IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case Number: 7464/2021

In the matter between

THIBAULT SQUARE FINANCIAL SERVICES (PTY) LTD	**Applicant**
and	
LANCASTER 102 (PTY) LTD	**First Respondent**
STEINHOFF AFRICA HOLDINGS PROPRIETARY LIMITED	**Second Respondent**
ADV DEREK MITCHELL N.O	**Third Respondent**

JUDGMENT

(Delivered electronically on 01 December 2021)

FRANCIS, J

Introduction

[1] The applicant ("Thibault") has made an application to this court in which it seeks the following relief:

[1.1] An order in terms of section 3(2) of the Arbitration Act 42 of 1965 ("the Arbitration Act") setting aside an arbitration agreement between Thibault and the first respondent ("Lancaster") contained in an agreement entered into between

the parties, commonly referred to by them as the "Unwind Agreement".

[1.2] Alternative declaratory relief to the effect that:

[1.2.1] the pending arbitration proceedings are premature and should be set aside;

[1.2.2] the dispute between the parties should not be referred to arbitration; and

[1.2.3] the pending arbitration proceedings be stayed pending the determination of the action proceedings to be instituted by Thibault within 30 days of the court handing down its order in respect of this application.

[1.3] An order declaring that Thibault institute action against Lancaster and the second respondent ("SAHPL") to resolve the disputes referred to in the founding affidavit within thirty (30) days and to pursue same to conclusion, failing which any Order granted in terms of paragraph [1.2.3] will lapse.

[2] Lancaster opposes the application whilst SAHPL and the third respondent, the arbitrator appointed to arbitrate the dispute between Lancaster and Thibault, abide the decision of this court.

BACKGROUND

The following facts are either common cause or are not seriously disputed by the parties:

[3] During the latter half of 2017, Thibault, Lancaster, and SAHPL entered into a series of transactions, by way of a number of agreements, which were intended to result in *inter alia* the acquisition by Lancaster of shares in Steinhoff Retail Africa Limited ("STAR"), now Pepkor Holdings Limited ("Pepkor"), in circumstances where STAR had plans to acquire Shoprite Holdings Limited ("Shoprite"). The series of transactions are collectively referred to as "the Loop Transaction". The Loop Transaction made funding available to the Lancaster Group from SAHPL to finance its (the Lancaster Group's) transaction.

[4] In summary, the Loop Transaction comprises the following transactions:

[4.1] During October 2017, Standard Bank provided funding of R4 billion to SAHPL which was required to be repaid on the same day.

[4.2] SAHPL subscribed for preference shares in Lancaster, utilising the R4 billion in funding received from Standard Bank to pay the subscription price for these preference shares. A Preference Share Subscription Agreement was entered into between the parties.

[4.3] Lancaster subscribed for ordinary shares in Thibault, using the R4 billion received from SAHPL to pay the subscription price to Thibault for the ordinary shares. The parties concluded a Subscription Agreement.

[4.4] Thibault subscribed for preference shares in SAHPL, using the R4 billion received from Lancaster to pay SAHPL for these shares ("the SAHPL preference shares"). A Preference Share Subscription Agreement was concluded between the parties.

[4.5] SAHPL utilised the R4 billion received from Thibault to repay Standard Bank on the same day.

[5] The immediate outcome of the Loop Transaction was that SAHPL held preference shares in Lancaster, Lancaster held ordinary shares in Thibault, and Thibault held preference shares in SAHPL.

[6] Each share transaction was accompanied by a discrete agreement between the relevant parties and each agreement provided that any dispute between the relevant parties would be referred to private arbitration.

[7] It was contemplated that Lancaster would swap the shares it had acquired in Thibault for shares in STAR, if STAR acquired Shoprite. To give effect to this, Lancaster, SAHPL, and STAR entered into an option agreement. This option agreement provided that if STAR acquired Shoprite, Lancaster could swap its shares in Thibault for shares in STAR. The option agreement also contained a provision for any disputes between the parties to be referred to expedited private arbitration.

