REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No

5/11/19 — DATE

SIGNATURE

CASE NO: 30899/2019

In the matter between:

CORAL LAGOON INVESTMENTS 194 (PTY) LIMITED	First Applicant
ASH BROOK INVESTMENTS 15 (PTY) LIMITED	Second Applicant

and

CAPITEC BANK HOLDINGS LIMITED	First Respondent
CAPITEC BANK LIMITED	Second Respondent
THE TRANSNET SECOND DEFINED BENEFIT FUND	Third Respondent
ERIC ANTHONY WOOD N.O.	Fourth Respondent
TRUSTEGIC (PTY) LTD	Fifth Respondent

RORISANG BASADI INVESTMENTS (PTY) LTD	First Intervenor
LEMOSHANANG INVESTMENTS (PTY) LTD	Second Intervenor

And

CASE NO.:24805/17

In the matter between:

THE TRANSNET SECOND DEFINED BENEFIT FUND	Applicant (in Counter-application)
and	
CAPITEC BANK HOLDINGS LIMITED	First Respondent (in Counter-application)
CORAL LAGOON INVESTMENTS 194 (PTY) LIMITED	Second Respondent (in Counter-application)
ASH BROOK INVESTMENTS 15 (PTY) LIMITED	Third Respondent (in Counter-application)
REGIMENTS CAPITAL (PTY) LTD	Fourth Respondent (in Counter-application)
REGIMENTS FUNDS MANAGERS (PTY) LIMITED	Fifth Respondent (in Counter-application)

JUDGMENT

Vally J

INTRODUCTION

[1] There are two matters before me which have been brought on an urgent basis. All parties agreed that the matters required urgent judicial attention. Their combined papers are voluminous. Scrutinising them in the limited time was far from easy. However, my task was made immeasurably easier by the able and helpful

assistance I received from all the counsel and attorneys involved in the matter. I remain ever grateful to them and thank them accordingly.

[2] In Case No. 30899/2019[1] the first applicant, Coral Lagoon Investments 194 (Pty) Limited (Coral Lagoon), together with the second applicant, Ash Brook Investments 15 (Pty) Limited (Ash Brook), approach this Court on an urgent basis for:

a. a declaration that the refusal of the first respondent, Capitec Bank Holdings Limited (Capitec), to approve or consent to the sale of 810 230 Capitec shares by the applicants to the third respondent (the sale), the Transnet Second Defined Benefit Fund (TSDBF), and others is:

   i. unreasonable as contemplated in clause 13.7 of the Subscription of Shares Agreement concluded between the applicants and the first respondent on 12 December 2006 (the subscription agreement);

   ii. in breach of the first respondent's contractual duties of good faith as contemplated in clause 13.11 of the subscription agreement *alternatively* the common law; and

   iii. unlawful, inconsistent with and unconstitutionally infringes upon the applicants' fundamental rights to equality, dignity and property

[1] For ease of reference this will be referred to as the Coral Lagoon application and in order to avoid unnecessary prolixity all references to Coral Lagoon must be read to include Ash Brook. Therefore when referred to in the third person the plural "they" and "them" will be used.

in terms of sections 9, 10 and 25 of the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution) respectively and/or the Broad-Based Black Economic Empowerment Act, 53 of 2003 (the B-BBEE Act);

b. an order compelling Capitec to consent to the applicants selling their Capitec shares to the TSDBF;

c. an order of costs of two counsel.

[3] In Case No.: 24085/17[2], the TSDBF brought an application against Capitec. It was brought in the form of a counter application, as both it and Capitec were cited as respondents in the case. The TSDBF seeks an order declaring that Coral Lagoon does not require the consent of Capitec in order to sell its shareholding in Capitec to the TSDBF. The sale was part of a settlement agreement concluded on 8 August 2019 between TSDBF and Regiments.[3] At the same time, the TSDBF was cited as a respondent in the Coral Lagoon case, and in that case it made common cause with Coral Lagoon. So on the one hand the TSDBF seeks an order declaring that Coral Lagoon is not obliged to seek the consent of Capitec for the sale of its shares in Capitec to the TSDBF. On the other hand it supports the case of Coral Lagoon that the refusal of Capitec to give its consent is, amongst others, unlawful. It will be shown below that there is a perfectly rational explanation for the stances it adopted.

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[2] For ease of reference this will be referred to as the TSDBF application.

[3] "Regiments" is the name used by the parties in this case. It refers to a group of companies in which the fourth and fifth respondents in the TSDBF case have substantial shareholdings. For purposes of this case, it is not necessary to delve into the complex structure of the group. To the extent that any of those companies are affected by the proceedings in these cases, their interests are represented by the fourth and fifth respondents in the TSDBF case.

[4] Two minority shareholders in Ash Brook, Rorisang Basadi Investments (Pty) Ltd (Rorisang) and Lemoshanang Investments (Pty) Ltd (Lemoshanang) brought an application to intervene in both applications on the grounds that their voices as minority shareholders require to be heard for a just determination of the matters. Their application was unopposed. Accordingly, an order granting them leave to intervene was made. They make common cause with Coral Lagoon. They do so on the basis that the relief sought by Coral Lagoon is in their best interest.

APPLICATIONS TO STRIKE-OUT CERTAIN MATERIAL

[5] There are two applications by Capitec to strike out certain material from the record. The first arises in the Coral Lagoon matter and the second in the TSDBF matter.

Striking-out application in the Coral Lagoon matter

[6] In their founding affidavit Coral Lagoon, in its quest to show the lack of good faith on the part of Capitec, attached two emails they had received from Capitec which were sent in the course of the discussions before the litigation commenced. The emails were marked "*without prejudice*". Capitec asks that the two emails and all references to them in the founding affidavit be struck from the record. Coral Lagoon does not dispute that the emails was marked *"without prejudice"* and that they were sent in the course of discussions aimed at resolving the issue of Capitec granting consent for the sale to the TSDBF. Generally it is against public policy to allow a party to make reference to "*without prejudice*" communication in litigation as it stifles open and candid discussions aimed at avoiding the litigation in the first

place.[4] However, a court has the discretion to include *"without prejudice"* communication if it serves the interest of justice. In this case though, I am not satisfied that the inclusion of these two emails would really enhance the course of justice. Accordingly, I hold that the two emails and all references to them in the founding affidavit should be struck from the record.

Striking-out application in the TSDBF matter, alternatively an application to file a supplementary answering affidavit by Capitec

[7] In its replying affidavit the TSDBF (i) used robust language to describe Capitec's conduct. It described the conduct as an application of "*bullying tactics*" on the part of Capitec; and, (ii) submitted that the interpretation of the subscription agreement, as well as the practical effect given thereto over the years by Capitec, demonstrated that Capitec may be guilty of engaging in "*fronting.*" Capitec took offence to all the averments containing the descriptive terms "*bully*" or "*bullying conduct*" as well as the allegation of "*fronting*", which is a criminal offence under section 130(1)(d) of the B-BBEE Act. Capitec seeks to have them struck from the record on the grounds that they constitute scandalous and/or vexatious and prejudicial material. Alternatively, it asks for an opportunity to file a further affidavit so that it can explain itself. I believe the latter course is the just and fair one to adopt in this case. Capitec's further affidavit is therefore allowed.

