CHAMPERTY TO CHAMPAGNE:
THIRD PARTY LITIGATION FINANCING AND ACCESS TO JUSTICE

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In the certification of the class in the silicosis litigation in respect of the mineworkers who are alleged to have contracted silicosis and other lung diseases whilst working on gold mines, class actions have been hailed as a mechanism for providing access to justice for poor indigent litigants who would otherwise not be in a position to litigate before our courts. Yet this statement overlooks the fact that, in many instances (and certainly in respect of the silicosis litigation), a class action lawsuit cannot be pursued without expending and investing considerable economic resources into establishing the claim and running a potentially lengthy and costly trial with much reliance placed on expert evidence. The question arises, who funds the class?

In our view, third party litigation funding via the private financing of civil suits can assist prospective litigants with good prospects but who are without means to achieve justice. But can this commercial phenomenon truly be venerated as an access to justice development? Yes, it seems, and the powerful symbiosis of third party funding and class actions looks set to significantly alter both the litigation landscape in South Africa and the lives of those to whom the doors of the courts had previously been closed.

The recent case of the former Vodacom employee, Kenneth

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Nkosana Makate, who claimed payment of compensation from Vodacom for the use of his idea in developing the 'Please Call Me' has been celebrated in the media as a modern day David and Goliath story after Mr Makate won his legal battle in the Constitutional Court. However, if reports are to be believed, the figurative 'David' was not without the assistance of some heavy hitters - third party funders who paid his legal expenses and facilitated his running of the matter. And for its efforts, and for sharing the risk that his legal claim would come to nought in the Constitutional Court, it seems that South African third party litigation financing company Sterling Rand will be entitled to 50% of Mr. Makate's pay-out from Vodacom.

Despite having a potentially winning case, Mr. Makate did not have the resources to fight the matter in the Constitutional Court, a pursuit that typically involves legal bills containing many zeros. Indeed, around the world the cost of litigation is a major barrier to accessing courts and fear of being saddled with costs should the judicial view be unfavourable is a tempting incentive to abandon claims which have good prospects.

Of course, private litigation funding is not the only way to increase access to justice: a state-funded legal aid system and pro bono initiatives promote these laudable aims. In a recent article in April 2016 *Advocate*, pro bono was characterized as being a transformation issue as the inability of millions of South Africans to access legal services perpetuates inequality and thus maintains an untransformed society (Andy Bester, 'Pro bono: A transformation Issue', Advocate vol 29 number 1). That article highlighted that too little use is made of contingency arrangements in providing access to justice for those who cannot afford it.

In South Africa, the development of a third party funding model has gained some traction in the past decade. With its origin in Australia some years ago, it has spread rapidly around the world and bustling funding industries now exist in the United Kingdom, the United States, Canada and certain parts of Europe, each jurisdiction with its own 'bespoke' model of funding appropriate for domestic conditions.

Third party litigation funding refers broadly to funding arrangements in terms of which an external third party funder invests in a civil suit by contributing to, or covering altogether, the legal expenses associated with the litigation. In return, the investor is entitled to a share of the proceeds of the dispute if the claim is successful. Typically, where the claim is unsuccessful, the investor gets nothing.

There are, of course, no-hard-and-fast rules because litigation funding is not a carefully-crafted State creation designed for public benefit; it is a commercial development. Each funding arrangement may be different so as to cater for the risk appetite of the investor. It appears that the only overriding rule is that the reward must justify the risk, as is typical of equity funding. Like any other investor, third party litigation funders conduct a comprehensive due diligence on the civil suit to determine the likely risk and reward of the 'product', based on an assessment of the merits of the case, the means of the defendant and the size of the claim. Unlike attorneys and advocates, whose reward is regulated under the Contingency Fees Act, there are no such limits in respect of lay persons. (See the recent *Bobroff* decision in the Constitutional Court).

Third party litigation funding is usually influenced by the regulatory strictures and commercial conditions of the jurisdiction. In a number of countries, the development of a litigation funding industry was in fact spurred by local conditions – for example, cuts in legal aid spending or the restrictiveness in its qualifying criteria. In Australia, the ban on contingency fee agreements is credited with creating the conditions necessary for third party litigation funding to flourish.