[8] To cater for the eventuality that the Shoprite transaction did not materialise, Lancaster and Thibault concluded the Unwind Agreement, the purpose of which

was to "unwind" Lancaster's subscription for shares in Thibault. If triggered (i.e., if STAR's acquisition of Shoprite failed), the Unwind Agreement provides that:

[8.1] Lancaster would transfer the shares it had acquired in Thibault back to Thibault;

[8.2] Thibault would be required to transfer its SAHPL preference shares to Lancaster; and

[8.3] If the SAHPL preference shares were not issued to Thibault "for any reason whatsoever", Thibault would refund Lancaster the price which it (Lancaster) paid for Thibault's shares – i.e., the sum of R4 billion, plus interest.

[9] Each of the parties had their own objective in entering into the Loop Transaction.

[10] Thibault sought to acquire another material asset for the purposes of section 123 of the Companies Act 71 of 2008 to bring about the position where the additional material asset would meet certain regulatory and statutory requirements. The acquisition of the SAHPL preference shares would constitute such an additional material asset.

[11] The Steinhoff group, *via* SAHPL, would make a R4 billion broad based black economic empowerment investment in Lancaster, which would satisfy the requirements for funding by the Public Investment Corporation of Lancaster's holding company, Lancaster 101 (RF) Proprietary Limited.

[12] Lancaster would acquire STAR shares and an interest in Shoprite.

[13] The Shoprite deal, however, fell through in December 2017 and this triggered the provisions of the Unwind Agreement.

[14] Lancaster returned to Thibault the shares it had acquired in Thibault and signed the relevant share transfer forms on 21 December 2017. On the same day, Thibault sent Lancaster a letter evidencing its ownership of the SAHPL preference shares (in the form of a share certificate) and advised that it intended to transfer these shares to Lancaster. Both parties assumed that they had complied with the Unwind Agreement in that Lancaster took transfer of the SAHPL preference shares from Thibault in exchange for returning the shares it had acquired in Thibault.

[15] During October 2019, SAHPL advised both Thibault and Lancaster that the SAHPL Preference Share Subscription Agreement (which it had concluded with Thibault in 2017) was invalid because the condition precedent in that agreement had not been fulfilled. As a consequence, so contended SAHPL, the SAHPL preference shares which it had issued to Thibault – and which Thibault had in turn purported to transfer to Lancaster in terms of the Unwind Agreement – were not validly issued because they had not been authorised in terms of SAHPL's Memorandum of Incorporation ("MOI").

[16] In a letter dated 10 October 2019, apart from alerting Lancaster of the invalidity of the issuance of the preference shares, SAHPL advised Lancaster that it had no claim against SAHPL as a result of the failure of the conditions precedent because SAHPL did not frustrate their fulfilment. In addition, SAHPL advised

Lancaster that since SAHPL's MOI was not amended to allow for the creation of the SAHPL preference shares, these shares could not have been issued and, therefore, Lancaster had no rights *vis-à-vis* SAHPL under and in terms of SAHPL's Preference Share Subscription Agreement.

[17] Also on 10 October 2019, SAHPL sent another letter to Lancaster in which reference was made to Lancaster's Preference Share Subscription Agreement with SAHPL and stated *inter alia* that in terms of that agreement, Lancaster had pledged and ceded *in securitatem debiti* to SAHPL its rights and interests in and to the Thibault shares owned by Lancaster. SAHPL requested Lancaster to confirm that it had perfected or delivered such security.

[18] Thereafter, on 30 October 2019, SAHPL addressed a letter to Thibault advising it of the problem relating to the issuing of the SAHPL preference shares and informed Thibault that the issue of these shares to Thibault was a nullity and void.

[19] The stance adopted by SAHPL in respect of the SAHPL preference shares had a material impact on the contractual relationship between Thibault and Lancaster and the transfer and exchange of shares that had taken place in terms of the Unwind Agreement. Lancaster advised Thibault that the latter had breached the Unwind Agreement by failing to lawfully transfer the SAHPL preference shares to Lancaster or to pay the repurchase consideration in terms of the Unwind Agreement. If SAHPL's contentions were correct, the factual position would be that the SAHPL preference shares were not validly issued, did not come into force, and could not be validly transferred by Thibault to Lancaster.

[20] Given the situation in which all the parties found themselves, they held various discussions during the course of 2019 and 2020 in an attempt to resolve matters between them. However, these engagements did not yield any satisfactory outcome.

[21] In early December 2020, Lancaster notified Thibault that if no suitable arrangement was made in relation to the interruption of the running of prescription in respect of its claims, Lancaster would have no option but to institute arbitration proceedings against Thibault.

