THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case no: 451/12

In the matter between:

PRICEWATERHOUSECOOPERS 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	**First Respondent**
IMF (AUSTRALIA) LTD	**Second Respondent**

Neutral citation: *PriceWaterhouseCoopers Inc & others v National Potato Co-operative Ltd & another* (451/12) [2015] ZASCA 2 (4 March 2015)

Coram: WALLIS JA and FOURIE and KOEN AJJA.

Heard: 9 to 13 February 2015

Delivered: 4 March 2015

Summary: Auditor – relationship with client contractual – duties – whether audit conducted negligently – damages – causation.

Opinion evidence – when admissible – need to establish facts on which expert's opinion is based – hearsay – qualifications of expert witness – duties of expert witness – independence – not to act as advocate for party calling expert.

Causation – need for causal link between loss and contents of auditor's reports – losses arising from trading – not recoverable from the auditor.

Prescription – s 12(3) of the Prescription Act 68 of 1969 – knowledge of facts giving rise to claim – acquisition of knowledge by the exercise of reasonable care – corporate entity – knowledge of directors to be attributed to entity – no special rule of attribution when claim arising from auditor's alleged failure to report properly to members of entity.

Conduct of trial – objections to hearsay evidence to be dealt with expeditiously – proper approach to the leading of expert evidence – need for judge to prevent proceedings from becoming unduly prolonged.

ORDER

On appeal from: North Gauteng High Court (Botha J sitting as court of first instance):

1 The appeals by the second to fifth appellants, and the appeals by the first appellant against paragraph 1 of the order of 14 March 2012 and the orders referred to in paragraphs 5, 6 and 7 of this order, are upheld with costs, such costs to include the costs consequent upon the employment of two counsel.

2 The judgments of the court below and the orders granted on 24 January 2011, 14 December 2011 and paragraphs 1, 6, 7 and 9 of the order of 14 March 2012 are set aside and replaced by the following:

'The first plaintiff's claim is dismissed with costs, such costs to be paid jointly and severally by the first and second plaintiffs, the one paying the other to be absolved, and to include the costs of two counsel and the qualifying expenses of Mr Wixley.'

3 The cross-appeal is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

4 The costs orders in paragraphs 1 and 3 are to be paid by the respondents jointly and severally, the one paying the other to be absolved.

5 The last sentence of paragraph 2 of the order of 28 July 2011 is set aside and replaced by the following:

'Die tweede tot vyfde verweerders moet die koste van opposisie betaal.'

6 Paragraph 8 of the order of 18 November 2011 is set aside and replaced by the following:

'Die tweede tot vyfde verweerders moet die koste van opposisie betaal.'

7 Paragraph 2 of the order dated 27 April 2011 is set aside and replaced by the following:

'Die eisers word gesamentlik en afsonderlik gelas om die koste van die aansoek te betaal.'

JUDGMENT

Wallis JA (Fourie and Koen AJJA concurring)

[1] Four firms (the second to fifth appellants, to which I will refer collectively as PWC) acted as auditors of the first respondent, the National Potato Co-operative Ltd (NPC) from 1984 to 1997. Whether they breached their contractual obligations as auditors, thereby causing NPC to suffer damages, is the issue in this appeal. NPC alleged that the annual financial statements of NPC, throughout that period, failed to make adequate provisions for bad and doubtful debts that had arisen through on-going reckless mismanagement of its affairs in regard to the extension of credit to its members.[1] They said that PWC should have identified this reckless mismanagement in the course of the audits and either insisted on changes to the financial statements to reflect the true position, or disclosed the under-provisions in their auditors' reports. If they had done so, NPC alleged that remedial measures would have been instituted. Instead NPC was obliged to write off substantial sums as bad debts causing it to suffer loss, which it sought to recover from PWC. Botha J upheld its claims and judgment was entered against the four different firms of auditors in varying amounts totalling R62 884 905,45. Interest was ordered to run on that amount at a rate of 15,5 per cent per annum from 15 December 2000 and a number of costs orders were made in NPC's favour. The main appeal lies against the judgment holding PWC liable in damages and

---

[1] NPC's heads of argument said that the evaluation of the recoverability of debts and making appropriate provision for bad debts 'het altyd aan die hart van die saak gelê'.

against the quantum of the damages. It is brought with the leave of the trial court, although the judge limited the grounds for that appeal by excluding issues that PWC wished to raise, such as prescription. This court removed those limitations after argument and in addition it granted leave to appeal against certain costs orders granted by the trial court.[2]

[2] The core issue set out above, simply stated as it is, engaged the high court in a hearing on the merits of the claim for 264 days and a further hearing on quantum for 31 days. In addition we were informed that the hearing was due to continue on 121 additional days but was, for one or other reason, stood down. Two judgments were produced on the merits running to nearly 1100 pages. Over and above those judgments there was a separate hearing on costs and a separate judgment on that issue. A number of interlocutory applications were dealt with separately, both before the trial commenced and during it. The case has already engaged the attention of this court on four prior occasions, once on the propriety of NPC receiving funding from an outside source in order to pursue this litigation,[3] twice on issues relating to the provision of security[4] and, as already mentioned, most recently on the scope of this appeal. We are now confronted with a record that has been abbreviated when viewed against the size of the trial bundle, but is still some 85 000 pages long. The heads of argument, together with the core bundles presented by the parties and the bundles of authorities, add another 5 000 pages. This material was provided to us on computers loaded with appropriate software to enable us to work with it. The court has been specially constituted to hear the appeal

---

[2] *PriceWaterhouseCoopers Inc and Others v National Potato Co-Operative Ltd and Another* 2013 ZASCA 123.
[3] *Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA).
[4] *Aartappel Koöperasie Bpk v Price Waterhouse Coopers* [2007] ZASCA 166; *Price Waterhouse v Van Vollenhoven NO and Another* [2009] ZASCA 166.

without disrupting the ordinary work of the SCA and to that end sat in the week prior to the commencement of the court term.[5]

[3] It is appropriate at the outset for us to express our gratitude to the attorneys and counsel for the efforts they have made to enable the appeal to be disposed of with reasonable expedition. However, it is also appropriate to echo a recent comment by Lord Toulson,[6] that the case assumed a complexity that we do not think was necessary, as a result of the manner in which it was conducted, and, in consequence, the trial court, for which we have sympathy, was led into a forest relatively impenetrable to light. I will deal with these matters at a later stage when addressing the issue of costs.

History of the litigation

[4] Summons was issued on 16 November 1999. The initial particulars of claim were struck out on exception and fresh particulars were delivered in December 2000. These ran to 450 pages and referred to 304 files containing more than 100 000 pages of documents. The trial commenced before Hartzenberg J in 2002, but, during the course of the cross-examination of the first witness, he granted an amendment to the plea raising the funding issue. This was eventually resolved in NPC's favour in June 2004. The trial was then set to resume in October 2005 and two pre-trial meetings were held with Hartzenberg J on 9 June 2005 and 19 July 2005 at which an agreement was made to separate the merits and the assessment of any damages payable to NPC. Hartzenberg J recused

---

[5] Our task and that of the trial judge was fortunately not as onerous as that of the Canadian judge dealing with a similar claim in *Widdrington (Estate of) c. Wightman*, 2011 QCCS 1788 (CanLII) described by her as 'the longest running judicial saga in the legal history of Quebec and Canada'.

[6] *Manchester Ship Canal Co Ltd and another v United Utilities Water plc* [2014] UKSC 40; [2014] 4 All ER 40 (SC) para 25.

himself, at the instance of NPC, before the trial recommenced and it then proceeded before Botha J on 4 October 2005. Shortly before the commencement of the hearing before Botha J, the particulars of claim were substantially amended to abandon certain claims and amend others.

[5] On 24 January 2011 Botha J delivered his judgment on the merits. The first part of 943 pages contained his synopsis of the evidence led before him. The second part, a mere 123 pages, set out his reasons. He made an order upholding two claims arising from the writing off of bad debts and declaring the four firms of auditors liable to compensate NPC for damages represented by the amounts written off by NPC in respect of a number of specified debtors. The other claims by NPC were dismissed. One of those is the subject of a cross-appeal by NPC. The appellants' initial attempt to appeal against the declaratory order immediately after it was handed down and before the quantum was assessed was set aside as an irregular step. That decision and the concomitant costs order are challenged as a subsidiary issue in the appeal.

[6] In a judgment delivered on 14 December 2011 Botha J quantified the liability of PWC in terms of the declaratory order. He dealt with the costs of the action and various interlocutory applications in a separate judgment delivered on 14 March 2012. PWC seeks to overturn the declaratory order and the consequential award of damages and asks for the dismissal of the claim with costs on the attorney and client scale.

[7] There are in addition several subsidiary appeals. The first relates to the limited order for costs made in favour of PriceWaterhouseCoopers Inc, the first appellant (PWC Inc), which was not the auditor at any of the relevant times and against which no award of damages was made. The

judge confined his order for costs in its favour to costs up to the earliest time when it could have taken exception to the claims against it, without defining when that time was. PWC Inc says that it could not except to the claim against it, as it was based on factual allegations that were never proved. Accordingly it seeks its costs of the trial.

[8] The declaratory judgment annexed a schedule of the bad debts written off for which the court held the auditors to be liable in damages. After judgment NPC applied for two amendments to the claim, which were granted over the opposition of PWC and PWC Inc. The grant of those orders involved a significant enhancement of the award of damages, and forms the subject of the appeal against quantum if the main appeal fails. There are separate appeals in relation to the two costs orders arising from those amendments. The appeals against the subsidiary costs orders are dealt with in the judgment of Koen AJA. Lastly there is a general appeal by PWC against the overall costs order made by the trial judge.

The parties

[9] NPC was an agricultural co-operative constituted in terms of the Co-operatives Act 91 of 1981 (the Act) and active among potato farmers. It was originally established in 1963 under the name Transvaal Potato Co-operative Ltd (TPC). During the period from 1983 to 1997, which is when the breaches of contract allegedly occurred, it twice merged with other co-operatives but, other than resulting in the change of its name to NPC in 1989, on each occasion the merged entity continued to operate in the same form. It was not suggested that the mergers had any bearing on the issues in this case. In 2000, whilst retaining its identity, it effectively merged with Northern Transvaal Co-operative Ltd, which has conducted NPC's business operations on an agency basis since then. By that time the bulk of

its membership had left. It has not been a going concern since 1997. In substance it exists solely for the purpose of pursuing this claim. It is convenient to refer to it throughout as NPC notwithstanding the fact that it was operating under a different name at the earliest stage of the period in dispute.

[10] The second respondent, IMF (Australia) Ltd (IMF), is a listed company in Australia that carries on business as a litigation funder and since 28 January 2009 has provided NPC with funding to pursue this litigation. It did so on the basis that, if the litigation succeeded it would be fully reimbursed for its costs and paid a management fee for its services in regard to the conduct of the litigation. In addition it would receive a proportion, exceeding fifty five per cent, of the gross proceeds of the litigation. Potentially, depending upon the gross amount recovered, it could be the sole beneficiary of a judgment in favour of NPC. Counsel for NPC and IMF informed us that this would very likely be the case. It was joined as a party at the instance of the auditors with a view to obtaining a costs order against it if its defence to the claim succeeded.[7]

[11] PWC Inc is a firm of auditors as were the other four appellants. It is the only firm that still exists, and indeed the only one that existed when this litigation commenced. The firm of Hoek & Wiehahn, the second appellant, were the auditors of NPC between 1983 and 1987. In 1988, as a result of a merger or amalgamation, Wiehahn Meyernel, the third appellant was established and became NPC's auditors. That continued until 1991 when Price Waterhouse Meyernel, the fourth appellant, came into being. Finally, in 1995, Price Waterhouse, the fifth appellant, was

---

[7] *Price Waterhouse Coopers Inc and Others v IMF (Australia) Ltd and Another* 2013 (6) SA 216 (GNP).

formed and took over the task of auditor for NPC until 1997 when it resigned. Throughout this entire period Mr Odendaal, who was the principal witness for the appellants, was involved in the audit of NPC, initially under the supervision of others, but for most of the period as the principal auditor.

[12] It may strike the reader as odd that an entity such as NPC should remain in existence solely for the purpose of conducting litigation, a major beneficiary of which is intended to be a party unconnected with the dispute and unconnected, so far as the court can discern, with this country. Indeed it is wholly unclear who, other than IMF, stands to gain from the litigation that has taken up so much court time over so protracted a period. It is debatable whether that is a desirable state of affairs. It is one thing to enable an impecunious litigant to obtain legal relief to which that litigant is entitled.[8] 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.[9] It may perhaps be necessary at some future date to consider the precise ambit of our earlier

---

[8] *Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA) para 27; *Thusi v Minister of Home Affairs & 71 Other Cases* 2011 (2) SA 561 (KZP) paras 105-110. When this issue was dealt with by this court the funding arrangements were domestic and limited, involved members of the co-operative and were unrelated to IMF and its different interests.

[9] Section 34 of the Constitution of the Republic of South Africa 1996.

decision in this regard and to what extent it permits a departure from the previous law in relation to champerty.

[13] Another apparent incongruity is that the auditors concerned, that is PWC, as opposed to PWC Inc, no longer exist and have not done so since a date prior to the commencement of this litigation. In the result the judgment granted by the trial court lies against entities that have not existed at any time during the course of protracted litigation. The explanation lies in the principle that, notwithstanding its dissolution, a partnership – and each of the four firms was a partnership – is said to continue in existence, notwithstanding its dissolution, for the purposes of any claims against the partnership.[10] In terms of rule 14(2) of the Uniform Rules it may be sued in its own name[11] and after judgment has been obtained, if the judgment is not satisfied, the courts may be approached for an order identifying the partners at the relevant times and declaring the judgment to lie against the partners.[12] PWC does not appear to have been handicapped in its opposition to this action by the fact that the firms did not exist.

[14] PWC Inc was never the auditor of NPC. It was joined in the action on the basis of an allegation that it came into existence as the result of an amalgamation involving the fifth appellant, Price Waterhouse, and that it had taken over the assets of Price Waterhouse and assumed liability for the debts and liabilities of its predecessor. A similar allegation was made in relation to each of the firms constituting PWC, but that allegation was not

---

[10] *Essakow v Gundelfinger and Another* 1928 TPD 308 at 312; *Goldberg and Another v Di Meo* 1960 (3) SA 136 (N) at 149H.
[11] *Spie Batignolles Société Anonyme v Van Niekerk: In re Van Niekerk v SA Yster en Staal Industriële Korporasie Bpk en Andere* 1980 (2) SA 441 (NC).
[12] *M Rauff (Pty) Ltd v Pietersburg Coal Agency* 1974 (1) SA 811 (T) at 812E.

proved and it was accepted that PWC Inc bore no liability to NPC for any of its claims. Although not said expressly in the judgment on the merits it was implicit in it that the claim against PWC Inc was dismissed. Its involvement in this appeal relates only to costs.

The pleaded claim

[15] The particulars of claim were lengthy, repetitive and burdened by masses of documents. The following can be distilled from them. NPC's claim was based on the contract, or contracts, that it alleged it concluded with PWC for the performance of audit services. PWC was appointed annually at its annual general meeting as the auditor of NPC in terms of s 145 of the Act and this appointment was accepted, giving rise to a contract between NPC and PWC for the rendering of audit services by the latter to the former. Arising from this it pleaded that PWC owed to NPC various duties in relation to the performance of the audit and that PWC breached these duties in various ways. As is often the case the pleaded duties went further than could be sustained by either evidence or argument. In this court, however, it was common cause among all the expert witnesses that PWC owed NPC the following duties.

[16] PWC was in the first instance obliged to perform those functions imposed upon an auditor by the provisions of ss 153 and 154 of the Act. It was obliged to perform these duties with proper skill and care and without negligence in accordance with the standards of the auditing profession.[13] The standards of the auditing profession were to be derived from the provisions of the Public Accountants and Auditors Act 80 of 1991 (the Auditors Act) and the standards issued from time to time by the profession

[13] *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) paras 18-21.

in the form of generally accepted auditing standards (GAAS). Which of those standards were relevant and how they should have been applied in a particular case might properly be the subject of expert evidence and such evidence was led at the trial. Its impact will be assessed at a later stage. The documents embodying these standards at the relevant times were placed before the trial court.

[17] NPC alleged that during the entire period there were material irregularities in the management, control and administration of credit. It attributed this to the members of the credit department and the executives granting credit in conflict with the statute of NPC, the credit policy determined from time to time by the board and the provisions of the drought aid scheme. The staff in the credit department and executive employees were said to have behaved recklessly, irregularly and dishonestly in granting credit to members:

- who were technically insolvent;
- in excess of authorised credit limits;
- without obtaining sufficient security;
- where the creditworthiness of the member was questionable;
- where the member's credit history revealed that they were not accounting to NPC for the proceeds of their crops, or were evading the statutory pledge.

It was alleged that this conduct was concealed from the board and the members by various stratagems. In particular it was said that the extent and escalation in bad debts, that would otherwise have revealed the increased risk to which NPC was exposed as a result of this misconduct, was misrepresented to the board. This prevented the board and the members from taking remedial steps to resolve the issue of

mismanagement. NPC characterised this as the reckless mismanagement of credit.

[18] The consequence of this reckless credit mismanagement was said to be that NPC suffered substantial damages by way of the writing off of bad debts. These had not been reflected in the annual financial statements, which therefore disclosed a misleading picture of the financial position of NPC. This persisted from 30 September 1984, covering the financial year prior to that date, until 28 February 1997. The complaint in each year was essentially the same, namely, that the provision for doubtful debts reflected in the annual financial statements, which was R300 000 in every year, save for 1996/7, was too low to provide an accurate picture of the potential bad debts of NPC.[14] If proper provision had been made in each year for doubtful debts, far larger amounts would have had to be shown and, had this been done, NPC would have shown a loss rather than a profit in virtually every year. Certainly the accounts would have reflected the financial position of NPC as being parlous if not actually insolvent. Notwithstanding this, PWC either certified the annual financial statements as being a fair reflection of the financial state of affairs of NPC as required by s 154(2) of the Act (1992 to 1995), or qualified its certification (1983 to 1991 and again in 1997) in a way that was said to have diverted attention away from the true underlying problem, of reckless mismanagement of the grant of credit and the recovery of debts from members.

---

[14] In the light of the evidence of the experts the focus shifted in the course of the trial from the standard annual provision to a comparison between the amounts written off as bad debts, together with that provision, and the amounts that NPC contended should have been provided for potential bad debts.

[19] NPC alleged that if PWC had properly discharged its duties as auditor it would have identified the wholesale reckless mismanagement of credit. A far higher proportion of the debts reflected in NPC's books would have been regarded as doubtful and treated as such in the annual financial statements. This would have resulted in the profit figure being restated to reflect the greater write-offs required in respect of the provision for bad and doubtful debts. If the directors were not prepared to alter the annual financial statements accordingly (and it was assumed in the pleadings that they would not have done so) then PWC should have qualified them, spelling out in detail their deficiencies and highlighting what were said to be misstatements in the directors' reports. In every year, so it was alleged, PWC should have refused to certify the annual financial statements as a true and fair reflection of the financial affairs of NPC. In not doing so it was in breach of its contractual obligations.

[20] The pleadings took a curious turn when it came to the issue of damages. One would have expected that after the lengthy recitation of PWC's duties; the mismanagement of NPC's affairs; the defects in its annual financial statements and the alleged breaches by PWC of its contractual obligations, there would have been allegations setting out the respects in which NPC was said to have suffered losses in consequence of the alleged contractual breaches. Instead there was a single paragraph reading as follows:[15]

---

[15] The pleadings, as with most of the documents and the bulk of the evidence, were in Afrikaans, so that the passage quoted is my translation. In the original the paragraph read as follows:
'Al NAK se skade voormeld vloei natuurlik uit PWC se kontrakbreuk en is skade wat normaalweg te wagte sou wees en wat regtens geag word om binne die kontemplasie van die partye te gewees het as die waarskynlike gevolge van die kontrakbreuk. Alternatiewelik, was dit, ten tye van die sluiting van elk van die jaarlikse kontrakte, binne die kontemplasie van die partye, soos verteenwoordig, of behoort dit redelikerwys binne die kontemplasie van die partye soos voormeld te gewees het, dat al die skade voormeld, alternatiewelik al die tipe skade voormeld, waarskynlik sou volg uit 'n verbreking van die kontrak. Alternatiewelik was dit ten tye van die sluiting van elk van die jaarlikse kontrakte, sodanig

'All NPC's aforementioned damages flow naturally from PWC's breach of contract and are damages that are normally to be anticipated, and are in law to be regarded as, within the contemplation of the parties as the probable consequences of a breach of contract. Alternatively, it was at the time of concluding each of the annual contracts within the contemplation of the parties, as represented, or ought reasonably to have been within the contemplation of the parties as aforesaid, that all the damages as aforesaid, alternatively all the type of damages aforesaid, probably would follow from a breach of contract. Alternatively it was at the time of concluding each of the annual contracts so within the actual contemplation of the parties as aforesaid, that the contract in each case was in truth concluded on that basis.'

[21] In the following paragraphs it was explained that, notwithstanding anything in the particulars of claim, the damages claimed by NPC were confined to various heads. Of those only two remain relevant, the others having been rejected by the trial court. The first consisted of losses arising from bad debts written off. These were divided into two components, namely bad debts written off before 28 February 1998 and bad debts that had not yet been written off by that date, but fell to be written off later. The latter were assessed as having been bad on that date, but, when the pleadings were amended in 2011, allowance was made for amounts that had in fact been recovered by that date and for any amounts that the attorney attending to collections expected still to recover, less the costs of collection which included an insurance premium. The second head, which is the subject of the cross-appeal, related to the losses that NPC alleged it had suffered because it had not recovered these amounts from debtors and hence had not had these amounts available to it for further investment or to discharge liabilities. This amount was calculated at the rate of interest

---

binne die werklike kontemplasie van die partye soos voormeld, dat die kontrak in elke geval as't ware op daardie basis gesluit is.'

that the Land Bank had, during the relevant period, charged NPC on loans made to it.

[22] In summary, NPC sought to recover from its auditors, amounts it claimed to have written off as bad debts or that it would have to write off as bad at some future stage. There was no allegation that the auditors were in any way involved in granting credit to the debtors concerned. Nor did they have any responsibility for the collection of debts. The bad debts arose because NPC, acting through its own staff and management, extended credit to debtors who either were not creditworthy when the debts were incurred or had become unable to repay them by the time the action commenced. No allegations were made connecting the auditors to the granting of credit to these debtors or to the inability to recover these amounts from them.

[23] This was an undoubted deficiency in the pleadings and it could possibly have been a ground for a further exception. No legally relevant connection was alleged to exist between the allegations of breach of contract and the amounts that NPC wished to recover from PWC by way of damages. But no exception was lodged. The basis upon which the case was conducted emerged from the opening address delivered in October 2005 when the hearing commenced before Botha J. NPC argued that had PWC performed its contractual obligations properly either the directors, or failing them the members of NPC, would have been aware of the gross deficiencies in the implementation of the credit policy and the reckless mismanagement of the grant and recovery of credit, and would have taken steps to recover debts and put an end to the irregularities. Instead it was alleged that the mismanagement was allowed to flourish. Had it been checked, then in relation to each bad debt making up the overall claim for

damages, either credit would not have been granted to these debtors or the debts would have been recovered.