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[4] *Naidoo v Marine & Trade Insurance Co Ltd* 1978 (3) SA 666 (A) at 677B-D

FACTS

Regiments, Ash Brook, Coral Lagoon and Capitec

[8] Regiments holds a 59.82% interest in Ash Brook. The rest of the shareholding in Ash Brook is held by Rorisang (4.5%), Lemoshanang (13.27%) and a few others. Ash Brook owns 100% of Coral Lagoon.

[9] On 12 December 2006 Coral Lagoon purchased 10 000 000 shares in Capitec at the price of R30 per share. This purchase forms the nucleus of the agreement referred to as the subscription agreement. The prevailing market price of the share on the Johannesburg Stock Exchange (JSE) was R28.78. Coral Lagoon, therefore, paid a premium of R1.12 per share. The 10 000 000 shares held by Coral Lagoon by virtue of the purchase represented 12.21% of the total shareholding in Capitec. Coral Lagoon qualifies as a black person or entity (*Qualifying Black Person*) in terms of the B-BBEE Act and the Codes of Good Practice contemplated in s 9 of the B-BBEE Act (the Codes). From 2012 onwards Coral Lagoon began disposing of some of the 10 000 000 shares through various transactions.

[10] The Industrial Development Corporation (IDC) financed R285m and Capitec financed the other R15m of the purchase price. Both the IDC and Capitec received an equivalent value of preference shares in Ash Brook.

[11] The subscription agreement contained three selling restrictions. They are: the Ash Brook share restriction (Ash Brook restrictions); the Coral Lagoon share restrictions (Coral Lagoon restrictions); and the Capitec share restriction (Capitec

restriction). The parties are *ad idem* that the only restriction that affects the consideration of this matter is the Capitec restriction, which is detailed in clause 8.3 of the subscription agreement. It deals with breaches of selling restrictions by Coral Lagoon and reads:

> Clause 8.3
> "Save for the provisions of the Facility Letter, should [Coral Lagoon] sell, alienate, donate, exchange, encumber, or in any other manner endeavour to dispose ("sold") any of the [Capitec] shares to any entity or person who, in [Capitec's] opinion does not comply with the BEE Act and Codes, [Capitec] will determine the number of [Capitec] Shares sold and [Coral Lagoon] will within 30 days after requested thereto by [Capitec] acquire an equal number of [Capitec] shares and cause same to be registered in [Coral Lagoon's] name."

[12] According to Capitec clause 8.3 was imposed on Coral Lagoon in order to ensure that the Capitec shares owned by Coral Lagoon would always remain in the hands of a Qualifying Black Person. It has understandably been referred to as the "*buyback clause*" or the "*repurchase clause*" by the parties.

[13] On 29 February 2012 Capitec redeemed its preference shares in Ash Brook for R23.7m and Coral Lagoon sold 5 284 735 of Capitec shares at a 15% discounted price of R156.11 per share to the Public Investment Corporation (PIC), the investment arm of the Government Employees Pension Fund (GEPF). The sale realised R824 999 980.85 for Coral Lagoon. As a result Coral Lagoon was able to liquidate its loan with the IDC. In consequence the holding of Coral Lagoon in Capitec reduced to 4 715 265 shares, which represented 5.6% of Capitec's total shareholding. The said sale was sanctioned by Capitec. It is agreed by the parties that Capitec adopted the view at the time that its consent was required for the sale to be effected. The purchase by PIC was subject to PIC agreeing to similar selling

restrictive conditions as were imposed on Coral Lagoon, save that they were to apply for a period of 5 years only, i.e. until 28 Feb 2017. Thereafter the PIC was free to dispose of the shares to whomsoever it wished. It is noteworthy that while PIC agreed to the selling restrictive conditions, it itself is not a Qualifying Black Person.

[14] In May 2015 Petratouch (Pty) Ltd (Petratouch), a wholly owned black entity acquired the 5 284 735 Capitec shares from the PIC. To finance the purchase Petratouch sought a loan from Investec Bank Ltd (Investec) and pledged as security 3 798 600 Capitec shares (4.5% of Capitec shareholding) to Investec, leaving it with only 1 486 135 shares. Crucially, in order for Petratouch to secure the funding it, together with Investec, called upon Capitec not to impose any restrictive conditions on all the 5 284 735 shares so that Investec could trade with these shares freely. Capitec relented and agreed not to impose any conditions on the 3 798 600 shares but imposed a condition on the 1 486 135 shares that were left in the hands of Petratouch. Effectively, Capitec deemed it appropriate to impose the selling restrictions on Petratouch, a Qualifying Black Company, but not on Investec which was not a Qualifying Black Person. Further still, Investec sold 3 700 000 shares at a discount of only 6.5% to non-Black companies. In the result, Capitec was comfortable with the fact that its B-BBEE rating was reduced by 3 700 000 shares (approximately 4.38%). Capitec was also not unhappy with allowing the PIC to hold the shares for a period of five years and then selling them to whoever it wished. Capitec has not explained its conduct in the papers in these proceedings save to say that it was satisfied that Coral Lagoon had to liquidate its debt to the PIC. In simple terms, shares that were in the hands of a Qualifying Black Person and which enhanced the B-BBEE rating of Capitec were allowed to be sold to persons or

entities that were not black. The following is a list of the entities that bought these shares:

Institution	Final Number of [Capitec] shares allocated
Marshall Wace Asset Management (UK)	561,236
Laurium Capital	258,766
Abax Investments	258,766
Peregrine Capital	230,000
Peregrine Securities	225,000
Mazi Capital	220,000
Investec Wealth & Investment	217,856
Fairtree Capital	163,346
36ONE Asset Management	160,000
Charlemagne Capital (UK)	159,877
Nitrogen Fund Managers	150,000
Anchor Capital	140,000
Kaizen Asset Management	125,000
Capital	105,000
USB (Broker)	85,000
Wellington Management (USA)	82,000
Visio Capital	80,000
Moore Capital (USA)	77,953
Jabre Capital Partners (Europe)	77,953
Old Mutual	68,000
BlueCrest Capital Management	62,363
Moon Capital (USA)	32,669
Investec Asset Management	32,000
Outset (Broker)	30,000

Allan Gray	25,877
Courtney Capital	20,000
Blackstar Fund Managers	15,000
AllWeather Capital	15,000
Openheimer Funds	11,311
RMB (Broker)	10,000
TOTAL (ZAR)	3,700,000

[15] The transactions, no doubt, undermined Capitec's ambition to increase its B-BBEE status which, according to a message it released to its shareholders, was aimed at achieving 25% of its total shareholding by 2010.