[22] Thereafter, on 10 December 2020, SAHPL, Lancaster, and Thibault entered into a Suspension of Prescription Agreement in terms of which prescription was suspended from 9 December 2020 to 8 March 2020 in relation to, *inter alia*, Lancaster's claims in the arbitration.

[23] On 1 March 2021, Lancaster sent a formal notice to Thibault initiating the mediation process under clause 9 of the Unwind Agreement as a precursor to the arbitration proceedings that were subsequently instituted by Lancaster, and which forms the subject matter of this application.

[24] Thibault opposed the institution of arbitration proceedings. Its principal objections to the arbitration were two-fold: firstly, the arbitration was premature in that the period for mediation had not yet lapsed; and, secondly, given the issues which would have to be traversed at the arbitration, an arbitration would be an inappropriate forum to resolve the dispute between the parties as SAHPL, a necessary party to the dispute, would not be a party to the arbitration.

[25] Notwithstanding Thibault's protestations, the arbitration process commenced with the third respondent being appointed as arbitrator by the Cape Bar Council on 22 April 2021.

[26] On 28 April 2021, Thibault advised Lancaster and the third respondent that it intended to launch proceedings to override the arbitration provisions of the Unwind Agreement.

[27] In tandem with the flurry of activity and exchange of correspondence with regard to the arbitration, SAHPL, on 28 April 2021, lodged an application in which it sought an order *inter alia* declaring that the SAHPL – Thibault Preference Share Subscription Agreement was void *ab initio*, alternatively invalid ("the Invalidity Application"). SAHPL also, in the same application, sought declaratory relief that all agreements and transactions within the Loop Transaction, and the Unwind Agreement, were void *ab initio*, alternatively invalid.

[28] Notwithstanding Thibault's threat to launch proceedings to override the arbitration provisions of the Unwind Agreement, a pre-arbitration meeting was scheduled for 5 May 2020. A day before that meeting, Thibault launched the application presently before this court.

[29] The pre-arbitration meeting went ahead on 5 May 2020 where, once again, Thibault registered its objection to the arbitration proceedings and foreshadowed an urgent application for interdictory relief to prevent the arbitration from proceeding. The arbitrator ruled that Lancaster was entitled to proceed with the arbitration in the absence of a court order preventing such arbitration from

proceeding, and proposed a timetable for the hearing of Thibault's challenge to the arbitrator's jurisdiction.

[30] On 14 May 2021, Thibault launched an urgent application to interdict the arbitration proceedings before the third respondent, pending the outcome of this application. Thibault's application was heard on 4 June 2021 and was dismissed with costs on 18 June 2021 by Henney J.

[31] As noted, SAHPL lodged its Invalidity Application on 28 April 2021. Thibault and Lancaster were joined as respondents in this application. Papers were filed and the matter was set down for hearing on 11 November 2021. I was assigned to hear this application as well. All the legal representatives were aware of this fact as it was mentioned during argument before me in the application which is the subject of this judgement.

[32] On 14 October 2021, SAHPL filed a notice removing the Invalidity Application from the roll. SAHPL also sent an e-mail to the court, copied to all the parties, in which it advised *inter alia* that:

> "*The parties have come to an agreement regarding a number of matters, including the (Invalidity Application). In terms of the agreement, inter alia the parties have agreed to suspend all current litigation involving the parties. This includes (the Invalidity Application), and accordingly this application is hereby removed from the roll*".

[33] In light of the notice and the correspondence received from SAHPL, I sent a letter to all the parties concerned to address me on what impact, if any, their agreement

had on the application that was currently before me in light of the fact that judgment had yet to be delivered. All the parties made written submissions.

[34] Thibault was of the view that the judgment should be pended whilst Lancaster expressed the view that the agreement between the parties had no effect whatsoever on my pending judgment. SAHPL, being *dominus litis* in the Invalidity Application, states the position as follows:

> "*In short, (SAHPL) takes the view that the agreement to suspend the Invalidity Application does not impact on the litigation before Mr Justice Francis under case number 7464/2021 (the Override Application). The Invalidity Application has not been withdrawn, it has been suspended. In the event that that suspension should in due course be lifted, the Invalidity Application will have to proceed.*
>
> *Differently put, the Invalidity Application has not gone away, it has simply been put on hold at present.*
>
> *This is the position with respect to all litigation involving inter alia these parties, including the Override Application – whilst it (like inter alia the Invalidity Application) has been suspended, the suspension of the litigation proceedings does not extend to judgments.*"

[35] Having considered the parties' submissions, I adopt the position that this judgement should be delivered in the ordinary course. In so far as the Invalidity Application is concerned, I accept that it has been suspended indefinitely, even though it might be resumed at short notice.