[24] The plea added little of moment to the definition of the dispute. It placed in issue virtually every material allegation in the particulars of claim. That included a denial that any contracts had been concluded between NPC and the firms making up PWC; a denial that those firms owed any duty to NPC beyond those set out in ss 153 and 154 of the Act; a denial that there had been reckless mismanagement of credit in the activities of NPC; a denial that PWC had in any respect breached any obligations that it owed to NPC; a denial, if it had, that NPC had suffered any loss as a result and a denial of all aspects of the quantum of the claim. In addition PWC pleaded that any claim against its constituent firms had prescribed and that the additional claims imported by NPC after the declaratory order was granted had been waived when the amendment of the particulars of claim occurred in 2005 prior to the resumption of the trial.

The issues

[25] From the foregoing the following issues arise in this appeal:

(a) Was the relationship between NPC and PWC contractual?

(b) If so, what were the obligations assumed by PWC thereunder?

(c) Did officials of NPC recklessly mismanage credit as alleged?

(d) Did PWC breach any of its contractual obligations?

(e) If so, did those breaches cause NPC to suffer any loss?

(f) What was the proper basis for determining the amount of that loss?

(g) Did the recoverable loss include the claim for interest that was the subject of the cross-appeal?

(h) Had the whole, or any part, of the claim prescribed before the institution of this action?

(i) What costs order should have been made in relation to the main trial?

(j) What costs orders should have been made in relation to the subsidiary issues?

Before turning to deal with these questions it is desirable to sketch some of the relevant background and history.

NPC's business

[26] NPC operated on co-operative principles, to assist farmers who grew potatoes in obtaining seed potatoes, packaging, fertiliser, insecticides and other items necessary for the cultivation of potatoes. It also had facilities for testing and certifying the quality of seed potatoes, a limited cold storage facility for seed potatoes, and field officers to provide advice to farmers. Whilst initially based at Bethal in what is now Mpumalanga, its activities eventually extended to all the major potato growing areas of South Africa. Unlike many other agricultural co-operatives it did not store or market its members' products or, in general, engage in other business activities. This was due to the nature of potatoes as an agricultural commodity that was not centrally marketed or subject to any form of price control, but would be sold by farmers through the fresh produce markets in major centres and informally from their farms, with prices being determined by supply and demand. It was also a market that producers might enter on an opportunistic basis when prices were high and offered the opportunity for a quick profit, but this had the effect of depressing those high prices because of over-supply.

[27] NPC did not itself keep stocks of the items required by its members but purchased them on their behalf and on-sold them. In the case of seed potatoes it would purchase them from its own members and then sell them to other members. The debts incurred by members through these activities were referred to as production credits. In order to finance its business NPC borrowed money on favourable terms from the Land and Agricultural Bank of South Africa (the Land Bank). Its profitability was dependent upon any mark-up it charged to its members on the supply of production materials and the difference between the rate of interest that it charged its members and the rate of interest that it was being charged by the Land Bank. That did not make for substantial profits especially as the Land Bank asked co-operatives to limit to one per cent the margin they charged on loans funded by the Land Bank.

[28] NPC was dependent upon the Land Bank in order to remain in business. Without the financial support it received from that source it could not have continued its activities. Its liability to the Land Bank was by far its largest liability. Conversely the principal asset of NPC was the debts owed to it by members to whom it had granted production credits. These debts were the security for the Land Bank's claims. NPC had not built up reserves of capital to cushion it against any significant downturn in its financial fortunes. Accordingly if it failed in any significant degree to collect what was owing to it by its members it faced closure.

[29] The financial challenges facing NPC were exacerbated by protracted droughts during the 1980s, which made it difficult for its members to grow the crops necessary to enable them to repay the production credits they had received from NPC. Whilst these sometimes led to shortages in the market place and hence higher prices, the higher

prices were insufficient to compensate for the loss of production. Drought caused widespread problems in the agricultural sector and the government of the day put in place various schemes designed to assist farmers who were struggling to remain in business as a result of the drought. Many members of the NPC participated in these drought aid schemes, which in practice involved the Land Bank granting extended repayment terms in respect of certain farmers' debts against the security of a government guarantee ('die staatswaarborg').

[30] There were also problems in obtaining security for members' indebtedness to NPC. The best form of security in the form of a mortgage bond over the member's farm was rarely available. Usually farms would be mortgaged to the Land Bank or some other financial institution. Potatoes were not the principal crop of most members of NPC and the majority were also members of other larger co-operatives, in particular the grain co-operatives. Although this allowed for some measure of cross-subsidisation, so that in years where the potato crop was poor the grain harvest might be good and vice versa, when both crops were poor this aggravated the problem of repayment of debts. Because of their greater financial muscle these larger co-operatives were often able to obtain security of better quality and ranking ahead of any that NPC could obtain. In addition they usually marketed their members' produce so that they had the advantage of receiving the proceeds directly. If NPC wished to obtain direct payment of the proceeds of selling potatoes they had to obtain a written authority from the member, addressed to the market agents used by the farmer to market the potatoes, authorising the agent to pay the proceeds of sales directly to NPC. In addition NPC would obtain notarial bonds over movables as security, but in the nature of things, if it had to

rely upon such a bond, it rarely proved adequate to cover the entire indebtedness.

[31] The principal security held by NPC was the statutory pledge over its members' crops, in terms of s 173(1)*(c)* of the Act. But the pledge had its limitations. It applied to potatoes held by the member at the time the debt arose or any potatoes produced or acquired in the period of 18 months thereafter. It was not therefore a long-term form of security. Furthermore, as there was no obligation on farmers to deliver their potato crops to NPC or its nominated agents, it was relatively easy to circumvent. The evidence showed that the efforts by NPC to enforce this security were limited and sporadic and it frequently agreed to waive the pledge or made fresh advances to members from the proceeds of their crops, in effect, creating carry-over debts ('oorlaatskulde').

[32] The uncomfortable financial position of NPC was reflected in its annual financial statements for the year after the introduction of the first drought aid scheme. This was the year ended 30 September 1983 and these statements were not attacked in these proceedings. They showed that the total capital of NPC was a little over R2.5 million. Its fixed assets were a little less than R2 million and its current assets slightly less than R14 million. Of that figure, debtors represented nearly R13 million, which was nearly double the figure for the previous year. The amount owing to the Land Bank was nearly R10 million. The surplus for the year was R340 000 on a turnover of over R20 million and that was determined after writing off bad debts of R430 000, an increase from the previous year of 165 per cent.

[33] The board of directors were clearly aware of this situation and aware also that NPC was heavily dependent upon its debtors meeting their obligations for its financial health. That was made clear to them by the auditor – not at that stage Mr Odendaal – who told the directors at the meeting when they approved the annual financial statements that special attention needed to be given to debtors. He is recorded in the minutes as saying that bad debts had their origin in the decision to grant credit and that it was therefore necessary to ensure that information available at that time should be considered carefully and that staff should be properly trained in these matters. This caused the board to resolve that immediate attention be given to the credit policy. At the same time it would have been under pressure to provide financial support to its members at the very time that the members were facing great financial constraints and were most likely to default on their obligations to NPC. Accordingly, satisfying the purpose for which it was established and simultaneously implementing stringent credit policies was a source of tension if not outright conflict.

[34] The members of NPC were also made aware of the dangerous financial situation in which it found itself. In the directors' report forming part of the annual financial statements for that year their attention was drawn to the effects of the drought and the massive increase in NPC's debtors. According to the report, if the government had not put forward its drought aid scheme 'your Co-operative as well as its producers would have been in a serious financial disposition (sic)'. Although there had been an increase in membership this was not caused by farmers entering the potato business but reflected 'producers' need for financing of crops'. That was also reflected in the increase in turnover during the year.

[35] That is how matters stood at the financial year end in 1983 and it remained unaltered during the period under consideration. The allegation that the annual financial statements did not reflect the true financial position of NPC from 1984 to 1997 renders it necessary to consider the picture painted by those statements and other documents in those years. To avoid undue prolixity and simplify reading the detailed analysis is contained in the appendix to this judgment. In what follows the conclusions drawn from it are summarised. In doing so I will highlight the problems that existed; the concerns raised by the Land Bank and the auditors; the knowledge of the directors of the financial situation; the steps taken by the directors to address the problems that existed; and the information given to members about that situation.

Summary of the position from 1984 to 1997

[36] From October 1983, and the beginning of the 1984 financial year, to November 1997, and the finalisation of the financial statements for the year ended 28 February 1997 the financial statements reflected that NPC was financially insecure. It lacked capital resources to withstand any vicissitudes in trading conditions. Its operations extended throughout the country, but were controlled centrally from Bethal, so that it was heavily dependent on the field officers and credit officers in the regions for the implementation of credit policies. The business of the provision of production materials to its members was conducted almost entirely on credit and was dependent upon Land Bank financing. The Land Bank repeatedly expressed concern over its practices in regard to the grant of credit and the recovery of amounts owing to it, especially by the exercise of its statutory pledge. Withdrawal of Land Bank support or any significant diminution thereof would have been catastrophic. When it

demanded repayment of debts and reduced its willingness to provide credit in 1997 this rapidly led to the effective demise of NPC's business.

[37] From 1983 to 1992 there were persistent droughts that eventually affected all areas of agriculture in South Africa and the government intervened by establishing the series of drought aid schemes referred to in para 29. These schemes were administered by the Land Bank, which was already responsible for much agricultural credit in the country. Its ability from 1983 until 1992 to extend credit to co-operatives under these schemes was itself dependent on the state guarantee. If that were withdrawn, large amounts would have become due to the Land Bank and would have had to be recovered from farmers, who *ex hypothesi* had been enduring difficult times. On a broader front there was always a risk of the government withdrawing its support from agriculture, particularly in the uncertain political climate through the late 1980s and early 1990s. The Land Bank itself, if not satisfied that a co-operative was implementing the drought aid scheme properly could refuse to pay claims under the scheme and it could always withdraw, limit or impose onerous conditions on the cash credit account of the NPC.

[38] The NPC had a persistent problem with bad debts. In every year a relatively small increase in bad debts written off would have tipped the balance sheet into negative territory and reflected that the NPC was trading unprofitably and potentially in insolvent circumstances. Mr Odendaal and the members from time to time of the board of directors knew this. So did the members of NPC because it was apparent from the annual financial statements and (insofar as members attended such meetings) the reports made by Mr Odendaal at annual general meetings. The adoption of more and more stringent credit policies did nothing to

alleviate this but nonetheless the board consistently reported that the credit policy was being implemented stringently. This was never queried, notwithstanding the fact that these policies seemed to make no difference to the on-going increases in and concerns about the bad debts.

[39] Despite these difficulties the NPC expanded its operations and its turnover increased virtually every year, sometimes by very large amounts. For example between 1986 and 1987 it increased from R29.5 million to R48.5 million and again the following year to R71 million, where it remained for a year before increasing to R102 million in 1990. Over the same period debtors increased from R27 million to R70 million and the indebtedness to the Land Bank by an equivalent amount from R22 million to R65 million. Over R7 million had been written off as bad debts during this period and the extent of drought aid debt was consistently close to 50 per cent of all debtors.

[40] In 1992 NPC was saved from closure by the receipt of R28.5 million from the government when the drought aid scheme and the corresponding state guarantee were terminated. The opportunity was taken to write off large amounts of debt. However, nothing thereafter changed in NPC's business operations. Its turnover increased from 1992 to 1996 from R123 to R142 million, but its debtors increased over the same period from R66 million to R111 million, that is, by the same amount. In 1997 the Land Bank reduced its support substantially and imposed conditions on continuing to provide credit. As a result the business largely collapsed. Massive amounts were written off as bad debts resulting in a loss of R34 million in 1997. According to the directors' report in 1999, its turnover fell from R119 million in 1997, to R 83.4 million in 1998 and R53.6 million in 1999. It was utterly dependent on the Land Bank's support if it

was to remain a going concern. When the Land Bank commenced action against it that was the straw that broke the camel's back. Membership was falling fast from a peak of 906 to 572 and then a little over 100. In 2000 it effectively merged with Northern Transvaal Co-operative Ltd, and ceased trading.

[41] In 1997 PWC resigned as auditors. They concluded for various reasons that they could not express an audit opinion on the financial statements for the year ended 28 February 1997 and withheld an opinion. Mr Collett, who played a key role in this litigation, had come on the scene and was conducting an investigation that led to the present claim being made against the auditors. By May 1998 Mr Collett was recorded as informing the directors that he was confident that the claim against the auditors would succeed.

[42] The directors who held office from time to time throughout this period were well aware of all these matters. As experienced farmers themselves, engaged in growing potatoes and in some instances serving on other agricultural committees and bodies, they were in a good position to judge the state of the agricultural industry, particularly as it related to potatoes. They would have known about the impact of weather conditions, such as drought, rain and snow, on crops; whether pests and disease were affecting crops; the costs of farming potatoes at any particular time; the prices being obtained in fresh produce markets at various times; and, in general, the state of the potato growing industry. Furthermore, as the directors were elected to represent the different regions in which potatoes were being farmed, each director could be expected to have particular knowledge of farming conditions in the area he (and they were all men) represented, as well as a degree of personal knowledge of the potato

farmers in his areas,[16] which would encompass the nature and extent of their farming activities, the problems they were encountering and whether they were 'good' or 'bad' farmers. Lastly, while they might not have had advanced education in financial matters, a number of them were successfully operating large farming businesses and could have been expected to have a reasonable understanding of financial matters and financial statements. The suggestion that they were simple farmers easily duped by management does not hold water.

[43] The members too would have been generally aware of the matters described in paras 26 to 34 and 36 to 42 above. These were all matters that were communicated to them in the annual financial statements of NPC. There were other communications to them in the form of a newsletter, the NAKBLAD, and one must accept that as farmers they would have paid attention to the information available through public media and the like. It is against that general background that I turn to the specific dispute in the present case.

The dispute

[44] Although the pleadings (and at times the judgment of the trial court) suggest that it was PWC's responsibility to determine the proper level of provisions for bad debts and the amounts to be written off each year as bad debts, and that the annual provisions they made were inadequate, that was plainly incorrect and it was not pursued before us. The case was based on the contention that the reason for the high level of bad debts was mismanagement of the function of granting credit and recovery of debts

---

[16] At any given time there were usually no more than 400 or 500 active farming members of NPC so that the number of individual farmers in a given area would not be great and they would tend to be known to one another.

by the officials of NPC, who were acting recklessly or dishonestly and irregularly, through deliberate breaches of the statute of NPC and its credit policy,[17] and that this was either known to Mr Odendaal or should have become apparent to him had he undertaken a proper audit. The nature and extent of this reckless mismanagement was concealed from the directors and members and PWC's reports facilitated this. The reports did not disclose the reckless mismanagement of credit, and the amounts written off as bad debts, as well as the standard annual provision for bad debts, were not a reasonable reflection of the financial position of NPC in respect of these items.

[45] NPC contended that, had PWC complied with their contractual obligations, they would have known the full extent of the reckless mismanagement of credit and would have insisted that the financial statements be amended to reflect a more realistic position. Alternatively, they should have qualified their reports by saying that in their view there was reckless mismanagement of credit; that the write-offs and provision were substantially inadequate; and, drawn attention to the consequences for the financial statements of their views being given effect. Had they done so it was argued that from the commencement of the period under consideration, the reckless mismanagement of credit and the consequent parlous financial circumstances of NPC would have emerged and this would have caused the board, or failing it, the members to take steps to

---

[17] Para 1.10 of the heads of argument said: 'Eiser se saak is dat hy wesenlike skade gely het as gevolg van roekelose kredietbestuur en/of wanbestuur.' (Plaintiff's case is that it has suffered material loss as a result of reckless credit management and/or mismanagement.) In the pleadings, under the general heading of material irregularities in the management, control and administration of members and/or debtors' accounts, it was specifically alleged that this was due to the fact that: 'The credit department and/or the personnel of the credit department and/or executive management, provided credit and/or proceeded with the provision of credit to members and/or debtors in a reckless and/or irregular and/or dishonest manner in circumstances where it was clear, or should have been clear, from the information available to them and/or the NPC's records in relation to such members, that such transactions were of such high risk that it would necessarily or probably lead to damage to NPC.' (My translation.)

remedy the position. Instead the situation was allowed to deteriorate until matters came to a head in 1997. It was contended that the alleged breaches of contract by PWC had led to NPC providing credit to farmers who were not creditworthy and in due course having to write these debts off as irrecoverable. The amounts so written off, in respect eventually of 46 farmers, constituted the damages for which it said that PWC was liable.

[46] PWC's stance was that the audits were all conducted properly and that the approach by NPC has the effect of making the auditors the insurers of the viability of the business. They accepted that from time to time it was appropriate for the auditor's report to be qualified, but said that the qualifications included from 1985 to 1991 and again in 1997 were appropriately phrased to convey to NPC and its members the nature and extent of the problems facing the co-operative and from then on it was for them to determine what should be done to address the situation. They disputed the allegations of reckless mismanagement and, to the extent that the grant of credit in any particular instance was inappropriate or unwise, they said that this was no more than the consequence of a poor decision taken in the conduct of NPC's business, and therefore that responsibility rested ultimately with the directors. If the business was run badly and this could be characterised as mismanagement they said that it was for management and the directors to identify and deal with the problem.

[47] It is important to note that NPC founded its attack on the audits on the proposition that there was overwhelming evidence of material mismanagement of credit that could be attributed to recklessness or dishonesty on the part of the responsible officials. I will refer to this as reckless mismanagement to distinguish it from a situation where the business was not well run; or where there was poor decision-making in

regard to the grant of credit; or where inadequate steps were taken to recover outstanding debts, all of which could possibly be described as mismanagement, but arising for other reasons, such as incompetence, carelessness or inefficiency. The alleged reckless mismanagement broadly encompassed credit being granted contrary to the provisions of the statute of NPC and the credit policy laid down from time to time by the board and the failure to enforce strictly the statutory pledge against debtors. It included the irregular inclusion of some debtors under the drought aid scheme; the unlawful advance of loans to subsidiaries; the failure to obtain proper security; manipulation and renewing of debts so that they appeared to have arisen more recently than was in truth the case; the incorrect levying of interest and ultimately the under provision for bad debts. This is the way in which the case was expressed in the pleadings and it was reiterated in the heads of argument in this court.

[48] NPC's case was not that the affairs of the co-operative were run badly or unwisely, and that the failure of PWC to demand that higher provisions for bad debts be made in the annual financial statements, or to qualify their audit reports, was the cause of their loss. No doubt that was because it would have raised intractable problems of causation. Holding the auditors liable for that kind of mismanagement would effectively make them the underwriters of the NPC's business failures, a risk that they did not agree to run when they undertook the audit. It follows that if the cause of NPC's problems was that it was a poorly run business, with a mixture of over generous granting of credit and a less than zealous approach to the recovery of payment from debtors, exacerbated by adverse farming conditions and inadequate prices, this could not be laid at the door of PWC.

[49] NPC pinned its colours firmly to the mast of reckless mismanagement of credit by the responsible officials and the failure by PWC to discover or disclose this and its consequences in its audit reports. At a minimum NPC ascribed that failure to negligence in the performance of the audit. However, in the court below and in its heads of argument, as well as from time to time its oral argument in this court, NPC suggested that Mr Odendaal's reports were either deliberately dishonest and misleading or that he allowed himself to become a pawn of management so that his reports were a mere smokescreen for their misconduct. I turn then to outline the evidence led by the parties in support of their respective cases.

The evidence

[50] A massive number of documents were placed before the court on the basis that they were what they purported to be, but the correctness of their contents was not admitted. In the course of the trial much use was made of many of these and other documents. However, some potentially important documents were no longer available, such as the audit working papers for the period prior to 1990 and those for 1991. In addition Mr Collett said that when he and his team were undertaking their investigation there were files of bad debtors that were not available, which raises the possibility that the files furnished by the NPC were incomplete. That is reinforced by the fact that Mr Odendaal's notes in some of the audit files refer to balance sheets in respect of debtors, when Mr Collett's team found none. It suggested that documents might have gone astray and that the files might be incomplete.

[51] NPC presented its case largely through the evidence of Mr Collett. He had conducted the investigation into the affairs of NPC after the

departure of the chief executive, Mr Boonzaaier, in 1997 and prepared the report that formed the basis for the action against PWC. He gave evidence as an expert on the basis of his report and the files of documents prepared in the course of his investigation. Messrs Marais, Greyling and De Jager, who were previously employed by NPC, gave some supporting evidence of a factual nature. Mrs van der Merwe explained how the files for each debtor whose debt formed part of the claim were assembled from files obtained from NPC and Mr van Schalkwyk dealt with interest rates charged by the Land Bank from time to time. Dr Wentzel was a qualified accountant who had spent his working life working in the Noord-Westelike Koöperatiewe Landboumaatskapy, and he testified in regard to the working operations of co-operatives, the drought aid scheme and certain accounting issues in relation to co-operatives.

[52] Mr Hopkins and Professor Wainer gave expert evidence on accounting issues. They were well qualified to do so. Mr Hopkins was a former professor of accountancy at the University of Cape Town and had then had a successful career in business with various companies. Professor Wainer had extensive academic experience as well as substantial involvement in practice with a leading firm of accountants and auditors, of which he had eventually become chief executive, and subsequently as senior partner of another firm. He has also served on various professional bodies, particularly those responsible for setting standards. At the end of the day, however, all of this was merely supplementary to the evidence of Mr Collett upon which the entire case for NPC depended. The evidence of both Professor Wainer and Mr Hopkins was premised upon there having been reckless mismanagement of the affairs of NPC, and that, in turn, depended upon Mr Collett's evidence.

[53] It is no surprise therefore that PWC attacked Mr Collett's evidence on two grounds. The first, raised at an early stage of his evidence, was that the opinions he was expressing were based upon facts of which there was no proof and that, insofar as he was being used to place those facts before the court, his evidence was inadmissible hearsay. In turn, as there was no proof of the facts on which his opinions were based, those opinions were irrelevant and inadmissible. The second, raised in argument rather than in the course of his evidence, was that he was not in truth an expert and was accordingly unqualified to express the opinions that lay at the heart of his evidence regarding the existence of reckless mismanagement and the adequacy of the audit undertaken by Mr Odendaal.

[54] PWC led only two witnesses. Their primary witness was Mr Odendaal, who testified both as to what he had done in the course of conducting the audits over this period and as an expert witness as to the standards required of an auditor in the performance of an audit. In addition they called Mr Tom Wixley, a senior and experienced accountant and auditor, who had a 41 year career with one of the largest accounting firms in the world, of which he ultimately became the local chairman, as well as a member of the international council of that firm. He also had extensive experience serving on professional bodies especially those responsible for setting professional standards. Like Professor Wainer he has on many occasions given evidence as an expert witness in relation to accounting matters.