[16] During 2016 Coral Lagoon was presented with a bill for taxation by the Commissioner for the South African Revenue Service. In November 2016, in order to liquidate this tax liability, Coral Lagoon's directors recommended to its shareholders that Coral Lagoon sell some of its shares in Capitec. The recommendation was accepted. At the same time some of the Ash Brook shareholders wished to exit from Coral Lagoon. Coral Lagoon commenced negotiating the intended sale with Petratouch which wanted to increase its exposure to Capitec. The negotiations culminated in a willingness by Petratouch to purchase the shares at a substantial discount together with the encumbrances attached to them by the subscription agreement. In other words, Petratouch was willing to purchase the shares and accept the selling restrictions that befell Coral Lagoon. Noting clause 8.3 of the subscription agreement, Petratouch sought the approval of Capitec for the purchase. As Petratouch was wholly black owned and willing to accept that the selling restrictions would continue to apply Capitec granted the

approval. As a result Coral Lagoon sold 3 360 830 of its 4 715 265 Capitec shares to Petratouch leaving itself with 1 354 435 Capitec shares. This holding represented 1.17% of Capitec's shareholding.

[17] On 28 August 2018 Capitec became aware of the order issued by Tsoka J interdicting Coral Lagoon, Ash Brook and Regiments from dissipating any of their assets, including their shareholding in Capitec, pending the finalisation of a case brought against them by the TSDBF.

The TSDBF

[18] As mentioned before there are two applications before this Court: Coral Lagoon and TSDBF. The TSDBF claims to be a victim of what the parties have collectively characterised as "*State Capture*".[5] It maintains that Regiments was one of the perpetrators of "*the state capture project,*" which involved, *inter alia*, unlawfully fleecing various arms of the State, state owned enterprises and pension funds of employees employed by state owned enterprises. It is, it claims, one of those pension funds and has had R1 bn stolen from it by Regiments. To recover its losses it launched action proceedings on 10 August 2017 in this Court against thirteen defendants, most of whom were part of, or linked to, Regiments. The proceedings spawned a number of interlocutory applications. These resulted in three judgments and orders: one by Adams J, which required Regiments to provide security to the TSDBF; one by Tsoka J which has been referred to above; and finally, one by van der Linde J which interdicted Regiments from dissipating assets not covered under

[5] The term "*state capture*" has been extensively used in the papers before this Court. In fact, in the case of the TSDBF the nature, character, form and effect of "state capture" has been extensively dealt with in the averments of the affidavits filed on behalf of the TSDBF.

the Tsoka J order pending the outcome of the action proceedings. These orders fundamentally affected the ability of Regiments to pursue its commercial activities.

[19] Regiments and the TSDBF engaged in negotiations towards ending their litigation. While those were proceeding, on 12 July 2019 the attorneys for Coral Lagoon wrote to the attorneys for Capitec (the first letter) requesting, amongst others:

a. the attorneys to confirm that shareholders of Ash Brook are free to trade with their shares in Ash Brook as well as in Coral Lagoon without restriction, and that shareholders of Coral Lagoon are free to trade with their shares in Capitec without restriction; and,

b. Capitec to waive its rights in terms of clause 8.3 of the subscription agreement to call on Coral Lagoon to acquire Capitec shares pursuant to a "*sale, alienation, encumbrance, donation or disposal*" of Capitec shares by Coral Lagoon as contemplated in clause 8.3 of the subscription agreement; and,

c. Capitec to waive its right to purchase the Capitec shares from Coral Lagoon in terms of clauses 8.2 and 8.4 of the subscription agreement.

[20] The first letter was not fully responded to. In the meantime the negotiations between the TSDBF and Regiments towards ending their litigation bore fruit. A settlement agreement was concluded on 8 August 2019. The settlement agreement was between the TSDBF on the one hand and Regiments, Coral Lagoon and the

directors of Regiments, Mr Litha Mveliso Nyhonyha (Mr Nyhonyha) and Mr Magandheran Pillay (Mr Pillay) on the other hand. In terms of the settlement agreement Coral Lagoon agreed to sell 810 230 Capitec shares to the TSDBF. The debt of Regiments would be liquidated upon the sale. The implementation of the settlement agreement is subject to a suspensive condition that Regiments and Coral Lagoon secure the consent of Capitec allowing Coral Lagoon to sell the 810 230 Capitec shares to the TSDBF.

[21] On 13 August 2019 the legal advisors of the TSDBF and representatives of Capitec (which included its Chief Financial Officer, the head of its legal department, who is also the deponent to all its affidavits in these matters, and one other person from its legal department) met at the offices of the attorneys Edward Nathan Sonnenberg Inc (ENS) to discuss, amongst others, the claim of the TSDBF against Regiments. During the course of the discussions, the TSDBF representatives explained the background and structure of the settlement agreement. The discussion also canvassed the issue of Regiments' involvement in the "*State Capture*" project and the prejudice suffered by the TSDBF as a result thereof.

[22] On 14 August 2019 one of the legal advisors to the TSDBF, Mr Roger Rudolph (Mr Rudolph), penned an email to the same representatives of Capitec informing them that he wished to consider the contractual arrangements affecting Coral Lagoon's holding of Capitec shares; that he had in his possession the subscription agreement, the Ash Brook Memorandum of Incorporation (MOI), the Coral Lagoon MOI and the shareholders' agreement in relation to Ash Brook, and asked them to furnish him with a copy of Capitec's MOI. On the same day Mr

Rudolph wrote again to them alerting them to a submission made to the Zondo Commission of Enquiry which is focussed on "*State Capture*" as well as an article in an online daily newspaper which exposed the nefarious activities of Regiments.

[23] On 19 August 2019 the attorneys of Coral Lagoon wrote once again (the second letter) to the attorneys of Capitec reminding them that they had promised to respond more fully to the 12 July 2019 letter, but had yet to do so. Further, they informed the Capitec attorneys of the settlement agreement, furnished them with a copy of it and alerted them to the suspensive condition therein, which required the consent of Capitec in order for it to become effective. They asked that Capitec consent to the sale of 810 230 shares to the TSDBF and finally, if the consent was refused, that an explanation of the "*reasonable basis*" for the refusal be furnished as Capitec was bound by clause 13 of the subscription agreement which provides that:

> "Any consent or approval required to be given by any Party in terms of this Agreement will, unless specifically otherwise stated, not be unreasonably withheld."

[24] On 21 August 2019 the attorneys of Capitec responded to both letters:

a. With regard to the first letter they said:

> "(t)he requests ... are accordingly denied and the disposal and encumbrance restrictions applicable to (i) the shareholders of Ash Brook in respect of their shares in Ash Brook; (ii) Ash Brook in respect of its shares in Coral Lagoon; and (iii) Coral Lagoon in respect of its [Capitec shares] all remain in full force and effect."

b. With regard to the second letter they said:

> "The Subscription Agreement effectively prohibits Coral Lagoon from disposing of any of the [Capitec shares] held by it to any entity or person who, in Holdings' [sic, it should have been Capitec] opinion, does not comply with the B-BBEE Act and the Codes and Coral Lagoon is accordingly prohibited from disposing of any of its [Capitec shares] to the TSDBF."

[25] Crucially, the response of Capitec's attorneys makes it clear that they and their clients were firmly of the view that Coral Lagoon was prohibited from selling the Capitec shares to the TSDBF and that Capitec refused to consent to the sale. Of equally crucial importance is that the response specifically avoids answering the pertinent question: what is "*the reasonable basis*" for refusing the consent?