[36] Both Thibault and Lancaster agree that this application ultimately turns on the relatively discrete facts outlined above, none of which are really in dispute. Rather, the dispute lies in the competing legal submissions made by them. Before discussing these submissions, perhaps it is necessary to set out the relevant legal principles; again, there does not appear to be much dispute with regard to the applicable legal principles.

LEGAL PRINCIPLES

[37] It is a well-established principle that where parties voluntarily contract with each other to refer their disputes to private arbitration, that choice must, save in exceptional circumstances, be respected. O'regan ADCJ pertinently stated the position as follows in ***Lefuno Mphaphuli & Associates (Pty) Ltd v Andrews***[1]:

> *"The decision to refer a dispute to private arbitrations is a choice which, and as long as it is voluntarily made, should be respected by the courts. Parties are entitled to determine what matters are to be arbitrated, the identity of the arbitrator, the process to be followed in arbitration, whether there will be an appeal to an arbitral appeal body and other similar matters".*

[38] Courts are enjoined to respect the parties' autonomy in concluding an arbitration agreement and to minimise the extent of judicial interference in the process[2]. Parties who refer matters to arbitration implicitly, if not explicitly, abandon the right to litigate in courts of law and accept that they will be finally bound by the decision

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[1] 2009 (6) BCLR 527 (CC) at para 219.

[2] See, ***Aveng Africa Ltd (formerly Grinaker – LTD Ltd) t/a Grinaker-LTA Building East v Midros Investments (Pty) Ltd 2011 (3) SA 631 (KZD)*** at para [13].

of the arbitrator; it is only in exceptional circumstances that a court will interfere with or stay an arbitration.[3]

[39] Section 3 (1) of the Arbitration Act underscores the binding effect of an arbitration agreement and states that, *"(u)nless the agreement otherwise provides, an arbitration agreement shall not be capable of being terminated except by consent of all the parties thereto"*.

[40] The legislature has, however, seen fit to grant the courts the power to override an agreement to arbitrate. This power is codified in section 3 (2) of the Arbitration Act and provides as follows:

> *"(2) the court may at any time on the application of any party to an arbitration agreement, on good cause shown –*
>
> *(a) set aside the arbitration agreement; or*
> *(b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or*
> *(c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred."*

[41] The Constitutional Court in ***De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being & Another***[4] reaffirmed that the

[3] Cf. the comments of Gorven AJA in ***Zhongji Development Construction Engineering Company Ltd v Kamoto Copper Company SARL*** **[2014] 4 All SA 617 (SCA)** at para [56]. See also, ***Universiteit van Stellenbosch v JA Louw (Edms) Bpk*** **1983 (4) SA 321 (A)** at 334A to B.

[4] **2016 (2) SA 1 (CC)** at para [36].

onus resting on a party that aims at avoiding the consequences of an arbitration clause is not easily discharged.

[42] The legislature has not sought to provide a blueprint on what constitutes "good cause". Neither has the Supreme Court of Appeal or the Constitutional Court. Nonetheless, the courts have on various occasions reflected on the threshold an applicant has to surpass in order to convince a court to exercise its discretion under section 3(2) of the Arbitration Act. Thus, it has been held that a court may exercise its discretion in favour of an applicant when "a very strong case"[5] has been made out, where there are "compelling reasons"[6], where a "persuasive case"[7] has been made out, or, absent an infringement of constitutional norms, misconduct, or irregularity, "truly compelling"[8] reasons exist.

[43] In deciding what is "good cause" for the purposes of section 3(2) of the Arbitration Act, a court is required to consider the merits of each case in order to achieve a just and equitable result in the particular circumstances[9].

PARTIES' SUBMISSIONS

[44] The parties submitted extensive heads of argument and what I summarise below is merely a snapshot of what I consider to be pertinent to the decision reached in this matter.

