently, and mainly due to developments in terms of case law, the concept of TPLF has in principle been accepted in both jurisdictions. However, in Australia the development originally transpired in the field of insolvency litigation. In South Africa the context was more in the confines of general litigation. It is submitted that the South African system could benefit by considering various aspects of the Australian system regarding the use of TPLF in insolvency litigation. It remains a question whether or not the respective systems would benefit by adopting comprehensive regulatory measures to regulate TPLF.

Keywords

Litigation funding; commercial litigation funding; third-party litigation funding; insolvency litigation.

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1 Introduction

The term "insolvency" assumes that individuals or entities have insufficient assets at their disposal to satisfy all claims.[1] The insolvency of a company could result in the insolvent winding-up of that entity, in which case the insolvency law framework will usually provide for a set of distribution rules to ensure the fair and equitable distribution of the limited resources among the general body of unsecured creditors.[2] Mechanisms that enable a liquidator to increase the amount of assets available for general distribution are important in this context – these could include tracing of assets mechanisms[3] and debt collection on behalf of the insolvent company, claims for disputed ownership in a valuable asset, voidable transaction provisions, claims for damages for breach of contract, and legal principles that allow for actions to claim some form of compensation from delinquent directors.[4] An obvious hurdle in this regard is that pursuing these remedies comes at a cost, with the insolvent company in winding-up potentially not having sufficient assets to fund the costs associated with litigation.[5]

Liquidators may have funding options available to cover the costs of litigation in such instances, for example by requesting funding from creditors. This is usually done in exchange for the funding creditor potentially receiving a priority in respect of the distribution of property recovered in that way.[6] However, the availability of this funding option would

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1 In Australia "insolvency" is defined with reference to the inability to pay debts as they become due and payable (*Corporations Act*, 2001 (Cth) s 95A in respect of insolvent companies and *Bankruptcy Act*, 1966 (Cth) ss 5(2) and 5(3) in respect of insolvent individuals). In South Africa, the insolvency of individuals refers to factual or balance sheet insolvency in general, but in the case of companies unable to pay their debts commercial insolvency will suffice - see *Boschpoort Ondernemings* (*Pty*) *Ltd v ABSA Bank Ltd* 2014 2 SA 518 (SCA).

2 See e.g. s 103 of the *Insolvency Act* 24 of 1936, that provides for a proportionate (*pari passu*) distribution to concurrent creditors, as well as s 555 of the Australian *Corporations Act*, 2001 (Cth).

3 For example, insolvency examinations; search and attachment warrants; etc.

4 In South Africa voidable dispositions are covered mainly in ss 26 to 33 of the *Insolvency Act* 24 of 1936 and directors' liability following liquidation of a company in s 424 of the *Companies Act* 61 of 1973. Similar recovery mechanisms are provided for under Pt 5.7B of the Australian *Corporations Act*, 2001 (Cth).

5 A fact recognised by many commentators in this area. See e.g. Armour and Walters 2006 *LQR* 295; Atkins 2004 *ILJ* 41; Taylor 2013 *NZULR* 587.

6 In Australia this option is provided under the *Corporations Act*, 2001 (Cth) s 564 and in South Africa under the *Insolvency Act* 24 of 1936 s 104(3).

depend on [a] creditor/s having the funds and being willing to provide funds to support the litigation, which is not always the case.[7] Furthermore, in South Africa creditor funding in exchange for a benefit is limited to statutory claims relating to voidable dispositions provided for by the *Insolvency Act* 24 of 1936.

In such an instance litigation funding provided by a third party (TPLF) could fulfil a useful function. In this context TPLF refers to the practice whereby a commercial entity (litigation funder) provides financial support for legal proceedings in exchange for the right to share in the proceeds of a successful action. This mechanism is a valuable resource in the hands of insolvency practitioners in numerous jurisdictions.[8]

TPLF was not always available due to the English law's doctrines of champerty and maintenance[9] effectively prohibiting the use of TPLF. These doctrines were overcome in England through the construction of an "insolvency exception". The "insolvency exception" developed on the basis of the statutory power of sale of the trustee in bankruptcy and the broad interpretation of the concept of the "property" of the bankrupt.[10] In terms of this "exception", it is indeed possible and permissible for a trustee to assign a cause of action for a fee to an outsider who had no interest in the litigation prior to having it assigned to him, on the basis that the cause of action is the "property" of the bankrupt, and the assignment is merely the trustee exercising the power of sale.[11] This principle was further extended to afford recognition to the power of a liquidator of an insolvent company to sell a cause of action as part of the "property" of the company.[12] The Australian judiciary followed a similar line of argument to recognise the legitimacy of litigation funding in insolvency and noted that a sale of a bare right of action by a liquidator would not offend the rules against champerty and maintenance, as

7 See Hede 1997 *IIR* 225, who attributes creditor reluctance to provide litigation funding to the "obvious risks involved" in doing so.

8 See INSOL International *Cross-Jurisdictional Comparison* for a report on the use of litigation funding in insolvency in a number of jurisdictions.

9 According to Mann *Australian Law Dictionary*, "maintenance" is defined as "[the support of] litigation in which one has no lawful interest", while "champerty" is seen as a specific form of maintenance that involves "giving finance to support another person's litigation for ultimate reward."

10 See *Seear v Lawson No 1* (1880) 15 ChD 426 433, with reference to the *Bankruptcy Act*, 1869 s 4 (indicating that the definition of "property" includes choses in actions) and s 25 (empowering the trustee to sell the property of the bankrupt).

11 *Seear v Lawson No 1* (1880) 15 ChD 426 433. Also see *Guy v Churchill* (1888) 40 ChD 481.

12 *In re Park Gate Waggon Works Co* (1881) 17 ChD 234, with reference to the liquidator's statutory power of sale under the *Companies Act*, 1862 s 95(3). See Walters 1996 *Company Lawyer* 165 for further information.

> a sale under statutory authority, to do that which Parliament has authorised, either expressly or by necessary implication, cannot involve the doing of anything that is unlawful.[13]

This case went further than its counterparts in England in so far as insolvent litigation funding was permitted in respect of the Australian equivalent of a "wrongful trading claim". The distinction was attributed to the fact that the wording of the Australian provision is different from its counterpart in England, in that the liability of the director is described as "a debt due to the company".[14] On that basis, the court held that "such a debt can properly be regarded as part of the property of the company which the liquidator is empowered to sell."[15]

In South Africa the development of TPLF was similarly stifled due to the impact of the Roman-Dutch law principles of *pactum de quota litis* on the one hand and - as in Australia - the English law doctrines of maintenance and champerty on the other hand.[16]

The Supreme Court of Appeal, however, re-evaluated the underlying principles of TPLF in 2004 in the judgment of *PricewaterhouseCoopers Inc v National Potato Co-operative Ltd*[17] (hereinafter also referred to as the *Potato* case). In its reconsideration of the matter the court, with reference to earlier judgments, pointed out that the courts had previously acknowledged an exception to the rule, namely that in the instance where a person "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."[18] Further, in its reassessment of the situation the Supreme Court of Appeal[19] in particular

13 *Re Movitor Pty Ltd (in liq)* (1996) 64 FCR 380 391.

14 Currently ss 588M and 588W of the *Corporations Act*, 2001 (Cth) (own emphasis).

15 *Re Movitor Pty Ltd (in liq)* (1996) 64 FCR 380 392. This distinction was also recognised in the English Court of Appeal in *Re Oasis Merchandising Services Ltd* [1998] Ch 170.