[55] NPC launched a ferocious attack on Mr Odendaal's evidence, both in regard to its substance and in regard to his honesty and reliability. He was described in the submissions to this court as a shocking witness whose evidence was studded with contradictions. NPC argued that his evidence

was evasive and that he repeatedly avoided answering questions or simply refused to do so. Although the trial court had heard and rejected a similar attack on his credibility, NPC persisted in contending in this court that Mr Odendaal's evidence should be rejected as untruthful. It submitted that, although an appeal court is reluctant to overturn a finding of credibility made by a trial court, based on that court's impression of the witness,[18] the trial court had erred in not adopting the approach to his evidence laid down by this court in *Martell*.[19]

[56] The principal evidential dispute appeared therefore to be a conflict between Mr Collett and Mr Odendaal, the former criticising and the latter defending the quality of the audits undertaken by the latter. The dispute between them lay at the heart of the central issues whether PWC breached its contractual obligations during this period and, if so, whether that occasioned loss to NPC, recoverable by way of an award of damages. However, before reaching those issues, it is necessary to address the anterior questions of the nature of PWC's relationship with NPC as a result of its appointment as its statutory auditor; the obligations that rested on PWC as a result of that appointment; and whether the evidence established that there was indeed reckless mismanagement of credit by NPC's officials and concealment of that mismanagement. It is to those issues that I now turn.

Legal basis for the auditor's appointment

[57] PWC's argument under this head was that the appointment of an auditor was a requirement of the Act (s 143(1)) and had to be undertaken

---

[18] *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd* 2002 (4) SA 408 (SCA) para 24.
[19] *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) para 5.

by the members of NPC at the annual general meeting (s 145(1)). The co-operative was obliged to pay the auditor the agreed fee for rendering the audit services (s 155(1)). Accordingly the decision by the annual general meeting was the sole source of the auditor's appointment as such and was not in any way dependent upon a contractual relationship existing between the auditor and the co-operative. They submitted that the Act provided a comprehensive code covering the appointment and duties of the auditor (ss 152 -154). In those circumstances it was contended that the source of the auditor's appointment in this case was statutory and not contractual. Furthermore PWC contended that there was no evidence of any contract in the particular circumstances of this case that would alter that situation.

[58] The argument is one with potentially far-reaching consequences, as it would apply with equal force to the appointment of auditors by companies, something that has been a feature of legislation governing companies for many years both in this country and elsewhere. Yet no authority was cited for the proposition and my own researches have not revealed that it has occurred to any lawyer to argue a similar point in this or any other jurisdiction. Whilst novelty alone is not a ground for rejecting a legal point the fact that over a protracted period an otherwise obvious contention does not appear to have been raised anywhere is a ground for suspecting that it may not be sound.

[59] In my judgment the point is not sound. The fallacy lies in approaching the matter solely from the perspective of what must occur at the annual general meeting of the co-operative or company and not from what must necessarily precede it. The decision at the annual general meeting to appoint a particular person or firm as auditor must necessarily be preceded by the board of directors (or, if there is opposition to their

proposal, the opposing faction in relation to their own nominee) approaching a firm of auditors and asking whether they are willing to accept the appointment. Auditors like PWC are firms that offer specialist auditing services in return for remuneration. They are under no obligation to accept an appointment as auditor and will only do so if the terms of appointment offered to them are sufficiently attractive and acceptable. A proposal to appoint them as auditor will always follow upon agreement having been reached upon these matters. Only then will it be proposed to the members at the annual general meeting that they should agree to make the appointment.

[60] It does not seem to me to matter in those circumstances whether one analyses the legal position on the basis that the co-operative or company making the appointment offers to appoint the auditor on the terms agreed, such appointment to be finalised by the approval of the members at the annual general meeting, and the auditor accepts that offer, or as an offer by the auditor to accept an appointment on agreed terms accepted by the co-operative or company by way of the resolution of members at the annual general meeting. The only apparent difference between those two analyses might be as to the precise moment when the contract comes into existence. The relationship in either event is contractual. It is noteworthy that this is the view of it taken by the auditing profession in its published auditing standards (Audit statement 211). It is also the consistent view of legal writers dealing with the relationship between an auditor and the enterprise being audited.[20]

---

[20] HS Cilliers and ML Benade and others *Cilliers and Benade Corporate Law* (3 ed) para 23.36, p 409; Halsbury's Laws of England, (5 ed) Vol 15, paras 916 and 918; John L Powell QC and Roger Stewart QC *Jackson and Powell on Professional Liability* (7 ed) 1-014 and 17-020.

[61] For those reasons I hold that the relationship between the various iterations of PWC as auditor of NPC from time to time and NPC was contractual. Bearing in mind the provisions of s 145(3) of the Act, which in this respect paralleled the provisions of s 270(2) of the Companies Act 61 of 1973, which was in force at the time, this was not a single continuing relationship such as that created by a contract of employment. Under the Act each annual appointment of an auditor gave rise to a separate contract. That has an important bearing on not only the issue of prescription, but also the issues of negligence and causation. This is especially so because there were four different firms that contracted with NPC during the years in question. A breach of contract by the one cannot therefore be 'carried over' or attributed to another. There is no question of a continuing breach of contract. As the authors of *Jackson and Powell*[21] point out:

'The fact that auditors have negligently performed their duties in one year does not by itself establish that the absence of a report about the same matter in the next year is negligent. Where what is complained of is an omission to note a particular point the circumstances giving rise to that omission in the year in question need to be examined.'

[62] The entire case was conducted without this important point being raised or canvassed. NPC's approach was that there was a continuing breach of contract by a single entity compendiously described as PWC. That was erroneous. If there were breaches of contract by any of the four firms so described they were independent breaches occurring in different years and having different consequences. It was necessary to identify the consequences flowing from each such breach. As the case lay in contract, not delict, there was no question of joint wrongdoing and no basis for

---

[21] *Op cit* para 17-020.

judgment to be entered jointly against different firms as happened when the issue of quantum was addressed. Cases of true joint liability in contract are most likely to arise in circumstances where the parties being held liable are parties to the same contract and the claim arises out of the same breach, but for some or other reason they are not jointly and severally liable.[22] The present was a situation where the possibility existed of saying that the different firms were separately and independently liable for the same or similar loss,[23] but the case was not pursued on that footing.

PWC's contractual obligations

[63] The role of the auditor has been the subject of numerous judgments, none more lucid than that of Bingham LJ in *Caparo v Dickman*,[24] where he said:

'At the heart of this case lies the role of the statutory auditor. That role is, I think, without close analogy. Its peculiar characteristics derive from the nature of the public limited liability company. The members, or shareholders, of the company are its owners. But they are too numerous, and in most cases too unskilled, to undertake the day-to-day management of that which they own. So responsibility for day-to-day management of the company is delegated to directors. The shareholders, despite their overall powers of control, are in most companies for most of the time investors and little more. But it would, of course, be unsatisfactory and open to abuse if the shareholders received no report on the financial stewardship of their investment save from those to whom the stewardship had been entrusted. So provision is made for the company in general meeting to appoint an auditor … whose duty is to investigate and form an opinion on the adequacy of the company's accounting records and returns, and the correspondence between the company's accounting records and returns and its accounts … The auditor has then to report to the company's members (among other

---

[22] RH Christie and GB Bradfield *Christie's The Law of Contract in South Africa* (6 ed) 262-263.
[23] *Van Immerzeel & Pohl v Samancor Ltd* 2001 (2) SA 90 (SCA) paras 76 and 77.
[24] *Caparo Industries plc v Dickman & others* [1989] 1 All ER 798 (CA) at 804a-e. Cited with approval by Nugent J in *Powertech Industries Limited v Mayberry & another* 1996 (2) SA 742 (W) at 746A-E. See also *Lipschitz & another NNO v Wolpert & Abrahams* 1977 (2) SA 732 (A) at 740-C-E.

things) whether in his opinion the company's accounts give a true and fair view of the company's financial position … In carrying out his investigation and in forming his opinion the auditor necessarily works very closely with the directors and officers of the company. He receives his remuneration from the company. He naturally, and rightly, regards the company as his client. But he is employed by the company to exercise his professional skill and judgment for the purpose of giving the shareholders an independent report on the reliability of the company's accounts and thus on their investment.'

Save that the members of NPC were not investors, but became members in order to facilitate and further their own farming interests, I think that this correctly states the function that PWC was obliged to fulfil for NPC.

[64] The auditors' obligation was to express an opinion on the financial statements prepared by management, an expression that encompasses both the board of directors and the officials acting under their direction. Under the Act the responsibility for managing the affairs of NPC, covering both the conduct of the business and the adoption of appropriate accounting practices in accordance with GAAP, lay with the board of directors. They were also responsible for preparing the financial statements on which PWC expressed an opinion. PWC were not an adviser and it was not part of their audit function to advise on the manner in which NPC should have conducted its business or whether it was being run in a prudent fashion.[25] They were, however, obliged to conduct the audit in a reasonably skilled manner and without negligence.[26] If in the course of the conduct of the audit they discovered matters concerning the manner in which the business was being conducted that might materially affect the accuracy of the

---

[25] *In re London & General Bank (No 2)* [1895] 2 Ch D 673 at 682. Halsbury's Laws of England, (5 ed) Vol 15, para 929.

[26] *Thoroughbred Breeders*, supra, fn 13. Proof of negligence is a pre-requisite to liability. See s 26(5)*(a)* of Public Accountants' and Auditors' Act 51 of 1951; s 20(9)*(a)* of Public Accountants' and Auditors' Act 80 of 1991.

financial statements it was part of their audit responsibility to investigate and report it to the appropriate level of management. Depending on the outcome of their investigations they might have required the financial statements to be amended or have qualified or withheld their report to members.

[65] The primary source of a statutory auditor's rights and obligations under its contract with its client is the statute. In this case, although NPC sought in its pleaded case to burden PWC with obligations going beyond its statutory duties, it led no evidence to support that approach. It contended that PWC was obliged to audit its accounting records; to investigate its system of internal controls and report on it; to evaluate its accounting policies and report on them; and to comply with unspecified provisions of NPC's statutes. An endeavour was made to sub-divide the audit function into separate compartments, but that was inappropriate. It overlooked that the function of the auditor under the Act was a global one, namely to audit and evaluate the financial statements of NPC and to determine and report whether they fairly reflected its financial affairs and the result of its activities (s 145(2)). In the course of that they would need to examine many of the matters identified in the particulars of claim, but it is necessary to keep in mind that their task was a global one.

[66] The relevant provisions of s 153 of the Act provided that the auditor was obliged to:

'(a) examine the co-operative's annual financial statements …

(b) satisfy himself that proper accounting records in accordance with the requirements of this Act have been kept by the co-operative and that proper returns, adequate for the purposes of his audit, have been received from branches and depots not visited by him;

(c)-(e) …

(f) obtain all the information and explanations which to the best of his knowledge and belief are necessary for the purpose of carrying out his duties;

(g) satisfy himself that the co-operative's annual financial statements are in agreement with its accounting records;

(h) examine the accounting records of the co-operative and carry out such tests in respect of such records and such other auditing procedures as he may consider necessary in order to satisfy himself that the annual financial statements fairly reflect the financial state of the affairs of the co-operative and the results of its operations in conformity with generally accepted accounting practice applied on a basis consistent with that of the preceding year;

(i) satisfy himself that statements made by the directors in their report do not conflict with a fair interpretation or distort the meaning of the annual financial statements and the company notes …'

[67] Having conducted an audit in accordance with those provisions PWC was then obliged to render its report to the members of NPC. If satisfied that the annual financial statements fairly reflected its financial state of affairs and the result of its trading activities it would report accordingly. If unable to do so, or only able to do so with qualifications, PWC was obliged to report to that effect and to set forth the facts and circumstances that prevented it from giving a report. or an unqualified report, as the case might be (s 154(3)).[27] Whether PWC properly discharged its obligations in this regard was central to the dispute in this case.

[68] The audit standards dealt with the nature of the qualifications that an auditor could attach to their report, and to when such qualifications were justified and when an audit report should be declined or an adverse report

[27] This section was amended in 1993, but the amendment did not effect any material change to the auditor's obligations.

given. Audit standard AU 321 in GAAS set out the following position from 1982 until 1990, during which PWC consistently issued qualified audit reports. An unqualified audit report was one that expressed the view that the financial statements fairly represented the financial position of the audited entity and the result of its activities. The need to qualify a report could arise either from uncertainty about matters that prevented the auditor from expressing an unqualified opinion, or disagreement between the auditor and management as to the presentation of matters in the financial statements. If the uncertainty related to a material matter then the auditor could report that 'subject to' the relevant matter the financial statements fairly reflected the financial position. However, if the uncertainty was fundamental, because, for example, it would affect the solvency of the enterprise or its status as a going concern, then the auditor was obliged to disclaim an opinion, that is, to report that they were unable to form a view on whether the financial statements fairly reflected the entity's financial position and activities.

[69] Where the problem was a disagreement between the auditor and management on the proper presentation of matters in the financial statements, and the disagreement was material, but not fundamental, the auditor was required by the audit standard to express the opinion that, 'except for' the area of disagreement, the financial statements fairly reflected the financial position and the activities of the enterprise. If the disagreement was fundamental the auditor was obliged to express the opinion that the financial statements did not fairly reflect the enterprise's financial position and activities.

[70] In its original form AU 321 said that the explanatory paragraph in which an auditor set out the reasons for qualifying should include 'a brief

résumé of the reasons for the qualification, the implications thereof for the financial statements and where possible the amounts involved'. Sufficient information had to be given to enable the reader to understand clearly the reason for the qualification. This had to be construed in the light of the requirement in s 154(3) of the Act that obliged the auditor to set forth the facts and circumstances preventing them from giving a report or an unqualified report. The statute demanded a full statement of matters giving rise to that situation and the auditing standard could not detract from that. It is important to note that compliance with the provisions of GAAS, while possibly a necessary condition for an auditor not to be held in breach of contract, may not be a sufficient condition therefor, if the GAAS standard is less stringent than a statutory obligation. Similarly, such compliance goes some way towards showing that the auditor was not negligent, but is not necessarily decisive.[28]

[71] In 1991 AU 321 was revised to exclude the possibility of a 'subject to' opinion being expressed in the case of material uncertainty. The circumstances that hitherto had attracted that kind of qualification would now require an 'except for' qualification or a disclaimer of opinion. If the auditor disclaimed an opinion they had to set out the reasons therefor. This is what Mr Odendaal did in 1991, although the grounds for his disclaimer were challenged. The revised standard contained the same provision in regard to the explanation for a qualified opinion or a disclaimer, save that it added that all material matters about which the auditor had reservations should be mentioned. The audit standard made it clear that, as with many other aspects of an audit, it was a matter for the professional judgment of the auditor to determine whether something was material.

---

[28] *Kripps v Touche Ross & Co.*, 1998 CanLII 3905 (BC SC); 56 BCLR (3d) 160 paras 69 to 73.

[72] Apart from the issues surrounding the auditor's duties in relation to the report made to members at the end of the audit, ultimately there was little controversy over their obligations in terms of the audit standards. They were required to approach the audit from an independent and slightly sceptical standpoint[29] recognising that there are many reasons why financial statements may be materially misstated. The audit had to be planned so that areas of material risk would be identified and suitable audit evidence obtained to enable the auditor to express an opinion on the financial statements. Such evidence could either come from testing the internal controls of the enterprise, or from other sources, referred to as substantive evidence. If the audit revealed areas of potential risk the auditor was obliged to investigate sufficiently to satisfy themselves that they did not result in misstatements in the financial statements, or to ascertain the extent to which they did and affected fair presentation of the enterprise's financial position and report accordingly. In the latter case this could result in the financial statements being redrawn or in a qualified report.

[73] On the central question of the audit of debtors all the experts agreed that the auditor's task was to assess whether management's view of the extent to which the debts were likely to be recoverable and to result in a cash flow to the enterprise was reasonable.[30] It was accepted that this was

---

[29] The auditor is not however required to be suspicious as opposed to being reasonably careful in the conduct of the audit. *In re Kingston Cotton Mill Company (No 2)* [1896] 2 Ch D 279 at 284. In the words of Lord Denning the auditor must come to the task with 'an inquiring mind … suspecting that someone may have made a mistake somewhere and that a check must be made to ensure that there has been none.' *Fomento (Sterling Area) Ltd v Selsdon Fountain Pen Co Ltd and Others* [1958] 1 All ER 11 (HL) at 22b-d; *Tonkwane Sawmill Co Ltd v Filmalter* 1975 (2) SA 453 (W) at 455H-I.

[30] The alleged failure by auditors to make a proper report on bad debts recurs regularly in claims against auditors based on their allegedly negligent conduct of an audit. See, for example, *In re London & General Bank (No 2)*, supra; *Scarborough Harbour Commissioners v Robinson, Coulson. Kirkby & Co*

a matter of judgment based on the audit evidence available to the auditor. A dispute over this issue raged between the experts with the NPC's experts, Professor Wainer and Mr Hopkins, being strongly critical of the approach adopted by Mr Odendaal, and Mr Wixley saying that his approach was acceptable. In addition Mr Odendaal, as was to be expected, defended his approach. I will revert to this in dealing with the allegations of breach of contract.

[74] The only other significant point to note at this stage is that throughout the relevant period there was no published audit standard dealing with audit assessments of the recoverability and value of debtors. SAAS 540 dealing with the audit of accounting estimates was only published in January 1997. It provided, somewhat unhelpfully, that the auditor should obtain sufficient appropriate audit evidence regarding accounting estimates and whether they were reasonable. The auditor could either obtain such evidence by reviewing and testing the process used by management to develop the estimate, or by using an independent estimate, or by reviewing subsequent events confirming (or presumably not confirming) the estimate. It said that in evaluating the data and process used by management the auditor should test whether the data was accurate, complete and relevant and had been analysed appropriately. A comparison of previous estimates with actual experience would enable the auditor to determine whether the estimates were reliable. Where available, events after year end tending to reflect on the reliability of such estimates might provide helpful audit evidence. The auditor could only demand a

---

1934, Acct. L. R.; *Berg Sons & Co Ltd v Mervyn Hampton Adams and others* [1993] BCLC 1045 (QBD (Comm Crt)); *Alexander and others v Cambridge Credit Corporation Ltd and another* (1987) 9 NSWLR 310 (CA); *Kripps v Touche Ross & Co.,* 1998 CanLII 3905 (BC SC); 56 BCLR (3d) 160; *Widdrington (Estate of) c. Wightman*, 2011 QCCS 1788 (CanLII).

revision of the estimate by management if the difference between management's estimate and that of the auditor was unreasonable. If management was unwilling to revise its estimate the difference should, in terms of this standard, be treated as a misstatement and might lead to the qualification of the auditor's report.

[75] Two other points warrant brief mention. The first is that, apart from the duty to report to members on the financial statements, the auditor had a duty to report to the appropriate levels of management about weaknesses discovered in internal controls and accounting systems. A number of Mr Odendaal's audit reports, which were addressed to senior management and the board, highlighted failures to adhere strictly to the requirements of the credit policy and to other weaknesses in the internal systems of NPC. For the purpose of NPC's complaints, however, these were only relevant to the extent that it was contended that their contents revealed that the auditor should have undertaken further investigations or incorporated reference to the contents of these reports in the auditor's report in the annual financial statements. Second, it was accepted that the auditor should maintain records in the form of audit working papers of the work undertaken, containing details of the audit evidence obtained in the course of the audit and the investigations undertaken in the procurement of that evidence. Mr Odendaal's notes on many of the central issues were criticised as being cryptic – an apt description – and it was argued that they showed that he had not undertaken the work he claimed to have done in the course of the audit. This becomes relevant when considering his evidence.

Was there reckless mismanagement of credit at NPC?

[76] NPC's case, as described in para 47 above, was that there was reckless mismanagement by its officials in the grant of credit and the

recovery of debts and that such reckless mismanagement had led to material under-provisions in respect of doubtful debts. The trial court found this to be established, albeit in somewhat broad and general terms. Its conclusions were expressed as follows:

'If there is one overwhelming impression left by the evidence it is that there was mismanagement at NPC …

The mismanagement primarily took two forms: the injudicious or irregular grant of credit and the ineffective collection of debts, primarily in company with a failure to enforce the pledge.'[31] (My translation)

It is by no means clear what the judge intended to convey by this. It was not NPC's case that its affairs had been mismanaged in the limited sense of having been badly run and unwise business decisions having been taken. Its case was that the employees responsible for the grant of credit and the recovery of debts had acted recklessly or dishonestly or deliberately in breach of policies binding upon them and then concealed their own misconduct. However, there is no such finding in the judgment of the trial court and that notion seems inconsistent with the judge having held that the directors of NPC had full knowledge of the mismanagement.

[77] NPC's case on this issue rested on the documents that were placed before the court, primarily in the form of debtors' files prepared by Mr Collett and his team of investigators, and on Mr Collett's evidence and, in particular, the conclusions he drew and the opinions he expressed on those documents. That renders it appropriate at this stage of the judgment to deal with the objections raised by PWC to the use made of those documents

---

[31] 'As daar een indruk is wat die getuienis oorweldigend laat, is dit dat daar wanbestuur by die NAK was…

Die wanbestuur het hoofsaaklik twee vorme aangeneem: onoordeelkundige en/of onreëlmatige krediet verlening en ondoeltreffende invordering van skuld, meestal gepaard met 'n versuim om die pandreg af te dwing.'

and to Mr Collett's standing as an expert witness. I will deal with them separately under the general, but not necessarily comprehensive, headings of 'hearsay' and 'expert evidence' and then revert to the issue of reckless mismanagement.

Hearsay

[78] Both when the trial initially commenced before Hartzenberg J with the evidence of Mr van Rensburg and again when it re-commenced before Botha J with the evidence of Mr Collett, counsel then appearing for PWC recorded an objection to either witness giving evidence that amounted to hearsay. On both occasions, however, he indicated that, rather than seeking a ruling whenever hearsay evidence was led, or perhaps a general ruling, he would wait until the end of the witness' evidence to deal finally with the objection. That was (and still is) a common practice in trials and finds some limited sanction in the provisions of s 3(3) of the Law of Evidence Amendment Act 45 of 1988. Where the scope of the evidence is limited and its admissibility may be contestable, to admit it provisionally may be a convenient way for the trial to proceed. However, in a case of the scope and magnitude of this one it was disastrous because, as Lord Tomlin said in 1935[32] in regard to the evidence of expert witnesses on the meaning of a patent specification:

'In the first place time is wasted and money spent on what is not legitimate. In the second place there accumulates a mass of material which far from assisting the Judge renders his task the more difficult, because he has to sift the grain from an unnecessary amount of chaff.

---

[32] *British Celanese Ltd v Courtaulds Ltd* (1935) 52 RPC 171 (HL) quoted with approval in *Gentiruco AG v Firestone (SA) (Pty) Ltd* 1972 (1) SA 589 (A) at 617F - 618C and *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 (4) SA 399 (SCA) para 40. See also *Van Aardt v Galway* 2012 (2) SA 312 (SCA) para 10.

In my opinion the trial Courts should make strenuous efforts to put a check upon an undesirable and growing practice.'

[79] It was apparent from the outset of Mr Collett's evidence that, insofar as he spoke of facts concerning the affairs of NPC, he was entirely dependent upon the documents he had looked at and assembled into the extensive trial bundles. He was led in chief from his two summaries of expert evidence. These showed that the source of his knowledge of the facts was the documents, not least because of the copious references to those documents in those summaries. When PWC's counsel objected that this was hearsay, NPC's counsel responded that much of Mr Collett's evidence would be hearsay.[33] He added that, unless supported by other admissible evidence or an application had been made to admit it in terms of s 3 of the Law of Evidence Amendment Act 45 of 1988 it should be ignored. No such application was ever made or foreshadowed. Nor was it argued that the documents were proof of their contents and admissible in terms of s 34 of the Civil Proceedings and Evidence Act 25 of 1965. Nor did the evidence of Messrs Marais and Greyling take the matter any further.