[26] Meanwhile the TSDBF's legal advisor, Mr Rudolph, was awaiting a response to his email of 14 August 2019 from the representatives of Capitec. No response was ever received, so on 21 August 2019 he sent an email to the head of Capitec's legal department and to its attorney. The head of the legal department, it will be recalled, was at the meeting of 13 August 2019 and is the deponent to most of its affidavits in these cases. It bears mentioning that when Mr Rudolph sent this email on 21 August he was not aware of the exchange between the attorneys for Coral Lagoon and the attorneys for Capitec referred to in the two previous paragraphs. In any event, his email, in my view, is significant and bears full reproduction here. It reads:

> "I understand that by now you would have received:
>
> 1. Wood's application ... to interdict the settlement agreement concluded by the TSDBF with the various Regiments ...
>
> 2. Correspondence from Coral Lagoon requesting the consent contemplated by that settlement agreement.

> The TSDBF will be opposing Wood's application. We expect that you will be considering a response to Wood's application and to the request for consent.
>
> The TSDBF would like your support for the implementation of the settlement agreement and would, accordingly, like to ensure that the decision that Capitec makes on both fronts is made only after the board of Capitec has considered all the facts and circumstances that the TSDBF regards as relevant to such a decision, including the importance of the settlement agreement in the context of the national need for recovery of losses by victims of State Capture.
> Accordingly, our client would like to request an opportunity to make a written representation to the board of Capitec before the board makes any decision on either of these aspects.
> We are mindful of the urgency. At present, the papers require a notice of intention to oppose the relief sought by Wood would be filed by 30 August 2019 and the matter is set down for hearing on 10 September 2019. In addition, the last date for fulfilment of the suspensive conditions in the settlement agreement is 6 Sept 2019.
> I look forward to hearing from you."

[27] The tenor of the email is conciliatory, not conflictual or even neutral. It is, without doubt, based on a belief that Capitec would be sympathetic to the TSDBF's case, especially since the TSDBF representatives had explained to Capitec representatives the nature of "*State Capture*" that Regiments was involved in, the harm it had suffered at the hands of Regiments and how the settlement agreement brings justice to its members who are all indigent pensioners. The belief was further based on the understanding that it would make business sense for Capitec to sever all links with Regiments; that it would not be in the interests of Capitec to be associated with Regiments and to take advantage of Regiments' B-BBEE standing to improve its own B-BBEE rating given that Regiments had been accused of committing serious crimes and impoverishing much of the community as a consequence. The TSDBF further requested an opportunity to make written representations to the board of Capitec so that its message could be brought to the attention of the members of the board. The TSDBF clearly believed that if the board

were to consider its representations, the board would agree to consent to the sale. But alas the belief turned out to be wrong. Capitec had no intention of consenting to the sale. It had already written to the attorneys of Coral Lagoon on 19 and 21 August 2019 (the same day that Mr Rudolph wrote to its attorney) indicating in no uncertain terms that it would not consent to the sale. Responding per email on the same day to Mr Rudolph's email the attorney for Capitec wrote:

> "Thank you for your email.
>
> Kindly note that due to the stringent timelines by which to respond to Coral's request for Capitec's consent, as contemplated in the Settlement Agreement, our client has taken a stance on the matter. Herewith a copy of the letter received from [Coral Lagoon's] attorneys dated 19 August 2019 and our response [dated 21 August]
>
> Kindly be guided accordingly."

Approximately 30 minutes later Mr Rudolph responded per email in the following terms:

> "We note your email below and the attachments.
>
> Our client's request for an opportunity to make representations to your client's board stands."

[28] Mr Rudolph received no response to his last email and so on 23 August 2019 the Principal Officer of the TSDBF, Mr Petrus Maritz (Mr Maritz), decided to write directly to the chairperson of the board of Capitec, Ms Santie Botha. His letter informed her that Regiments, Mr Nyhonyha, Mr Pillay and Dr Eric Wood (Dr Wood) and others related to Regiments had committed fraud against the TSDBF, were sued by the TSDBF and that the TSDBF had concluded the settlement agreement with them in order to recover its losses. He claimed that the settlement agreement was "*of substantial national importance and prominence*" as it was "*the largest single*

recovery of state captured funds." He informed her that the settlement agreement involved the TSDBF purchasing 810 230 Capitec shares (which constituted only 0.7% of the total shares issued in Capitec) from Coral Lagoon and that the TSDBF would *"like Capitec's support in implementing it*". He concluded by stating that the "*purpose of* [the] *letter is to ask for an opportunity to make more detailed written representations to the board of* [Capitec] *with a view to obtain this support from Capitec.*"

[29] On 27 August 2019 Mr Rudolph responded to the 21 August 2019 letter from the attorneys of Capitec. He asked the attorneys for some clarity regarding their claim that the sale of Capitec shares held by Coral Lagoon was subject to "*encumbrance restrictions*". In this regard he asked if they were referring to clause 8.3 of the subscription agreement. Finally, he closed his response with a plea that the TSDBF be allowed to make written representations to the board of Capitec.

[30] On 27 August 2019 Capitec, without solicitation, wrote to the shareholders and directors of Ash Brook, (including Rorisang directors and Lemoshanang directors and shareholders) and Coral Lagoon informing them that in terms of the subscription agreement Coral Lagoon was prohibited from disposing of any or all of the Capitec shares to any entity or person who, in its opinion, is not a Qualifying Black Person. It stated further that the TSDBF is not a Qualifying Black Person and is therefore prohibited from acquiring the shares. The letter repeated (verbatim in some respects) what was said to the attorneys for Coral Lagoon:

> "2.2 In terms of the Subscription Agreement –
> 2.2.1 Coral Lagoon is prohibited from disposing of any or all of the [Capitec] shares held by it to any entity or person who, in Capitec's opinion, does not comply with the Broad-Based Black Economic

> Empowerment, Act No 53 of 2003 and the Codes of Good Practice on black economic empowerment contemplated in section 9 of the B-BBEE Act ...; and
> 2.2.2 should Coral Lagoon dispose of [Capitec] shares held by it to any person who does not, in the opinion of Capitec, comply with the B-BBEE Act and the Codes, Capitec will be entitled to require that Coral Lagoon purchase a number of replacement [Capitec] shares as determined by Capitec."

The letter then threatens the shareholders and directors of Ash Brook in the following terms:

> "... should you or any of your representatives, in your respective capacities as a shareholder or director of Ash Brook or Coral Lagoon, authorise or otherwise facilitate, whether directly or indirectly (including by way of approving any shareholder or director resolutions), the disposal by Coral Lagoon of any of the [Capitec] Shares held by it to the TSDBF, Capitec will consider you to have deliberately interfered with, or facilitated an unlawful breach of, the [subscription agreement] and Capitec will join you in any proceedings which it may institute in order to enforce its rights under the [subscription of shares agreement], including any proceedings brought to recover any damages suffered by it."

