IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 10530 / 2020

In the matter between:

CAPITEC BANK HOLDINGS LIMITED	Applicant
and	
CORAL LAGOON INVESTMENTS 194 (PTY) LTD	First Respondent
ASH BROOK INVESTMENTS 15 (PTY) LTD	Second Respondent

Case No: 7532 / 2020

In re:

CORAL LAGOON INVESTMENTS 194 (PTY) LTD	First Plaintiff
ASH BROOK INVESTMENTS 15 (PTY) LTD	Second Plaintiff
and	
CAPITEC BANK HOLDINGS LIMITED	Defendant

Coram: Wille, J

Heard: 22nd of February 2021

Delivered: 16th of April 2021

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This is an opposed application in which the applicant seeks an order to enforce an agreement not to sue. In the alternative, an order is sought to stay the certain proceedings[1] and for these disputes between the parties to be submitted to private arbitration. The applicant is a public listed company holding shares in Capitec Bank. The first respondent is a special purpose vehicle which was established to acquire shares in and to the applicant on behalf of a black economic empowerment consortium.[2] The first respondent is a wholly owns subsidiary of the second respondent. The first and second respondents shall be referred to as the respondents, unless otherwise specifically indicated.

[2] The respondents concluded an agreement with the applicant in terms of which they undertook to not institute legal proceedings against the applicant relying upon the conclusion of a particular commercial transaction.[3] It is the applicant's case that the

[1] The action proceedings pending in this court - the 'action'
[2] The 'BEE' consortium
[3] This transaction was concluded during 2017

respondents concluded this later transaction with the full awareness of their rights after obtaining prior independent legal advice thereon. The respondents' case is that this agreement not to sue is against public policy and should not be enforced.[4] The applicant contends for a breach of the agreement by the respondents by instituting the action.

[3] In the alternative, the applicant seeks an order [5], that the respondents be directed to refer their disputes raised in the action to private arbitration. This position taken by the applicant is buttressed by a suite of agreements between the applicant and the respondents in terms of which the parties specifically agreed to refer their disputes to be resolved by the arbitration process.

[4] The applicant, the respondents and the Industrial Development Corporation[6], concluded a linked set of signed agreements during 2016. This was the frontrunner to the applicant issuing (10) million ordinary shares to the first respondent. The parties had intersecting motives for concluding this sale share transaction. The applicant desired to increase its direct transformation shareholding with a view to achieving the targets for transformation ownership as set out in the Financial Sector Code, under the Act.[7] The respondents in turn hankered to obtain shares in the applicant, while the IDC coveted to support the transformation of the banking sector in South Africa. This is a complex matter and accordingly I have discussed in this judgment what seems to me of the greatest importance. It must not be inferred that from my failure to refer specifically to any argument or contention, that I was unaware of it, or that I ignored it.

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[4] The counter-applications
[5] In terms section 6 of the Arbitration Act 42 of 1965
[6] The 'IDC'
[7] Broad-Based Black Economic Empowerment Act 53 of 2003

THE FACTUAL MATRIX

[5] An important agreement relevant for present purposes is the subscription agreement dated 12 December 2006.[8] It contains no less than (3) sets of restrictions connected with share disposal aimed primarily at maintaining a direct transformation shareholding in the applicant. This latter agreement also includes an arbitration covenant, which is the first of the two arbitration agreements on which the respondent relies for the alternative relief it seeks in this matter.

[6] The first respondent[9], sold (5 284 735) of its (10 000 000), ordinary shareholding in the applicant to the PIC.[10] This left the first respondent with a remaining shareholding of (4 715 265), shares in the applicant. During the course of the following year, dissatisfaction loomed in connection with the selling restrictions imposed upon the second respondent and in turn, its shareholders. The second respondent thereupon approached the applicant and requested the applicant for a waiver in connection with the agreed selling share sale restrictions. The applicant refused on the bases that these restrictions were dominant to the entire purpose of the subscription agreement.

[7] The respondents instituted action against the applicant seeking orders declaring that the selling restrictions were inconsistent with sections 9, 10 and 25 of the Constitution[11] and invalid. Besides, an order was sought that the respondents be entitled to dispose of their shares without any selling restrictions.[12] This action is still pending. It was indeed

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[8] The Subscription of Shares and Shareholders Agreement
[9] During 2012
[10] The Public Investment Corporation
[11] The Constitution of the Republic of South Africa, 1996
[12] The '2016' action

this pending action that caused the applicant to insist on the inclusion of the agreement 'not to sue' as more fully described hereunder.