16 See further Khoza 2018 *PELJ* 4; Kuper 2019 https://www.golegal.co.za/litigation-funding-history/; and Lawrence *Regulating Third Party Funding* 60 regarding the historical development of this issue in South African law.

17 *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* 2004 6 SA 66 (SCA) (the *Potato* case). See further Cloete and Nagel 2005 *De Jure* 420 for a discussion in support of the judgment; and see Khoza 2018 *PELJ* 6.

18 The *Potato* case para 27 with reference to *Thomas Hugo and Fred J Möller v The Transvaal Loan, Finance and Mortgage Company* [1894] 2 OR 336 341; *Schweizer's Claimholders' Rights Syndicate Limited v The Rand Exploring Syndicate, Limited* [1896] 2 OR 140 144; and *Patz v Salzburg* 1907 TS 526 527. Burger 2014 https://www.werksmans.com/legal-updates-and-opinions/let-the-litigation-funder-beware/ points out that such agreements would in general be contrary to public policy when they were of a "speculative nature" or concluded for a "wrongful purpose".

19 The *Potato* case paras 23-43 regarding the re-evaluation of public policy in view of the common law position, developments in England, and the introduction of the *Contingency Fees Act* 66 of 1997 and s 34 of the *Constitution of the Republic of South Africa*, 1996.

considered, amongst other things, public policy in view of the basic right of access to justice provided for in section 34 of the *Constitution of the Republic of South Africa*, 1996, the legalising of contingency fees by the introduction of the *Contingency Fees Act* 66 of 1997, and developments regarding champerty in England. In essence, the Supreme Court of Appeal then held that a TPLF agreement is not contrary to public policy or void *per se*, and clearly stated that

> [t]he law of maintenance and champerty developed out of a need to protect the system of civil justice; and as the civil justice system has developed its own inner strength the need for the rules for maintenance and champerty has diminished – if not entirely disappeared.[20]

Even though TPLF is thus not unfamiliar in the South African context and has been used in mainly non-insolvency cases such as the important *PricewaterhouseCoopers Inc v National Potato Co-operative Ltd*,[21] the use of litigation funding in insolvency law is not well-developed in South Africa. We suggest that expanding the use of TPLF to the insolvency context, as has been done in other jurisdictions, could be a positive development in South Africa. It could benefit unsecured creditors, potentially allowing for a greater return than would have been the case had the liquidator not been able to pursue the asset or debt recovery litigation. It also serves a public interest purpose in that the enforcement of directors' obligations and the recovery of assets wrongfully disposed of are enabled.

TPLF is thus clearly a valuable resource in insolvency where other funding options to support litigation may not be feasible or available. However, in spite of the obvious benefits there could also be practical and policy concerns about the operation of this mechanism regarding matters such as the funding premium; funder control over proceedings; the benefit to creditors; conflicts of interest; funder ability to comply with adverse cost orders; the privileged nature of the agreement; and so forth.[22] These concerns, as well as implications for liquidator obligations and liability require careful consideration when using TPLF in insolvency.

The purpose of this paper is to discuss how the more mature rules in relation to insolvent litigation funding in Australia could inform the use of litigation funding in insolvency in South Africa. Australia offers a useful basis for a comparative study – its legal system is similar in some ways to the South African legal system, due to legal rules being contained in a combination of legislation and case law (common law); it has a well-developed litigation

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20 The *Potato* case para 32.

21 *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* 2004 6 SA 66 (SCA).

22 See generally Duffy 2016 *UNSWLJ* 165; Morabito and Waye 2011 *NZ L Rev* 323; Solas *Third Party Funding* 265 *et seq*; Waye and Morabito 2009 *CJQ* 389.

funding market;[23] and it is one of the first jurisdictions in which insolvent litigation funding has been widely used.[24] The Australian judiciary has furthermore had the opportunity to consider the application of this mechanism in insolvency since 1996, and has consequently had occasion to develop guidelines for its use in insolvency. These could potentially be useful in a South African context where the application of litigation funding in insolvency is still in its infancy.

2 Basis and extent of judicial oversight

2.1 Australia

In Australia provisions of the *Corporations Act,* 2001 (Cth), particularly section 477(2B) and sections 90-20 and 90-15 of Schedule 2 of the Act (the Insolvency Practice Schedule (Corporations) (IPSC))[25] enable judicial involvement in the approval of TPLF agreements in insolvency. Section 477(2B) of the Act provides that a liquidator needs to obtain either court or creditor approval to enter into an agreement that will be longer than three months. As TPLF agreements will typically continue for more than three months, it is clear that insolvency practitioners need to obtain approval as described in that provision before entering into a TPLF agreement. In spite of creditor approval perhaps being the less onerous and costly option, insolvency practitioners often still seek court approval for a variety of reasons. These include, for example, the fact that the resolution to approve the agreement could be defeated when put to creditors where there are votes of interests associated with proposed examinees;[26] where significant creditors are the defendants in the proposed litigation;[27] or because the funding agreement itself contains court approval as a condition.[28]

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23 Although the exact number of funders operating in Australia is unknown, it is suggested that there are more than 30 and industry revenue is expected to continue growing over the five years through 2027-28 at an annualised 2.9%, to total AU$195.2 million. See Baikie 2023 https://my.ibisworld.com/download/au/en/industry-specialized/5446/1/0/pdf 12.

24 Insolvent litigation funding was legitimised as a result of the decision in *Re Movitor Pty Ltd (in liq)* (1996) 64 FCR 380. See Cini 1998 *ILJ* 171 *et seq* for a discussion on the historical development and an analysis of the earlier insolvent litigation funding cases in Australia.

25 A similar opportunity was previously provided for in terms of the *Corporations Act*, 2001 (Cth) s 479(3), which has now been repealed.

26 In *Re ACN 076 673 875 Ltd* (2008) 42 ACSR 296 para 2, this is the reason that was advanced for seeking court approval for a litigation funding agreement, after the motion to approve the agreement was defeated.

27 *Re Feastys Family Restaurants Pty Ltd (in liq)* (1996) 14 ACLC 1058.

28 See e.g. *Re Great Southern Ltd (in liq) (Receivers and Managers Apptd)* [2012] FCA 1072 para 26; *Re Robinson* [2017] FCA 594 para 44. Also see *Re OLI 1 Pty Ltd (in liq)* [2020] FCA 450 for an illustration of the circumstances that would compel a liquidator to seek court approval under s 477(2B).

Sections 90-20 and 90-15 of the IPSC furthermore generally enable insolvency practitioners to seek directions from court in relation to administrations – insolvency practitioners commonly use this provision, among other things, to obtain court approval for litigation funding agreements.[29] In earlier cases the predecessor of this provision[30] was used regularly by insolvency practitioners when the principles pertaining to insolvent litigation funding were less settled, to obtain directions from the court in relation to the entering into of a litigation funding agreement.[31] In later cases this provision is useful when liquidators regard it as "prudent" to seek the approval of the court, even where the committees of inspection or creditors have agreed in principle to the litigation funding agreements due to concerns about compliance with liquidators' obligations.[32]

An analysis of case law suggests that the court adopts a similar approach and would consider similar matters, irrespective of whether approval of the TPLF agreement is sought under section 477(2B) or sections 90-20 and 90-15 of the IPSC (or its predecessor provision).[33] However, even though the court may consider similar matters in deciding whether to approve the TPLF agreement, it is important to note that the effect of the approval would differ, depending on the provision under which it was sought, with approval under section 477(2B) offering no protection or immunity to a liquidator, unlike section 479(3), for example.[34]

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29 The predecessor provision, s 479(3), gave rise to a number of cases in which litigation funding agreements were considered by the court. See e.g. *Re Movitor Pty Ltd (in liq)* (1996) 64 FCR 380; *Re Tosich Construction Pty Ltd; Ex Parte Wily* (1997) 73 FCR 219; *Re Addstone Pty Ltd (in liq)* (1998) 83 FCR 583; *Buiscex Ltd v Panfida Foods Ltd (in liq)* (1998) 28 ACSR 357; *Elfic Ltd v Macks* [2003] 2 Qd R 125.