In South Africa, the emergence of financing arrangements only became possible after the Supreme Court of Appeal in *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd* (PWC 2004) re-considered the common law rule which made champerty unlawful. Champerty, where a third party provides a litigant with funds to litigate in return for a share of the proceeds of the litigation, has been looked on with disfavour for centuries for its encouraging speculative litigation and for the potential for abuse of the legal process.

However, in the landmark judgment in PWC 2004, the Supreme Court of Appeal held that such agreements could no longer be regarded as unlawful. This was so, firstly, because the rationale for the rule had been overtaken by developments in judicial institutions. The Supreme Court of Appeal took note of the fact that judicial independence and court structures mitigated the danger of abuse of process. The Court also recognised that champerty was consistent with the constitutional values underlining access to courts and freedom of contract. However it did recognise that there could, nonetheless, be exceptional circumstances in which champertous agreements would constitute an abuse of process (e.g. if they were frivolous or vexatious).

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Ten years later, the third party funding industry in South Africa has begun to flourish but remains somewhat controversial. Critics argue that an ethical dilemma is created by non-parties controlling or meddling in litigation, that financing fees are usurious and that the potential exists for clogging of the court roll. Related to this is an important question about the proper role of courts, as publically-funded institutions. Indeed, in *Price-WaterhouseCoopers Inc and Others v National Potato Co-operative Ltd and Another* [2015] 2 All SA 403 (SCA) (the 2013 decision under the same name) Wallis JA observed that the major beneficiary of the litigation in question was IMF, an Australian litigation funder entirely unconnected with the dispute (and indeed to South Africa at all). In questioning whether this was a desirable state of affairs, Wallis JA held:

It is one thing to enable an impecunious litigant to obtain legal relief to which that litigant is entitled. It is another matter altogether to have a situation where an outsider to a dispute, motivated solely by considerations of profit, may be the sole beneficiary of a judgment. That is something that may have to engage this court on another occasion. Litigation exists for the proper settlement of disputes in society in the interests of the parties to those disputes. It comes at a social cost. It is undesirable that outsiders driven purely by commercial motives should be able to take over these disputes for their own benefit. When that occurs it is difficult to see how the constitutional guarantee of access to courts is engaged. It may perhaps be necessary at some future date to consider the precise ambit of our earlier decision in this regard and to what extent it permits a departure from the previous law in relation to champerty.

Notwithstanding this warning, third party funding recently received a ringing judicial endorsement by Mojapelo J in the South Gauteng High Court, Johannesburg in *Gold Fields Limited and Others v Motley Rice LLC, In re: Nkala v Harmony Gold Mining Company Limited and Others* 2015 (4) SA 299 (GJ). This case concerned U.S law firm Motley Rice and its involvement in the precedent-setting class action silicosis case. As the mineworkers themselves could not fund the litigation, and the miners' South African counsel, Richard Spoor, could not front the costs, Motley Rice was approached to fund the litigation. It was accepted that without the support of a large firm or organisation such as Motley Rice, the mineworkers' claims would not get off the ground. Motley Rice's involvement, primarily through its funding to Spoor, therefore enabled Spoor to provide the claimants with a means of accessing the court.

In our view, the true transformative potential of third party funding lies in the niche class action arena. In this context significant upfront investment is required to facilitate and administer the class action process, which typically involves a huge number of claimants of modest means. Because a class action suit can involve thousands of litigants, third party funding of class action suits has the potential to impact immeasurably on the lives of ordinary South Africans, forming part of the class, who would otherwise not have had their day in court. So, while an individual claim for a social security pay-out likely would not receive the attention of funders, a class action based on the same cause of action involving thousands of claimants may, given the economies of scale. And while funders' exclusively commercial incentives require a measure of circumspection in how we approach (and ultimately regulate) such funding in South Africa, it is undeniable that this new development has begun to unlock the transformative potential of s38 (c) of the Constitution. A