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[5] ***Universiteit van Stellenbosch v JA Louw*** at 334A.
[6] ***Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd*** **1971 (2) SA 388 (W)** at 391H.
[7] ***De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being & Another*** at [36].
[8] ***Ibid*** at para [37].
[9] ***De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being & Another*** **2015 (1) SA 106 (SCA)** at para [23].

[45] Thibault, who bears the onus of showing good cause, submits that the Loop Transaction is predicated on a series of agreements that are indivisible (alternatively interdependent and inter-related). Accordingly, a challenge to any one of the legs of the Loop Transaction invariably involves a challenge to all the other elements of the transaction. In the matter at hand, the alleged invalidity of the issuance of the SAHPL preference shares is the fulcrum around which all disputes between the parties revolve.

[46] Thibault submits that the disputes between the various parties are so inter-related and overlapping that they ought to be dealt with in a single set of court proceedings. Having parallel proceedings where Thibault and Lancaster are involved in an arbitral dispute while Thibault, Lancaster and Steinhoff are involved in court proceedings carries with it the possibility of significant wasted costs, the unnecessary use of judicial resources, the risk of conflicting judgments, and the risk of necessary parties not being subject to binding pronouncements.

[47] Thibault further submits that its procedural rights and its ability to advance its case will be seriously compromised in an arbitration in at least the following respects:

[47.1] In the arbitration, Thibault will be required to defend the case brought against it based on the error of a third party (SAHPL) without it being able to join that party to the proceedings and, in this regard, have recourse to its rights to discovery, cross-examination, and a request for further particulars from SAHPL.

[47.2] Thibault would not be able to raise the defence of estoppel against

SAHPL because the latter is not a party to the arbitration.

[47.3] Thibault will be compromised in a defence which it could raise against Lancaster's claim, namely that the latter had breached the Unwind Agreement by purportedly transferring the Thibault shares to Thibault whilst these shares were encumbered to SAHPL; and

[47.4] SAHPL instituted a written release and indemnity agreement (which lapsed), but which was amended and restated by way of an addendum in favour of Thibault. In this Addendum Agreement in Respect of Release and Indemnity Agreement ("RAIA"), dated 24 March 2021, SAHPL indemnified Thibault in respect of costs and all losses (including due and payable obligations) that Thibault may incur in consequence of *inter alia* proceedings that Lancaster may institute against Thibault in respect of the Unwind Agreement. Thibault submitted that the institution of arbitration proceedings would entitle Thibault to invoke the provisions of the RAIA against SAHPL. However, since SAHPL is not a party to the arbitration proceedings, Thibault would be deprived of the opportunity to enforce the RAIA against SAHPL in these proceedings.

[48] Thibault submitted that the loss of its procedural rights and the compromise of its defences was unjust and inequitable in the circumstances and amounted to "good cause".

[49] On the other hand, Lancaster submitted that Thibault failed to discharge

the onus of showing that there is a truly compelling reason to grant the relief sought.

[50] In summary, Lancaster submits that the indivisibility of the Loop Transaction and the inter-related contractual relationships between Lancaster, Thibault and SAHPL, are exaggerated. Each of the transactions comprising the Loop Transaction are separate contracts between each of the contracting parties with their own terms, triggers, and consequences. Thus, Lancaster has a claim against Thibault under the Unwind Agreement to which SAHPL is not a party, and Thibault has potential remedies against SAHPL in terms of its (Thibault's) Preference Share Subscription Agreement with SAHPL to which Lancaster is not a party.

[51] Lancaster submits further that both Thibault and Lancaster oppose the Invalidity Application and they both regard the Unwind Agreement as valid and enforceable. SAHPL is not a party to the Unwind Agreement and has no *locus standi* to challenge the validity of the Unwind Agreement in the Invalidity Application. There is, therefore, no prospect of the Unwind Agreement being held to be invalid and unenforceable in those proceedings.

[52] Lancaster disputes Thibault's contention that there is a risk of conflicting decisions. In the arbitration proceedings, Lancaster seeks relief in terms of the Unwind Agreement on the basis that SAHPL had stated that it did not validly issue the SAHPL preference shares to Thibault which Thibault purported to transfer to Lancaster. This is not the same relief which is being sought by SAHPL in the Invalidity Application. In other words, in the arbitration proceedings, Lancaster's case is not based on whether there was a breach of obligations under SAHPL's

Preference Share Subscription Agreement or whether that agreement was invalid. Lancaster's case is based on the allegation that Thibault did not effect the transfer of the SAHPL preference shares to Lancaster under the specific obligations set forth in the Unwind Agreement.