[80] In my view, notwithstanding the stance of PWC's counsel, the trial court should have intervened once it became apparent, as it must have done within a couple of days of Mr Collett commencing giving evidence, that it was overwhelmingly based upon hearsay. The basic principle is that, while a party may in general call its witnesses in any order it likes, it is the usual practice for expert witnesses to be called after witnesses of fact, where they are to be called upon to express opinions on the facts dealt

---

[33] '…weens die aard van die ondersoek sal ons uit die aard van die saak heelwat getuienis aanbied wat in die kategorie sal val van hoorsê getuienis. Dis onvermydelik.'

with by such witnesses.[34] While the conduct of the trial is usually a matter for the parties to determine as they present their cases,[35] I have no doubt that, in the exercise of a judge's power to control trial proceedings, the judge may intervene to ensure that they are conducted in a manner that avoids delay and the unwarranted escalation of costs. Two courses of action were open to the judge. The first would have been to require NPC to identify the hearsay evidence that it wished to have admitted and make application for its admission on any available ground, and then to make a ruling on its admissibility. Such a ruling could always have been revisited at a later stage of the trial if necessary. The second, insofar as it was indicated that witnesses would be called to substantiate the hearsay evidence, was to require that Mr Collett's evidence stand down until such evidence had been led and was properly before the court. That would have been an appropriate and permissible course for the judge to adopt. Instead Mr Collett was allowed to continue unchecked.

[81] The next stage at which this issue could have been addressed was when Mr Collett finished giving evidence and before he was cross-examined. Instead he was cross-examined on the very evidence that was said to be inadmissible. The third time it should have been dealt with was at the close of NPC's case,[36] but the court was not asked to make a ruling. Then at the end of the trial, after some 160 days had been spent on this evidence, it was submitted that it was all inadmissible hearsay. By then of course it was impossible to sort the wheat of admissible evidence from the chaff of inadmissible hearsay.

---

[34] Tristram Hodgkinson *Expert Evidence: Law and Practice* 106-7.
[35] *Fischer and another v Ramahlele and others* 2014 (4) SA 614 (SCA) paras 13 and 14.
[36] *Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security* 2012 (2) SA 137 (SCA) para 24.

[82] The judge was correct to say that the expert accounting witnesses could properly express an opinion on the appropriateness of Mr Odendaal's audit work where that was based solely on documents. That was permissible, because they were 'walking in Mr Odendaal's shoes'. In other words to the extent that they looked at the same documents as Mr Odendaal and expressed views as to the audit consequences flowing from those documents, all that was necessary was that the documents be identified as those on the basis of which Mr Odendaal had conducted his audit. Of course, to the extent that Mr Odendaal said that he relied for his audit on material not emerging from those documents, that would affect the validity of those opinions, but it would not render the documents inadmissible for that limited purpose. However, when used, as Mr Collett did, for other purposes such as those described in the following paragraphs, that was impermissible.

[83] Over and above his opinions on auditing questions, Mr Collett described in detail the business of NPC, the terms of its statutes and the history of its mergers with other co-operatives. He told the court what role the directors played in its operations, what the credit policy was and how it fell to be applied. He said how the production accounts were conducted and, as counsel for NPC put it in oral argument before us, described 'every facet of its business'.[37] Lastly, he dealt with what had occurred with each of fifty debtors in the conduct of their accounts with NPC over the entire period.

---

[37] 'Elke faset van sy bedryf'.

[84] These were plainly matters of which Mr Collett had no personal knowledge and this evidence should have come from the directors and employees of NPC, who were familiar with them. His knowledge was gleaned entirely from the documents he had read and the interpretation he put on those documents. Thus one finds him at one stage reading into the record an extract from a minute of a directors' meeting and telling the court that he was not sure what one sentence meant, but that a later sentence meant that the directors had taken a particular decision. He said that the directors had played a non-executive role and that their only engagement with NPC's management was at the directors' meetings held three times a year. He explained that debtors had been given credit without authority merely because he was unable to find a credit application form in the debtor's file and could not find a resolution of directors authorising the extension of credit. No-one responsible for granting credit gave evidence as to the circumstances in which it was extended or how it could have been extended without authority.

[85] The overall extent of the hearsay evidence introduced by Mr Collett is apparent from a consideration of the various headings to different sections of his first expert summary. These started (I translate) with 'The business of the TPC and the foundation of the NPC (1983 to 1988)'. They continued with 'The merger between TPC and Markpro that brought the NPC into existence'; 'The NPC from 1988 to 1993'; 'The merger of NPC and Peko (Co-operative) Ltd on 31 December 1993 to bring the NPC (after merger) into existence'; 'The NPC after merger (1993-1998)' and 'The nature of NPC's business'. This demonstrated unequivocally that the suggestion made to us in argument, that Mr Collett was only dealing with the operations of NPC's business in 1997 and 1998 when he was directly involved in its affairs, was unfounded. The summary, which was closely

followed in evidence, dealt with the potato harvest from 1985 to 1997 for NPC members and nationally, as well as the prices prevailing in markets around the country, apparently derived from NPC records and information from the Potato Board. This formed the basis for various calculations made by Mr Collett largely for the purpose of comparing conditions in the potato industry with those in regard to mealies.

[86] After an excursus by Mr Collett into the provisions of the Act and the statute of NPC, which involved him in expressing opinions on legal issues, he then dealt extensively with the credit policy of NPC, analysing which of its provisions were of the greatest importance. After expressing an opinion on the importance of this to the risk undertaken by NPC in giving credit to members, he passed on to an analysis of non-compliance with the credit policy. Later he was to deal with the system of internal controls. He also dealt with the drought aid scheme, before explaining in some detail the basis upon which the government withdrew the state guarantee. Other factual matters dealt with in his evidence were the terms of the loans advanced by the Land Bank to NPC; the manner in which NPC charged interest on debts; and the operations of the subsidiaries. This summary is by no means comprehensive.

[87] It was submitted that many of these apparent problems were overcome in the light of other evidence at the trial and that NPC had little option but to follow this course, particularly in relation to the history of the debtors. That proposition can be disposed of summarily. Mr Pieterse, a director from 1987 and the chair of the board from 1996 attended much of the trial and was available to deal with these matters. There was no indication that employees working in the credit department and the different regions could not have been called to explain why credit was

given in the case of the farmers whose bad debts made up the claim and what was done to recover those debts, or why the statutory pledge was relaxed or not enforced. The decision to conduct the case by leading the evidence of Mr Collett on the history and the relevant facts was seriously and obviously flawed and it should not have been permitted.

[88] The argument on admissibility was advanced on the footing that Mr Collett's evidence fell into five components. First, insofar as he relied on the contents of minutes of meetings, Mr van Rensburg testified that the minutes of directors' meetings and meetings of the credit committee were an accurate reflection of what occurred at those meetings. That meant, so it was argued, that what was recorded in those minutes could be taken as factually correct. However, that went further than Mr van Rensburg's evidence. The agreement between the parties prior to the trial commencing was that documents were what they purported to be and could be used without producing the originals. Mr van Rensburg's evidence was that the minutes were accurate. However, that meant no more than that the minutes reflected what had transpired at the meetings and excluded the possibility that matters other than those shown in the minutes had been the subject of discussion. It was not a basis for asserting the factual correctness of statements in regard, for example, to debtors and their accounts.

[89] Second, it was argued that the contents of the debtors' files could be accepted as proof of the facts contained therein, and that Mr Collett's evidence and conclusions about the credit histories of those debtors was correct. This submission was advanced on the following basis. Mr Collett prepared the files and the summaries used in court from files furnished to him by NPC. PWC were invited before the trial to co-operate to arrive at an agreed summary of their contents but declined to do so. However,

during the course of the trial they allocated a team of auditors to audit Mr Collett's work at a cost of R6.5 million and, to assist them in doing so, leave was sought and granted for Mr Collett to be cross-examined by more than one advocate. Yet at the end of this exercise no real challenge was raised to Mr Collett' evidence in regard to these files.[38] Furthermore when the trial reached the quantum stage the parties were able to reach agreement on the bulk of the amounts written off as bad debts to be included in computing the amount of the judgment. Accordingly, so the argument ran, there was no dispute about the contents and accuracy of the debtors' files and they were admissible as proof of their contents.

[90] This is an attractive argument to a court confronted by the mass of documents such as that in this case, especially when many of those were brought into existence in order to record factual matters. However, on reflection, I do not think that it is sound. The evidence went no further than saying that Mr Collett had been placed in possession of debtors' files held by NPC and had analysed their contents on the footing, firstly, that they were complete insofar as the documents were concerned and, secondly, that a mere reading of their contents would furnish an accurate history of each debtor's dealings with NPC. At that level it was factual evidence but of no relevance unless the underlying premises were well founded.[39] However, there was no evidence to establish either of them. Mr Collett said that there were debtors whose records could not be found and so were excluded from his investigation. It could not therefore be accepted that the files were complete especially bearing in mind that they extended

---

[38] Reliance was placed on *S v Boesak* 2000 (3) SA 381 (SCA) at 393I-398F. However, the circumstances of that case were markedly different from this one. There the evidential issue was whether the signature on one letter was that of the accused. Here the issue was whether the files prepared by Mr Collett contained a complete history of the dealings between NPC and the debtors.

[39] In the heads of argument it was said that some of his evidence in regard to credit mismanagement was hearsay, but it rested on the correctness of the debtor accounts and other unspecified evidential material.

over a lengthy period during which documents could easily have been lost or destroyed, either deliberately, because they were no longer regarded as necessary, or inadvertently. As to the second in a relatively small co-operative dealing with farmers throughout the country employing field officers and credit officers in the different regions one would have expected many interactions between the members and NPC to have occurred telephonically, or during visits to the farm by officials or by the farmers to NPC's offices. Such interactions would by and large have been informal and one would not expect them to be recorded in the way in which professional people, such as, doctors and lawyers conventionally record matters. There were records of farm visits and other dealings between field officers and credit officers and individual farmers, but it does not appear from Mr Collett's evidence that he had any regard to them. In fact, consistent with his belief that there was reckless or dishonest management of credit, he treated them as entirely self-serving.

[91] Once the underlying premises were absent the debtors' files were of limited relevance. They contained documents in the possession of NPC that embodied records of some, but not necessarily all, of their dealings with their debtors. As such they might properly have been used for certain purposes in the course of the trial, but they could not be used for the purpose for which Mr Collett used them, namely to provide a supposedly complete and accurate history of each debtor's dealings with NPC. At most they reflected some aspects of those dealings, but no more. That in turn impacts upon the conclusions drawn from them, which I will deal with under the heading of 'expert evidence'.

[92] Thirdly, it was argued that Mr Collett's evidence was admissible in regard to the circumstances of his appointment, investigation and

methodology as well as events in which he was actively engaged such as the merger with Northern Transvaal Co-operative Ltd and the litigation with the Land Bank. That was clearly correct and I do not understand it to have been disputed. However that evidence was not relevant in regard to any issue in the case.

[93] Fourthly and fifthly, it was said that Mr Collett's analyses of the debtors' files was admissible as merely collating that which the judges would otherwise have to do for themselves. This encompassed the absence of application forms and verification of assets and liabilities in the files and that security had not been registered, all of which it was said was not hearsay. Similarly it was said that his summary of the credit history and the depiction thereof was objectively ascertainable by reference to the files themselves so that his conclusions merely placed this material in a more understandable and usable form. However, that was, like the general evidence concerning the debtors' files, dependent on the underlying premise of completeness that was never established.

[94] In summary, the evidence given by Mr Collett concerning matters in which he was involved was not hearsay and, where relevant, was admissible. His evidence concerning the history and business of NPC was all hearsay and inadmissible. The documents on which he and others relied in expressing opinions about the quality of Mr Odendaal's audit work were admissible for that purpose, but the validity of those opinions depended upon whether these documents were the only ones upon which Mr Odendaal's audit was based, or independently justified those opinions irrespective of any additional material relied on by Mr Odendaal. The other documents on which Mr Collett relied for his credit history of the debtors and for his opinions in regard to reckless mismanagement of credit

were not admissible as proof of the underlying facts in relation to those debtors. They may have been admissible for other purposes, such as the cross-examination of Mr Odendaal, or as forming the foundation for the auditing experts to express their opinions, but that did not affect their admissibility for the purpose for which Mr Collett's evidence was tendered.

[95] The broad contention, that all of Mr Collett's evidence should be disregarded as hearsay, cannot therefore succeed. In the light of the course that the trial took in regard to his evidence it is not feasible at this stage to separate that which was admissible from that which was not, or to separate inadmissible hearsay evidence from opinions and conclusions derived by him from that evidence. Instead, in considering the factual issues relating particularly to whether there was reckless mismanagement of credit, breaches of contract and causation it will be borne in mind that in many respects NPC's case rests upon inadmissible evidence.

Expert evidence

[96] Whilst not all opinion evidence is expert evidence the evidence of Mr Collett was tendered on the basis that he was an expert witness and qualified to express opinions in regard to the alleged deficiencies of Mr Odendaal's audit; the proper management of NPC; the respects in which it was subject to reckless mismanagement of credit; the losses suffered as a result and the reasons why PWC should be held liable for those losses. It is necessary therefore, in considering his evidence relative to the question of reckless mismanagement of credit, to consider when a witness may give evidence as an expert and what constraints operate in relation to such evidence. Mr Collett's evidence can then be measured against those standards.

[97] Opinion evidence is admissible 'when the Court can receive "appreciable help" from that witness on the particular issue'. [40] That will be when:

'… by reason of their special knowledge and skill, they are better qualified to draw inferences than the trier of fact. There are some subjects upon which the court is usually quite incapable of forming an opinion unassisted, and others upon which it could come to some sort of independent conclusion, but the help of an expert would be useful.'[41]

As to the nature of an expert's opinion, in the same case, Wessels JA said:[42]

'… an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.'

[98] Courts in this and other jurisdictions have experienced problems with expert witnesses, sometimes unflatteringly described as 'hired guns'. In *The Ikarian Reefer*[43] Cresswell J set out certain duties that an expert witness should observe when giving evidence. Pertinent to the evidence of Mr Collett in this case are the following:

---

[40] *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (AD) at 616H. This statement it derived from *Wigmore on Principles of Evidence* (3 ed) Vol VII para 1923.
[41] *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH* 1976 (3) SA 352 (A) at 370G-H.
[42] At 371F-H.
[43] *National Justice Compania Naviera SA v Prudential Assurance Co Ltd ('The Ikarian Reefer')* [1993] 2 Lloyd's Rep 68 [QB (Com Ct)] at 81 – 82. Approved in *Pasquale Della Gatta, MV; MV Filippo Lembo; Imperial Marine Co v Deiulemar Compagnia Di Navigazione Spa* 2012 (1) SA 58 (SCA) para 27, fn 12 and *Schneider NO and Another v AA and Another* 2010 (5) SA 203 (WCC) at 211E-I.

'The duties and responsibilities of expert witnesses in civil cases include the following:
1. Expert evidence presented to the Court should be and should be seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation …
2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise … An expert witness in the High Court should never assume the role of advocate.
3. An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinion. . . .
4. An expert witness should make it clear when a particular question or issue falls outside his expertise.'

These principles echo the point made by Diemont JA in *Stock*[44] that:

'An expert … must be made to understand that he is there to assist the Court. If he is to be helpful he must be neutral. The evidence of such a witness is of little value where he, or she, is partisan and consistently asserts the cause of the party who calls him. I may add that when it comes to assessing the credibility of such a witness, this Court can test his reasoning and is accordingly to that extent in as good a position as the trial Court was.'

[99] Lastly when dealing with the approach to an expert witness I have found helpful the following passage from the judgment of Justice Marie St-Pierre in *Widdrington*:[45]

'***Legal principles and tools to assess credibility and reliability***

[326] "*Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist*"

---

[44] *Stock v Stock* 1981 (3) SA 1280 (A) at 1296 E-G. See also *Jacobs and Another v Transnet Ltd t/a Metrorail and Another* 2015 (1) SA 139 (SCA) para 15.
[45] Supra, fn 5. The judgment is one for the clarity of which I can only express admiration. It was upheld on appeal on all major issues. *Wightman v. Widdrington (Succession de)* 2013 QCCA 1187 (CanLII). An application for leave to appeal to the Supreme Court of Canada was dismissed. *Elliot C. Wightman, et al. v. Estate of Peter N. Widdrington*, 2014 CanLII 341 (SCC).

[327] *"As long as there is some admissible evidence on which the expert's testimony is based it cannot be ignored; but it follows that the more an expert relies on facts not in evidence, the weight given to his opinion will diminish"*.

[328] An opinion based on facts not in evidence has no value for the Court.

[329] With respect to its probative value, the testimony of an expert is considered in the same manner as the testimony of an ordinary witness. The Court is not bound by the expert witness's opinion.

[330] An expert witness's objectivity and the credibility of his opinions may be called into question, namely, where he or she:

- accepts to perform his or her mandate in a restricted manner;
- presents a product influenced as to form or content by the exigencies of litigation;
- shows a lack of independence or a bias;
- has an interest in the outcome of the litigation, either because of a relationship with the party that retained his or her services or otherwise;
- advocates the position of the party that retained his or her services; or
- selectively examines only the evidence that supports his or her conclusions or accepts to examine only the evidence provided by the party that retained his or her services.'

[100] Mr Collett's evidence did not measure up to these standards. His area of expertise was said to be that of a qualified chartered accountant and auditor. The primary thrust of his evidence was to explain how an auditor should have gone about the audit of NPC's financial statements in the years in question and to criticise the audits undertaken by Mr Odendaal. His only qualification to give expert evidence of this nature arose from the fact that he held the degrees B Comm (1979) and Hons B Compt (1981) and had passed his board examinations and qualified as a chartered accountant in 1983. His only practical experience had been acquired while he was in training. He gave no evidence to suggest that he

had kept abreast of developments in the profession since he had left it fourteen years prior to commencing his investigation and 22 years prior to his giving evidence. He had never been responsible for an audit and had only once had some involvement in the audit of an agricultural co-operative. On leaving the accounting profession he had worked for a bank and been an adviser on the preparation of claims under a government export incentive scheme. Before turning his hand to 'forensic audits' he had been involved with a group of companies that apparently operated bottle stores. At every possible level his qualifications to express opinions on matters relating to an audit pales into insignificance when measured against that of Professor Wainer, Mr Hopkins, Mr Wixley and Mr Odendaal. The issues on which he was called to give evidence were not straightforward and concerned the judgment of an experienced auditor. He was in no position on the basis of either qualification or experience to express opinions on those matters and he should not have been permitted to do so.

[101] But Mr Collett's evidence went far beyond that of an expert witness in auditing matters. He professed to have been someone with experience in forensic and auditing investigations. Reference to his curriculum vitae showed that this was a field into which he ventured in the very year that he commenced the investigation into the affairs of NPC. Indeed the manner in which he set out his areas of alleged expertise in his expert summary suggested to the reader that the experience he claimed arose largely from his involvement in this case. Counsel rightly submitted that it was an unusual situation where the expertise claimed by the witness arose from the very matters in regard to which he was giving evidence.

[102] Mr Collett expressed strong views on how the business of NPC should have been run and concluded that its affairs were characterised by reckless credit mismanagement. He lacked any apparent qualification or experience to express these views. Unlike Dr Wentzel, for example, he did not come to the witness stand with many years of experience in the management of an agricultural co-operative. This lack of qualification did not deter him, as shown by the following examination of his principal reasons for concluding that something more than conditions in the agricultural sector and a shortage of capital were to blame for NPC's dire financial position.

[103] An important aspect of Mr Collett's thinking emerged early on in his expert summary when he made a comparison between the NPC and seven grain co-operatives dealing with mealies, in order to ascertain the tendencies and norms generally applicable in the agricultural industry in relation to the drought aid scheme, bad debts and provisions for bad debts. From the financial statements of the grain co-operatives and some industry figures obtained from another source he reached the conclusion that during the period under review the potato industry was more stable than the mealie industry and had done better than the mealie industry. He then undertook a comparison between the bad debt percentage of NPC and those of the grain co-operatives, from which he concluded that the members of NPC had generally generated sufficient funds from their crops to discharge their indebtedness to NPC and that the level of bad debts at NPC was abnormal and outside the norms for comparable co-operatives. This could not, so he said, be explained or justified by circumstances in the agricultural sector or poor potato harvests or any relatively greater risks attaching to the potato industry. Upon this conclusion he built his contention that the explanation was to be found elsewhere in reckless

mismanagement of credit by the credit department, its personnel and executive management. He repeated all this in his evidence in chief.

[104] The fundamental problem with this entire analysis was that, to use a homely expression, he was not comparing apples and apples, or, in its converse form applicable to this case, he was comparing potatoes and mealies, without any basis for doing so. From the evidence there are significant differences between the two. Five of the seven co-operatives he used for his comparison were far larger than NPC both in membership and in the extent of their business operations. Many members of NPC grew potatoes on a supplementary and subordinate basis to their growing mealies and were members of grain co-operatives, which they regarded as their principal co-operative. This would have affected at least some of their purchases. In the board minutes of 22 May 1992 there is reference to other co-operatives having financed their members' ventures into growing potatoes. The other co-operatives dealt with crops in addition to mealies, supplied equipment to their members that NPC did not supply and had additional sources of revenue, such as income from storage fees, which were not available to NPC. The marketing channels of the two were wholly different, with the grain co-operatives controlling the marketing of their members' crops, while NPC had little control over their members' marketing of potatoes. Enforcement of the statutory pledge was far easier for the grain co-operatives than for NPC. In addition during the period until 1992 the marketing of the produce of grain co-operatives was controlled under the Marketing Act of 1936. Another difference is that there was no evidence that it is possible, if mealie prices are high, for farmers to grow crops of mealies on an opportunistic basis, whilst there was evidence that this occurred with potatoes. A large portion of the mealie crop is sold to millers who produce staple food items such as

mealie meal and mealie rice and provide a stable market. The only similar outlet for potatoes mentioned in the papers is the production of potato chips.

[105] It was incumbent on NPC to lay a proper factual basis for this comparison but it did not do so. It was well aware that this evidence would be challenged, because PWC delivered an expert summary for Professor Blignaut challenging the comparison. Undeterred by his lack of comparable qualifications and experience to those of Professor Blignaut, a further expert summary was delivered in respect of Mr Collett in which he criticised in sarcastic tones the views of Professor Blignaut.[46] He then gave this evidence and sought to defend it in cross-examination.