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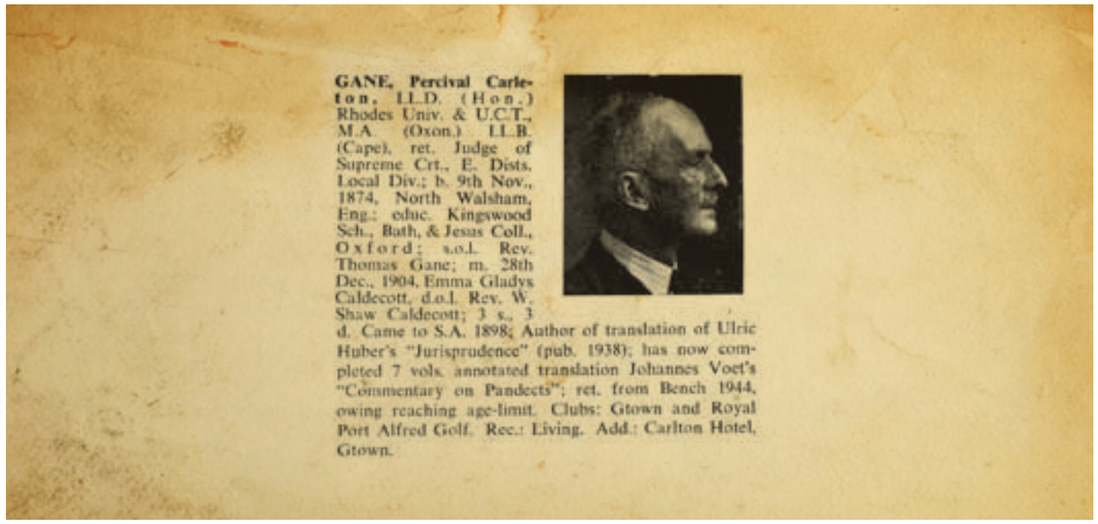

GANE, Percival Carleton, LL.D. (Hon.) Rhodes Univ. & U.C.T., M.A. (Oxon.) LL.B. (Cape), ret. Judge of Supreme Crt., E. Dists. Local Div.; b. 9th Nov., 1874, North Walsham, Eng.; educ. Kingswood Sch., Bath, & Jesus Coll., Oxford; s.o.l. Rev. Thomas Gane; m. 28th Dec., 1904, Emma Gladys Caldecott, d.o.l. Rev. W. Shaw Caldecott; 3 s., 3 d. Came to S.A. 1898; Author of translation of Ulric Huber's "Jurisprudence" (pub. 1938); has now completed 7 vols. annotated translation Johannes Voet's "Commentary on Pandects"; ret. from Bench 1944, owing reaching age-limit. Clubs: Gtown and Royal Port Alfred Golf. Rec.: Living. Add.: Carlton Hotel, Gtown.

Access to Roman-Dutch Law
Revealing Voet: Percival Carleton Gane – *One who hewed*

William de Villiers

It is trite that "The evil that men [and women] do lives after them; The good is oft interred with their bones."[1] Certainly great scholarship, public-spiritedness and intense hard work are no guarantee of immortality.

I was reminded of this when I discovered a proliferation of references on google.com (the well-known Internet search engine) to a mythical South African personality known as "Sir Percival Gane". In each instance, the man referred to was undoubtedly Percival Carleton Gane, a South African Judge who died more than half a century ago.

The time may have come to re-visit his life and something of his times.

BORN IN ENGLAND

Though he was to be remembered as a great scholar of Roman-Dutch authorities, Gane was born in North Walsham, Norfolk in England,[2] on 9 November 1874.

He was the son of the Reverend Thomas Gane and his wife, Eliza Shenton Fidler.

He came from modest origins. His grandfather, Thomas Gane, was a "tradesman" of Shepton Mallet in Somerset. His father was a Wesleyan Minister.

It makes sense to learn, therefore, that he was educated at the famous Methodist school, Kingswood, in Bath.[3]

He did well there, winning an entrance scholarship in 1886, and coming equal with another boy for a further scholarship in December 1891. In the latter year he was awarded a prize for an essay on the Reformation, and in 1892 he took the Meek Medal for Divinity. He left the school in 1893, to go up to Jesus College, Oxford, where he had been elected to an Open Classical Scholarship.[4]

Once again Gane achieved some prominence: he rowed (bow) in the Jesus boat, and served as President of the Jesus Junior Common Room and Debating Society. But he did less