30 Section 479(3) of the *Corporations Act*, 2001 (Cth), now repealed and replaced by the provisions in the Insolvency Practice Schedule (Corporations) (IPSC).

31 See e.g. *Re Movitor Pty Ltd (in liq)* (1996) 64 FCR 380; *Re Tosich Construction Pty Ltd; Ex Parte Wily* (1997) 73 FCR 219; *Buiscex Ltd v Panfida Foods Ltd (in liq)* (1998) 28 ACSR 357.

32 See e.g. *Re GB Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674 679, in which the court indicated that a liquidator acting in accordance with directions under s 479(3) would be "protected from claims by unsecured creditors or by contributories (or by the company itself), of any alleged breach of his duties as liquidator by so acting"; *Re Octaviar Administration Pty Ltd (in liq)* [2017] NSWSC 1556 paras 7-9, where the principles applicable to the exercise of the court's power under s 479(3) (or its equivalent, IPSC ss 90-15) are set out in detail, cited with approval in *Krejci (liquidator), re Community Work Pty Ltd (in liq)* [2018] FCA 425 para 47.

33 See e.g. *Buiscex Ltd v Panfida Foods Ltd (in liq)* (1998) 28 ACSR 357 (following *Re Movitor Pty Ltd (in liq)* (1996) 64 FCR 380) and *Re Tosich Construction Pty Ltd; Ex parte Wily* (1997) 73 FCR 219; *Re Imobridge Pty Ltd (in liq) (No 2)* [2000] 2 Qd R 280 (following *Re Movitor Pty Ltd (in liq)*); and *Re Addstone Pty Ltd (in liq)*); *Re ACN 076 673 875 Ltd* (relying on *Re Addstone Pty Ltd (in liq)* (1998) 83 FCR 583).

34 *Re City Pacific Ltd* (2017) 35 ACLC 17-028; *Re Macro Realty Developments Pty Ltd (No 2)* [2020] FCA 649 para 11.

It should furthermore be noted that the extent of court involvement in approving TPLF agreements in insolvency is limited to some degree. The court notes that it will not attempt to

> second guess the liquidator in the exercise of his powers, and generally will not interfere unless there can be seen to be some lack of good faith, some error of law or principle, or real and substantial grounds for doubting the prudence of the liquidator's conduct.[35]

The court furthermore indicated that the exercise of the discretion ultimately turns on "commercial considerations", that the court would not attempt to "second guess the liquidator's commercial judgment"[36] and that it is "impracticable, particularly in matters of commercial complexity, for the court to examine a liquidator's exercise of judgment in any depth."[37] The court also noted that it is not its role to "develop some alternative proposal which might seem preferable", but simply to "grant or deny approval to the liquidator's proposal."[38]

In other cases the court removed itself even further from any judgment in respect of the substance of the matter, indicating that "the focus of section 477(2B) of the Act is not the merits of the litigation nor even the merits of the liquidator's judgment to enter into the relevant agreements, but the impact of the agreement on the duration of the liquidation."[39]

Court approval of the TPLF agreement therefore appears to focus on whether the agreement is a proper exercise of the liquidator's powers rather than on the commercial merits of the agreement.

However, even though the court is unwilling to override a liquidator's commercial judgment, it still requires "evidence that a commercial judgment has been made, on the basis of appropriate advice."[40] Furthermore, the court's engagement with factors that it identifies as important in determining whether a liquidator is acting *bona fide* under section 477(2)(c) in selling or disposing of the cause of action, or part or all of the proceeds of a successful cause of action, points to careful judicial scrutiny of the litigation funding agreement.[41] These factors include: the nature of the cause of action; its

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35 *Re Spedley Securities Ltd (in liq)* (1992) 9 ACSR 83 85-86. Referred to in, for example, *Re ACN 076 673 875 Ltd* (2008) 42 ACSR 296 para 16; *Re Leigh* [2006] NSWSC 315 para 23; *Re HIH Insurance Ltd (in liq)* [2004] NSWSC 5 para 15.

36 *Re Imobridge Pty Ltd (in liq) (No 2)* [2000] 2 Qd R 280 para 16.

37 *Re Imobridge Pty Ltd (in liq) (No 2)* [2000] 2 Qd R 280 para 22.

38 *Re The Bell Group Ltd (in liq); Ex Parte Woodings* [2009] WASC 235 para 57. Similar sentiments were expressed in *Re City Pacific Ltd* (2017) 35 ACLC 17-028 para 10.

39 See *Re Opel Networks Pty Ltd* [2013] NSWSC 1245 para 7.

40 *Re Leigh* [2006] NSWSC 315 para 36.

41 As would seem to be borne out by the way in which the court would consider the evidence presented in relation to each of these factors in cases such as *Re Leigh* [2006] NSWSC 315 paras 26-36; *Re Great Southern Ltd (in liq) (Receivers and Managers Apptd)* [2012] FCA 1072.

complexity; the amount of costs likely to be incurred in the conduct of the action; the extent to which the funding entity is to contribute to the costs of the action; the extent to which the funding entity is to contribute towards the costs of the respondent in the event that the action is not successful or towards any order for security for costs by the court before which the action is to be heard; the extent to which the liquidator has canvassed other funding options; the level of the "premium" payable to the funder; the risks involved in the claim; and the liquidator's consultations with creditors of the company.[42]

2.2 South Africa

As mentioned previously, commercial insolvency-related litigation funding is currently not widely used in insolvency proceedings in South Africa. In light of how this funding mechanism is gaining traction across the world, as well as in contexts other than insolvency in South Africa, it is likely that this will change. It is therefore important to consider how the current South African legal framework will deal with TPLF agreements in the context of insolvency.

As stated earlier, there are no specific statutory provisions dealing with litigation funding agreements in insolvency in South Africa and no statutory requirements that would mandate court approval of TPLF agreements in insolvency in the absence of creditor approval. However, as in Australia there are statutory provisions that would allow a liquidator to approach the court for directions – specifically sections 386(5), 397(4) and 388(1) of the *Companies Act* 61 of 1973.[43] These could potentially provide an avenue for a liquidator to obtain prior court approval for entering into a TPLF. However, whether the liquidator perceives a need to do so is another question, and it is important here to consider the way in which South African legislation describes the powers of a liquidator.

South African legislation distinguishes between three main categories of liquidator powers.[44] First, under section 386(1)(a) to (e) of the 1973 *Companies Act* there are those powers which the liquidator can exercise in his or her own discretion.[45] These include powers to sign all deeds, receipts and other documents in the name of the company; to prove a claim against

42 *Re Addstone Pty Ltd (in liq)* (1998) 83 FCR 583 594. Also see *Re Leigh* [2006] NSWSC 315 para 25; *Re ACN 076 673 875 Ltd* (2008) 42 ACSR 296 paras 17-34; *Fortress Credit Corp (Australia) II Pty Ltd v Fletcher* (2011) 281 ALR 38 para 24; *Re Hird* [2018] FCA 781 para 37; *Re Australian Vocational Learning Institute Pty Ltd (in liq)* [2019] FCA 1638 paras 22-24.