[31] The three unambiguous messages conveyed to Ash Brook shareholders and directors in this letter are: firstly, Capitec refuses to retract from its position that Coral Lagoon is prohibited from selling the shares; secondly, for the first time it specifically makes reference to clause 8.3 and says it intends to invoke it should the sale proceed, and thirdly, it threatens them with litigation in their personal capacity should they agree (vote for) the sale of the Coral Lagoon shares. It is clear that this third message (the threat of litigation) derives from its first (that Coral Lagoon is prohibited from selling the shares) in that it would be tantamount to them agreeing to Coral Lagoon breaching the subscription agreement.

[32] On 30 August 2019, Ms Botha, the Chairperson of the Capitec board responded to Mr Maritz's letter of 23 August 2019. Given Ms Botha's status as one

of the most senior persons associated with Capitec the contents of her letter, although long, bear repetition here:

> "2. I have been informed that there have been a number of discussions between the TSDBF's attorneys and Capitec's management in relation to this matter and I reiterate Capitec's position as explained in the course of these discussions and furthermore respond as follows:
>
> 2.1 The Capitec shares held by Coral Lagoon ... were issued by Capitec to Coral Lagoon in terms of a Subscription Agreement concluded between *inter alios*, Coral Lagoon and Capitec [subscription agreement], to give effect to a broad-based black economic empowerment transaction (the Transaction).
>
> 2.2 The sole rationale for Capitec entering into the Subscription Agreement and implementing the Transaction was in order for Capitec to obtain enhanced direct B-BBEE ownership credentials and thereby increase compliance by the Capitec Group with the Financial Sector Charter (as it was known then) and the [Codes] published [in terms of the B-BBEE Act]. It was on this basis that the board of directors of Capitec proposed and recommended to the shareholders of Capitec that they approve the Transaction.
>
> 2.3 In terms of the Subscription Agreement, Coral Lagoon is prohibited from disposing of any or all of the [Capitec] Shares held by it to any entity or person who does not have the requisite level of black ownership ("Qualifying Black Person"). Since the TSDBF is not a Qualifying Black Person, a disposal by Coral Lagoon of any of the [Capitec] Shares held by it to the TSDBF is prohibited in terms, and amounts to a material breach, of the Subscription Agreement.
>
> 2.4 Were Capitec to support the disposal by Coral Lagoon of its [Capitec] Shares to the TSDBF, then Capitec would be waiving its rights under the Subscription Agreement pursuant to the non-compliance by Coral Lagoon with its contractual obligations under the Subscription Agreement. Such waiver would effectively result in Capitec agreeing to forfeiture of the direct B-BBEE ownership credentials attributable to such [Capitec] Shares, which would be contrary to the rationale for the Transaction and the basis on which the Capitec board of directors sought shareholder approval for the Transaction.
>
> 2.5 In the circumstances (and in terms of the JSE Limited Listings Requirements), the Capitec board of directors would need to obtain approval from Capitec shareholders in order to support the disposal by Coral Lagoon of its [Capitec] Shares to the TSDBF. In doing so, the board would need to motivate such approval, having regard to their fiduciary duties towards the company and shareholders as a whole.

2.6 It is difficult to conceive a basis for such a motivation having regard to, amongst other things, the prejudice that Capitec will suffer; the company's (and the country's) imperative to advance B-BBEE; the fact that the TSDBF's claims against the various persons remains pending in the High Court; and the fact that the beneficiaries, in part, of such approval will be the very individuals who according to the TSDBF have been implicated in state capture (as per your letter).

2.7 The prejudice to Capitec should also be viewed in the context of Capitec being a public, listed company with private and public sector pension funds invested in it.

3. Should the TSDBF proceed to implement the Settlement Agreement and acquire certain of the [Capitec] Shares held by Coral Lagoon without Capitec's support, Capitec will consider the TSDBF to have interfered with the contractual obligations of Coral Lagoon towards Capitec in terms of the Subscription Agreement. We accordingly encourage the TSDBF to continue to engage with Capitec with a view to finding a mutually acceptable solution that addresses both the interests of the TSDBF and the interests of Capitec and its shareholders and stakeholders.

4. With regards to the TSDBF's request to make more detailed representations to the board of directors, due to the fact that the members of the board are situated in different centres across the country, the TSDBF is invited to make such representations to André du Plessis, the Group CFO, who has been intricately involved in the B-BBEE transaction to date."

[33] Most of the contents are controversial. The following are some of the key ones:

a. In its original papers in the counter application the TSDBF pointed out that the contents of paragraph 2.3 were incorrect in that it is not prohibited from acquiring the shares despite the fact that it is not "*a Qualifying Black Person*". Similarly Coral Lagoon is not prohibited from selling them to the TSDBF and would not be breaching the subscription agreement by doing so. Capitec was invited to explain why it consistently and vigorously maintained that a prohibition on the sale was in place. Capitec ignored the invitation and, as will be seen later, made a complete *volte face* on the issue in its answering papers.

b. Similarly, with paragraph 2.4 of her letter which contends that consent for the sale was not possible because it would result in Capitec waiving its rights pursuant to the breach of the subscription agreement by Coral Lagoon. Bearing in mind that the TSDBF maintained that Coral Lagoon would not be breaching the subscription agreement by selling the shares to it, it invited Capitec to identify the rights it claimed it had in terms of the subscription agreement. Capitec ignored the invitation in its answering affidavit.

c. In paragraph 2.5 Ms Botha claims that in terms of the JSE Listing Requirements Capitec would have to obtain approval from its shareholders "*in order to support*" the sale to the TSDBF. The TSDBF pointed out in its papers that this is simply legally wrong. Capitec made no effort in its answer to explain why Ms Botha misleadingly claimed that the JSE Listing Requirements was an obstacle to it consenting to the sale.

d. In paragraph 2.6 Ms Botha claims that were the board to support the sale the motivation thereof would be difficult as the sale was prejudicial to the interests of Capitec, and that certain individuals who were instrumental in the alleged criminal activities that form part of "*state capture*" would benefit from the sale. The TSDBF pointed out that this is simply incorrect and that none of the parties guilty of unlawful conduct in the "*state capture*" would benefit from the sale. Capitec,

once again, did not deal with this in its answer, thus admitting that the Chairperson of its board relied on an incorrect understanding of the settlement agreement when engaging with Mr Maritz.

e. In paragraph 3 Ms Botha repeats the threat that if the TSDBF proceeded to implement the settlement agreement Capitec would consider this to be an unlawful interference with the contractual obligations of Coral Lagoon towards Capitec. Despite the threat, in the very next sentence she encouraged the TSDBF to engage with Capitec to find a mutually acceptable solution that addresses their respective interests. The TSDBF pointed out that the two sentences convey messages that are inconsistent with each other. The threat, it says, is the real message of Capitec. It is consistent with the approach adopted by Capitec throughout its dealings with the TSDBF, Coral Lagoon and Ash Brook. The invitation to the TSDBF to engage with Capitec for a mutually acceptable solution was a red herring. Capitec failed to dispute this.

f. In paragraph 4 Ms Botha refused to afford the TSDBF the opportunity to make written representations to members of the board because they "*are situated in different centres across the country*" and instead advised Mr Maritz that the TSDBF should make representations to Capitec's CFO only. The TSDBF understood this to mean that Capitec was not interested in engaging seriously or candidly with it.

