THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: **24 October 2022**

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Coral Lagoon Investments 194 (Pty) Ltd and Another v Capitec Bank Holdings Limited [2022] ZASCA 144

Today the Supreme Court of Appeal (SCA) dismissed an appeal from the Western Cape Division of the High Court (high court). The high court ordered the appellants, Coral Lagoon Investments 194 (Pty) Ltd (Coral) and its holding company, Ash Brook Investments 15 (Pty) Ltd (Ash Brook) to withdraw an action for damages against the respondent, Capitec Bank Holdings Limited (Capitec), thereby enforcing a clause not to sue, a *pactum de non petendo* (*pactum*), contained in a written consent agreement between Capitec and the appellants. Two main issues arose for determination in the appeal. Firstly, the interpretation of the consent agreement and, secondly, whether the *pactum*, which was a permanent one, was contrary to public policy.

Coral, wholly owned by Ash Brook, is a broad based black economic empowerment consortium comprising 13 black shareholders. In 2006 Capitec, Coral, Ash Brook, the shareholders of Ash Brook and the Industrial Development Corporation concluded a linked set of written agreements. Part of the set of agreements was a subscription agreement concluded between Capitec and the appellants on 12 December 2006. Capitec allotted and issued, and Coral subscribed for ten million ordinary shares in Capitec (CPI shares). An important element of the subscription agreement was three sets of selling restrictions, aimed at keeping the CPI shares in black shareholders' hands. One of these selling restrictions provided that should Coral in any manner endeavour to dispose of any of the CPI shares to any entity or person who, in Capitec's opinion, does not comply with the B-BBEE Act and transformation practises,

Capitec will determine the number of CPI shares sold and may require Coral to acquire an equal number of CPI shares and cause them to be registered in Coral's name.

It was always the parties understanding that Capitec's consent was required for Coral to trade in the CPI shares. However, in proceedings instituted against Capitec in September 2019, Capitec stated that it had realized that the clause was concerned with the Coral's *consequences* of selling any of its CPI shares to an entity or person who Capitec found to be in non-compliance with the B-BBEE Act and transformation practices. The effect of this concession was that Coral did not need Capitec's consent to sell its CPI shares.

From about 2014 there was ongoing dissatisfaction about the selling restrictions by Ash Brook and its shareholders. The appellants instituted proceedings against Capitec in 2016 (the 2016 action) in which the validity of certain provisions of the subscription agreement were challenged. The matter is still pending. In 2017, Coral sought to sell 3 360 830 of its CPI shares to a subsidiary of a 100 per cent black-owned company called Petratouch (Pty) Ltd (the 2017 Petratouch Transaction). Consistent with the practice adopted by the parties in the previous transactions, Coral sought Capitec's consent for the 2017 Petratouch Transaction. Capitec agreed, subject to certain conditions. Coral accepted the conditions and sold the CPI shares to Petratouch.

One of the agreements constituting the 2017 Petratouch Transaction was the consent agreement entered into between Capitec and the appellants, which contained the *pactum*. The purpose of the consent agreement was for Capitec to waive various rights in connection with the selling restrictions imposed in terms of the subscription agreement so that the 2017 Petratouch Transaction could proceed. Without these waivers, which Capitec was not obliged to make, the 2017 Petratouch Transaction would have breached the selling restrictions. On account of certain concerns, Capitec proposed the inclusion of the *pactum* in the consent agreement.

On 19 June 2020 the appellants instituted action against Capitec and claimed, in broad terms, that, but for Capitec's conduct, Coral would not have concluded the 2017 Petratouch Transaction at a discount of 52 per cent to the prevailing 30-day weighted average, amounting to a loss of R 1,225 billion.

The SCA interpreted the consent agreement and found that the institution of legal proceedings against Capitec was not permitted under two circumstances. Firstly, in terms of clause 7.1.6.1, the appellants were not allowed to use or rely upon the 2017 Petratouch Transaction in the 2016 action. Secondly, in terms of clause 7.1.6.2 the appellants were not permitted to institute any legal proceedings against Capitec where reliance is placed on the 2017 Petratouch Transaction. The context established that Capitec agreed to give its consent to the 2017

Petratouch Transaction only if the appellants agreed not to use or rely on the 2017 Petratouch Transaction or any part thereof against Capitec in the 2016 action or any other legal proceedings which they might institute against Capitec. The SCA found that the two clauses were clearly intended to create obligations and to afford rights and remedies and, as such, they constituted contractual undertakings. The claims against Capitec in the 2020 action were all reliant on the 2017 Petratouch Transaction, and the institution of the 2020 action was clearly in breach of the undertaking not to sue.

The appellants submitted that a constitutional right of access to a court cannot be waived and that the *pactum* is against public policy. This Court confirmed that a *pactum* is an agreement like any other. There was, therefore, no reason why Capitec could not enforce the *pactum*. This Court found that the appellants, as experienced businesspersons and negotiators, were fully aware of their rights and obligations, and voluntarily elected to consent to the terms of the *pactum*. The *pactum* was concluded in a particular context for a specific, legitimate reason and went no further than was necessary to prevent very specific litigation. As such it is a limited and reasonable restriction on the appellants' ability to litigate. In light hereof, public policy require that parties should comply with the contractual obligations that have been entered into freely.

The SCA emphasised that courts should use the power to invalidate a contract or not to enforce it sparingly and only in the clearest of cases. In addition, agreements not to litigate are not necessarily unreasonable but each case should be determined on its own terms.

In the result, the SCA dismissed the appeal.

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