43 The *Companies Act* 71 of 2008 repealed the *Companies Act* 61 of 1973, but in terms of Schedule 5, Item 9 of the 2008 Act some of the provisions in Chapter XIV of the 1973 *Companies Act* relating to liquidation were retained for the time being, pending the introduction of new insolvency legislation.

44 See Cilliers *et al Cilliers and Benade: Corporate Law* para 28.28.

45 See in general Kunst, Boraine and Burdette *Meskin* paras 4.46, 4.47, 4.50 and 4.52.

the estate of a debtor of the company; to draw, accept, make or endorse any bill of exchange or promissory note on behalf of the company provided no additional liability is placed on the company; to summon a general meeting of the company or its creditors for the purpose of obtaining their authority or sanction for any matter or purposes as he or she may consider necessary; and to take such measures as are considered necessary for the protection and better administration of the affairs and property of the company. Secondly, there are those powers for which authority granted by the creditors and members or contributories are required,[46] or, failing their authority, or for which the directions of the Master have been obtained in terms of section 387(2) of the 1973 *Companies Act*, and thirdly there are those powers which require court authorisation.[47] The second category of powers includes powers in relation to the treatment of some unexecuted contracts; the sale of property; the right to litigate in the name of and on behalf of the company; to agree to any reasonable offer of composition made by any debtor; to compromise or admit any claim or demand against the company, including an unliquidated claim; or to submit a dispute concerning any claim to arbitration. The third category includes those powers which can be exercised only with the leave of the court.[48] In this regard section 386(5) of the 1973 *Companies Act*, for instance, provides that the court may, if it deems fit, grant leave to a liquidator to raise money on the security of assets of the company, or to do any other thing that the court may consider necessary for the winding up of the affairs of the company and the distribution of assets.[49]

Some of the powers listed under the second category are particularly relevant to this article, namely the power regarding the sale of company property, which could arguably include the "sale" of a right of action to a commercial funder, as well as the power to litigate in the name of and on behalf of the company. As there is an express statutory requirement to obtain creditor approval for these types of actions, liquidators may not perceive the need to obtain court approval in addition to creditor approval to enter into a TPLF agreement. However, it should be noted that litigating in the name of the company and entering into a TPLF agreement to support such litigation may arguably be regarded as distinct acts and powers. In the absence of directly applicable statutory provisions or precedent regarding

46 See s 386(3) read with s 386(4) and see s 387(1) of the 1973 *Companies Act*.
47 Section 386(5) and see s 387(3) of the 1973 *Companies Act* as well.
48 Section 386(5) and see Kunst, Boraine and Burdette *Meskin* para 4.50.
49 Also see s 387(2), that allows the liquidator in a case of liquidation by court order, who fails to get directions from the creditors and members at a general meeting of creditors, to approach the master for such directions. Should the master also fail to provide the same, the liquidator may apply to the court for directions – s 387(3) of the 1973 *Companies Act*. S 388 empowers the court to determine any questions arising in the context of voluntary liquidation.

entering into a TPLF agreement insolvency, there is the potential to view entering into such an agreement as "any other thing that may be considered necessary for the winding up of the affairs of the company", thus requiring court approval for entering into those agreements under the third category of liquidator powers in terms of section 386(5) of the 1973 *Companies Act*.[50] Based on the fact that court approval may come to be considered as a requirement, especially where creditor approval cannot be obtained, as well as the fact that there are specific statutory provisions that would enable the liquidator to seek directions from the court, it is not inconceivable that the South African judiciary may be approached with a request to approve an insolvent litigation funding agreement – particularly where the creditors appear reluctant to sanction the agreement.

The judicial guidelines developed and applied by the Australian judiciary when asked to approve a TPLF might serve to provide some useful insights into the type of issues that could arise and the approach that could be adopted in respect of those issues, should the South African judiciary become increasingly involved in the approval of TPLFs.

3 Judicial guidelines

On the basis of an analysis of Australian case law dealing with the approval of TPLF agreements, it is possible to develop an understanding of the "judicial guidelines" that would apply when the court is requested to approve TPLF agreements. As mentioned previously, South African precedent in this regard is not equally well-developed and some of the judicial guidelines developed in Australia may provide useful insights in the South African context – not only to the South African judiciary when given an opportunity to consider TPLF agreements in insolvency, but also to insolvency practitioners who might be contemplating entering into such agreements. The discussion below aims to provide an overview of some of the judicial guidelines that apply to insolvent TPLF in Australia and to assess their potential utility in a South African context.

3.1 Creditor approval or consultation

A question that arises is whether *ex ante* court approval of an insolvent TPLF agreement would depend on creditors having approved the involvement of a commercial funder, or at least on creditors having been consulted or informed about such an agreement. Australian case law suggests that creditor approval is not an absolute requirement for the

50 Kunst, Boraine and Burdette *Meskin* para 4.50 remark in this regard that "[b]ut, in addition, in any event he may seek directions from the Court in the form of its leave to do anything which he is able to satisfy the Court is necessary for the winding-up of the company and in some circumstances he may seek other directions from the Court."

approval of a litigation funding agreement by the court, but that it could be regarded as "a firm indication that the exercise of the [liquidator's] power is *bona fide*."[51] That said, the Australian judiciary has demonstrated a willingness to approve TPLF agreements even contrary to the wishes of creditors where the circumstances warrant.[52]

Creditor consultation regarding the funding of litigation may be relevant in so far as the court will consider whether the liquidator investigated funding options alternative to commercial funding, often creditor funding, when requested to approve the TPLF agreement.[53] However, even in this regard failure to explore alternative funding options (or to obtain quotes from multiple funders) has not proved to be fatal to an application for approval of a TPLF agreement. In *Re ACN 076 673 875 Ltd, for* example, the court indicated that it is preferable for a liquidator to be "able to show that he has explored other alternatives" but that "it is not essential to do so",[54] once again creating the possibility of leaving the creditors out of the loop.

The Australian judiciary therefore seems to have adopted a very flexible approach in respect of creditor involvement, whether it be by way of approval or consultation, with this being seen as a positive indication but by no means a requirement.

We suggest for numerous reasons that a similar "generous" approach in regard to creditor involvement should not be relied upon by South African liquidators, and that it would be prudent for liquidators to obtain creditor approval for a TPLF agreement in so far as it is possible, or at least to consult with creditors in regard to such an agreement. First, the South African insolvency law framework suggests that creditor approval is in general required for a number of matters as previously discussed, including for litigation by the liquidator.[55] Secondly, due to the fact that insolvent litigation funding is relatively unfamiliar in South Africa, a more cautious approach is advised in the initial stages of the use of this funding mechanism in insolvency. Thirdly, apart from the general provisions and legal requirements discussed above, commercial litigation funders indicate that they insist on such approval.[56]

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51 *Re Addstone Pty Ltd (in liq)* (1998) 83 FCR 583 594. Also see *UTSA Pty Ltd (in liq) v Ultra Tune Australia Pty Ltd* (1996) 132 FLR 363 401-402.

52 See e.g. *Buiscex Ltd v Panfida Foods Ltd (in liq)* (1998) 28 ACSR 357 364.

53 See e.g. *Re Addstone Pty Ltd (in liq)* (1998) 83 FCR 583 596; and *Re ACN 076 673 875 Ltd* (2008) 42 ACSR 296 para 36.

54 *Re ACN 076 673 875 Ltd* (2008) 42 ACSR 296 para 36.

55 See the discussion above and s 386(4)(a) of the 1973 *Companies Act*.

56 Information provided by Simon Kuper, director of Taurus Capital, during an interview (hereafter "Kuper Interview"), where it was mentioned that the funder prefers creditors to act with their "eyes wide open".