Rorisang and Lemoshanang

[34] It will be recalled that on 27 August 2019 Rorisang, Lemoshanang and their respective directors and shareholders received unsolicited letters from Capitec threatening them with legal action should they agree to Coral Lagoon selling the shares to the TSDBF. On 4 September 2019 a meeting of the shareholders of Ash Brook was held to discuss the settlement agreement and take a decision with regard thereto. Resolutions approving the sale were put before the shareholders. The representative of Lemoshanang stated that "*Lemoshanang will vote against all the proposed resolutions only because*" Capitec refuses "*to provide consent to the Settlement Agreement. Lemoshanang can't be seen either actively or passively breaching the Capitec, Ash Brook and Coral Lagoon subscription agreement.*" In the same vein the representative of Rorisang said:

> "... Rorisang is neutral towards the Settlement Agreement. However, Rorisang will be voting against the proposed resolutions, not to be obstructive but to ensure that Rorisang is not in breach of the terms of the Subscription Agreement. On 27 August 2019, Rorisang received a letter from Capitec and is now of the opinion that the suspensive conditions [in the settlement agreement] are *pro non scripto*. Rorisang has no choice but to vote against the proposed resolutions."

THE CASES OF CORAL LAGOON, THE TSDBF AND THE INTERVENORS

[35] Capitec's insistence that the subscription agreement prohibited Coral Lagoon from selling the shares to the TSDBF, and its constant threats to all the parties that they would face litigation should they proceed with the sale, prompted Coral Lagoon to approach this Court for relief. In the case of the TSDBF these same factors, as well as Capitec's unwillingness to allow it to make written representations to the Capitec board, prompted it to come to this Court. Both Coral Lagoon and the TSDBF wish to abide by the settlement agreement and are desirous of ensuring that the suspensive condition – that Coral Lagoon acquires the consent of Capitec – is

fulfilled. Both claim that Capitec had a single objective, which is to scupper the settlement agreement so that it could profit from Regiments' conduct. It, according to them, saw this as an opportunity to get Coral Lagoon to sell the Capitec shares to an entity (that would of course have to enhance its B- BBEE rating) of its choice, which entity would accept stringent restrictions on the future sale. Such a sale would undoubtedly have to be at a hefty discount for it to be attractive to an entity willing to accept the very stringent restrictions imposed by Capitec on the future sale. Both the TSDBF and Coral Lagoon take a very dim view of Capitec's conduct.

The case specific to Coral Lagoon

[36] Coral Lagoon approached the case on the basis that they required the consent of Capitec for the sale to be effected. They identified all three of the restrictions in the subscription agreement as obstacles to the implementation of the settlement agreement. The reason for that reliance is to be found in the manner the parties had previously dealt with each other, which was that the Coral Lagoon and Ash Brook were obliged to obtain consent for diluting their holdings in Capitec. At the same time Capitec consistently maintained that absent its consent the sale was prohibited. They contend that:

a. Capitec's refusal to consent to the settlement agreement is a breach of its contractual and common law duty of good faith towards themselves, and is unreasonable as well as unlawful; and,

b. All the restriction clauses are contrary to public policy, unlawful and unconstitutional; and,

c. All the restriction clauses infringe their rights to equality, dignity and property as set out respectively in ss 9, 10 and 25 of the Constitution and/or the B-BBEE Act, in that they unfairly discriminated against the black shareholders who paid a premium, not discounted, price for the shares; unjustifiably infringed upon the dignity of the black shareholders by hindering their right to freely trade in the shares that were fully paid up; and they unjustifiably deprived the black shareholders of the rights to property by forcing them to sell their shares at a hefty discount.

The case specific to the TSDBF

[37] The TSDBF approached the case on the basis that Capitec had no basis in law to prohibit Coral Lagoon from selling the shares to it. Though approached from different angles, they both have the same objective: to allow the sale to go through without the risk of it being undone through litigation in the future. Since Capitec had consistently threatened them to this effect it was a risk it was not willing to countenance, but more importantly, if the consent was not given the settlement agreement could not take effect as the obtainment thereof was a suspensive condition. After receiving the application of Coral Lagoon the TSDBF elected to support Coral Lagoon's case even though it was of the view that the consent of Capitec was not necessary. Since this Court would be adjudicating on that specific issue – which involved considering all the contentions of Coral Lagoon (breach of good faith, unreasonable conduct and unconstitutionality of the restrictions) - it agreed with Coral Lagoon. In effect, the TSDBF's case was that if this Court held consent was necessary then it supported Coral Lagoon's case. It also in its reply

claimed that the rights of its members to social welfare in terms of s 27(1)(c) of the Constitution were infringed by the conduct of Capitec.

[38] The impact of the threats is one of the reasons Rorisang and Lomoshanang elected to intervene in the Coral Lagoon case. The other is that their interests are directly affected by the two cases, which made it essential that they were heard. They, however, did not make out a case separate from that of Coral Lagoon and the TSDBF.

CAPITEC'S ANSWER TO THE CASES

[39] In its answer to both applications (i) Capitec raised a number of technical points; and, (ii) Capitec pointed out that the only restriction that was relevant in the present circumstances was the one contained in clause 8.3. The Ash Brook and Coral Lagoon restrictions were not applicable to this case.

[40] Capitec admitted that it bore a duty of good faith and reasonable conduct towards Coral Lagoon and Ash Brook. It accepted that these duties arose from the subscription agreement, but denied that it owed them these duties in terms of the common law. It further disputed bearing the same duties towards the TSDBF.

[41] In answer to the Coral Lagoon application it firstly brought an application to strike-out from the record the "*without prejudice*" emails on the basis that they were protected from disclosure to the Court, and secondly contended that it had a legitimate interest in ensuring that clause 8.3 was adhered to by Coral Lagoon. It said that if the sale were to proceed then it would "*only receive the continuing*

recognition benefit of Coral Lagoon shares for 13 years. That is significantly shorter than the indefinite protection it currently enjoys through clause 8.3, coupled with the other Selling Restrictions." Its interest is to ensure that the 810 230 shares remain in the hands of a Qualifying Black Person.

[42] In answer to the TSDBF's application Capitec agreed that clause 8.3 of the subscription agreement did not prevent Coral Lagoon from selling its shares in Capitec to the TSDBF. The following averment in its answering affidavit is of particular importance in this regard:

> "Clause 8.3 creates no right for [Capitec] to prevent Coral Lagoon from selling its shares in [Capitec]. [Capitec] could not interdict Coral Lagoon from selling shares to the [TSDBF]. Nor would Coral Lagoon be in breach of the Subscription Agreement if it did so. What clause 8.3 creates is a right for [Capitec] to compel Coral Lagoon to either:
>
> Sells [sic] its shares to a buyer who, in Capitec's reasonable opinion is a BEE buyer; or
>
> If it sells its shares to a buyer not approved by Capitec [it is not clear if Capitec is claiming that even if the buyer is a "BEE buyer" it would have to approve it], to purchase an equivalent number of shares in Capitec on the open market."

