



**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:** 09 JUNE 2021

**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*

*Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others (470/2020) [2021] ZASCA 99 (09 July 2021)*

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Today the Supreme Court of Appeal (SCA) handed down a judgment upholding the appeal against the Gauteng Division of the High Court, Johannesburg with costs, including the costs of two counsel.

The first appellant, Capitec Bank Holdings Limited (Capitec Holdings), the first respondent, Coral Lagoon Investments 194 (Pty) Ltd (Coral), and the second respondent, Ash Brook Investments 16 (Pty) Ltd (Ash Brook), in December 2006, concluded a subscription of shares and shareholders agreement (the subscription agreement). Pursuant to the subscription agreement, Coral subscribed for, and Capitec Holdings issued, 10 million ordinary shares to Coral. Coral, in turn, was required to allot and issue shares to Ash Brook so as to constitute Ash Brook as the only ordinary shareholder of Coral. This was done. The object of the subscription agreement was, as its recital explains, to permit Capitec Holding to increase its black shareholding, and thereby fulfil its black empowerment obligations.

Regiments Capital (Pty) Ltd (Regiments Capital) held a 59.82% interest in Ash Brook. On 8 August 2019, Regiments Capital, and various parties related to it (the Regiments Parties), Coral and the third respondent, the Transnet Second Defined Benefit Fund (the Fund), entered into a settlement agreement. The settlement agreement required Regiments Capital and the Regiments Fund Managers to pay the Fund a settlement amount of R500 million, together with interest, in settlement of the Fund's claims against the Regiments Parties. Those claims arose from litigation instituted by the Fund against the Regiments Parties. The Fund alleged that the Regiments Parties had defrauded the Fund and sought to recover monies for the benefit of the Fund's members. The settlement amount was to be funded by the sale of 810 230 Capitec Holdings shares (the sale shares). The proceeds of the sale were to be used to discharge the settlement amount owing to the Fund, with the balance of the purchase price to be paid by the Fund to an account nominated by Coral.

Coral and the Fund sought to obtain the consent of Capitec Holdings for the disposal of the sale shares by Coral. Capitec Holdings did not give its consent. On 2 September 2019, Coral and Ash Brook brought an urgent application in the Gauteng Division of the High Court, Johannesburg (the high court). They sought a declarator that the withholding by Capitec Holdings of its approval or consent for the disposal of the sale shares pursuant to the settlement agreement was unreasonable as contemplated in clause 13.7 of the subscription agreement and in breach of Capitec Holdings' duties of good faith in terms of clause 13.11 of the subscription agreement, alternatively, at common law. In addition, mandatory relief was sought, directing Capitec Holdings to give its approval or consent in terms of the settlement agreement. The Fund, cited as the third respondent in the application, brought a counter-application against Capitec Holdings for an order that Capitec Holdings had no right under the subscription agreement to prevent Coral from selling the sale shares to the Fund.

The applications were heard in the high court by Vally J. He found for Coral and Ash Brook and determined that Capitec Holding's refusal to consent to the sale of the sale shares was in breach of its contractual and common law duties of good faith and reasonableness and ordered Capitec Holdings to consent to the sale within two days of the grant of the order. Capitec Holdings was also ordered to pay the costs of Coral and Ash Brook, and the costs of the Fund and the two intervening parties, Rorisang and Lemoshanang. Vally J refused Capitec Holdings leave to appeal these orders. This Court however granted leave.

The main issue in this appeal was whether Capitec Holdings' consent was required before Coral could sell the sale shares to the Fund, and if it was, did Capitec Holdings owe duties of good faith and reasonableness to Coral, which Capitec Holdings breached in failing to consent to the sale? The high court found that Capitec Holdings' consent was required for the sale of shares to take place, and Capitec Holdings was in breach of its duties of good faith and reasonableness in failing to consent to the sale. As a result, the high court issued an order declaring that Capitec Holdings' refusal to consent to the sale was in breach of its contractual and common law duties of good faith. The high court, in addition, issued a mandamus requiring Capitec Holdings to grant its consent to the sale within two working days.

The SCA found that the text of clause 8.3 offered no indication that the consent of Capitec Holdings was required to permit Coral to sell the sale shares to the Fund. It held that the high court was in error in finding that the subscription agreement required the consent of Capitec Holdings in order for Coral to proceed with the sale to the Fund. It held that the high court proceeded from its assessment of the conduct of Capitec Holdings to its conclusion as to the contents of the subscription agreement. The analysis should have commenced with an interpretation of what the subscription agreement provided. The SCA was of the view that had the high court done so, the meaning of clause 8.3 would have become plain.

The SCA considered the recent decision of the Constitutional Court in *University of Johannesburg* as to the relationship between the admission of extrinsic evidence to determine the meaning of a contract and the parol evidence rule. The implication of the decision was to render the parol evidence rule a residual rule.

It was found that the manner in which the parties implemented the subscription agreement was relevant evidence as to what clause 8.3 meant. Extrinsic evidence was found to be admissible to understand the meaning of the words used in a written contract. The SCA reiterated the Constitutional Court affirmation about the fact that an expansive approach should be taken to the admissibility of extrinsic evidence of context and purpose, whether or not the words used in the contract were ambiguous, so as to determine what the parties to the contract intended.

Further, the SCA was of the view that that Capitec Holdings wished to enforce its rights in terms of the subscription agreement could not be held to be a breach of good faith. Nor could good faith be marshalled to require Capitec Holdings to give consent, when none was required of it. The SCA held that the *Beadica* judgment provided an authoritative interpretation of cases that explain the role that good faith plays in the law of contract. It was therefore found that the high court's reasoning based upon good faith, and the respondents' submissions in support of that reasoning, could not survive the exposition in *Beadica*. The reasoning for this was that *Beadica* affirmed that while good faith underlined the law of contract and informed its substantive rules, good faith and fairness were not substantive, free-standing principles to which direct recourse may be had so as to interfere with contractual bargains or decline to enforce contracts.

The SCA held that ultimately, what Coral and Ash Brook were in reality seeking was a waiver by Capitec Holdings of its right to require Coral to repurchase the equivalent number of shares it wished to sell. Further, Capitec Holdings had no obligation to do so, and invocations of good faith could not alter that position. In the result the appeal was upheld with costs, including the costs of two counsel, paragraphs 4 – 8 of the order of the high court were set aside and replaced with the following: 'the application under case number 30899/2019 is dismissed; the applicants and the first and second Intervening Parties in case number 30899/2019 shall pay the costs of the first and second respondents, such costs to include the costs of two counsel, where employed'.

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