If it is thus assumed that the liquidator should obtain creditor approval, a question that arises is whether creditor approval should be obtained in principle, (in other words, creditor approval to enter into a TPLF agreement), or whether the approval should be to enter into that particular funding agreement. In case of the latter, creditors may require access to information about the terms of the agreement. In practice, it appears that the detailed terms of the agreement are apparently left to the liquidator to negotiate with the litigation funder.[57] However, there is the possibility that creditors may argue that they need all the information and may insist on information about the litigation funding agreement before agreeing to or giving the mandate to pursue litigation. This raises concerns about the confidentiality of the agreement, where required. In such instances seeking directions from the court would be useful and it is submitted that the validity of a TPLF agreement or related questions concerning the agreement could become the subject of judicial scrutiny in such a scenario. Such a process would provide an opportunity for the court to scrutinise the terms of the agreement to ensure that creditors' interests are protected, while the confidentiality of the agreement would be maintained.

3.2 Funder control over proceedings or settlement agreements

Another pertinent issue is whether the TPLF agreement allows a funder to exercise control over the proceedings or settlement agreements. The extent of acceptable funder control would typically depend on the construct of the litigation funding agreement. In Australia, where the bare cause of action is assigned, it appears generally to be more acceptable for a funder to assume complete control of the proceedings.[58]

In the case of a more typical funding agreement, where the funder provides financial support for the litigation in exchange for a share of the proceeds of a successful outcome, the court accepts that a litigation funder could negotiate to have a degree of influence in respect of the funded proceedings, as "[n]o sane litigation funder would agree to fund proceedings without some measure giving it some influence."[59] That said, it is important from a liquidator perspective not to abdicate responsibility and to keep in mind the importance of complying with liquidators' obligations.[60]

With regard to litigation funder control in South Africa, the point of departure regarding the role, rights and obligations is set out in a TPLF agreement between the TPLF entity and the litigant instituting the claim. Some

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57 Kuper Interview.

58 See e.g. *UTSA Pty Ltd (in liq) v Ultra Tune Australia Pty Ltd* (1996) 132 FLR 363 401. Also see *Re Tosich Construction Pty Ltd; Ex Parte Wily* (1997) 73 FCR 219 236.

59 *Re City Pacific Ltd* (2017) 35 ACLC 17-028 paras 24-25.

60 *Elfic Ltd v Macks* [2003] 2 Qd R 125 para 105.

guidance on this matter is provided in the certification hearing of the class action in *De Bruyn v Steinhoff Holdings NV.*[61] In considering measures to mitigate the potential influence of the funder on the process the court, mentioned that:[62]

> [i]t is unavoidable that third party funders, by reason of their position can seek to influence matters outside their remit…That risk is not best dealt with by banishing third party funding. That would have the perverse result of limiting access to the courts in cases that might be deserving. Rather, the risk is mitigated by requiring that class lawyers do their duty to their clients ... .

The court accepted that the appointment of a supervising attorney to address this risk would deter the funders from exercising undue influence.[63]

Even though this litigation did not involve typical insolvency proceedings, the "general principles" basis upon which TPLF has been developing in South Africa suggests that the court would similarly frown upon funders taking control of proceedings or attempting to "influence matters outside their remit" in the context of funded insolvency actions. Any guidance taken from Australian judicial guidelines in respect of funded insolvency proceedings would support such an approach.

Ultimately in a South African context the extent to which a litigation funder attempts to exercise control over legal proceedings may have a bearing on the question as to the validity of the agreement, or may influence a court to insist on joining a TPL funder and to grant a cost order in applicable cases where a TPL funder does take over the litigation or gets too involved in the litigation itself.[64] A litigation funder would be advised not to take control of the litigation and liquidators would similarly be advised not to abdicate responsibility for legal proceedings in favour of the funder. As in Australia, liquidators in South Africa are subject to particular legal obligations and the emphasis by the Australian judiciary on the proper exercise of liquidator obligations when considering this aspect could be equally relevant in the South African context.

3.3 Funding premium

The extent to which a funder is permitted to profit from the litigation remains controversial. In Australia this issue is addressed in the context of whether the litigation funding agreement involves a *bona fide* exercise of the liquidator's power of sale. A finding that the premium is "grossly excessive", and therefore not a *bona fide* exercise of the liquidator's power of sale could ultimately prove fatal to the litigation funding agreement.[65] It is unclear what

61 *De Bruyn v Steinhoff Holdings NV* 2022 1 SA 442 (GJ).
62 *De Bruyn v Steinhoff Holdings NV* 2022 1 SA 442 (GJ) para 113.
63 *De Bruyn v Steinhoff Holdings NV* 2022 1 SA 442 (GJ) para 113.
64 See para 3.6 below.
65 *Re Movitor Pty Ltd (in liq)* (1996) 64 FCR 380 394.

would be considered as "grossly excessive" and subsequent cases where a funding premium of 75 per cent was allowed[66] would seem to obfuscate matters further.

The court generally appears reluctant to question the commercial judgment of the liquidator and it seems that there is a significant margin in which a funder could negotiate a premium with the liquidator, perhaps due to the approach that a small return "is a better result for the company's creditors than nothing."[67]

In spite of the absence of a regulatory framework in South Africa, some litigation funders adhere to broad principles relating to the benefit to be derived from a positive outcome of litigation funding in general. There are several ways to structure the premium or commission rate, but the most common is for the funder to be repaid its investment and then receive 25 per cent to 50 per cent of the remainder of the judgement or the amount awarded, depending for instance on the complexity of the matter.[68] This percentage should have some rationale to it and the factors of a particular case, such as the complexity of the litigation, its possible duration, etcetera should be considered in calculating this percentage.

In *De Bruyn v Steinhoff Holdings NV*,[69] where a class action for damages was instituted by and on behalf of the shareholders of the defendant company based on allegations of neglect of their common law and statutory duties by the directors and auditors, the court insisted on the funding arrangements being provided to the court, since these were deemed to be one of the factors for consideration at the certification stage of class action proceedings. As to the benefit of the funder, the TPLF agreement stipulated that the funder "will seek 25% of the class wide recovery, subject to the court determining the acceptability of this funding fee percentage."[70]

It must be stressed that, unlike the *Contingency Fees Act* 66 of 1997 that applies to contingency fees agreements between the litigant and its legal representative and that sets limits as to the financial benefits to be derived from the litigation, there are no such limits in the case of TPLF – mainly

66 *Buiscex Ltd v Panfida Foods Ltd (in liq)* (1998) 28 ACSR 357 364.

67 *Re City Pacific Ltd* (2017) 35 ACLC 17-028 para 20.

68 Information obtained during the Kuper Interview. It is submitted that the prescribed percentages in respect of the *Contingency Fees Act* may serve as a guideline, although it is not legally binding on TPLF as such (see the remarks in *De Bruyn v Steinhoff Holdings NV* 2022 1 SA 442 (GJ) para 88 regarding references to the *Contingency Fees Act*). Where TPL funders are seen as the only beneficiaries of a positive outcome, they may be deemed not to be *bona fide* (pure) funders – see the discussion in para 3.6 below.

69 *De Bruyn v Steinhoff Holdings NV* 2022 1 SA 442 (GJ) para 88.