[43] The matter was set down for 3 October 2019. On that morning, before the hearing commenced and literally at the door of Court, Capitec made an open offer to Coral Lagoon. It was simply handed to the parties by Capitec without any supporting affidavits. Capitec indicated that it intended to rely on the offer during the hearing. The matter was postponed, though not only because of the open offer, and Capitec was invited to bring an application to have the open offer introduced as part of the papers. This was done. All the parties were allowed to respond thereto and to file supplementary heads of argument prior to the hearing.

[44] The open offer was that Capitec would consent to Coral Lagoon selling 415 000 of its Capitec shares on the open market and pay the TSDBF the proceeds of that sale (Capitec maintained that the amount raised would be sufficient to liquidate the debt of Regiments to the TSDBF). Upon the creation of a Black Economic Empowerment segment on a licensed exchange in the country, and upon the listing, Capitec would consent to a further sale by Coral Lagoon of 310 000 of its Capitec shares on the open market. The rest of its Capitec shares (629 345) should only be sold to a Qualifying Black Person that is willing to accept that for 10 years after the sale it would not sell those shares except to a Qualifying Black Person.

[45] The open offer was rejected by Coral Lagoon.

ANALYSIS

[46] At the hearing Capitec abandoned the technical points raised in its answer. Nothing further need be said about them.

[47] Fundamentally then, the case turns on whether consent from Capitec is necessary for the sale to be effected. The issue can also be approached by asking if there was a prohibition on the sale.

[48] Capitec's approach to the issue has not been consistent:

a. Upon concluding the subscription agreement it adopted the view that its consent was required before Coral Lagoon sold any of the shares. Maintaining this view it got involved in the sale of some of the shares

in 2012 prior to the sale taking place. It consented to the sale to the PIC. In 2016 it consented to another sale of some of the shares to Petratouch. On 21 August 2019 its attorneys stated that Coral Lagoon was "*effectively*" prohibited from selling the shares to any entity that is not in the opinion of Capitec a Qualifying Black Person. On 27 August it wrote to directors and shareholders of Ash Brook repeating this assertion and threatened them with litigation should they allow Coral Lagoon to sell any of the shares to the TSDBF. On 30 August 2019 the chairperson of its board wrote to the Principal Officer of the TSDBF and repeated the assertion.

b. However, upon receipt of two applications it changed its stance. In answer it said that it agreed with the TSDBF that the subscription agreement confers no right upon it to grant or refuse consent for the sale. On this stance Coral Lagoon was not prohibited from selling its Capitec shares to any person or entity. It was only faced with the risk of Capitec coming to the conclusion that they were not sold to a Qualifying Black Person, and as a consequence thereof insisting on a re-purchase of the same number of shares sold on the open market.

c. In its open offer it adopted the stance that consent was required, at least for it not to demand a re-purchase of the shares, even if not for the sale itself.

d. At the hearing it adopted the stance that Coral Lagoon could sell to any Qualifying Black Person without even informing it of the sale, and that person/entity was free to re-sell the shares the very next day on the open market to anybody. In that case neither Coral Lagoon nor the purchasing entity would bear any risk of future litigation from Capitec.

[49] The changes in stances, Coral Lagoon, Rorisang, Lemoshanang and the TSDBF say, undeniably demonstrate that Capitec acted in bad faith towards all of them and was especially in breach of its duty of good faith and reasonable conduct towards Coral Lagoon. Had this new stance – that consent for the sale was not necessary – been adopted from the beginning Coral Lagoon would not have: (a) sold their shares at a hefty discount in 2012 and 2016; and, (b) sought Capitec's consent for the sale to the TSDBF. They would have explored other options that allowed them to obtain optimal benefit from their holdings and also allowed Regiments to clear its debt with the TSDBF. The lack of good faith has been significantly prejudicial to them and their other shareholders – Rorisang and Lemoshanang. Capitec had no answer to this.

[50] Having changed it stance on more than one occasion, it became incumbent upon Capitec to explain why it had contended in the letters and emails referred to, and quoted from, above that Coral Lagoon was "*prohibited*" from selling the shares. In this regard it simply said that the averments made therein "*were incorrect*". But saying they "*were incorrect*" is not an explanation: it is either a statement of fact or an opinion. An explanation would have to furnish reasons for why the contentions were made. It would also have to focus on why it was followed up with the forceful

threat that litigation would ensue should the sale proceed without its consent. The contention and the threat were made on more than one occasion and were made by its attorney and the chairperson of its board. These are senior persons. Any reasonable person who received them would be entitled to accept that the contention was correct and the threat was real. After all they emanated from persons who would be expected to have the skill, knowledge and experience to present a true and correct account of the subscription agreement and who would be careful before making threats.

[51] The threat was either grossly careless or deliberately designed to intimidate Coral Lagoon, Ash Brook, their respective shareholders and directors as well as the TSDBF. It certainly intimidated the Rorisang and Lemoshanang shareholders to vote against the sale to the TSDBF, and therefore allows for the inference that it was deliberately designed to so do. Such conduct is not consonant with its duty of good faith and reasonable conduct.

[52] Moreover, the changes in stance by Capitec were radical. Its failure to explain why this was so is undoubtedly a breach of its contractual as well as its common law duty of good faith to Coral Lagoon. With regard to the common law duty of good faith, I find Capitec's claim that no such a duty exists in our law to be incorrect. I have dealt with this issue in another judgment and there is no need for me to repeat what is said there.[6] Any person changing its stance so radically and not explaining

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[6] See my minority judgment in *Atlantis Property Holdings CC v Atlantis Excel Service Station* [2019] 3 All SA 441 (GJ) for my views on this duty and how our law of contract has developed on this issue.

itself cannot be said to be acting in good faith. It is also not acting with due regard to its duty of candour to this Court.

[53] Coral Lagoon maintains that despite the changes in stance by Capitec, the prudent way to proceed is to work on the basis that consent is required. Clause 8.3 allows Capitec to compel them to re-purchase the same number of shares sold if Capitec was of the opinion that they were not sold to a black person. The practical effect of this is if Coral Lagoon wish to avoid the risk of being forced to re-purchase the number of shares sold it should obtain at least the opinion if not the consent of Capitec before it actually proceeds with the sale. Hence, a business-like interpretation of clause 8.3 is one that requires Coral Lagoon to ask Capitec for its consent to an impending sale. This prevents it from having to take a risk no reasonable business person or director would take given her fiduciary duties. For this reason, Coral Lagoon says that despite Capitec's latest stance that no consent is required, it must be required to give it. The claim that no consent is required is merely a ruse and exposes them to unnecessary and unwarranted risk. It would, therefore, be incorrect to hold that in the present case the consent of the said sale is not required as contended by the TSDBF and Capitec. Consent at the very least is required to ensure that Coral Lagoon is unburdened of the real threat of future litigation on the same issue and where the facts remain unchanged. Such a course would not be in the interests of justice.

[54] I hold that because of the contradictory stances adopted by Capitec justice can only be dispensed if the matter is approached on the basis that Capitec's consent is required for the sale.