[106] Mr Collett's attempts to defend this comparison under cross-examination showed him to be an unsatisfactory witness. He avoided answering questions, gave answers that were unresponsive and failed to deal with the substance of the challenge that his comparison was invalid and the conclusions drawn from it unjustified. The first and obvious reason for this was that he was testifying to matters far outside his area of expertise. This lack of expertise was highlighted at a later stage of his cross-examination when he was unwilling to deal with an auditing textbook directed at the factors to be taken into account in auditing an agricultural enterprise that said, contrary to his opinion, that the auditor had to take into account in the audit of debtors the likely realisation of standing crops. The reason given, that this was an American textbook and

---

[46] The summary contains expressions such as 'it is difficult to comprehend' and 'despite the concession that' and 'it is unclear' (I translate). The professor's statement that the comparison was impossible ('onmoontlik') is throughout contained in inverted commas to convey incredulity that he should express such an opinion. He purports to place Professor Blignaut's views in the correct perspective and said that he has no underlying basis for his opinions.

their standards might be different, was risible. Equally risible was his contention, after reluctantly conceding that the crop in the ground should be taken into account in assessing a debtor's likely ability to pay, that this would only be the case if harvesting the crop had commenced.

[107] The other key factor in Mr Collett's conclusion that there was something wrong in the credit department of NPC, arose from his rejecting the notion that its capital reserves were inadequate. This in turn flowed from his view of the true nature of NPC's business. The evidence in that regard was clear and is summarised in para 26. It showed that NPC had very little by way of a capital buffer to protect itself when faced with adverse trading circumstances of which the increase in bad debts was the most important. The need to build up its capital resources had been a constant theme throughout the period in reports by the Land Bank, the auditor and the directors at annual general meetings. While additional shares had been issued from time to time these were not paid-up but merely represented claims upon members at some future date. If the members were not discharging their indebtedness to NPC it is difficult to see how they could have met any such calls. In any event, apart from circumstances in the agricultural sector, another reason for NPC being unable to withstand the continued accumulation of bad debts was its poor capital position and its dependence on loan capital.

[108] Mr Collett was dismissive of the notion that the poor capital position of NPC had contributed to its financial woes. Although the Registrar of Co-operatives recommended that a capital base of 30 per cent of fixed capital from members and own resources and no more than 70 per cent loan capital should be the goal, he did not agree. His view was that NPC's business was essentially that of a financial institution providing

credit to its members that they would otherwise have had to obtain from sources such as commercial banks. To that end he compared NPC's capital ratio with those of two financial institutions, namely, Nedcor Bank and Standard Bank, two of the largest banks in South Africa, and found it to be adequate. He said that the Land Bank and other banks had less than 8 per cent own capital and asked why the NPC needed more. Furthermore he suggested that NPC's approach to credit control should follow the lines of these commercial banks and similar financial institutions.

[109] These views were challenged in cross-examination. It was suggested to Mr Collett that the Registrar of Co-operatives, with the expertise available to him, would better appreciate the capital requirements of co-operatives. His response was to say that a number of co-operatives did not meet the Registrar's standard. Elsewhere he said that he could never discover the basis for this norm. That was hardly to the point. Notwithstanding the views of the Registrar, supported by the board and the auditor, he did not see any reason to strengthen NPC's capital base. It was put to him that the *modus operandi* of NPC was that it purchased its members' production requirements from suppliers, thereby incurring a liability to those suppliers, which it discharged, and then sold those items to its members who, as a result, became indebted to NPC, but he demurred. His attitude was that the members of NPC purchased their own production requirements from suppliers and financed the purchases through loans from NPC. That was simply incorrect. The comparison with two large banks was unjustified.

[110] Throughout his evidence Mr Collett persisted with his contention that NPC could be properly compared with the grain co-operatives notwithstanding all the evidence to the contrary. He steadfastly supported

his comparison between NPC and commercial banks. He was adamant that his investigation had uncovered serious mismanagement of the credit department of the NPC, characterised by him as reckless and even dishonest. Yet he produced no evidence identifying any individual as having been guilty of such conduct. He was happy to tar the entire credit department and executive management with this brush, without identifying a single case where either the grant of credit, or the failure to recover an amount owing to NPC, was the result of recklessness or dishonesty. His approach was simply that everything was irregular, reckless or dishonest. He even went so far as to level allegations of tax fraud against Mr Odendaal in the face of evidence that the tax returns in regard to bad debts written off were in accordance with specific discussions with the revenue authorities.

[111] The trial judge identified many of these weaknesses in Mr Collett's evidence without linking them specifically to his standing and reliability as an expert witness. He noted that Mr Collett was reluctant to accept that climatic circumstances might have contributed to NPC's problems. As the judge correctly pointed out, had that not been a factor the experienced farmers making up the board and membership of NPC would not have accepted it as an explanation. He said that Mr Collett was reluctant to blame the directors for the problems or to accept that they had knowledge of the problems, but correctly held that the directors were fully aware of the situation. He accurately described Mr Collett as pedantic, rigid and dogmatic. He would brook no departure from the literal application of the credit policy, NPC's statute and the provisions of the Act. This led him to say that the loans by NPC to its subsidiaries were evidence of reckless mismanagement because the statutory formalities had not been observed,

when the loans were reflected in the financial statements and both the Land Bank and members were fully aware and approved of them.

[112] The trial judge also criticised Mr Collett for his lack of understanding of the business of NPC and his suggestion in a business plan that it should phase out the extension of credit and concentrate its efforts on the production of paper bags for potatoes. He had preconceived notions of how interest should be charged on outstanding accounts. His advice to the Northern Transvaal Co-operative diverged from his stance in regard to NPC. As a witness he contradicted himself and sought to avoid answering hypothetical questions. When he made concessions he did so reluctantly. All of this I endorse.

[113] This analysis exposed fundamental flaws in Mr Collett's approach and undermined his qualification to testify as an expert and the reliability of his evidence. When the standards enunciated by Justice Cresswell, and the approach suggested by Justice St-Pierre, are applied to his evidence, it is immediately apparent that it did not satisfy the tests for admissibility as expert opinion evidence. First, he laid no foundation for being regarded as an expert, save his qualifications as an accountant who had not been in practice for many years and had limited practical experience. Second, his opinions were based largely upon the hearsay evidence he had culled from various documents and were not founded on proven facts. Third, his evidence, fairly viewed, was nothing more than that of an advocate advancing the case of his client the NPC. Fourth, it was not objective but was directed at justifying the conclusions he had formed. He was unwilling to defer to the experience of those with far greater expertise in the matters under consideration than he. Fifth, it must be borne in mind that he not only undertook the original investigation leading to the claim,

but was intimately involved in the gathering of evidence and the pleaded formulation of the claim. He was also involved in the claim by and against the Land Bank and its resolution as well as being the moving spirit in the merger with Northern Transvaal Co-operative Ltd. In the result the clear impression and conclusion is that he was not truly independent of his client from whom his firm had undoubtedly earned very large sums of money.

[114] In summary therefore I conclude that Mr Collett was not an expert in any of the various areas in which he gave evidence, namely, accountancy standards, the proper conduct of an audit, the agricultural economy or the proper conduct of the business of an agricultural co-operative and in particular the administration of credit. Even had he any expertise in these areas, qualifying him to give opinion evidence as an expert:

- his opinions were expressed without any factual basis having been established by way of admissible evidence;
- he gave evidence in areas where he lacked expertise and not only did not identify them but pretended to an expertise he lacked;
- he was the person who devised the claim (as the judge said it was ‘sy maaksel’) and was for that and the other reasons set out in para 113 not truly independent;
- he effectively became the advocate for the claim’s merits;
- he disregarded or discounted any facts inconsistent with his own theories and conclusions;
- the presentation of his evidence was not only influenced by the exigencies of litigation, but directed the entire course of the litigation.

For all those reasons Mr Collett's evidence is of little or no value in this case and no finding adverse to PWC could or should have been based thereon.

Was reckless mismanagement nonetheless proved to have occurred?

[115] The judge's finding, referred to in para 76, that there was mismanagement of the credit department of NPC, cannot be supported, if by that he meant reckless mismanagement of credit. In my view all that the judge intended to find was that there had been mismanagement of the affairs of NPC in the respects he indicated, but without a finding of recklessness. His criticisms of Mr Collett's evidence as well as his favourable view of Messrs Marais and Greyling suggest that he would have rejected any such notion had it been made clear to him that this was the basis of NPC's case. He said of Mr Marais that if he was typical of the quality and calibre of NPC's personnel it was a pity that NPC could not overcome its difficulties. Mr Greyling likewise made a favourable impression on him.

[116] This highlighted the inexplicable failure of NPC to call a single witness to testify to the factual matters that were the subject of much of Mr Collett's evidence. Mr Pieterse, a director of NPC from 1987 and its chairman from 1995, as well as a member of its credit committee from inception, was available to give evidence but did not do so. We accordingly have no direct evidence of what the board did about the implementation of the credit policy and the grant and recovery of credit. Although the entire credit department was described as having been reckless or dishonest there was no suggestion that any individual had been disciplined for such conduct. Apart from generalities no individual was pointed out as having been responsible for reckless or dishonest conduct.

None of the officials who worked with Mr Odendaal during the course of the audits were called to support the contention that the audits were merely a smokescreen, in which he simply endorsed the views of management without demur or investigation and that there were in reality no audits worthy of the name.

[117] The expert evidence of Professor Wainer and Mr Hopkins, both of whom were instructed to express their opinions on Mr Odendaal's audits on the hypothesis that there had been reckless mismanagement of credit at NPC, was contaminated by that assumption. It also renders it problematic to rely on their evidence for the purpose of identifying the mismanagement they had been told to assume was present.

[118] The shortcomings in the evidence were debated with counsel who responded by saying that if we ourselves examined the files Mr Collett had prepared, we would draw the same inferences as he had done. For this purpose it was suggested that we did not need to rely on any expertise claimed by Mr Collett and should simply treat his evidence as a helpful way in which to reduce a vast amount of factual material to manageable proportions. I doubt very much whether that is a permissible approach for the court to take, but a brief survey of the various respects in which it was said that there was reckless mismanagement does not to my mind support Mr Collett's conclusions.

[119] Nine grounds were advanced in the particulars of claim for saying that reckless mismanagement had occurred, but in the heads of argument reliance was only placed on six. Two of these were that in many of the debtors' files Mr Collett's investigation team had not found either applications for credit or current balance sheets for the applicants and that

no verification of assets and liabilities of debtors was undertaken. It was said that the absence of these documents meant that the risk of granting credit was raised and this warranted further investigation by the auditors when they audited the financial statements. There are two problems with this. The first is that there was no evidence that the documents available to Mr Collett were complete and his evidence was that there were missing files and that his access to documents was often restricted. The fact that Mrs van der Merwe from his investigating team testified that the files they prepared included all the documents they received from NPC was of no assistance in the absence of evidence from within NPC that the files were complete and no documents had been lost, disposed of or destroyed during this period of fourteen years. In some instances Mr Collett said that no balance sheets were provided, for example, with Mr T G van Zyl, when Mr Odendaal's notes showed that he had seen balance sheets. The second problem is, that in the absence of any evidence about the circumstances in which credit was granted to these individuals or the reasons therefor, it is impossible to say that the presence or absence of credit application forms and balance sheets would either have altered the decision to grant credit or had any bearing on the risk undertaken by NPC. If Mr Collett's investigation had extended to all the debtors' files instead of the 120 that he started with and narrowed down over time, it might well have been discovered that the same situation in regard to credit applications and balance sheets prevailed in regard to the grant of credit to people who were entirely creditworthy. That would have tended to refute the conclusion that he drew from their absence in certain cases.

[120] It was argued that credit was granted without authorisation. This was based on the fact that the so-called 'green book', recording decisions of the credit committee on credit limits, and the computer records showing

the extent of credit granted did not coincide. However, Mr Greyling, who dealt with this in his evidence, said expressly that Mr van Vuuren had the ability by using a password (and presumably therefore the authority) to alter the credit limits reflected on the system. Mr Greyling was at pains to say that he was not able to say that the grant of additional credit over and above that reflected in the green book was unauthorised. That disposed of this point.

[121] The next ground for contending that there was reckless mismanagement of credit was that debtors were enrolled in the drought aid scheme although they did not qualify therefor. In evidence it emerged that the Land Bank investigated every claim made under the scheme to see whether the claim was justified and that every claim had been paid so that there were none outstanding. The final review of claims by the Land Bank had taken place in 1993 and all the claims submitted were paid. Accordingly the state institutions concerned with the implementation of the scheme satisfied themselves that the claims submitted under it were valid. In those circumstances this ground was without substance. That it was persisted in, and indeed that it was used as the basis for including in the particulars of claim and pursuing until the stage of judgment a claim for over R11 million, suggested that Mr Collett's approach to the problems he allegedly discovered through his investigations was directed at devising claims rather than undertaking an independent investigation.

[122] The last two grounds pursued in argument were linked. They were the alleged failure to obtain adequate security from debtors and the failure to enforce the statutory pledge strictly, contrary so it was said, to the credit policy laid down by the board. The argument ignored the fact that obtaining such security was extremely difficult as pointed out above, in

paras 30 and 31. It also assumed that the strict enforcement of the statutory pledge was feasible in practical terms. However, the evidence of Mr Marais suggested otherwise. The members were under no obligation to market their potatoes through the agents appointed by NPC and many did not do so. That immediately caused problems in enforcing the pledge. Second, the pledge was of limited duration so it could not be used to cover carry-over debt. Third, there was evidence that in a number of cases NPC agreed to release part of the proceeds of a member's crops to the member notwithstanding that they had not discharged their entire indebtedness to NPC. There was no evidence of why this was done in any particular case and, in the absence of such evidence, one cannot conclude that the reasons for doing so were anything other than straightforward business decisions at the time.

[123] NPC's counsel rightly said that the only question in this regard was whether the writing off of bad debts was, on the probabilities, the result of reckless credit mismanagement or the result of ordinary trading and legitimate decisions by NPC's directors and management. It was for NPC to show that it was the former and for that purpose it relied on the evidence, both factual and opinion, of Mr Collett. Once that evidence is rejected, as in my view it must be, it follows that NPC failed to prove that there was reckless mismanagement of credit. On that ground alone its claim should have failed and this appeal must succeed. However, that would follow even if the mismanagement on which NPC relied involved no recklessness or irregularity or dishonesty, but arose from a flawed business approach and an unduly lenient approach to the grant of credit and the recovery of debts. Assuming that PWC nonetheless breached it contractual obligations in the performance of the annual audits and that

this was due to negligence on its part, the damages claimed by NPC were not in my view caused by their negligence.

Causation

[124] For the purposes of this portion of the judgment I will assume against PWC that it did indeed breach its contractual obligations in regard to the assessment of the value to be ascribed to debtors in the annual financial statements from year to year and that this was due to negligence on the part of the audit team lead by Mr Odendaal. Were I convinced that this was not the case I would have said so, but it seems to me that some at least of the criticisms by Professor Wainer and Mr Hopkins, when viewed in the light of the at times somewhat cautious support given to Mr Odendaal by Mr Wixley, were warranted.

[125] Mr Odendaal's approach to the assessment of the recoverability of debtors was to review a list of suggested write-offs prepared by management in the light of each debtor's file in discussion with the regional field officer or credit officer. In the course of this process he would identify additional debtors or amounts that in his view should also have been treated as bad or potentially irrecoverable, and the overall figure included in the accounts would then be resolved between him and management. From 1984 until 1990 he nonetheless reported that he could not express a view on the recoverability of the debts and that his audit was subject to that qualification. In 1991 he withheld any audit opinion on the grounds that he was unable to express a view on the recoverability of debtors or the continued availability of finance.

[126] I think there is force in the criticism that Mr Odendaal should have been more concerned at the annual escalation in both debtors and bad

debts, as well as the fact that from 1984 to 1990 such a high proportion of debts fell under the drought aid scheme. That warranted a closer examination of the credit history of the debtors, something that Mr Odendaal said that he did not undertake. It appears that where a debtor had furnished security he was inclined to accept that security at face value. That was not a safe approach particularly with notarial bonds. The judge correctly said that his approach of taking the likely harvest at year end into account as the primary source of recovery of debts made sense. However, the records, in the form of his audit working papers, do not suggest that he made in-depth enquiries in that regard beyond the estimates furnished to him by the officials. Whilst those were generally 85 per cent accurate according to Mr Marais, there is no indication in the case of major troublesome debtors that he enquired further about such estimates or drew any conclusions from the failure of those debtors to reduce their indebtedness from year to year. His disregard of events, such as the remittal to debtors of part of the proceeds of their harvests, after the end of the financial year but prior to the completion of the audit, on the grounds that this was irrelevant in the light of the matching principle, made little sense when he was aware that this was a regular feature of NPC's business and its extent across the board could have been estimated from past history.

[127] Mr Odendaal was undoubtedly aware that the credit policy laid down by the board was not strictly adhered to and that the board did not always sanction departures from it. There is merit in the trial judge's criticism that he appeared to try and distance himself from any responsibility for the way in which credit was granted. This ignored the fact that it was for him to report on whether the financial statements, in which debtors played a key role, reflected a fair picture of NPC's finances.

If credit was being granted too leniently then this could impact on the recoverability of debtors and the matters on which his opinion was sought. He was also aware that the statutory pledge was not well enforced. Both of these had great potential significance for the recoverability of debts and there is substance in the criticism that he should have investigated them further.

[128] I also think that the brief reasons given by Mr Odendaal for qualifying his reports from 1984 to 1991 did not meet the statutory standard of setting forth the facts and circumstances that prevented him from giving an unqualified report. The terms of those qualifications have been set out elsewhere. They were elliptic, expressed as a broad generality ('current economic circumstances in the agricultural industry') and lacking the detail one expects when facts and circumstances have to be set out. They certainly did not convey to anyone that he had reservations about the ability of NPC to recover debts under the drought aid scheme or about the continued availability of Land Bank finance, although those reasons featured prominently in his notes and his evidence. That was clearly important in view of the extent of those debtors and the heavy dependence on the Land Bank for finance.

[129] One other issue was the manner in which NPC dealt with bad debts. These were written off against a suspense account and then a sum would be written back in each year as recoveries. As early as 1990 the Land Bank had objected to this mode of accounting and despite attempts by NPC to justify it insisted that it should be changed and that a proper provision should be made in the accounts for bad debts. Not only did NPC not act upon this instruction from the Land Bank, but Mr Odendaal was happy to allow it to continue. I do not agree with Mr Wixley when he says that this

was acceptable because it was a fairly widespread practice at the time in a number of companies and could be regarded as permissible in terms of what he referred to as 'little GAAP'. It was not a satisfactory mode of reflecting the position in regard to provisions for bad debts and the writing off of bad debts and Mr Odendaal should, in my view, have raised a clear objection to it.

[130] Accepting for present purposes that these and possibly other shortcomings in the audit amounted to breaches of contract and were the result of negligence, the issue of causation of loss looms large. The loss that NPC sought to recover from PWC was the amounts written off in respect ultimately of 46 debtors. In order to lay that at the door of PWC it was necessary to show that had PWC's reports in the financial statements been qualified in far greater detail so as to highlight the problems NPC was experiencing with bad debts, or it had gone to the extent of withholding an audit opinion, steps would have been taken by the members in general meeting to ensure that the problems were resolved and that either credit would not have been extended to those debtors, or it would have been recovered. This is always the first step in any enquiry into causation.[47]

[131] The judge thought that it was obvious that the members would have done something about the problems, had they received proper reports from PWC, and that it was unnecessary for there to be any evidence on the point.[48] The heads of argument on behalf of NPC also adopted this

---

[47] *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700E-I. I do not think that anything said in *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC) paras 40 to 50 detracts from this approach in this case.

[48] 'Na my mening is dit nie nodig om getuienis aan te bied oor iets wat by wyse van 'n voor die hand liggende afleiding aanvaar kan word.'

approach saying that steps would have been taken immediately to set things to rights, either by the members or the Land Bank or the Registrar of Co-operatives. It was said that it should be assumed that the members would have acted in a responsible fashion.

[132] I am unconvinced that this is correct. The evidence does not suggest, much less establish on a balance of probabilities, that more strident warnings from the auditor about NPC's vulnerability to bad debts, and expressly that the credit policy was not being stringently applied and the statutory pledge was not being enforced, would have had any impact upon the members of NPC. The possibilities postulated in the particulars of claim were the taking of disciplinary steps against responsible employees including possibly dismissal and the appointment of new management and officials or additional staff in conjunction with further instructions from the board in relation to compliance with the credit policy. Yet there is no evidence that any of these steps were taken in 1997 when matters came to a head. Why then would it have happened at an earlier stage? It is true that attorneys were instructed in conjunction with Mr Collett's enquiry to pursue debtors, but the result seems to have been insolvencies on a large scale rather than recovery of debts. And this was accompanied by the resignation of members and the effective collapse of NPC's business over the following three years.

[133] For seven years from 1984 to 1991 the members of NPC were told every year that the auditors were unable to express any opinion on the recoverability of the debtors that constituted the major asset and the principal source of income for NPC, as well as the security for its indebtedness to the Land Bank. Every year the amounts written off as bad debts mounted significantly. In addition they received regular warnings

from the directors regarding the need to control debtors and recover what was owing to NPC. Those who attended annual general meetings – and only a handful did in person and a slightly greater number by proxy – were given further warnings by both the auditor and on occasions representatives of the Land Bank. In 1983 they had been told that but for the intervention of state aid NPC would have been in a serious financial disposition (sic). In 1993 they were told that the payment received on the withdrawal of the state guarantee was a godsend without which NPC could not have survived. They would have seen that bad debts written off in that year were over R11 million. They would also have seen that the provision for bad debts remained static.

[134] Yet, notwithstanding the constant drumbeat of bad news about NPC's poor financial position and its hand to mouth approach to running its affairs, there is not the slightest jot or tittle of evidence that any member at any stage expressed concern or disquiet at the position or asked any questions or reacted in any way to what they were being told. Neither Mr Pieterse, nor any other board member, came to give evidence about their own conduct during this period and what they did to address and resolve the situation. Nor did he or anyone else explain what steps were taken in 1997 and why those were unsuccessful or why other steps taken at an earlier stage would have resolved the problem. No-one gave evidence to the effect that the form and tenor of the financial statements and the audit reports led them to believe that all was well and could safely be left to continue.

[135] There may be cases where it can be said with confidence that if a particular breach of contract or wrongful act had not occurred it would be obvious what would have resulted. One is entitled, in looking at causation,

to use some common sense.[49] But whether the obvious would have occurred must be measured against the objective facts confronting the court. A recent example of a situation where the apparently obvious had to give way to other facts is provided by *Newcastle International Airport Ltd v Eversheds LLP*.[50] There the plaintiff engaged the defendant, a well-known firm of solicitors, to prepare new service contracts for the directors of the company. They did so on the instruction of one of the directors and the contracts contained provisions for the payment of a substantial bonus to the directors if they were able successfully to negotiate a refinancing arrangement for the company. The court held that the solicitors were under an obligation to the company when presenting the draft contracts to the remuneration committee to provide the chair with a user friendly memorandum explaining in clear language the terms and effect of the contract. They were negligent in not doing so and the company brought an action against the solicitors for damages represented by the amount of the bonuses the two directors had received.