70 *De Bruyn v Steinhoff Holdings NV* 2022 1 SA 442 (GJ) para 84.

because the practice is not specifically regulated by legislation.[71] In *PriceWaterhouseCoopers Inc v National Potato Co-operative Ltd*[72] the Supreme Court of Appeal viewed not too favourably a funding agreement that provided for more than 55 per cent as an additional benefit to be derived from a successful order in favour of the plaintiff. Thus, and in an attempt to prevent the funder from potentially being joined as a party to the proceedings, a practical approach with some litigation funders seems to be to limit the benefit due in terms of the agreement to not more than 50 per cent.[73] Some local funders nevertheless limit their fees to a maximum of 50 per cent since that is viewed to be fair.[74]

Should such a matter serve before a court, it is submitted that limitations laid down in the *Contingency Fees Act* may serve as guidelines. It must nevertheless be stressed that the *Contingency Fees Act* is not applicable to pure TPLF agreements and courts will generally not deal with this aspect unless its consideration is essential to the matter to be decided.

It appears that the Australian judiciary may be a bit more generous in allowing significant premiums in relation to funded insolvency proceedings, compared to funded class action proceedings, due to the particular context in which insolvency proceedings take place. The approach that "something is better than nothing" in insolvency; the fact that the liquidator is a commercially sophisticated litigant and will be able to assess the appropriateness of the premium; the recognition of the protection of the creditors' interests in terms of the legal framework pertaining to liquidator obligations; all of these would serve to allow for a different view of the appropriateness of the funding premium in insolvency, as against the class action context. It remains to be seen whether similar considerations will apply in a South African context.

3.4 Importance of benefit to creditors

A question that arises is whether it should be a requirement that a benefit to unsecured creditors is apparent in order to obtain approval for a litigation funding agreement. Australian case law provides examples of litigation funding agreements that were approved even where the proceeds of the action were sufficient to cover only the liquidator remuneration and the funding premium. Importantly, in these cases the court recognised the relevance of public interest considerations in facilitating actions against

71 See Khoza 2018 *PELJ* 10, where the author also discusses the possible abuses that may ensue from unregulated fee structures.
72 *PriceWaterhouseCoopers Inc v National Potato Co-operative Ltd* 2015 2 All SA 403 (SCA) para 162.
73 Kuper Interview.
74 Kuper Interview.

directors for breach of duty,[75] or to pursue recovery proceedings,[76] as well as the importance of liquidators being remunerated for their professional services.[77]

Although the benefit for creditors is not strictly a statutory requirement for applying for the liquidation of companies as such, South African insolvency law is infused with the notion of the advantage of or benefit to creditors.[78] It is also said that the liquidator must execute the liquidation of a company to the benefit of the creditors and members of a company,[79] and that "… his duty to creditors is to see that they suffer the least loss and receive the best dividend."[80] It is thus submitted that commercially funded litigation should be aimed to benefit creditors, since the liquidator is expected to act in the best interest of the creditors as a group. The liquidator will probably not, and in fact should not, enter into such an agreement if no such benefit exists. It is further submitted that the creditors who should as a principle agree to such funding will also consider the potential benefit in agreeing to it. All aspects must be considered before embarking on entering into the TPLF agreement. It is also important to note that courts in general frown upon TPLF agreements that aim only to enrich the funder and not the person who is directly affected by the litigation (in the context of insolvency law, it would be the estate which is administered for the benefit of the creditors of that estate).[81] That said, it must be appreciated that the notion of public policy runs deeply in the context of the recognition and development of the principles of TPLF.[82] Public interest is also an important consideration in the development of South African law in general to ensure access to justice, and as such it may guide public policy.[83] It is therefore possible that a court may also consider public interest in the context of insolvency litigation.

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75 *Hall v Poolman* (2009) 75 NSWLR 99; [2009] NSWCA 64 para 187.

76 *Marsden v Screenmasters Australia Pty Ltd* [2015] FCA 1256 para 63.

77 *Re Cardinal Group Pty Ltd (in liq)* (2015) 110 ACSR 175 para 34.

78 Smith, Van der Linde and Calitz *Hockly* para 1.2 where the authors state that the "[a]dvantage of creditors is still the leading principle of the South African pro-creditor law of insolvency". Also see *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* 2017 1 All SA 331 (SCA) para 56.

79 Cilliers *et al Cilliers and Benade: Corporate Law* para 28.18.

80 Cilliers *et al Cilliers and Benade: Corporate Law* para 28.18, relying on *Macadamia Finance Ltd v De Wet* 1991 4 SA 273 (T); *James v Magistrate Wynberg* 1995 1 SA 1 (C); and *Receiver of Revenue, Port Elizabeth v Jeeva: Merck v Jeeva* 1996 2 SA 573 (A).

81 See the discussion below.

82 Public policy features strongly in the *Potato* case paras 29 and 38-40, and see in general the remark on public policy in *De Bruyn v Steinhoff Holdings NV* 2022 1 SA 442 (GJ) para 156.

83 Although usually associated with public interest litigation, the point is made that it should infuse all law in South Africa – see Brickhill *et al Public Interest Litigation* 16.

The emphasis on the potential benefit to creditors in South African insolvency law may be a point of differentiation between the two jurisdictions. In addition to protecting the private rights/interests of creditors, Australian law clearly recognises the "public interest" element in the insolvency proceedings mentioned above, whereas South African law seems to focus more on the private rights of creditors in this context. It is submitted, however, that since public interest is a consideration in the development of South African law to provide access to justice in general, it may also be relevant in this ambit. In the absence of clear directions in South African insolvency law in this respect, a difference in the approaches underpinning a particular legal system could cause differences in nuance in the development of legal rules (unless the public interest element is incorporated to the same extent as in Australia). These differences in approaches may lead to different outcomes, should there be an application to approve an insolvent TPLF agreement in the respective jurisdictions.

3.5 Disclosure of funding agreement

A further issue is where the existence and terms of the TPLF agreement should be disclosed. In the insolvency context the matter of confidentiality in relation to the funding agreement was addressed in a number of recent Australian cases, with confidentiality orders being granted in *Krejci (Liquidator), re Community Work Pty Ltd (in liq)*, *Hancock (Liquidator), re South Townsville Developments Pty Ltd (in liq)*[84] and *Kogan, re Rogulj Enterprises Pty Ltd (in liq).*[85] In *Hancock (Liquidator), re South Townsville Developments Pty Ltd (in liq)* the court emphasised the fact that confidentiality orders were sought to further the interests of the creditors and to prevent the defendants from obtaining an unfair advantage not available to ordinary litigators by learning the terms and conditions under which the plaintiff was able to pay its legal costs and expenses.[86] Similar sentiments were echoed in *Kogan, re Rogulj Enterprises Pty Ltd (in liq)*, with the court noting that "[t]he clear public interest in the due and beneficial administration of the estates of insolvent companies for the benefit of creditors is a relevant consideration in favour of granting an order under section 37FA."[87]

However, in *Hancock Liquidator of South Townsville Developments Pty Ltd (in liq) (No 2)* the court considered that the defendants were entitled to access portions of the agreement which were relevant to how they should

84 *Hancock (Liquidator), re South Townsville Developments Pty Ltd (in liq)* [2019] FCA 71.

85 *Kogan, re Rogulj Enterprises Pty Ltd (in liq)* [2021] FCA 856.

86 *Hancock (Liquidator), re South Townsville Developments Pty Ltd (in liq)* [2019] FCA 71 para 11.