[53] Finally, Lancaster submitted that the fact that Thibault may not enjoy the same procedural rights which it would otherwise have in action proceedings before the High Court, does not render the arbitration unfair or make this case an exceptional one. It was a deliberate choice by the parties to the various transactions to structure their affairs in separate agreements, each of which contains a self-standing provision for an expedited private arbitration. In any event, so argues Lancaster, if Thibault requires assistance from SAHPL in the form of documents or witnesses, it can invoke the provision of section 16(1)[10] of the Arbitration Act to subpoena those documents as well as any SAHPL employee who may be required to give oral evidence in the pending arbitration proceedings.

DISCUSSION

[54] In this matter, both protagonists, Lancaster and Thibault, are innocent parties in the sense that they have been blindsided by the revelation by SAHPL that the SAHPL preference shares were not validly issued and, therefore, void, alternatively invalid.

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[10] Section 16(1) of the Arbitration Act reads in relevant part as follows:

"The issue of a summons to compel any person to attend before an arbitration tribunal to give evidence and to produce books, documents or things to an arbitration tribunal, may be procured by any party to a reference in the same manner and subject to the same conditions as if the reference were a civil action pending in the court having jurisdiction in the area in which the arbitration proceedings are being or are about to be held..."

[55] Although the relief sought by Lancaster in the arbitration is premised on a breach of the Unwind Agreement and not on the invalidity *per se* of the SAHPL preference shares, it cannot be denied that the validity or otherwise of the SAHPL preference shares will loom large in the arbitration; of course, this issue is central to the Invalidity Application. There is thus a real possibility that the same issue will be traversed in separate and distinct sets of proceedings, one which takes the form of an arbitration and the other the form of court proceedings. The concomitant danger of conflicting outcomes may well constitute good cause for the exercise by the court of its discretion to at least stay the arbitration proceedings[11].

[56] A further factor which may constitute good cause is that although SAHPL is not a party to the arbitration, a real possibility exists that given the issues to be determined during the arbitration, the Arbitrator's decision may well impact on SAHPL.[12]

[57] Another factor which may constitute good cause in favour of Thibault is that Thibault is in a sense an innocent party and yet it will be locked into an arbitration process where it will not have the procedural rights that normally would be available to it against a third party who is responsible for its (Thibault's) misfortune. An important procedural right in this regard would be the right to join SAHPL as a third-party in legal proceedings; this option is not available to Thibault in the arbitration.

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[11] See, ***MV Iran Dastghayb Islamic Republic of Iran Shipping Lines v Terra-Marine SA*** **2010 (6) 493 (SCA)** at para [31].

[12] See, ***Wellhockyl & Others v Advtech Ltd and Others*** **2003 (6) SA 737 (W)** at paras 756B-C (this principle was cited with approval by the Constitutional Court in ***De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being & Another*** at fn 34).

[58] Although I am of the view that Thibault has *prima facie* demonstrated sufficient reasons that may pass muster to surpass the "good cause" threshold for the arbitration to at least be stayed, the question still remains whether this will be a just and equitable result for all the parties. If the arbitration is stayed in favour of court proceedings, a just and equitable result will be one where court proceedings are instituted promptly, all the parties participate in good faith to ensure that the proceedings are finalised expeditiously, and a binding decision is handed down which will create certainty for the parties with regard to their disputes. Quite simply, it assumes a level of commitment to the court proceedings by all the parties.

[59] On a conspectus of the evidence before me, I am not satisfied that an application in terms of section 3(2) of the Arbitration Act, or any of the other alternative declaratory relief sought by the applicant, will achieve a just and equitable result. I say so for the following reasons:

[59.1] SAHPL appears, at best, to be a somewhat reluctant litigant. It had an opportunity as far back as October 2019 to institute proceedings with regard to the alleged invalidity of the SAHPL preference shares. It lodged the Invalidity Application about 18 months later. Even allowing for the period in which the parties attempted to settle the matter, this is an inordinate delay in instituting legal proceedings in respect of a matter which is claimed to be of material significance to all the parties.