[136] In dealing with causation Rimer LJ said that had the solicitors prepared such a memorandum, the obvious answer to whether the chair of the remuneration committee would have read and acted upon it was 'of course', especially as the chair was described by the judge as being 'capable, experienced, worldly and intelligent' with a 'long and impressive track record of work in the field of corporate finance'. But, in the light of the evidence given by her, the court concluded that her antipathy to lawyers and contracts; her preference for the broad picture rather than detail; her practice of 'skimming' documents and ignoring attachments;

---

[49] *Lee*, supra, para 49.
[50] *Newcastle International Airport Ltd v Eversheds LLP* [2013] EWCA Civ 1514; [2014] 2 All ER 728 (CA). paras 86 to 100.

and the fact that she consciously delegated the issues surrounding the contracts to the directors concerned, led to the conclusion that she would not have read any memorandum had the solicitors prepared one, or, if she had read it, she would not have understood it, and that the contracts would have been signed in any event.

[137] In this case, however obvious it may have seemed to the judge that a more alarmist report from the auditors would have provoked not only a reaction, but also the taking of effective remedial steps by the members, I am unable to share his view in the light of the facts summarised above. The members were not – contrary to Mr Collett's evidence – interested in NPC as an investment that would generate a return. They were concerned with its ability to harness their collective purchasing power to extract reasonable prices from suppliers of their needs in relation to production material, and its ability to assist them by allowing them credit on their purchases. They may well have thought, especially in the 1980s, that the government, via the Land Bank, would be unwilling to withdraw support from the agricultural sector and therefore NPC. It did not serve their interests to restrict the basis upon which NPC made credit available to them and they would no doubt have supported a flexible or even benevolent approach to the grant of credit and the recovery of payment. It would also not have served their interests to have the statutory pledge strictly enforced, which in many instances would have meant that they received no return on their potato crops.

[138] I am fortified in this view by the fact that the reports that were made by the auditors, when read in the light of the financial statements, did not attract any reaction from members. The 1991 and 1992 financial years provide the clearest possible example of this. An amount of R1.3 million

was written off as bad debts in 1991, but the directors' report said that potentially another R5.2 million might be irrecoverable. This did not attract any response from members. Then in 1992, when NPC received the sum of R28.5 million from government the accounts showed R11.5 million being written off against bad debts, although it was explained that this was in effect some R18 million. This too attracted no response from members. For my part I am unable against that background to see that it was obvious that the members would have taken effective remedial steps if the auditors had reported differently. If those simple facts did not cause disquiet, or even panic, I fail to see what would.

[139] We cannot ignore what did happen when the auditors withheld an opinion, on the grounds that the uncertainties surrounding NPC's finances and its ability to continue as a going concern precluded them from expressing an opinion. In effect the business collapsed. It is difficult to see how an equally adverse audit opinion at an earlier stage would not have had a similar result. But one cannot build a claim for damages against the auditor on the basis that, if they had done their job properly, the business would have gone into liquidation at an earlier date and therefore the auditors must be held liable for all debts incurred after that date. Such a claim was rejected in *Galoo*[51] on the grounds that any negligence by the auditor had merely given rise to the opportunity for the business to suffer loss in the future and not to the loss caused by its continuing to trade. The losses claimed by NPC in this case are losses that flowed from the conduct of its business in the ordinary course and such losses do not ordinarily flow from statements in the accounts of the company, but from its trading

---

[51] *Galoo Ltd (in liquidation) and others v Bright Graeme Murray (a firm) and another* [1995] 1 All ER 16 (CA).

activities. Whether it suffers a loss from those activities will depend upon the prudence of its trading decisions, market conditions and the like.[52]

[140] There was one other insuperable hurdle for NPC to surmount if it was to show that it had suffered any loss flowing from deficiencies in PWC's reports to members. It formulated its claim on the basis of 46 debts that were written off at various times between 1990 and 1998, according to its schedule of damages. In order to substantiate that claim it needed to prove that if PWC had reported differently either these debts would not have been incurred or they would have been repaid. It was quite unable to do this as emerged at an early stage of Mr Collett's cross-examination. He was asked if, in his opinion, that would have been the result, and he answered that both were possible. It was put to him that at one pole was a situation where none of the farmers received credit and at the other was a situation where they all received credit and all repaid it. In between those poles there were an enormous variety of possibilities. This he accepted. When it was put to him that it was mere guesswork as to what would have happened, he answered:

'Wel dit sou die een of die ander moes wees of gedeeltelik die een of die ander.'
(Well it would have been the one or the other or partly the one or the other.')

Further cross-examination elicited the response that only an in in-depth audit of each individual farmer would have revealed what would have happened had the auditors reported differently. The answer lay somewhere in the uncertain terrain between the two extremes. What could not be said was that NPC would not have suffered any of these losses. Where it gave

---

[52] *Galoo, op cit,* 29e-g. See also *Alexander and others v Cambridge Credit Corporation Ltd and another* (1987) 9 NSWLR 310 at 359C-E.

credit either the whole debt or a great deal of the debt or some of the debt could probably have been recovered .[53]

[141] This evidence alone should have spelled the death knell of NPC's case. That conclusion was reinforced by an examination of some of the debtors' files, which indicated that some matters simply could not be laid at the door of the auditors. In the case of the largest of all, Mr Coleman, who eventually owed over R7 million, a meeting was held with the vice-chairman of NPC, Mr van Rensburg, in June 1995 to discuss his situation. He already owed some R2 million and Mr Marais' note of the meeting recorded that the NPC found itself in a bind, where it either had to withdraw and try to recover what he owed, or continue and extend further credit.[54] The decision was made, unwisely as it transpired, to make available a further R3 million in credit. It was, however, supported by various estimates of the likely proceeds of his crop that suggested that it would suffice to discharge all or most of his debts.

[142] Other similar situations emerge from the documents. The debt of Junior Boerdery was incurred entirely in the period after PWC ceased to be NPC's auditors. Yet, even with Mr Collett's input, NPC was unable to prevent the loan being made. That is hardly surprising. From the time it first became a member of NPC in 1991 Junior Boerdery had been an impeccable debtor. Going back in time to 29 August 1990, at a directors' meeting on that day the board approved an extension of time for payment of Tonkin Uitval Boerdery's (Tonkin) debt of some R573 264. At the same time it approved an increase in its credit limit to R1 085 000. Two

---

[53] '… kon die hele skuld of 'n groot deel of 'n gedeelte daarvan dalk verhaal gewees het.'
[54] 'NAK is in 'n knyptang (moet ons uitklim of moet ons aangaan ?)'

years later in 1992 Tonkin was liquidated owing NPC nearly R1.3 million. But in the meantime it had made payments exceeding R3 million to NPC and at all times its crop estimates and actual income from those crops exceeded its indebtedness to NPC. The decisions to afford it additional credit may in retrospect have been unwise, but they were decisions in the ordinary course of business and Mr Odendaal lacked any proper basis for disagreeing with management on their impact on NPC's business.

[143] These instances not only reinforce the point that it was impossible to say what would have happened with these debtors had the auditors reported differently at different times, but they demonstrate that there were other intervening factors involved including conscious decisions by the board to extend credit to members whose financial circumstances were poor. Four of the major debtors included in NPC's claim, namely, Messrs Ferreira, Bekker, Coleman and Van Vuuren, representing in all more than one quarter of the amount for which judgment was given, were considered and discussed at board meetings. The credit committee discussed the position of Messrs Saaiman and Wilson and the two Van der Walts, all of whom were ultimately large debtors, whose debts were written off. Yet, despite the allegation that the board was misled in regard to the position of debtors, no member of the board was called to substantiate this.

[144] It follows that even had NPC pursued its claim on a narrower basis, alleging merely that the administration of credit by its credit department had been inept and that a proper audit would have revealed this, it would not justify the claims that it advanced in this action. On that ground also the appeal has to be upheld.

Prescription

[145] Summons in this case was issued on 16 November 1999. By 15 November 1996 all of the claims, bar possibly any that arose in relation to the 1996/1997 financial year, had arisen. The question is therefore whether by that date NPC had knowledge of the identity of the debtor and of the facts from which the claim arose or could by the exercise of reasonable care have acquired that knowledge. (Section 12(3) of the Prescription Act 68 of 1969). In a line of cases commencing with *Drennan Maud & Partners v Pennington Town Board*[55] this court has consistently held that all that is required is knowledge of the minimum facts required to institute action. It is unnecessary for the claimant to be aware of the legal consequences of those facts. Where the claimant does not have actual knowledge of those facts, but could by the exercise of reasonable care have acquired that knowledge, that is equivalent to actual knowledge.

[146] The issue in this case relates to the identity of the persons whose knowledge is relevant to the commencement of prescription. The trial court held that, as the responsibility of the auditors was to report to the members of NPC, it was their knowledge that was relevant and it held that they did not have knowledge of facts giving rise to a claim against PWC, nor could they have acquired them by the exercise of reasonable care.

[147] I am not sure that I share the judge's view on the knowledge or ability to acquire it of the members of NPC. As recorded earlier there were

---

[55] *Drennan Maud & Partners v Pennington Town Board* 1998 (3) 200 (SCA) at 209F-G. The line continues through *Van Staden v Fourie* 1989 (3) SA 200 (A) at 216B – F; *Nedcor Bank Bpk v Regering van die Republiek van Suid-Afrika* 2001 (1) SA 987 (SCA) ([2001] 1 All SA 107) paras 11 – 13; *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng* 2009 (3) SA 577 (SCA) ([2009] 3 All SA 475) para 37; and *Claasen v Bester* 2012 (2) SA 404 (SCA) paras 10 – 16 to *Macleod v Kweyiya* 2013 (6) SA 1 (SCA) para 9.

many warnings given to them about the potential problems with bad debts and, had they responded to this information by insisting that the board make diligent enquiries into the situation, they would have discovered all the information known to the board. But, be that as it may, it is unnecessary for me to take this any further because it was not in my opinion their actual knowledge or the knowledge that they could have acquired by the exercise of reasonable care that mattered, but the knowledge of the board members.

[148] When one is concerned with the knowledge of a corporate entity such as NPC it is necessary to identify the natural persons whose knowledge is to be taken to be the knowledge of the corporate entity. This is a search for what Lord Hoffmann[56] referred to as the rules of attribution by which courts determine:

'Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc of the company?'

[149] The present claim is one by NPC, not by its members. Indeed, one of the reasons that it has been held that shareholders of a company do not have a claim for damages against the auditors for damages arising from negligent audit reports is that the company has such a claim and is taken to pursue it in the interests of its members.[57] But that cannot mean that in the context of a claim by the corporate entity against its auditors it is the knowledge of the shareholders or, as in this case, the members, that is relevant for the purposes of the commencement of the running of prescription. When prescription is raised against a corporate entity the

---

[56] *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 (PC) at 507F. Cited with approval in *Northview Shopping Centre (Pty) Ltd v Revelas Properties Jhb CC and Another* 2010 (3) SA 630 (SCA) para 20.

[57] *Caparo Industries plc v Dickman and others* [1990] 1 All ER 568 (HL) at 580 d-f.

ordinary rule of attribution of knowledge to the company of the knowledge of natural persons of the facts giving rise to the claim, is satisfied if the members of the board of directors have that knowledge, or could acquire it if they took reasonable care. It is unnecessary for the purposes of this case to consider whether the knowledge of other persons within the entity would also be attributed to it for the purposes of prescription. It suffices that the directors had knowledge of the facts giving rise to the claim, or could have acquired such knowledge by taking reasonable care. It was pointed out to counsel for NPC that he was in effect urging us to formulate a special rule of attribution of knowledge for the purposes of prescription and applicable only to claims against auditors arising from deficiencies in their reports to members. Understandably he made no submissions in support of such a rule.

[150] On that factual question there is a clear finding by the trial court that the directors had that knowledge. It was in my view justified on the evidence, but even if they did not have actual knowledge they could have acquired it by the exercise of reasonable care. The directors knew of all the problems relating to bad debts and the shortage of capital other than loan capital. They laid down the credit policy, and either knew that it was not being implemented as strictly as their reports to members suggested, or could, by taking reasonable care, have ascertained the true position. They were regularly told who the major problem debtors were and they could readily have investigated and unearthed the true position in relation to these debtors, if in fact they did not do so. All of this would have enabled them to assess whether the financial statements in regard to debtors painted a fair picture and if they did not, enabled NPC to proceed against the auditors for any loss it had suffered as a result of their defective audits.

[151] In those circumstances the plea of prescription should have succeeded in relation to the claims against the second, third and fourth appellants and at least in part against the fifth appellant. As their appeal in any event succeeds on the other grounds set out in this judgment it is unnecessary to explore the extent to which the plea should have been upheld in relation to the fifth appellant.

Costs

[152] The appeals of all the second to fifth appellants (PWC) against the judgments in terms of which they were declared to be liable to compensate NPC for damages and the judgment in which that liability was quantified must succeed. That success carries with it an order of costs including the costs of two counsel. Concomitantly NPC's cross-appeal against the quantum of the damages awarded to it must be dismissed with costs, including the costs of two counsel. Before the issue of the practice directive in regard to the set-down and hearing of this appeal, PWC brought an application for the separation of the issues relating to hearsay evidence and prescription. In the practice directive that application was adjourned on the basis that it would be dealt with in the course of the appeal. It attracted no argument, written or oral. Accordingly we make no order in respect of the costs of that application.

[153] PWC Inc has a separate appeal against the limited order for costs granted in its favour by the trial court. The justification for that order was that it should have taken exception to the claim. That was fallacious as its potential liability arose from the factual allegation that it had assumed liability for the debts of the earlier partnerships constituting PWC. Its appeal must therefore succeed. However, as the trial and appeal were conducted by PWC and PWC Inc through the same attorneys and counsel

using the same witnesses, it seems to me that it would be appropriate to order that the respondents bear the appellants' costs of the trial and the appeal jointly and severally the one paying the other to be absolved, without distinguishing between the costs of PWC Inc and those of PWC.

[154] Not content with an order for costs in their favour, PWC and PWC Inc urged us to make an order for costs on the attorney and client scale against the respondents on the basis of the treatment of Mr Odendaal, both in regard to the allegations of dishonesty that peppered both his cross-examination and the submissions made in both the trial court and this court concerning his integrity and reliability as a witness, and in regard to the allegations of tax fraud levelled against him. As to the cross-examination it was in my view hostile and aggressive, with constant and frequently misplaced statements that Mr Odendaal was not answering the question and liberally speckled with comments by counsel about the quality of Mr Odendaal's answers. On many aspects the cross-examiner quibbled over matters of fine detail to little purpose. But, as the judge noted in his judgment, Mr Odendaal was not always a responsive witness and he allowed himself to become irritated with questions. There were undoubtedly weaknesses in his recollection of matters – hardly surprising after the passage of many years – but some of the shortcomings in his evidence were borne of a desire to defend himself and his work at all costs, even when not supported by his own audit notes. Whilst the cross-examiner's approach and manner of cross-examination and his attitude towards Mr Odendaal are to be deprecated and verged on the abusive, that does not in my view justify an order for attorney and client costs, especially as the beneficiaries of that order would be the appellants and not Mr Odendaal.

[155] The allegations of tax fraud were more serious, as one would expect when that type of allegation is levelled against a person whose work must frequently bear the scrutiny of the revenue authorities. However, I think that Mr Odendaal's standing and stature as an accountant and auditor will be more than adequately vindicated by saying that in my view there was no substance in those allegations and that Mr Odendaal was entitled to take umbrage, as he did, when they were levelled against him. It does not call for a special order of costs in favour of the appellants.

[156] It is desirable that at this point I deal with one other matter in regard to which Mr Odendaal's credibility was subjected to attack. Indeed, in this court, it became the cornerstone for the argument about his credibility. That was a note made by Mr Wixley in the course of a conference he had with Mr Odendaal for the purpose of informing himself of matters relevant to his own expert testimony. The note dealt with Mr Odendaal's approach to the assessment of the amounts to be written off as bad debts and to the assessment of the value and recoverability of the debtors' book. It recorded that his methodology was to look at the state of the current crop, the strength of the individual debtor's balance sheet and security. Doubtful debtors were marked and discussed and the note recorded that, unless further information was obtained, Mr Odendaal would 'insist' on the debtor being written off. Then follows the sentence on which the attack on his credibility depended. It read:

'In some years the co-op could not afford the full write-off & in those years the audit report was qualified.'

[157] After this note was disclosed, in the course of the cross-examination of Mr Wixley, it was put to Mr Wixley that it showed that Mr Odendaal colluded with management to present false accounts to members and made

a false report to members. Mr Wixley made some concessions in that regard, but said in re-examination that he could not be sure that his note was entirely accurate or that he had correctly understood and recorded Mr Odendaal's point. When his cross-examination was finished, an application was made to recall Mr Odendaal to deal with the note's contents. That application was opposed by NPC and refused. I have no doubt that NPC was wrong to oppose it and that the judge erred in refusing to permit Mr Odendaal to be recalled to testify and be cross-examined in relation to it. It was apparent that counsel for NPC intended to make use of the note for the purpose of impugning Mr Odendaal's credibility and the result of the judge's order was that it was used for that purpose without Mr Odendaal having been afforded any opportunity to defend himself. The note was succinct and in my view did not necessarily bear the meaning attributed to it by counsel. But it is not for this court at this stage of the matter to speculate about the circumstances in which Mr Wixley came to make a note in those terms, or whether he misunderstood Mr Odendaal. It suffices to say that in my view the attacks upon Mr Odendaal's credibility and personal integrity based on the contents of this note were unwarranted in circumstances where he was denied an opportunity to defend himself.

[158] Earlier in this judgment I said that I would comment on the conduct of the trial and how it assumed the proportions that it did. Much of the blame must be laid at the doors of those responsible for the presentation of the case. There was no justification for it to have been conducted on the basis of Mr Collett being the principal witness, instead of following the obvious course of calling the witnesses of fact from NPC who could have described the manner in which it conducted business over the years in question and given first-hand evidence concerning its problems. Calling Mr Collett instead of those with personal knowledge gives rise to the

suspicion that had those witnesses been called their evidence would not have supported his conclusions.

[159] I have already dealt with the fact that much of Mr Collett's evidence was hearsay and how that should have been dealt with to forestall a situation where the bulk of the evidence had been presented on an inadmissible basis impossible to remedy at the later stages of the trial. The same is true of that part of his evidence that was presented as the opinion evidence of an expert witness. It is impossible to discern why his expertise was not challenged at a very early stage of the case on the grounds that he was not an expert in the fields in which he claimed expertise, namely accountancy and auditing. Nor was he an expert in the matters on which he intended to give evidence such as the agricultural industry; the nature of NPC's business; and the proper way in which to operate the credit function of an agricultural co-operative. In respect of these he was not an expert at all. Had such a challenge been advanced on the basis of what was contained in his expert summary and some evidence in respect of his credentials as an expert witness, it should have been upheld. It may be that counsel judged that raising these objections would not have led to a favourable ruling from the trial judge, but it is unfortunate that we cannot know that because the issue was not raised directly. All that I can say is that if these objections had been timeously raised and upheld, as they ought to have been, it is unlikely that this litigation would have become the marathon that it did.

[160] One other factor that must be mentioned as a cause of the inordinate length of this litigation is the manner in which the principal witnesses were led and cross-examined. Invariably the experts were led by taking them through their expert summaries and related documents in

inordinate, dreary and unnecessary detail. All of the accountants trawled through the provisions of GAAS even though the text had been agreed, and was both readily understandable and available for the judge to read. It turned out, hardly surprisingly, that they were all reading the same text and understood it in much the same way. That was unnecessary and is not the purpose of expert evidence. There was a complete failure on both sides to recognise that:

'The expert may be tendered for cross-examination upon his report alone, without additional oral examination, or after only limited questioning:

"as a general rule the report of an expert witness can be read as his evidence in chief, subject only to supplementary questions necessary for explanation or amplification of the report."'[58]

[161] Lastly not only was the evidence in chief quite unnecessarily prolix, but in general the same was true of the cross-examination. I exempt from this comment the cross-examination of leading counsel who originally appeared for PWC and PWC Inc. When he commenced his cross-examination Mr Collett's evidence stretched over some 6 800 pages of transcript and had canvassed something in excess of 100 000 documents. Measured against that his cross-examination from the outset was to the point and exposed many of Mr Collett's weaknesses as a witness. But as to the balance far too much time was spent examining him on documents about which he had no personal knowledge. The cross-examination of Mr Odendaal has already been commented on and I highlight the point the judge made that, in many respects, it was simply quibbling over detail of little relevance and seeking to advance hopeless arguments. The cross-examination of all the experts also tended towards nit-picking examination

---

[58] Hodgkinson, supra, 109-110 citing Sheen J in *The Capitaine Le Goff* [1981] 1 Lloyd's Rep 322 (QB(Adm Ct)) at 325.

of relatively minor points, instead of focussing on the central issues. This contributed greatly to the duration of the trial. It did little to clarify issues and led as I said in paragraph 3 to a situation where it was very difficult to discern the wood for the trees. It is incumbent upon judges seized with the task of hearing cases of this potential magnitude to exercise control over the conduct of proceedings, by taking the kind of steps indicated in this judgment, to prevent them from assuming unmanageable proportions, to the detriment and cost of the parties and society, by consuming scarce judicial resources.

Result

[162] I make the following order, incorporating the orders flowing from my brother Koen AJA's judgment dealing with the ancillary costs orders. The order is as follows:

1 The appeals by the second to fifth appellants and the appeal by the first appellant against paragraph 1 of the order of 14 March 2012 and the orders referred to in paragraphs 5, 6 and 7 of this order, are upheld with costs, such costs to include the costs consequent upon the employment of two counsel.

2 The judgments of the court below and the orders granted on 24 January 2011, 14 December 2011 and paragraphs 1, 6, 7 and 9 of the order of 14 March 2012 are set aside and replaced by the following:

'The first plaintiff's claim is dismissed with costs, such costs to be paid jointly and severally by the first and second plaintiffs, the one paying the other to be absolved, and to include the costs of two counsel and the qualifying expenses of Mr Wixley.'

3 The cross-appeal is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

4 The costs orders in paragraphs 1 and 3 are to be paid by the respondents jointly and severally, the one paying the other to be absolved.

5 The last sentence of paragraph 2 of the order of 28 July 2011 is set aside and replaced by the following:

'Die tweede tot vyfde verweerders moet die koste van opposisie betaal.'

6 Paragraph 8 of the order of 18 November 2011 is set aside and replaced by the following:

'Die tweede tot vyfde verweerders moet die koste van opposisie betaal.'

7 Paragraph 2 of the order dated 27 April 2011 is set aside and replaced by the following:

'Die eisers word gesamentlik en afsonderlik gelas om die koste van die aansoek te betaal.'

M J D WALLIS

JUDGE OF APPEAL

Koen AJA (Wallis JA and Fourie AJA concurring)

[163] This judgment, as foreshadowed in paragraph [8] of the main judgment of Wallis JA, deals with the two costs orders[59] granted in respect of the amendments to NPC's particulars of claim following the initial judgment, and the costs order made in respect of the appellants' abortive application for leave to appeal.[60] The same terminology as in the main judgment is adopted.

---

[59] Respectively the third and fourth appeals.
[60] The fifth appeal.

[164] The two costs orders relating to the amendment of NPC's claim can conveniently be dealt with together. Although chronologically they followed after the abortive application for leave to appeal, I deal with them first, in the sequence that they appear as appeals.