87 *Kogan, re Rogulj Enterprises Pty Ltd (in liq)* [2021] FCA 856 para 31; with reference to provisions of the *Federal Court of Australia Act*, 1976 (Cth).

conduct a security of costs application.[88] It was reasoned that their forensic decisions concerning security for costs should be made on an informed basis, and it may well be that having regard to the relevant terms of the funding agreement, for example, they would not press for a separate order providing security for costs.[89]

In the absence of specific legal rules in this regard in South African law, this question needs to be considered in the confines of the general rules pertaining to the legal professional privilege between a litigant and its legal representative, for instance. A legal opinion by senior counsel holds the view that South African law will not view the litigation funding agreement to be privileged as such.[90] On this basis it is then submitted that a South African court may decide that when a funding agreement is directly relevant to the underlying dispute it will be disclosable, as in the case of a class-action certification process, as mentioned before, as well as in matters where the abuse of process is argued etcetera.[91] The authors[92] of the opinion state that

> a blanket recognition of privilege of litigation funding agreements would prevent courts from performing the supervisory function required by each of these categories of proceedings, and accordingly the courts are unlikely to hold as a blanket rule that such agreements are privileged under the litigation privilege.

However, it is pointed out that South African courts would (possibly) allow portions of the litigation funding agreements to be redacted if these would tend to reveal otherwise privileged material.[93]

In summary the opinion states that:[94]

> 5 We have been unable to find any South African decisions on this issue. However, having done a survey of a number of comparative jurisdictions, in our view South African courts, when confronted with the issue, will apply the following principles:
>
> 5.1 Documents that are privileged in the hands of a prospective client or client of a litigation funder will remain privileged even once they are provided to the funder;
>
> 5.2 In order to prevent the inference being drawn that there has been an express or implied waiver of the prospective client or client's privilege,

88 *Hancock Liquidator of South Townsville Developments Pty Ltd (in liq) (No 2)* [2019] FCA 622 para 11.
89 *Hancock Liquidator of South Townsville Developments Pty Ltd (in liq) (No 2)* [2019] FCA 622 para 20.
90 Harris and Watson Legal Opinion para 52.
91 Harris and Watson Legal Opinion para 53.
92 Harris and Watson Legal Opinion para 53.
93 Harris and Watson Legal Opinion paras 51 and 54.
94 Harris and Watson Legal Opinion para 5.

the prospective client or client must conclude a non-disclosure or confidentiality agreement with the litigation funder;

5.3 Communications between the litigant and the funder, and documents produced by the funder will be privileged when they tend to disclose privileged material;

5.4 Litigation funding agreements are not privileged but courts will allow the redaction of terms that tend to disclose privileged material.

As discussed previously, it may be necessary to disclose some detail as to the funding and related matters since this is an aspect that the court needs to consider at this stage of the proceeding.[95]

It is thus submitted that discovery of the TPLF agreement (and related communications) should remain confidential to the extent that these do not have a bearing on the merits of the claim, to the extent that the TPLF funder is not a party to the *lis*, and to the extent that there is no legal obligation to disclose the same by means of discovery. However, depending on how the case unfolds (for instance if the court on request of the defendant decides to join the TPLF funder), discovery may become relevant for the purposes of considering joinder and the granting of an adverse cost order.

Although confidentiality as such is not as a rule a valid ground for objecting to the production of a document, a court has some discretion to limit a party's right to inspect such documents.[96] It seems that funders would also prefer to preserve any legal privilege or confidentiality regarding the status of the documents provided to the funder by its client, the litigant, that may exist, as well as confidential communications between them. This approach generally appears to align with the approach adopted by the Australian judiciary, as discussed above.

3.6 Liability for adverse cost orders

Whether a litigation funder agrees to and is capable of meeting adverse cost orders is also relevant when seeking court approval for a litigation funding agreement. An inability or unwillingness of the funder to do so would clearly have adverse effects for unsecured creditors and/or the liquidator. The court emphasises contractual protection against adverse costs orders when considering the interests of creditors, and also potentially regarding oppression in relation to the other party.[97] However, a contractual safeguard has limited utility where the litigation funder is not in a position to meet its

95 *De Bruyn v Steinhoff Holdings NV* 2022 1 SA 442 (GJ) paras 60-64.
96 *Crown Cork and Seal Co Inc v Rheem South Africa (Pty) Ltd* 1980 3 SA 1093 (W).
97 *Re Leigh* [2006] NSWSC 315 paras 35-36; *Re Great Southern Ltd (in liq) (Receivers and Managers Apptd)* [2012] FCA 1072 paras 42, 45.

obligations under the funding agreement and litigation funders could therefore be required to provide security for costs.[98]

In South Africa the courts have developed the common law in this respect and entrenched the principle that litigation funders are at risk of being joined to proceedings that they fund, and as such they run the risk of an adverse cost order being granted against them. This would especially be the case if they were found to be the main, if not the sole beneficiaries of the litigation and therefore not so called "pure funders".[99] Contractual protection against adverse cost orders may therefore not be as critical as in the Australian context. However, the ability of the funder to satisfy a potential adverse cost order remains an issue and could be addressed by a requirement that the approval of the TPLF agreement is conditional upon the funder being able to provide security for costs. This jurisprudential development serves as proof that the South African courts will indeed, and to some extent, act as the watchdog in the absence of statutory regulation when it comes to the development of TPLF rules.[100] However, Burger[101] laments that in developing the common law in this regard the court, according to him, neglected to make it clear what the considerations should be to allow a defendant to join a TPLF funder to the suit, and also bemoans the fact that no criteria were set to consider when an adverse cost order would be allowed.

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98 See e.g. *Turner v Tesa Mining (NSW) Pty Ltd* [2019] FCA 1644.

99 See *PriceWaterhouseCoopers Inc v National Potato Co-Operative Ltd* 2013 6 SA 216 (GNP) apparently approved on appeal on this point in *PriceWaterhouseCoopers Inc v National Potato Co-operative Ltd* 2015 2 All SA 403 (SCA) para 10 and see para 162. In fact, the Supreme Court of Appeal in the last-mentioned judgment, remarked in passing at para 12 that the 2004 *Potato* case judgment must perhaps be revisited to reconsider the precise ambit of the deviation from the rules of champerty as in this case where the TPL funder was the only person to benefit from the outcome. Also see *EP Property Projects (Pty) Ltd v Registrar of Deeds, Cape Town, and Four Related Applications* 2014 1 SA 141 (WCC), where the High Court granted a cost order against a litigation funder who had already been joined to the proceedings; *Scholtz v Merryweather* 2014 6 SA 90 (WCC) para 110 where the court applied the distinction between "pure litigation" funders and other types of litigation funders with a view to awarding cost orders against the "other types" of litigation funders; and also see *Gold Fields Ltd v Motley Rice LLC* 2015 4 SA 299 (GJ) 324, where the funder was considered to be a "pure funder" who was merely facilitating access to justice without "gaining access to justice for his own purposes." See Van Loggerenberg, Bertelsmann and Erasmus *Superior Court Practice* A1-27; and also see Khoza 2018 *PELJ* 7, for a further discussion of these judgments.

100 See Vikovich 2023 https://iclg.com/alb/african-litigation-funding-market-a-hot-potato following the decision of the court *a quo* in *PriceWaterhouseCoopers Inc v National Potato Co-Operative Ltd* 2013 6 SA 216 (GNP) 222E-G, as confirmed on this point by the SCA in the appeal case mentioned in the previous footnote.

101 See the discussion of this case in Burger 2014 https://www.werksmans.com/legal-updates-and-opinions/let-the-litigation-funder-beware/ where he argues that this approach may make the application of TPLF uncertain.

4 Critical analysis and recommendations

In the absence of the formal regulation of TPLF in Australia, the system of "judicial oversight" appears to fulfil an important function as a regulatory "gap-filler". However, useful as this quasi-regulatory measure may appear to be, it is important to take note of certain shortcomings inherent to this form of "regulation" in Australia.