[8] During the middle of the following year, the first respondent entered into a sale share transaction with Petratouch (Pty) Ltd.[13] This transaction involved numerous parties and a suite of agreements were again concluded. This transaction consisted, inter alia, of the following components: that the second respondent would be restructured and that the first respondent would dispose of (3 360 830), of its shares in the applicant, to Petratouch.[14] The first respondent thereafter retained a shareholding of (1 354 435) shares in the applicant. It is the applicant's argument that the current action instituted by the respondents against the applicant, is inextricably linked and is based on this very transaction. I shall in this judgment refer to this latter transaction as the *'transaction'*.

[9] One of the agreements[15], in the suite of the agreements for the *transaction* set out the cascading phases of the *transaction* and defined all the material terms. Yet another agreement in the suite forming part of the *transaction* was concluded between the parties to this dispute.[16] The purpose of this consent agreement, was for the applicant to waive various rights in connection with the selling restrictions imposed in terms of the subscription agreement so that the *transaction* could proceed. Without the consent agreement the transactional steps contemplated in the *transaction* would be in direct violation of the selling restrictions imposed by the terms of the subscription agreement.

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[13] Petratouch
[14] The 'transaction'
[15] The 'framework' agreement'
[16] The 'consent' agreement

[10] The subject clause in the consent agreement that requires scrutiny is the clause that each of the respondents will not institute legal proceedings against the applicant - *wherein they seek to use or rely upon* - the *transaction.* This is the basis upon which applicant seeks an order directing the respondents to withdraw their current action. In the alternative, the applicant seeks to rely on a clause[17], in the consent agreement[18], to the effect that the parties agreed that any dispute arising out of or in connection with the *transaction* would be resolved by the process of private arbitration.

[11] On 10th August 2017, the Transnet Fund,[19] instituted action in the Gauteng Local Division claiming damages of approximately R1 billion from various persons and entities. The Fund claimed that certain persons and entities had stolen or defrauded money from it due to what are now commonly referred to as 'State Capture' activities. The defendants in that action included Regiments Capital (Pty) Ltd[20], which is the majority shareholder in the second respondent.

[12] About two years later certain of the parties to the fund litigation, including the Fund, Regiments (and the first respondent), concluded a settlement agreement which involved a further sale of an allotment of (810 230) of the first respondent's shares in the applicant, to the Fund.[21] The fund did not qualify in terms of the transformation threshold as set out in the subscription agreement and the issue of the selling restrictions accordingly found direct application.[22] A waiver in this connection was sought from the applicant in the form of a direct and specific consent to the share sale transaction.

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[17] Clause 21.2
[18] Including some of the other agreements to the suite
[19] The 'Transnet Second Defined Benefit Fund' – the 'Fund'
[20] Regiments
[21] The 'settlement' agreement
[22] Clause 8.3

[13] The applicant refused the waiver as sought and further litigation followed. During September 2019, the first respondent and the second respondent[23], launched and application against the applicant. The court seized with the matter ordered that the applicant was obliged to consent to the sale. This order is on appeal to the Supreme Court of Appeal.

DISCUSSION

[14] During June 2020, the respondents instituted the current action against the applicant. They seek an order for the payment of R l 225 955 165, 33 plus interest and costs. This claim is based on four causes of action, which are all framed in the alternative, to one another. The first claim[24], is a claim founded in contract, based on a breach of a duty of reasonableness and good faith allegedly owed in terms of the subscription agreement, alternatively a common law duty of good faith. The respondents aver that the applicant breached these duties by imposing a condition of 'consent', in connection with the *transaction* which caused the first respondent to dispose of its shares at a discounted rate.

[15] The second claim[25], is a claim in delict based on an alleged grossly negligent and fraudulent material misrepresentation by the applicant, in that the *transaction* was conditional upon the applicant's consent. The third claim [26], is also a claim in delict, this is couched in the form of a pure economic loss claim, suffered by first respondent as a result of applicant's averred breach of a duty to not engage in conduct that diminished or reduced

[23] Including the 'Fund'
[24] Claim 'A'
[25] Claim 'B'
[26] Claim 'C'

the value of the respondents proprietary interest in their shareholding in and to the applicant.

[16] The final claim[27], is a statutory claim based on an allegation that the applicant engaged in 'fronting' which amounted to conduct, alternatively the conducting of the applicant's business in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the first respondent in terms of section 163(1)(a) and (b) of the Companies Act[28], or which amounted to unfair discrimination on the basis of race as contemplated in section 7 of the Promotion of Equality and the Prevention of Unfair Discrimination Act.[29]

[17] The applicant raises a shield that the institution of the current action by the respondents is unlawful because it breaches the respondents' agreement not to sue, alternatively the respondents' agreement to resolve their disputes by means of private arbitration. The applicant contends for the position that the current action must be withdrawn because the respondents are bound by the provisions of the consent agreement not to institute legal proceedings against the applicant, in which they seek to use or rely on the *transaction* or any part of it. The applicant takes the view that the consent agreement amounts in essence to a contractual undertaking not to institute an action. They argue that as the law currently stands, the subject clause is enforceable and still forms part of our law.[30]

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[27] Claim 'D'
[28] The Companies Act 71 of 2008
[29] Act 4 of 2000
[30] *Tuning Fork (Pty) Ltd t/a Balanced Audio v Greeff and another* 2014 (4) SA 521 (WCC) para 43 (iv) and 75

[18] In contrast, the respondents take the position that the applicant is committing an abuse of process by seeking to enforce this clause in these discrete application proceedings, rather than by way of a special dilatory plea to the current pending action.