[59.2] SAHPL has been joined as a respondent in application proceedings initiated by Thibault – this application as well as the interim

application brought before Henney J – but has chosen to abide the decision of the court and not be actively involved in these proceedings. If one accepts Thibault's argument that SAHPL is an interested party who is likely to be prejudiced by a decision in the arbitration and that all parties will be best served by being involved in court proceedings, one would have assumed that SAHPL would have actively joined the fray. It did not do so. Indeed, SAHPL's own Invalidity Application is, for all intents and purposes, postponed indefinitely.

[60] Given the foregoing, one may quite legitimately ask the question whether SAHPL will actively participate in any court proceedings that may be initiated by Thibault. A further question that needs to be answered is whether Thibault is likely to actively pursue any action proceedings with any degree of fervour once such proceedings are initiated. These questions are raised within the context of the RAIA.

[61] As noted earlier, SAHPL and Thibault have concluded an RAIA. In terms of this RAIA, SAHPL has indemnified Thibault in respect of costs and all losses (including due and payable obligations) that Thibault may incur in consequence of *inter alia* proceedings that Lancaster may institute against Thibault in respect of the Unwind Agreement. A copy of the RAIA is attached to Thibault's founding affidavit as annexure "JRDT14".

[62] The RAIA indicates that Thibault has obtained a complete indemnity from SAHPL against any dispute that may be lodged against Thibault by Lancaster. This indemnity includes payment of any amount that Thibault may be called upon to

pay Lancaster as well as all professional expenses incurred by Thibault, which includes attorneys' costs and the costs of two counsel (clauses 2.1.1 and 2.1.2 read with clause 2.1.4 (iii) of Annex A to the RAIA). SAHPL further agrees to pay any claim and costs within ten business days of having received a written demand from Thibault (clauses 2.1.1 and 2.1.2 of Annex A to the RAIA). [As an aside, and contrary to what Thibault submitted, Thibault does not have to necessarily join SAHPL in any court proceedings in order to invoke its indemnity against the latter].

[63] SAHPL has agreed to take over any claims in relation to Lancaster, and Thibault has committed its full co-operation in this regard. This co-operation extends to any legal proceedings instituted by Lancaster and includes legal proceedings to set aside or stay the arbitration proceedings brought by Lancaster (clause 2.1.4 of Annex A to the RAIA).

[64] It is also apparent from the RAIA that Thibault is released from any contractual liability regarding any Share Preference Subscription Agreement or the Unwind Agreement, that SAHPL takes over full responsibility for any payments that Thibault may be called upon to make to Lancaster, and SAHPL has agreed to defend any proceedings initiated by Thibault - Thibault will act only as instructed by SAHPL in relation to any legal proceedings and SAHPL will direct the course of any legal disputes with Lancaster (clause 2.1.4 read with clause 2.1.5 of Annex A to the RAIA).

[65] This agreement took effect on 24 March 2021, that is before SAHPL lodged its Invalidity Application, before Thibault lodged the application presently before this court, and pre-dates the institution of the arbitration process which was initiated on

12 April 2021 when Lancaster sent a letter to the chairperson of the Cape Bar Council requesting the appointment of an arbitrator.

[66] In my view, it would not be just and equitable to allow SAHPL and Thibault to determine the course, and possible consequence, of a dispute between Thibault and Lancaster in circumstances where Thibault is fully indemnified against any claim Lancaster has against it, and there is no guarantee that SAHPL will pursue its allegation that the SAHPL preference shares are void or, alternatively invalid. Quite simply, if the arbitration is to be stayed, or the arbitration agreement to be overridden, it would mean that Lancaster's right to relief in terms of the Unwind Agreement would be at the whim of Thibault and SAHPL. This would be inimical to a just and equitable result, especially in circumstances where the arbitration is underway, the arbitrator has already made findings on procedural issues, and a timetable is in place for the further conduct of proceedings.

[67] In the circumstances, I am not persuaded that Thibault has made out a case for the relief sought. Accordingly, the application must fail. I see no reason why costs should not follow the cause.

ORDER

The application is dismissed with costs, including the costs consequent upon the employment of two counsel.

FRANCIS J
Judge of the High Court

Counsel for Applicant:	Adv C M Eloff SC
	Adv A Morrissey
Attorney for Applicant:	Mr N Sarkas
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