[165] The initial declaratory judgment determined the liability of PWC with reference to a schedule annexed thereto. Following that judgment NPC applied to amend its claim and the quantum thereof. Despite opposition, the court on two separate occasions allowed NPC to amend its particulars of claim, giving rise to the two costs orders forming the subject of these two appeals. The first order was granted on 28 July 2011. Paragraph 2 thereof directed that NPC pay the costs of the amendments then sought on an unopposed basis, including the costs of two counsel where applicable. The appellants (PWC and PWC Inc) were directed to pay the costs of opposition to that application, such costs to include the costs of three counsel. The second order was granted on 18 November 2011. It directed that the same appellants pay the costs of opposition to the application, such costs to include the costs of three advocates. The trial court granted the second to fifth appellants leave to appeal against these orders and this court granted PWC Inc leave to appeal against them.

[166] Whether the amendments to the particulars of claim should have been granted, has now been rendered largely academic in the light of the conclusion reached on the main appeal. It remains relevant, however, to determine whether this court should interfere with the costs orders that were granted. It is therefore necessary to consider the merits of the applications for amendment.

[167] During the presentation of NPC's evidence in the first stage of the trial it emerged that NPC had not accounted for amounts it had recovered or could recover in respect of its alleged damages. Accordingly, after the last witness for NPC had testified, but before closing its case, the NPC's leading counsel applied from the bar for further issues to be separated for determination during the second stage of the trial. That application was successful resulting in the following ruling in terms of rule 33(4):

'1.1 The plaintiffs will be entitled to adduce evidence of the amounts recovered from debtors and subsidiaries whose debts have been written off, and the reasonableness of such recoveries, in the second round or stage of the trial, provided that this will not detract from the defendants' right to apply for absolution from the instance at the close of the plaintiffs' case at the end of the first round or stage of the trial on any basis other than that the amount recovered from debtors and subsidiaries, or the reasonableness thereof, were not proved.

1.2 The plaintiffs will be entitled to adduce evidence of the cash credit interest rates levied by the Land Bank after 6 July 1995 in the second round or stage of the trial, provided that this will not detract from the defendants' right to apply for absolution from the instance at the close of the plaintiffs' case at the end of the first round or stage of the trial on any basis other than that the cash credit interest rates levied by the Land Bank after 6 July 1995 were not proved.' (My translation)

[168] NPC contended that the amendments sought reflected its revised claim, calculated in accordance with the ruling in terms of rule 33(4). In its amended form the amount claimed in respect of bad debts was R56 951 978.62 after taking into account amounts recovered in respect of debts previously written off. The schedule itemising how this amount was calculated reflected gross amounts recovered, as well as legal costs, insurance and finally net recoveries. The legal costs were incurred in recovering or endeavouring to recover amounts from debtors, whether or not successfully. The insurance was in respect of life insurance on the lives of debtors. NPC maintained that in having to account for what could

reasonably be recovered from debtors, the net amount of the recovery, after deducting all costs and charges incurred in respect of such recoveries, had to be taken into account and not simply the gross amount recovered without regard to any legal costs. Accounting for the cost of the insurance was considered to be part of the quantification of damages, which stood over for determination at the second stage of the trial. The schedule also reflected that an amount of R54 052 224.76 was claimed in respect of the Land Bank interest component of its claim.

[169] PWC argued that the trial court was *functus officio* after the initial judgment was delivered and that NPC by these amendments was seeking to claim amounts outside PWC's liability as determined by the initial judgment. It accordingly contended that the amendments and the costs orders against it should not have been granted.

[170] The amendments mainly sought to introduce adjustments to the net recoveries made from debtors of NPC and the Land Bank interest claim. In some instances the adjustment to what was previously written off resulted in an increased liability, for example where the legal costs incurred in respect of a particular recovery from a debtor exceeded the amount recovered from that debtor, or where the costs of insurance exceeded the net recovery. But when this was pointed out in argument it was accepted that it was impermissible to increase the claim on that basis.

[171] I am not persuaded that the trial court erred in concluding that these accounting differences were simply part of the quantification of damages, a matter it had to determine during the second stage of the trial in respect of the debtors of NPC whose debts had been written off. The contractual measure of damages sought to be recovered required that the net financial

position of NPC allegedly caused by PWC's breach would have to be determined, and that required that the net amounts recovered from debtors had to be taken into account. But in any event, to the extent that there might have been any reservations as to whether the amounts claimed pursuant to the amendments fell within the parameters of the initial judgment, convenience dictated that the amendments be granted and if objectionable, PWC could raise its objections in the course of the hearing on quantum. The court could then during the quantification stage of the trial determine whether what was claimed properly fell within or beyond the scope of the initial judgment.

[172] The amendments were correctly granted. They were not, however, of such complexity and importance to the respondents as to justify an award of the costs of three counsel. In my view the employment of only one counsel was justified. The appeals against these costs orders succeed to the extent that they are limited to the costs of one counsel as set out in paragraphs 5 and 6 of our order at the end of the main judgment.

[173] I turn next to the appeal[61] against the costs order granted against PWC Inc and PWC on 27 April 2011, when its application for leave to appeal against the initial judgment was set aside as an irregular step. Paragraph 2 of that order directed that the appellants pay the costs of the application, including the costs consequent upon the employment of three counsel. The appellants appeal against the whole of that costs order, with the leave of this court, seeking a variation thereof by deleting it in its entirety and replacing it with an order granting them the costs of that application.

---

[61] This was the fifth appeal.

[174] It is not in dispute that the application for leave to appeal complied with the requirements of rule 49. It was nevertheless set aside as an irregular step on the basis that the parties had agreed that there would be no appeal until the entire action had been finalised. Rule 30 dealing with irregular proceedings applies only to irregularities of form and not to matters of substance.[62] A notice of application for leave to appeal, in compliance with the rules of court, however, cannot be an irregular step or proceeding simply because of some alleged agreement between the parties not to pursue an appeal until the action is finally completed before the trial court.

[175] Even if there was such an agreement, the notice of application for leave to appeal was not irregular, but had to be considered on its merits. A court is not bound by any such agreement between the parties. The declaratory order contained in the initial judgment was a 'judgment or order' in terms of s 20(1) of the Supreme Court Act 59 of 1959, which then applied to appeals, and was susceptible to immediate appeal with the leave of the court. The agreement of the parties could not detract from that, although it was plainly relevant to the judge's consideration of whether it was appropriate in the interests of justice to permit an appeal at that stage. There might have been very sound reasons, in the best interests of the administration of justice, which would have persuaded the court to grant leave to appeal in respect of its judgment even though the parties had agreed otherwise. If the trial court had concluded that there were no such reasons and that the agreement between the parties should prevail, the

---

[62] *Singh v Vorkel* 1947 (3) SA 400 (C) at 406; *Odendaal v De Jager* 1961 (4) SA 307 (O) at 310F-G.

application should have been dismissed for that reason and not on the basis that the notice of application was an irregular step or proceeding.

[176] In any event, it seems clear that whatever agreement the parties had reached at the outset, by the time the application for leave to appeal was pursued, that agreement no longer applied. The agreement reached at the commencement of the trial, following an exchange of correspondence, is recorded in the signed minute of the meeting before Hartzenberg J. It recorded that:

'1.1 The parties confirm the agreement that the trial will be conducted in stages. The merits, (that is all the issues in dispute excluding any calculation of any damages to which the plaintiff may be entitled) will be adjudicated first and after findings have been made in this regard (including findings on the basis on which the quantum of the plaintiff must be calculated, if applicable) the trial shall be adjourned to afford the parties' experts the opportunity to endeavour to agree the quantum in accordance with the findings made by the court on the merits.

1.2 Plaintiff is of the view that the appropriate time to address this issue would be after the findings have been made. (My translation)

[177] This minute made no reference to there being no appeal until the end of the trial. It did, however, give effect to a proposal previously suggested by PWC's attorneys in their letter of 11 July 2005 which recorded that:

'Our clients are agreed that, provided they are not prejudiced in any way, they will not – should the case go against them – apply for leave to appeal until the quantification has been undertaken in accordance with the suggestions made above. We underscore that this agreement applies only if our suggestions are accepted. In the event of any other configuration, we would have to take instructions afresh.'

[178] The trial however took a different turn to that contemplated in the aforesaid correspondence, when the judge separated the further issues after the last witness for the NPC testified. The judge reasoned that the agreement reached between the parties was an 'unqualified' agreement that the trial would be addressed in two phases and that there would not be an appeal in the interim. I am unable to agree with that conclusion. The agreement, such as it was, provided that PWC would not pursue an appeal until the action was complete, so long as it was 'not prejudiced' and on the underlying basis of a certain factual 'configuration'. The agreement must be viewed, as PWC argued, 'within the context of the matrix of facts that pertained at the time'.

[179] At the stage PWC's attorney's letter was written, 'everything', that is all issues, was supposed to have been addressed in the first phase and only the calculation of the quantum would occur during the second phase in accordance with directions to be made by the court during the first phase. The rule 33(4) ruling introduced a different 'configuration'. Not allowing an appeal at the time when such leave was sought was potentially prejudicial to PWC and PWC Inc.

[180] It was competent for the court to issue the order it did in terms of rule 33(4). The effect of that order was that considerably more evidentiary issues were left to be dealt with in the second phase of the trial than were contemplated when the agreement to finalise the trial without an interim appeal was concluded. Accordingly, insofar as it may be relevant, the agreement not to pursue an appeal before at the end of the trial no longer applied and there was nothing to preclude PWC from applying for leave to appeal.

[181] The judge erred in dismissing the application for leave to appeal as an irregular proceeding and awarding costs, including the costs of three counsel against PWC Inc and PWC. The correct fate of the application now only has relevance as regards the costs order. The court did not address the question whether leave to appeal was appropriate at that time. It set aside the application as an irregular proceeding on erroneous grounds. The application in terms of rule 30 should not have succeeded and should have been dismissed. It follows that the costs order should have been in favour of the appellants. The argument as to whether the notice of appeal constituted an irregular proceeding was, however, not of such complexity as to warrant the employment of two counsel. Accordingly, only the costs of one counsel should be allowed.

[182] In the result the appeal on this issue succeeds and an order in terms of paragraph 7 of the order in the main judgment must be made.

_____

P A KOEN

ACTING JUDGE OF APPEAL

APPENDIX

The years from 1984 to 1990

[1] Early in 1984 the Land Bank raised with NPC concerns about its credit and debt recovery policies. In a letter dated 12 April 1984, the managing director of the Land Bank pointed out that NPC had extended additional credit of nearly R11 million during the previous year, but only recovered R5 million. He said that this raised concern with the Land Bank ('wek kommer by die Bank') and that it was in NPC's best interests to review its policies on the granting of credit and debt recovery. Representatives of the bank met with the board of directors and the then principal auditor, Mr Hugo, on 28 June 1984 to stress these points. They were blunt in their assessment of affairs. They said that NPC granted credit too freely, that it was not effectively exercising its statutory pledge and that the collection of debts was inadequate. They stressed that the collection of debts must be carefully followed up and that a proper credit policy had to be implemented. NPC's participation in the 1984 drought aid scheme was dependent upon the formulation of a credit policy approved and monitored by the bank.

[2] In July 1984 the Land Bank established an emergency assistance scheme for farmers who had been hard hit by drought, backed by a government guarantee given to the Land Bank. One element of the scheme was the postponement of the obligation of members of co-operatives to repay their production credits to their co-operative. Many farmers had arrear debts ('oorlaatskulde') in respect of the 1984 crop. These would be consolidated with debts owing under the 1983 drought assistance scheme and the repayment period would be extended for up to six years, on the basis that the farmers would repay as much as possible each year. These debts would carry a subsidised rate of interest for two years, after which

the position would be reviewed. In the meantime the co-operatives would continue to finance new production credits for the 1984/85 season. The nett effect of this was that the farmers would incur additional debts, it being the underlying premise of the scheme that with good harvests in future years they would be able to pay their debts.

[3] The entire scheme was to be monitored by the Land Bank. It stressed that the extension of credit by co-operatives would have to follow careful policies in determining how much credit to give. This was, however, subject to an overriding intention to assist farmers who should still be assisted ('in dié gees word daar dus van koöperasies verwag om die boer te help wat nog gehelp te word'). Follow-up letters addressed by the bank to the chair of the board of directors of NPC stressed the need to follow credit policies and warned that the bank would not authorise payments unless its requirements were satisfied.

[4] Against this background PWC conducted the audit for the year ended 30 September 1984. Mr Odendaal was by now involved in the audit although it was still under the overall control of Messrs Hugo and Naudé. In a letter addressed by the latter to the chair of the board of directors he complained that computer problems had caused difficulties in conducting the audit. That had made the audit of debtors difficult because of the absence of debtors' trial balances and the inability to reconcile the control accounts. This was embodied in the auditor's report in the annual financial statements. That referred to gaps in internal controls and the fact that there was an un-reconciled debit balance in the debtors' account.

[5] The directors' report for that year said that there had been a far larger harvest than in previous years, but a substantial drop in prices had

accompanied this, frequently to below production costs. On a marginally higher turnover debtors had increased from R12.7 million to R20 million and borrowings from the Land Bank from R9.9 million to R16.6 million, of which drought relief accounted for over R12 million. Bad debts increased from R432 058 to R509 333. The drought relief scheme stood at 60 per cent of debtors. The directors' report understandably said that the board and the Land Bank were deeply disturbed by this situation. An appeal was made to members to comply strictly with the credit policy, although the board noted that strict compliance would inconvenience many farmers.

[6] In September 1985 the board noted that 15 per cent of accounts encompassing 31 per cent of outstanding debts were in arrears. At the same meeting it approved the grant of further production credits of over R900 000 to farmers whose arrears collectively amounted to over R750 000. None of those farmers were among the bad debtors that later formed the subject of NPC's claim.

[7] In each of the years from 1985 to 1990 PWC qualified the annual financial statements. They said that they had been prepared on a going concern basis, but that as a result of current economic circumstances in the agricultural industry it was not possible for the auditors to form a view on the recoverability of the total indebtedness of members.[63] In argument in both this court and below NPC launched a fierce attack on this qualification and that is dealt with in the body of the main judgment.

---

[63] 'Die finansiële jaarstate is opgestel op 'n lopendesaak begrip, maar dit is as gevolg van die huidige ekonomiese omstandighede in die landboubedryf nie moontlik om 'n mening te vorm oor die verhaalbaarheid van die totale ledeskulde nie.'

[8] The annual financial statements for 1985 and, in particular, the directors' report painted a gloomy picture. It was said that a crisis stared NPC and its members in the face and that the debtors' position did not make for a favourable picture. Although harvests had improved prices were low and, on average, below production costs. For the first time farmers were finding themselves unable to repay their production credits from the proceeds of other crops. When prices were high opportunistic producers entered the market depressing prices. Drought aid now represented 70 per cent of debtors. Progress was not being made in collecting outstanding debts, notwithstanding the employment of a financial manager with responsibility for granting credit and collection of outstanding debts. The board said that without assistance from the state NPC could not continue to assist members who were struggling. A summary of the debtors over the previous four years showed that they had virtually quadrupled whilst turnover had changed little. Between 1984 and 1985 debtors not entitled to drought assistance increased by nearly 50 per cent to over R12 million. Whilst the bad debt provision remained static at R300 000, write-offs of bad debts had increased to just short of R1 million, nearly doubling in one year. Once these were taken into account the operating surplus became an operating loss.

[9] In 1986 the new financial manager produced a report for the board that stressed the deteriorating financial position and the urgent need for NPC to build up its capital reserves. That would require significant further capital inputs from members or other sources. If this could not be obtained the financial position of NPC would deteriorate. At its meeting on 15 August 1986 the board took note of the high risks attendant upon debtors and resolved to adopt a conservative view and write off doubtful debts 'as far as possible' ('sover as moontlik'). The heart of the problem remained

that, even though there had been a 30 per cent increase in turnover, production credit debtors had only declined by 2 per cent. The collection of debts owing under the drought aid scheme remained a problem. A new issue arose of farmers seeking assistance to stave off other creditors, particularly creditors under hire purchase agreements, and funds being released to them in order that they could harvest their crops. In addition a number of insolvencies were occurring among members and this was emphasised at the annual general meeting. The 1986 directors' report said that the board remained deeply concerned about both the financial position of members and the continued existence of NPC. The level of debtors under both the drought aid scheme and production credits increased by R4 million on an increased turnover of R9 million. Recoveries in respect of bad debts previously written off remained minimal.

[10] Little change was reflected in the 1987 accounts. The level of debtors increased by a further R6 million on an increased turnover of R18 million. The indebtedness to the Land Bank grew correspondingly. Bad debts written off exceeded R1 million and when taken into account meant that a trading surplus became a deficit. In addition the category of 'sundry debtors' increased markedly from a nominal amount to over R2 million. The board said it remained optimistic about the future of the industry provided that greater co-ordination in planting and greater price stability could be achieved. However, it continued to say that the general state of debtors was unsatisfactory and that it remained concerned at the financial position of a number of members of NPC.

[11] Although the board received a report from the financial manager in February 1988 that both the liquidity and solvency position of NPC was under pressure, it resolved not to impose a levy on members. This

notwithstanding that the report pointed out that profitability was minimal; that the level of debt per share was increasing, especially if the debtor suspense account was brought into the reckoning; that NPC was overly dependent on Land Bank financing; and that if urgent corrective measures were not taken the result would be catastrophic. At the annual general meeting on 24 and 26 February 1988, the chair reported on the level of bad debts written off and said that rising debt levels were due to price increases in production inputs. He expressed concern at the increasing debt burden. Mr Odendaal, from PWC, said he was concerned at the fact that the ratio between members' funds and total funds had deteriorated and stressed that this ratio needed to be improved.

[12] 1988 saw a continuing increase in membership, presumably in part as a result of a merger with the Markpro Co-operative that led to the change in name to NPC, and a corresponding increase in the level of debtors. By February 1988 it was anticipated that rising input prices would place further pressure on members' ability to repay debt. After the merger the financial year end changed from 30 September to 31 December. There was, however, no change in the problems facing NPC of which the obtaining of fresh capital remained critical. Production increased both among members and new entrants to the market resulting in lower prices. The directors reported in the 1988 annual financial statements that as a result it was anticipated that members would find it difficult to meet their obligations. In comparison with the full year to 30 September 1987, the ten months to 31 December 1988 showed an increase in turnover from R48.6 million to R71 million, an increase in debtors from R33 million to R50 million and an increase in indebtedness to the Land Bank from R28 million to nearly R47 million. Bad debts of R1.3 million were written

off in addition to the R880 000 in bad debts written off in the five months between 30 September 1987 and 28 February 1988.

[13] The audit report provided to the board by Mr Odendaal in respect of that period highlighted that credit limits were regularly exceeded and production inputs were sometimes supplied to members who were not creditworthy. Debtors' balances were not reconciled with ledger accounts on a regular basis with a consequent loss of interest to NPC. Credit was given for seed without the approval of the credit committee. Undertakings were given to deal with this.

[14] In May 1989, after a visit by its officials to NPC, the managing director of the Land Bank wrote to the chief executive in strong terms. He pointed out that NPC was heavily dependent on external financing and the result was that exposure to the risk of non-payment to the tune of some R43 million lay with the bank and the state. The increase in debtors over the previous 28 months had been financed almost entirely with external finance, giving rise to a substantial obligation in respect of interest. It was therefore of fundamental importance to improve NPC's capital position and place limits on the extension of credit. The bank's concluded that the situation in regard to the debts of members was disturbing. If nothing were done to address the problems it said it would be obliged to make further extensions of credit dependent upon compliance with stringent conditions. This letter was placed before the board. At that meeting the board gave an instruction to management to take steps to recover arrear amounts and to implement the credit policy strictly. At a later meeting it resolved not to impose a levy on purchases, but to raise the capital contributions of members over a period of three years.

[15] The Land Bank continued to express unhappiness at the financial situation of NPC. It pointed out that in the period of 27 months to 31 December 1998 credit extended by NPC exceeded recoveries by R13 million. In addition there had been an astronomical increase in provisions for bad debts ('astronomiese toename in voorsiening vir slegte skulde'). This prompted the initiation (but not necessarily the implementation in practice) of further and more stringent credit requirements and the Land Bank was advised accordingly. The bank was assured that the board and management shared its concerns about the financial position.

[16] Despite the Land Bank's intervention, the instructions from the board to officials and the auditors expressing concern in their audit report for 1989 about non-compliance with credit control measures, the 1989 annual financial statements showed that the position continued to deteriorate. Debtors increased by a further R15 million from the end of the previous year. In its report to management on the audit PWC described the overall increase over three years as enormous ('n geweldige toename'). They advised that four steps had to be taken to remedy the situation. These were: stricter application of the credit policy; prior determination of credit limits and the maintenance of arrears within those limits; timely action to recover arrears; and obtaining security for new and existing debts. For the first time the amounts owing by NPC to the Land Bank exceeded the amounts owing to NPC by members.

[17] Not surprisingly the Land Bank continued to be concerned about the financial situation at NPC. A further visit by officials in April 1990 led to a letter being written by the chief executive of the Land Bank to NPC. An accompanying letter addressed to the chair of the board said that aspects of

the letter demanded the urgent attention of the board. It asked for a meeting with him and his management committee. The accompanying letter highlighted the peculiar accounting treatment of bad debts, which involved an amount of over R5 million being written off as bad and being transferred to a suspense account, from which nearly R4 million was then written back as recoveries of bad debts. The letter asked that a proper assessment of bad debts be made, and that the R300 000 figure in the annual financial statements be revised to a more realistic level acceptable to the bank. The bank expressed doubt that sufficient collection of debts would occur within a foreseeable period to prevent the debtors' book aging, that is, the average period for which the debts had been outstanding increasing. There was a threat, if this was not addressed, that the bank would review the basis upon which it was financing members' production credits and that this could cause NPC a cash flow problem. In addition the bank queried the basis upon NPC had invested in a company that manufactured bags for potatoes.

[18] At the annual general meeting of NPC in May 1990 (attended by only 13 members in person and 46 by proxy, a mere 5 per cent of the membership) the chair told those present that the Registrar of Co-operatives, the Land Bank, the auditors, the board and management were all worried about the poor ratio between own and borrowed capital. However the biggest worry remained the high percentage of overdue accounts. An explanation of the treatment of doubtful debtors was furnished to the Land Bank, but was not accepted, which meant that those debts were no longer regarded as providing security for the money owing to the Land Bank. The Land Bank was clear that the position in regard to doubtful and bad debts was unacceptable. After a meeting with members of the board it expressed the view that of the R40 million in unrecovered

debts a large portion could be regarded as irrecoverable ('n groot gedeelte van hierdie bedrag as oninvorderbaar beskou te word'). It also warned that the indiscriminate granting of credit, with all its attendant risks linked to the recovery of debts, could land NPC in a financial crisis and stressed the need for a stringent application of the credit policy.

[19] The affairs of NPC then attracted the attention of the Registrar of Co-operatives, who sent inspectors to examine its affairs. Their concern was the rapidly deteriorating financial position of NPC over the previous five years in relation to debtors and capital. The report stressed the same points as had the Land Bank, management, the auditors and the board, namely that NPC needed to generate surpluses in order to improve its capital position and make it less dependent on borrowing and it needed to operate a stringent credit policy. The board discussed both this report and the letters received from the Land Bank and the credit policy was revised.