[19] In rebuttal the applicant contends for the following: that their reliance on the subject clause is a claim for specific performance: that it seeks to compel the respondents to comply with their contractual obligation not to sue it: that there is no rule that specific performance may be enforced only through action proceedings: that there is no rule that, once one party sues another based on a contract or arising out of the conclusion of the contract, the second party's existing contractual rights fall to be somehow abrogated and the fact that the respondents had already breached their contract by instituting the action, cannot detract from the applicant's entitlement to enforce its contractual rights by means of motion proceedings.

[20] Besides, it was appropriate for the applicant to have raised the provisions of the subject clause[31], by way of the application process, rather than as a special plea (which it has also done, subject to a reservation of its rights), in the present application. The applicant elected to proceed with application proceedings because it believed there would be no material disputes of fact and the motion proceedings would result in a quicker and cheaper means of having its dispute with the respondents adjudicated.

[21] Of equal importance, the applicant asserts that it has two self-standing rights which were triggered by the institution of the current action. Firstly, the applicant contends that it has the right to hold the respondents to their agreement not to institute legal proceedings

[31] The clause in the consent agreement not to sue

wherein they seek to use or rely upon the *transaction*. Next, the position is taken that the applicant has a right to hold the respondents to their agreement to have their disputes relating to or arising out of the subscription agreement referred to private arbitration.

[22] It is alleged that these rights are by their very nature based on the same factual grounds and have both been breached. The applicant argues that it has properly joined its two causes of action, as alternatives in the present application, in terms of the court rules and launched this composite application. The application being in the interests of justice. Further, out of an abundance of caution and with the full reservation of its rights, the applicant in any event filed a special plea and also pleaded over on the merits.

[23] The respondents in their counter application submit that because the applicant has pleaded there is no reason why the application should continue to exist separately. Another point raised by the respondents is that there are now parallel proceedings resulting in an unnecessary coverage of material which is irrelevant to the present application.

[24] Turning now for a moment to the subject clause in the consent agreement. The relevant portions of the subject clause record as follows:

'7.1 Each of Ash Brook and Coral hereby give the following warranties to Capitec Holdings:

7.1.6 it shall not and shall procure that its related and inter-related persons (as defined in the Companies Act) do not:

7.1.6.1 directly or indirectly use or rely on the Transaction (or any part thereof) or any of the Transaction Agreements in the Legal Proceedings or any other legal proceedings related thereto or flowing therefrom; and/or

7.1.6.2 directly or indirectly institute any legal proceedings against Capitec Holdings and/or any of its subsidiaries (as defined in the Companies Act), whether as plaintiff, applicant, defendant, respondent or otherwise, wherein it seeks to use or rely upon on the Transaction (or any part thereof)'

[25] The applicant argues that the meaning to be attributed to the subject clause is clear and unambiguous as it entails an agreement on the part of the respondents not to use or rely upon the *transaction* as a basis for instituting any legal proceedings against the applicant. The correct context bears reference and scrutiny. By way of introduction, in the consent agreement, it is recorded that the various steps to the *transaction* require the consent or approval of the applicant and the parties to the *transaction* have requested that the applicant grant to them an indulgence in this connection. It is further specifically recorded that these indulgences are formulated as warranties and that these transaction warranties are a material representation inducing the applicant to enter into the consent agreement.

[26] The purpose of the subject clause appears from the text which is to prevent the respondents from suing the applicant on the basis of the *transaction*. On a proper reading of the text, the warranty expressly applies to any legal proceedings, including any future proceedings. It must be borne in mind that the applicant was never the central party to the *transaction* and the applicant's consent was merely required in order for the *transaction* to proceed. The applicant submits that it only gave its consent on the basis that it did not risk being sued for its involvement in the *transaction*.

[27] It seems to me (taking into account the manner in which the respondents' claims are currently formulated), that the golden thread that runs through these claims is the core

allegation that during the negotiations leading up to the *transaction*, the applicant in some manner misrepresented the nature of the rights in terms of the subscription agreement. This in turn, caused the respondents' to suffer a loss. Each of these claims seek to use or rely upon the *transaction*.