[55] Capitec's claim that it was correct for it to withhold its consent since it has a legitimate purpose, which is to protect its B-BBEE rating, is not weight-bearing at all. Firstly, Capitec's reduction in its B-BBEE rating would only be 0.7%, which has to be viewed in the light of it voluntarily foregoing 4.38% of its B-BBEE rating in 2012 in order to assist the PIC and eventually Investec. Since it was indifferent to losing 4.38% of its rating, it can hardly complain about losing 0.7%. Its inconsistency and failure to provide a reasonable justification for the inconsistency only serves to strengthen the case of Coral Lagoon that it is not acting in concert with its duty of good faith and reasonable conduct towards Coral Lagoon.

[56] By refusing to grant consent for the sale on this basis means that it is quite willing to retain Regiments as a shareholder, even though it recognises that Regiments has stolen more than R1 billion from indigent pensioners belonging to the TSDBF. The logical conclusion of its position is that the loss of 0.7% of its B-BBEE rating is so important that it would rather keep its links with a shareholder who is tainted by dishonesty than reduce the rating. Being afforded and taking the opportunity to sever links with such a shareholder may serve Capitec's interest just as well as keeping its B-BBEE rating. Showing itself to be an ethical corporate citizen can be as advantageous as holding on to a 0.7% B-BBEE rating. In any event, the protection of its B-BBEE rating as a reason for refusing consent is not persuasive. On its stance at the hearing the Coral Lagoon portion of the B-BBEE rating could disappear in a span of a week at most.

[57] Furthermore, it cannot say that it is in its best interest to keep this shareholder at the expense of the indigent pensioners simply because 60% of those pensioners are white. A reasonable person considering the appropriate moral course to follow in this case would no doubt take note of their poverty as well as the fact that they had been dishonestly deprived of R1bn of their wealth by a shareholder of Capitec, and would see these as important as their racial profile. Thus, losing 0.7% of its B-BEE rating may be in the best interests of Capitec in this case. Accordingly, its reason for refusing consent on the grounds that it is protecting its own interest bears no weight.

[58] Lastly, there is the issue of the open offer made by Capitec. Capitec submitted that the open offer is evidence of its good faith and reasonableness towards both Coral Lagoon and the TSDBF, even though it does not bear any duty towards the TSDBF. It demonstrates that it is sensitive to the fact that the indigent pensioners have been unlawfully fleeced by one of its shareholders and that it is willing to consent to the sale of 415 000 Capitec shares by Coral Lagoon. There are four major problems with the open offer. Firstly, it clearly contradicts Capitec's latest stance that its consent is not required for the sale. Secondly, it is only willing to consent to the sale of approximately 50% of what has been agreed to by Regiments and the TSDBF. Thirdly, the open offer is subject to Coral Lagoon agreeing to further restrictions which are more onerous than the ones that are presently contained in the subscription agreement. Fourthly, it is subject to a condition that Coral Lagoon be willing to list all its shares on an exchange that does not yet exist but which, if it ever materialises, will price Coral Lagoon's shares lower than if they remain listed on the JSE exchange. Alternatively it would require Coral Lagoon to

sell their shares to a Qualifying Black Person who is willing to accept a ten year restriction on the future sale. The open offer cannot really qualify as an act of good faith, whether towards Coral Lagoon or the TSDBF.

[59] In closing, it bears mentioning that the condition placed on the sale by Capitec was particularly offensive to Coral Lagoon. They contended that the condition was irrefutable evidence that Capitec discriminated and continues to discriminate against them solely on the basis that they are black. They point out that they paid a premium for the shares *ab initio.* Therefore there is no commercial basis for forcing them to list their shares on an exchange (should one be formed) where their shares are priced at a discount or to sell them to a Qualifying Black Person who is willing to accept the onerous restrictions Capitec wishes to impose. They as well as the TSDBF contended that, in essence, Capitec was seeking a way of making Coral Lagoon pay for its legal duty to meet its obligations in terms of the B-BBEE Act and the Codes. Hence, their case that the restriction clauses were in breach of their rights to equality and dignity was proven by the open offer. There is much force in their contentions. However, given my holding that the matter should be despatched on the ground that Capitec has breached its contractual as well as common law duty of good faith, there is no purpose in my exploring this debate in detail.

CONCLUSION AND RELIEF

[60] In conclusion, I hold that Capitec has not been acting in a manner consonant with its duty of good faith and reasonable conduct towards Coral Lagoon.

[61] At the hearing Coral Lagoon moved an amendment to the notice of motion from the bar. The amendment was to include the words "*within two court days*" in paragraph 3 of the notice of motion. It was opposed by Capitec on the grounds that it restricts its right to consider its position for fourteen days before deciding to apply for leave to appeal. However, all parties agreed that the matter is urgent. The application for the amendment must be viewed in that light. In that case, Capitec's opposition to the amendment lacks all merit. There is no reason why it cannot assess its position within two court days of the order and exercise whatever rights it believes it may have. The law can then take its natural course. I therefore grant the application for the amendment of the notice of motion.

[62] The TSDBF asked for a punitive costs order. They were forced to approach the Court despite their attempts to avoid doing so (including requesting an opportunity to make written submissions to the board of Capitec). I see no reason why it should not receive as much of its costs as it can recover from the taxing master. Costs on an attorney and client scale would be fair and just in the circumstances.

The Order

1 The application by the first respondent to strike-out without prejudice communication and all references thereto in the founding affidavit in Case No. 30899/2019 is granted.

2 The applicants in Case No. 30899/2019 are to pay the costs of the striking-off application, which costs are to include those occasioned by the employment of two counsel where such was employed.

3 The application for the amendment of the notice of motion in Case No. 30899/2019 is granted.

4 The refusal of the first respondent to consent to the sale of 810 230 Capitec shares by the first applicant in Case No. 30899/2019 to the third respondent in the same case (the applicant in Case No. 24805/2017) is declared to be in breach of its contractual as well as its common law duty of good faith towards the applicants in case no. 30899/2019.

5 The first respondent is ordered to grant its consent to the sale of 810 230 Capitec shares by the first applicant in Case No. 30899/2019 to the third respondent in the same case (the applicant in case no. 24805/2017) within two working days of the date of this order.

6 The first respondent is ordered to pay the costs of the applicants in Case No. 30899/2019, which costs are to include those occasioned by the employment of two counsel.

7 The first respondent is ordered to pay the costs of the third respondent in Case No. 30899/2019 (applicant in Case No. 24805/2017) which costs are to include those occasioned by the employment of two counsel where such were employed and which costs are to be taxed on an attorney and client scale.

8 The first respondent is ordered to pay the costs of the intervening parties in both cases which costs are to include those occasioned by the employment of two counsel where such were employed.

Vally J

Dates of hearing:	21, 22, 23 and 24 October 2019
Date of judgment:	5 November 2019
Case No: 30899/2019	
For the applicant:	V Maleka SC with T Scott
Instructed by:	Mkhabela Huntley Attorneys Inc
Case No.: 24805/2017	
For the applicant:	M Chaskalson SC with N Luthuli
Instructed by:	Moeti Kanyane Attorneys
For the First Defendant in both cases:	A Breitenbach SC with M Bishop
Instructed by:	VanderSpuy Cape Town
For the Intervenors in both cases:	T Bokaba SC with K van Heerden
Instructed by:	Carol Coetzee & Associates