First, as mentioned previously, the court appears to hold quite a narrow view about its role in approving TPLF agreements. This narrow approach may cause "judicial oversight" to appear as a weak or ineffective regulatory measure. However, it is important to keep in mind that these decisions are given against the backdrop of a comprehensive set of legal rules in respect of insolvency practitioner professional qualifications and obligations, and the legal rights of creditors to supervise insolvency practitioner conduct that provide valuable safeguards for the interests of creditors. Creditors are furthermore in a position to exercise a degree of oversight in respect of the conduct of the liquidator and can, for example, require the liquidator to convene meetings,[102] and request a court to inquire into the administration of the company by the liquidator[103] or to appoint a reviewing liquidator[104] or even to remove the liquidator.[105]

Secondly, in addition to the limited role of the court in "approving" the litigation funding agreement it should be noted that court approval is not always required. For example, court approval is technically unnecessary where the insolvency practitioner is able to obtain creditor approval for the agreement.[106]

Thirdly, it is uncertain whether the approach of the court is or should be similar irrespective of whether approval is sought on the basis of section 477(2B) or under section 90-15 of the IPSC. It appears that the court suggests that a different approach is required when it is requested to approve a litigation funding agreement on the basis of section 90-15, due to the fact that "the granting of a direction under section 90-15 of the Schedule requires a wider inquiry",[107] because of the fact that "a direction – unlike an approval under section 477(2A) or section 477(2B) – exonerates the

102 IPSC s 75-15.
103 IPSC s 90-10.
104 IPSC s 90-23.
105 IPSC s 90-35.
106 *Corporations Act*, 2001 (Cth) s 477(2B).
107 *Re Macro Realty Developments Pty Ltd (No 2)* [2020] FCA 649 para 11. Also see *Re City Pacific Ltd* (2017) 35 ACLC 17-028, where the court expressed similar sentiments in respect of the distinction between s 477(2B) and the predecessor provision to s 90-15–s 479(3).

liquidator from personal liability."[108] However, in spite of pronouncements such as these it appears as if largely similar "guidelines" are applied by the court in both instances.

As in Australia, there is no targeted, formal regulatory framework in respect of litigation funders and litigation funding agreements in South Africa. However, as against the situation in Australia South African insolvency legislation contains no direct provision that would enable prior court approval of TPLF agreements. As indicated above, a case may be made that the creditors should authorise it and where they refuse to do so that the liquidator may approach a court in terms for instance of sections 386(5), 387(3) or 388(1), where applicable, for directions by the court. Whether this will occur is an open question, however.

Judicial oversight of insolvent TPLF agreements in Australia has proven to be a reasonably effective regulatory measure in the absence of a formal regulatory framework. It is suggested that the South Africa legal framework could benefit from a statutory provision that would enable or require *ex ante* court approval of TPLF agreements in insolvency. It would furthermore allow the court to develop "judicial guidelines" in respect of insolvent TPLF agreements, thus providing clarity and certainty to insolvency practitioners and funders about appropriate and acceptable contract terms. This form of "regulation" is also preferable to a strict, formal regulatory (statutory) framework, as it allows for flexibility and the responsive development of legal guidelines. However, as noted, the Australian system of judicial oversight contains a number of shortcomings. These should be taken into consideration in any possible law reform effort.

As in Australia, an extensive set of rules governing liquidator conduct exists in South Africa, that could fulfil an important complementary function to the judicial oversight of TPLF agreements, providing further support for the use of "judicial oversight" as a regulatory mechanism in respect of TPLF agreements in insolvency.

5 Conclusion

It is clear that commercial litigation funding can play a significant role in enabling the liquidator of an insolvent company to increase the assets available for distribution, ultimately to the benefit of creditors. However, the

108 *Re Macro Realty Developments Pty Ltd (No 2)* [2020] FCA 649 para 11, with reference to *Re Minken Pty Ltd (in liq); Minken Pty Ltd (in liq) v Entwisle* [2019] VSC 288 paras 2-24. Also see *Re Gerard Cassegrain & Co Pty Ltd (in liq)* [2013] NSWSC 257, in which case the liquidator sought approval for entering into the litigation funding agreement on the basis of s 477(2B), as well as directions under s 479(3) that entering into the agreements would be justified, in order to obtain the protection of the latter provision.

need for legal rules regulating TPLF agreements in insolvency is equally clear to ensure, among other things, that creditors' interests are adequately protected. Due to the similarities between the Australian and South African legal frameworks and insolvency law systems, for example in relation to the emphasis on creditors' interests; the importance of the liquidator's obligations; and the absence of a formal regulatory framework in respect of TPLF agreements, we suggest that a system of judicial approval for TPLF agreements in insolvency, similar to the practice that exists in Australia, could be equally useful in South Africa.

The similarities between the jurisdictions also provide support for the suggestion that it would be appropriate for the South African judiciary, if requested to approve a TPLF agreement, to consider the insolvent litigation funding guidelines developed by the Australian judiciary. However, as previously mentioned, there are certain differences between the two legal systems that would necessitate caution when doing so, and we do not suggest an indiscriminate adoption of Australian judicial guidelines in South Africa, but rather that these could provide a useful point of comparison.

We furthermore recognise that general principles in regard to TPLF agreements, particularly in a class action context, as well as principles in terms of the *Contingency Fees Act*, could already provide some guidance in the South African context. However, the insolvency context presents unique circumstances and has its own set of policy objectives. An example is the extent to which creditors who are indirect beneficiaries of a funded action in insolvency are protected by the fact that the liquidator is a commercially sophisticated litigant and also subject to stringent legal obligations, in contrast to class action plaintiffs, who are unable to rely on similar protections. For this reason it is submitted that the refinement of some of the more "general" principles available in South Africa in respect of litigation funding may be desirable when applied in insolvency litigation, potentially by considering Australian judicial guidelines which have developed in an insolvency-specific context. This would create an opportunity to ensure that the principles that develop and apply to insolvent litigation funding agreements are indeed fit for purpose.

The advent of TPLF has been described as one of the "most significant developments"[109] or "most innovative trends"[110] in civil litigation, one of the "biggest and most influential trends in civil justice",[111] and so forth. The use of this mechanism in insolvency proceedings could deliver obvious benefits. However, it appears that the potential value of TPLF agreements in insolvency is not fully realised in the South African insolvency context. A

109 Duffy 2016 *UNSWLJ* 165.
110 De Morpurgo 2011 *Cardozo J Int'l & Comp L* 343.
111 Steinitz and Field 2014 *Iowa L Rev* 713.

system of judicial approval of TPLF agreements akin to the Australian practice could provide enhanced clarity in relation to the acceptable parameters of insolvent TPLF agreements, as well as an assurance of the adequate protection of creditors' interests. This could serve to ameliorate potential concerns about the use of TPLF in insolvency, potentially increasing the uptake of its use, and ultimately benefitting creditors of the insolvent estate in South Africa.

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List of Abbreviations

Cardozo J Int'l & Comp L	Cardozo Journal of International and Comparative Law
CJQ	Civil Justice Quarterly
IIR	International Insolvency Review
ILJ	Insolvency Law Journal
Iowa L Rev	Iowa Law Review
IPSC	Insolvency Practice Schedule (Corporations)
LQR	Law Quarterly Review
NZ L Rev	New Zealand Law Review
NZULR	New Zealand Universities Law Review
PELJ	Potchefstroom Electronic Law Journal
TPLF	Third-party litigation funding
UNSWLJ	University of New South Wales Law Journal