[20] It emerges clearly from this that the board was well aware of the financial problems facing NPC. It understood what was necessary in order to resolve those problems. It adopted a strategic policy and a credit policy to address the problems relating to both the grant of credit and the recovery of debts. That was hampered by the fact that members were responsible for their own marketing through market agents and it was difficult to secure that the agents paid the proceeds of the sales to NPC. A new form, the so-called K-form, was introduced to improve this. Instructions were given to field agents in regard to the implementation of the revised credit policy. At a meeting in July 1990 the Land Bank's representatives said that these were steps that should have been taken many years before. The reaction of management was that it was apparent that the Land Bank viewed the position with debtors in a very serious light

and there was a risk that it would take steps against NPC. In December 1990, however, there was some relief because of the extension of the drought relief scheme.

[21] The financial position of NPC remained dire. Members were advised that the credit policy would be strictly implemented. In ten years debtors had increased from R2.6 million to R67 million. Accounts handed over for collection stood at R8.6 million and provisions for bad debts at R7.3 million. A list of these bad debts was tabled at the board meeting on 28 February 1991. However, although these were the provisions in the books of NPC, in its annual financial statements for 1990 the bad debt provision remained the same at R300 000 and an amount of close to R1.7 million was written off as uncollectable. PWC continued to report that they were unable to express an opinion on the recoverability of the members' debts. There was no mention of the fact that the internal records of NPC reflected a far higher figure in respect of doubtful debts.

The years from 1991 to 1996

[22] Some relief came in 1991 as a result of an extension of the drought aid scheme and a good year from a production and price point of view. But by the end of that year the Land Bank indicated that it now required a twenty per cent margin on the financing of production credits. The grant of credit remained problematic, with the bank complaining that in some instances NPC was granting credit to members, when other co-operatives of which those members were also members had refused to do so. It also expressed concern at the departure of a senior staff member, but was reassured that new and competent staff had been appointed in their place.

[23] When the audit for that year was being done PWC prepared a schedule of debtors that reflected doubtful debts as over R19.5 million. Of those, over R8.5 million had already been handed over for collection. This appears to have been done in about December 1991. Thereafter these figures were revised downwards until a figure of around R1.3 million appeared in the financial statements together with a statement in the directors' report that a further amount of R5.2 million 'may be irrecoverable'. Regrettably, however, the difference between the original schedule and the figures in the financial statements and the intervening documents showing the progressive reduction of the bad debt provision was not canvassed with Mr Odendaal, so that care must be taken not to attach too much weight to them. What they do show is that at this stage there was considerable scope for thinking that the debtors were overstated in the balance sheet and the provision for bad debts and bad debts written off may have been insufficient.

[24] At a meeting of the board prior to the annual general meeting Mr Odendaal, by then in charge of the audit, expressed his concern over the recoverability of debtors. However, this was not carried through to the annual financial statements themselves. The provision for doubtful debts remained unchanged at R300 000 and the debts written off as bad were smaller than the previous year at a little over R1.3 million. The auditors' report read:

'As mentioned in section 6 and section 7 of the directors' report, there is uncertainty about the general recoverability of debtors and the ability of the co-operative to obtain further financing.

Because of the significance of the uncertainties referred to in the preceding paragraph, we do not express an opinion on the annual financial statements for the year ended 31 December 1991.'

Notwithstanding the concerns that might have arisen from the matters dealt with in the preceding paragraph, Professor Wainer regarded this qualification as adequate. He added that no-one could obtain any assurance form the auditor in that event because the auditor had specifically withheld any such assurance.

[25] The directors' report said that the debts written off were mainly more than three years old. Various reasons were given for their having become irrecoverable. It then added that there was a further amount of R5 222 000 'that may be irrecoverable'. A description was given of measures taken to improve debt collection and credit control and the report finished on the optimistic note that 'taking into account these positive factors' the board believed that future bad debts could be limited to a level that NPC could absorb. Notwithstanding this optimism and the repeated emphasis on the stringent application of the credit policy, the audit report to management said that security for debts was frequently insufficient, drought scheme payments were in many instances in arrear and credit regulations were not always complied with. At the annual general meetings held in various centres, attended by 47 members in all, the chairman reported that there were difficulties with Land Bank financing and that it would be necessary to enforce the credit policy strictly. It was plain that in 1991 NPC was in dire financial straits and unless something changed dramatically it was unlikely to survive.

[26] In 1992 the government took steps to provide further drought aid assistance to farmers while at the same time aiming to remove the state guarantee from the system and restore and promote market-oriented financing to agriculture. It is apparent from the government announcement of this revised policy that carry-over debt of farmers enjoying drought

relief assistance had reached alarming proportions. What had started in 1983 as a guarantee of R800 million had reached the stage where carry-over debt owed by farmers in respect of production credit had reached R2.4 billion and covered virtually all food producing areas in South Africa. In order to extricate itself from this situation the government proposed to distribute to the various affected co-operatives an amount of R2.4 billion, after which the government guarantee would be withdrawn.

[27] The precise mechanism within which this revised scheme would work was at first unclear. In the meantime the minutes of directors' meetings during 1992 continued to reflect concern over NPC's finances. It was agreed that a deposit would be sought on purchases and fresh capital would be sought in order to provide the Land Bank with a guarantee. A revised credit policy was adopted and a credit committee was established consisting of Mr Dürr, the chairman of NPC, Mr Pieterse, who succeeded him as chairman, and one other. They were to decide whether credit should be granted in difficult cases. According to a letter addressed by the chief executive to the Land Bank, current debtors amounted to nearly R38 million and drought relief debtors to R43 million. Apart from the problems with debtors a subsidiary company that made potato pockets was losing money. At a directors' meeting in November 1992 there was continuing concern over the level of debtors and the ability of NPC to make recoveries. It was recorded that the provision for bad debts in the books of NPC stood at R4.4 million, which was less than the R5.2 million of the previous year. This amount appeared to reflect those debts that had been handed over for collection. It is apparent that the internal figures being used by management for the purpose of reporting to the board reflected bad debt provisions at a level considerably higher than the annual financial statements.

[28] When the fund to remove the state guarantee was distributed NPC received an amount of R28.5 million. That discharged the state from any further liability in respect of the drought aid scheme and this fact was minuted by the board at its meeting on 5 December 1992. The board then instructed management 'in conjunction with the auditors' to assess in what way this amount could be reflected in the annual financial statements to influence the balance sheet in the most favourable possible light.[64] It was common cause in argument that but for this payment NPC would have been insolvent and would have ceased operations very rapidly.

[29] Instead the financial position improved markedly as a result of this cash injection and the auditor's report to the annual financial statements for 1992 was unqualified. It said that in the opinion of the auditors the financial statements fairly represented the financial position of NPC. The directors' report said that in view of the assistance measures announced by the government that removed the government guarantee, it was not possible to compare the debtors' position with that in previous years. Debts totalling R11.5 million were written off, the bulk of them against the drought assistance accounts, the explanation being that the government no longer guaranteed these debts. However, the income statement showed a different picture. In the income statement R 18.35 million was written off of which R6.885 million was used against the state guarantee allotment, this being, according to the notes to the financial statements, 'an appropriate share' of bad debts to write off. The effect was to leave an amount of R21.5 million, which was used to create a contingency reserve,

---

[64] 'Die Raad gee opdrag dat in oorleg met die ouditeure 'n scenario uitwerk word om vas te stel op watter wyse die R28.5 miljoen aangewend kan word om die balansstaat verhoudinge die gunstigste te kan beïnvloed.'

so that the capital of NPC on the balance sheet tripled from R7 million to R21 million. However, while the drought aid indebtedness of members was reduced from R35 million to R23.5 million and the liabilities to the Land Bank fell by R34 million, total debtors declined by only R18 million. In the result the net cash position of NPC did not improve at all notwithstanding the injection of over R28 million from government. One subsidiary became dormant and the other two made losses.

[30] In its report to the annual general meetings the board described the receipt of this money as a godsend from the state. However, it did not resolve NPC's financial problems. The indebtedness of members to NPC arising under the drought aid scheme still stood at over R23 million and no longer had the backing of a government guarantee. Capital formation remained a problem and the board was faced with a dilemma in that members wanted the co-operative both to make a profit and to assist them by adopting a sympathetic approach to requests for credit. The internal reports during 1993 revealed that the same problems continued to plague NPC. The cash flow position improved slightly in August 1993 with the negotiation of a cash credit facility ('kaskredietrekening' or 'KKR') for the following year through the Land Bank. The facility also covered some existing debts but was subject to stringent conditions. Concerns continued to be expressed over the basis for the extension of credit and where the amount involved exceeded R500 000 it required board approval if the applicant's debt levels exceeded sixty per cent. When Mr Odendaal made a presentation of the annual financial statements to the board he yet again stressed the need to control costs, to recover debts and to deal with the high provisions for bad debts.

[31] Minutes show that the credit committee and the board were both being required to consider particular cases where debtors were seriously problematic. Thus at the directors' meeting in February 1994, prior to the annual general meeting, the cases of Messrs P L Ferreira, P J Bekker, R Coleman and T G van Zyl received attention. All four were among those in respect of whom judgment was granted in favour of NPC. In excess of R18.5 million, or more than one quarter of the judgment, was eventually written off in respect of these four. Mr Ferreira was already unable to pay his debts and his creditors were trying to work out a rescue plan, while Mr Bekker was seeking a moratorium from his creditors. Mr Coleman was given extended credit and time to pay his existing debts. Mr van Zyl's situation was left over for discussion at a later stage.

[32] The board approved the 1993 annual financial statements at a meeting on 10 March 1994. In doing so it noted that without the positive impact of the government's assistance NPC would not have been able to survive. Bad debts amounting to R2.8 million were written off in terms of an agreed schedule. Five of the debtors on the list making up the claim appear on this schedule, but save for one of them, only in respect of trivial amounts. The one exception was Tonkin Uitval Boerdery, in respect of which two amounts totalling R1 297 822.97 were written off. In addition there appear to have been amounts handed over for collection. One particular member whose situation was considered was Mr T G van Zyl, who it will be recalled, had been discussed at an earlier meeting. It was decided to postpone recovery of his debt of some R1.2 million and to extend additional production credit of R218 000 to him.

[33] The annual financial statements for 1993 were once again unqualified. The one operating subsidiary made a small profit and the

other a large loss. A further R5.8 million was written off as bad debts. Whilst debts under the drought aid scheme fell again this was more than offset by a substantial increase in ordinary debts from production credits, which increased from R 37 million to R 52 million. Whilst a small profit was generated on an increased turnover this was entirely dependent on the additional debts proving to be collectable.

[34] In 1994 the established pattern continued, although the new chief executive, Mr Boonzaaier, in a memorandum dated 14 March 1994 urged the board not to concentrate solely on credit control and the recovery of debt, but also to explore other ways of increasing profits. However, the continuing problems of bad debts and control of credit continued to be the focus of attention. At the annual general meetings they were described as a great source of concern ('n groot bron tot kommer') although the chairman said that with the help of a strong credit policy they were well under control ('goed onder beheer is'). In June a new and strengthened credit policy was adopted and there were particular concerns over the indebtedness of Mr P L Ferreira and Mr H J Saaiman. The latter's indebtedness, included in the judgment against the fourth respondent, was nearly R5 million. The credit manager addressed a notice to all agents and credit officials in the strongest terms saying that the situation in regard to orders for seeds and pockets was so unacceptable that unless an official order number was obtained these would be regarded as unauthorised credit. An internal audit function was established and its reports revealed that the internal audit team was picking up many of the irregularities later identified by Mr Collett, when he conducted the exhaustive investigation into NPC's financial affairs between June 1997 and August 1998 that formed the basis for the present action. Mr Collett was the principal witness for NPC.

[35] In August 1994 the Land Bank chimed in with its own concerns over the indiscriminate grant of credit, the high level of debtors and the need to implement the credit policy strictly. It also expressed concern over the continued viability of the subsidiary manufacturing potato pockets. The letter was sent to both the chief executive and the chairman of the board and it asked that it be placed before the board urgently. The chairman sent a reply a month later and thereafter the Land Bank sent officials on a follow-up visit, which resulted in a further letter on 26 January 1995. The Land Bank did not take a positive view of matters. It complained that credit was being given when it had been resolved not to extend further credit, as well as to people to whom banks and other co-operatives were refusing to extend credit. Members were either not remitting the entire proceeds of their crops to NPC, or NPC was paying some proceeds to members who still owed it money. The bank insisted that every three months the board had to examine a list of credit sales to all members who were in arrear, with a full explanation, and give instructions in respect of them. It threatened to refuse to finance transactions not concluded strictly in accordance with the credit policy.

[36] On 8 March 1995 the senior management of NPC sent a remarkable document to the auditors as a management declaration. In it they claimed that the financial records of NPC were in order and that provision had been made for any decline in value of existing assets. In regard to debtors they said that all the claims were bona fide, not subject to discounts and collectable within agreed credit periods. They added that the reserve for unforeseen losses, such as those for bad debts were sufficient. To my surprise I have been unable to find any reference to this in the evidence of any of the witnesses, although the accuracy of its contents is, to say the

least, debatable. On 17 March 1995 the auditors wrote to the chief executive saying that they had found certain weaknesses in the internal management system of NPC. The first item was the credit policy, including obtaining security, and the second was the debtors, and various irregularities were identified. A more general report was furnished to the directors.

[37] The annual financial statements for 1994 presented a relatively calm picture. Debtors had not increased substantially and nor had the indebtedness to the Land Bank. Bad debts of R4.7 million were written off. That meant that in the three years up to then a total of R22 million had been written off as bad debts. The amount owing on the drought aid scheme continued to decline and now represented only R8.5 million out of a total debtors book of nearly R72.5 million. Neither the auditor's report nor the directors' report made any special mention of the position in regard to debtors. However, shortly after those accounts had been approved an internal audit report was produced that showed that there was an alarming lack of proper control over the grant of credit. It analysed the 605 members and non-members with approved credit limits and revealed that there was no record of a credit application or approval in 53.5 per cent of cases; 75 per cent were overdue; although only R43 million of credit had been applied for, R109 million, including supplementary credit, had been approved and R77 million had been used.

[38] The 1995 annual financial statements, adopted in March 1996, were the last ones audited by PWC before the falling out with NPC that led to its resignation as auditors. The auditor's report certified that the annual financial statements were a reasonable reflection of NPC's financial circumstances. The directors' report was upbeat, describing the year as

outstanding ('uitstekend'). There had been a 34 per cent increase in turnover and profit had increased, although it remained small in relation to turnover – a little over one per cent. Debtors increased from R72 million to R95 million, while bad debts written off fell to R2.9 million. The indebtedness to the Land Bank increased by more than a third from R48 million to R69 million. In the result the increased turnover was virtually entirely financed by loans from the Land Bank. The only slight cloud on an otherwise sunny horizon was the statement in the chief executive's report that the rapid growth in business had placed the group's financial structure under pressure. The concern raised by this was shared by the Land Bank.

1996 and 1997

[39] The position changed rapidly after the annual general meeting for 1995 held in March 1996. By June 1996 the chief executive reported to the directors that a substantial loss for the current year had already been incurred as opposed to the budgeted profit. The loss was attributed to higher than budgeted write-offs in respect of bad debts. The financial manager reported to the board that member debtors had increased by R37.6 million as against the previous year and by R17.8 million since January 1996. He said that recoveries were below budget and it was unlikely that the position would improve. Most troubling of all he said that NPC's own resources for finance were exhausted and its external lines of credit had been taken up to their maximum.[65] NPC was outside the Land Bank's permissible criteria for the provision of loan finance and the bank was expressing its concern over the situation. It would have to be asked

[65] 'Tans is NAK se eie finansiering uitgeput en die bronne van buite finansiering is tot die maksimum benut.'

for an extension of time in respect of the cash credit account and it was unlikely to approve NPC's request for finance for the forthcoming year.

[40] From that date on the NPC's financial position deteriorated rapidly. Two of the long-standing troublesome accounts, those of Mr Coleman and Mr van Zyl, were in a desperate condition and in respect of each a further provision for bad debts of R2 million was made. At the following directors' meeting on 19 September 1996 a loss for the year of R3.9 million as against a budgeted profit of R2.9 million was reported. This was caused by a higher provision for bad debts of R5.2 million and weaker than expected trading profits. The Land Bank was unwilling to extend further credit as reported to the directors in October and the loss for the year had increased to R5.3 million. There were on-going discussions with the Land Bank and the situation was said to have been complicated by poor weather conditions, such as winds, excessive rain and snow, and low prices, which was going to lead to deferred debt in three regions of R24 million. Financiers were sympathetic but the cold figures were against NPC.[66] This was evidenced by the Land Bank's response to a request for further financial assistance, which was to say that it would await the outcome of the remedial measures taken by NPC. At the directors' meeting on 27 February 1997 it was recorded that NPC faced a serious financing problem and a detailed business plan was prepared to address its problems. Shortly thereafter the chief executive, Mr Boonzaaier, resigned, after the Land Bank indicated that, as a condition of giving further financial assistance, he should be dismissed.

---

[66] 'Die feit dat dit 'n moelike jaar was met een geweldige voorsiening vir slegte skuld word met empatie na geluister, maar die koue syfers gaan die deurslag gee. Ons kredietwaardigheid gaan vir die volgende twee jaar onder hierdie feite gebuk gaan.'

[41] When PWC undertook its interim audit in December 1996 and January 1997, it expressed a concern over the future viability of NPC as a going concern in the absence of future financing, and said that a comment in that regard would probably have to be included in the auditor's report in the annual financial statements. NPC had changed its financial year end to the end of February so that the annual financial statements covered a fourteen month period. The draft was considered by the management committee at its meeting on 30 April 1997, where it was recorded that the only qualification would be that the continuation of trading activities was dependent on obtaining sufficient finance.

[42] The reaction of the board was to postpone the adoption and signature of the annual financial statements. There was apparently some hope that post-balance sheet events, such as the disposal of loss-making subsidiaries, would improve the financial picture. In June 1997, Mr Collett, of Collett, Du Toit & Associates (Pty) Ltd, was appointed to investigate alleged financial irregularities, principally on the part of Mr Boonzaaier. In August a technical panel of PWC met to consider the annual financial statements and concluded that there was uncertainty regarding NPC's status as a going concern and that an audit opinion should be disclaimed on that basis.

[43] After this meeting Mr Odendaal wrote to the chairman of the board on 28 August 1997. The letter paints a dismal picture of NPC's finances. The one subsidiary had made further losses and others had been closed. NPC was dependent upon the Land Bank for finance, which had been granted until December 1998 on conditions. At the date of the annual financial statements it had exceeded its permissible limit and had to make arrangements to reduce the debt. A number of factors were identified as

having led to uncertainty at the date of the accounts. These included the position with subsidiaries; the need for finance in order to continue its activities; the need for the continued support of the Land Bank; and, the availability of reserves.

[44] The letter concluded as follows:

'In consequence of these uncertainties the co-operative's directors decided to postpone consideration of the group's financial statements with a view to seeing whether the uncertainties on 28 February 1997 could be resolved by taking into account post-balance sheet events. Post-balance sheet trading results had contributed further to the uncertainty.

Taking into account the post-balance sheet trading results of the group, as well as the ability of the co-operative to comply with the conditions imposed by the Land and Agricultural Bank of South Africa for the grant of future finance, we are unable to form an opinion over the going concern basis for the accounts.

This uncertainty is regarded as fundamental because of the substantial effect on the financial statements if the going concern basis is inapplicable. Generally accepted accounting practice requires that in those circumstances an opinion should not be expressed.'(My translation.)

[45] This report was tabled at a management meeting that resolved that the paragraph about no audit opinion being expressed should be better worded ('beter bewoord moet word'). In September 1997 the board of NPC resolved not to produce group financial statements and in a letter dated 20 September 1997 asked the auditors to review their audit report. The view was expressed that the existing opinion in respect of the group would not apply to NPC as an independent entity and that on its own NPC's future as a going concern was reasonably certain for the foreseeable future. Concern was expressed that the withholding of an audit opinion would cause problems with creditors, members and other clients,

and the potato industry as a whole. It would of itself have implications for the continued existence of NPC.

[46] After this meeting the directors received a preliminary report from Mr Collett, which they then incorporated in the directors' report in the annual financial statements. This resulted in further changes to the auditor's report. They pointed out that they had not been afforded the opportunity to audit Mr Collett's report and that its contents, if correct, would require certain specific and potentially important changes to be made to the annual financial statements. Their particular concern arose from the suggestion that the provision for doubtful debts of R11.2 million was probably inadequate. The auditors pointed out that the financial statements had been prepared on a going concern basis that was dependent on the ability to generate finance as well as continued support from the Land Bank. In the circumstances they said that they were not in a position to express a view on the annual financial statements. In a formal response to the letter of 20 September 1997 PWC highlighted the fact that, if the existing provision for bad debts were inadequate, it would require the restatement of the accounts and that as matters stood the directors' report and the financial statements were inconsistent. Any restatement of the financial statements would reflect a worse financial position and together with other uncertainties placed a question mark over NPC's ability to continue as a going concern.

[47] Pursuant to these concerns PWC disclaimed an audit opinion on the annual financial statements of NPC for the year ended 28 February 1997. It explained that it did so in the first instance because of the inclusion in the directors' report of Mr Collett's interim report containing information that, if true, would require important changes to the financial statements.

The investigation was incomplete and PWC had not had an opportunity to audit its contents. Secondly, PWC said that the financial statements had been prepared on a going concern basis and this was dependent on the availability of finance for future business and the realisation of assets and the payment of liabilities occuring in the ordinary course. The financial statements contained no indication of the value of assets and the classification of liabilities that would be necessary if it was not possible for NPC to continue as a going concern. Finally the ability of NPC to continue as a going concern depended on various factors of which the most important was the maintenance of the existing level of financial support and NPC's ability to procure such support in the future by complying with the Land Bank's requirements. Accordingly PWC withheld an opinion on the financial statements.

[48] The annual general meeting of NPC for the year to February 1997 took place on 5 November 1997. At it the members resolved to pursue the investigation by Mr Collett over the opposition of two previous chairmen, Mr Durr and Mr Holtzhausen, as well as the opposition of Mr Odendaal. PWC resigned as auditors and confirmed their resignation formally in a letter on 11 November 1997. Thereafter NPC limped on with the assistance of the Land Bank, which in June 1998 gave it a five year extension of time to repay existing loans. But by 2000, after the commencement of the present action, it was clear that it was trading in insolvent circumstances. In February 2000, as a result of Mr Collett's intervention, a relationship was forged with the Northern Transvaal Co-operative Ltd, which was approved by members. In substance, although NPC continued to exist, the operations of the two co-operatives were merged, with operational and administrative management and control resting with the Northern Transvaal Co-operative Ltd. That initially

included the management of the litigation against PWC but that is now in the hands of IMF in terms of its agreement with NPC.

Appearances

For appellant:	F G Barrie SC (with him H C Bothma)
Instructed by:	Norton Rose Fulbright, Johannesburg; Matsepes, Bloemfontein
For respondent:	M C Maritz SC (with him G W Alberts SC and N C Maritz)
Instructed by:	Kirkcaldy Pereira Inc, Pretoria; E G Cooper Majiedt, Bloemfontein.