IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 451/2012& 468/2012

Not Reportable

In the matter between:

PRICEWATERHOUSE COOPERS INC	**First Appellant**
HOEK & WIEHAHN	**Second Appellant**
WIEHAHN MEYERNEL	**Third Appellant**
PRICE WATERHOUSE MEYERNEL	**Fourth Appellant**
PRICE WATERHOUSE	**Fifth Appellant**

and

NATIONAL POTATO CO-OPERATIVE LTD & ANOTHER	**First Respondent**
IMF (AUSTRALIA) LIMITED	**Second Respondent**

Neutral Citation: **PriceWater House Coopers & others v National Potato Co-Operative Limited & another[2013] ZASCA 123 (23 September 2013).**

Coram: NAVSA ADP, BRAND, TSHIQI & MAJIEDT JJA, SWAIN AJA

Heard: 20 August2013

Delivered: 23 September 2013

ORDER

On appeal from: The North Gauteng High Court, Pretoria (BothaJ sitting as court of first instance).

The following order is made:

1. Leave to appeal is granted in terms of paras 1 to 5 of the application for leave to appeal save that in relation to para 4 of the application for leave to appeal, leave to appeal is not granted,in respect of para 3 of the order of the court below dated 14 March 2012.

JUDGMENT

THE COURT

[1] This is an application by PriceWaterHouseCoopers Incorporated (PWC), an auditing institution, and four auditing firms, to expand the restricted grounds on which leave to appeal was granted by the court below. In essence, the claim in the court below, by the first respondent, National Potato Co-operative Limited (the NPCL),

against the second to fifth applicants, was one based principally on the negligent performance of their contractual duties as auditors, relating in the main to the writing off of bad debts.The second respondent IMF (Australia) Limited provided the financial backing for the litigation embarked on by the NPCL.

[2] PWC came into existence during 1998 as a private company. It arose from an amalgamation between two public accountants' and auditors' firms, Price Waterhouse and Coopers & Lybrand. PWC did not exist at the time NPCL's alleged causes of action against the other auditors arose and it was never the NPCL's statutory auditor. However, in its original summons NPCL alleged that each of the auditors and PWC had successively taken over the assets and liabilities of its predecessor. NPCL pleaded that:

'2.4.5 Met elke oorname en/of amalgamasie soos voormeld, is die bates, laste en aanspreeklikhede van die voorganger in titel deur die opvolger in titel oorgeneem.'

In fact, PWC was not in existence at the time relevant to the trial.

[3] According to the applicants the trial record is one of epic proportions. Apparently, the particulars of claim on their own, comprise 448 pages with 304 bundles of annexures, amounting to almost 100 000 pages. The total number of documents in the case appear to exceed 200 000 pages. The trial was conducted over a period of 200 court days. It appears that the trial record comprises tens of thousands of pages.

[4] It is common cause that at the outset the parties were agreed that the trial should be conducted in two stages, namely liability and quantum. Subsequent to a finding in favour of the NPCL at the conclusion of the first stage, PWC applied for leave to appeal, which was met with an application by the former to have that application set aside as an irregular step. The court below held in favour of the NPCL on the basis that there had been a firm agreement between the parties that there would be no appeal, pending a final decision on quantum.It found that the application for leave to appeal was an irregular step as envisaged in Uniform Rule 30. Costs in this regard was awarded against PWC.

[5] In the action in the court below, the NPCL had sought judgment for R353 890 054.72 plus interest. The trial court (Botha J) issued a declaratory order in terms of which the second to fifth applicants were held liable for damages sustained by the NPCL and were ordered to pay the latter R62 884 905.45, with interest at 15,5 per cent per annum. As at 30 June 2012, the amount due was R175 376 723.20. It is important to note that in holding those applicants liable Botha J dismissed their defence on prescription in relation to a substantial part of NPCL's claim. Furthermore, in relation to his principal finding the learned judge allowed the evidence of a crucial witness on behalf of the NPCL, which the applicants contended was hearsay and ought not to have been permitted.

[6] For present purposes it is necessary to record that in the court below there was a contested application to compel the production of certain documents. The applicants succeeded in that application, but costs in respect thereof were ultimately awarded against them on the basis that their defence of prescription in respect of which the documentation had been sought, proved unsuccessful.

[7] In the court below the applicants applied for leave to appeal the whole of the judgment and related orders. Botha J granted leave to appeal against his main finding that the second to fifth applicants were liable for loss suffered by NPCL. In respect of the prescription point he refused the second to fifth applicants leave to appeal. In respect of the admission of the alleged hearsay evidence, he granted leave to appeal.

[8] During the second stage of the trial and on two occasions, Botha J granted NPCL leave to amend its pleadings and ordered all five of the applicants to pay the costs occasioned by their opposition to the amendments. The learned judge granted the second to fifth applicants leave to appeal against these costs orders, but omitted to grant PWC leave to appeal.

[9] As stated above, PWC had been joined by NPCL as a party to the action on the basis that it was a successor in title to preceding auditors. It is common cause that it had not existed during the period relevant to the trial.It appears that NPCL had not

proven any case against PWC and thus PWC was not the subject of either the declaratory order or the order to pay damages. The trial judge, however, thought it proper to grant PWC costson a limited basis only, reasoning that it could at an early stage of proceedings have excepted to the claim. Botha J refused PWC's application to appeal against the limited costs order. Furthermore, the learned judge refused all the applicants leave to appeal against the costs order ultimately granted against them in respect of the production of documents. It will be recalled that he had refused the costs of the application on the basis that the defence to which the documents related, namely prescription, had been rejected. The applicants contend that it is clear from the order of the court below, in relation to the application for leave to appeal, that Botha J inadvertently omitted to grant them leave to appeal against the overall costs order granted against them.They contend that, in the event of a successful appeal, they would be entitled to a costs order in their favour.

[10] Subsequent to Botha J's judgment in the application for leave to appeal, the applicants petitioned this court for leave to expand the grounds of appeal[1]. In terms of s 21(3)(c)(ii) of Act 59 of 1959 that application was referred for oral argument,hence the hearing before us.

[11] This court is in the invidious position of not having had the opportunity of scrutinising the full record of proceedings in the court below. Indeed it would have

[1] The court below granted NPCL a conditional cross appeal, which for present purposes need not be further discussed.

proven impractical to have done so in the limited time available. As can be seen from the details provided above, a reading of the full record will prove a Herculean taskand will probably require the fulltime commitment of an appeal panel for a year.

[12] It is necessary to deal in turn with the points that arise from the application to expand the grounds of appeal. First there is the question of the setting aside by the court below of an initial application for leave to appeal on the basis that it had been an irregular step, in that it flew in the face of a firm agreement not to pursue an appeal before both stages of the trial had been finalised. There are conflicting versions in relation to the agreement that had been reached. This involves the question of whether such an agreement was conditional and whether those conditions had been met. It also involves the exchange of correspondence and discussions between legal representatives. In our view, this issue is best dealt with by an informed court with full knowledge of the totality of relevant facts. On this aspect, having regard to the submissions of the parties and the available information, we are of the viewthat there is a reasonable prospect of success.

[13] The second issue is the omission by the trial judge to grant PWC leave to appeal the costs orders related to the amendments referred to above. The NPCL rightly conceded that the trial judge erred in this regard. Whilst they proffer an abandonment of that part of the judgment in their favour, leave to appeal in this regard is in our view apposite.

[14] The third issue is the limited costs order granted in favour of PWC on the basis that it ought early on to have excepted NPCL's claim against it. The relevant allegation made by NPCL in seeking to hold PWC liable is set out earlier in this judgment. Had they proved those allegations, a basis for PWC's liability would have been established. Thus an exception would have been ill-founded and would have had no prospect of success. Similarly, on this issue we are of the view that there is a reasonable prospect of success.

[15] The fourth issue requires only brief attention. The issue of prescription is not dealt with substantively in the affidavit in support of the application for leave to appeal. Although the deponent on behalf of the applicants gave notice of his intention to seek leave to include it as a further ground of appeal, such an application has to date not yet been brought. It will be recalled that despite ordering the production of documents sought by the applicants, the court below nonetheless granted costs against them in relation thereto on the basis that the defence to which they were related had proven unsuccessful. In our view it is premature to make a decision in relation to that issue. The order that follows is formulated to exclude leave to appeal being granted on the aspect that relates to prescription.

[16] The remaining issue in the application for leave to appeal is that in relation to the overall costs order on this aspect, it appears to follow compellingly that leave to appeal should be granted.

[17] The following order is made:

1. Leave to appeal is granted in terms of paras 1 to 5 of the application for leave to appeal save that in relation to para 4 of the application for leave to appeal, leave to appeal is not granted,in respect of para 3 of the order of the court below dated 14 March 2012.

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MS NAVSA

ACTING DEPUTY PRESIDENT

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F D J BRAND

JUDGE OF APPEAL

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Z L L TSHIQI

JUDGE OF APPEAL

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S A MAJIEDT

JUDGE OF APPEAL

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K G B SWAIN

ACTING JUDGE OF APPEAL

APPEARANCES:

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FOR RESPONDENT:	Adv. G W Alberts S.C. (with him Adv N C Maritz)
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