[28] The respondents in turn argue that this is not the case. They argue that the current action is buttressed upon the applicant's conduct in the 'Fund' application. The respondents say that this is how they first became aware of the misrepresentation that the applicant is alleged to have made about its understanding of the impact of the restrictive selling conditions. This proposition is elaborated upon in the context of the respondents' counter- application, to which I now turn.

[29] The respondents seek an order in the following terms: that the subject clause of the consent agreement be held not apply to the current action and that, the subject clause in the consent agreement is contrary and unenforceable to public policy, alternatively is inconsistent with section 34 of the Constitution.

[30] The public policy argument is based on the premise that the respondents would not have constitutionally waived their rights of access to court and that accordingly public policy factors weigh against enforcing the subject clause in the consent agreement in these particular circumstances. I am not persuaded that the concept of a waiver is relevant and I am also not persuaded that the subject clause is inconsistent with public policy in these circumstances.

[31] I say this because a waiver of rights in this connection formed the subject of scrutiny in *Lufuno*.[32] This in the context of arbitration agreements. There was a judicial assumption that such rights could be waived.[33] The court remarked that where parties agree to arbitrate, they arguably do not so much waive their rights, but simply agree not to exercise them.[34]

[32] Another aspect to consider is that it seems common cause on the facts that the respondents having been fully informed, elected voluntarily to consent to the terms of the subject clause. This brings me to the core issue in this matter namely the '*pacta sunt servanda'* principle.

[33] For this enquiry, I need to, inter alia, consider the facts and circumstances leading up to and the signing of the consent agreement. These are: that the respondents were legally represented: that the respondents were also represented by experienced business people: that the respondents acknowledged that by entering into the consent agreement they had been free to secure independent advice: that the respondents obtained independent professional advice to the cost of spending over R6 million and most significantly, each of the respondents recorded that they fully understood their respective rights and obligations under the consent agreement and that the provisions of this agreement were fair and reasonable and in accordance with their commercial intentions.

[34] It seems clear to me that this is a case where the respondents all agreed and accepted expressly that they understood what they were agreeing to in the consent agreement. The correct position in our law on this score has been recently clearly re-stated

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[32] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) para 199-218
[33] *Lufuno* para 80
[34] *Lufuno* para 216

in *Beadica*.[35] In short, in establishing whether a clause should be enforced includes a consideration of whether the parties negotiated with equal bargaining power and whether they understood what they were agreeing to. In this matter, it is clear that the parties were possessed of equal bargaining power and they must have understood what they were agreeing to. The consent agreement was after all, at their request.

[35] The facts demonstrate that the respondents chose voluntarily to consent to the terms of the subject clause. This brings me to the public policy arguments and debate. Public policy in this context, falls to be constitutionally infused. This means that a court may refuse to enforce certain contractual terms of an agreement where that term itself, alternatively, the enforcement thereof, would be contrary to public policy.[36] In *Barkhuizen,*[37] this was categorized as a measured balancing exercise.

[36] This refusal by a court must, for obvious reasons, be used sparingly. In general public policy dictates that parties should be bound by their contractual obligations embodied in a contract. This, especially where the contract was entered into freely and voluntarily. The respondents in this case attract the onus of exhibiting that the subject clause was and is against public policy.[38] The subject clause was agreed to for specific reason and purpose. The applicant was concerned that if it took part in the *transaction* it would lead to further possible exposure and litigation by the respondents. At the same time, the applicant did not want to frustrate the *transaction*. This was because the applicant was not a direct party.

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[35] *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC)
[36] *Beadica* para 80
[37] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 70
[38] *Barkhuizen* para 58

[37] The only 'interest' that the applicant had in the *transaction* was in relation to its transformation threshold. This is precisely why the applicant's consent was required. The transaction was not at the instance of the applicant and the applicant stood nothing to gain from the transaction.

[38] Besides, the subject clause does not prohibit the respondents from litigating against the applicant for any breach of the consent agreement. If it were so, this would clearly be in violation of public policy considerations. The subject clause, in my view, is very limited and specific. The terms of the subject clause prevent the respondents from relying on the *transaction* in order to litigate against the applicant.

[39] The respondents argue that if the terms of the subject clause are enforced, then in this event, it would in effect amount to a violation of their constitutionally enshrined rights.[39] To counter this argument, the applicant contends for the position that their argument is against the enforcement of the clause, not its validity. The argument is that the respondents voluntarily relinquished their rights which are very limited in scope. This, after having obtained legal advice before entering into the framework agreement and the consent agreement. The respondents themselves, at the time, considered the terms of the subject clause to be fair and reasonable in the circumstances.

[40] The respondents freely surrendered certain limited rights in return for the applicant's consent to the *transaction* as embodied in the suite of agreements. Further, at the time of concluding the *transaction* the respondents themselves considered these rights to be fair and reasonable, which they in turn waived freely and voluntarily. Under these

[39] In terms of section 34 of the Constitution

particular circumstances, in my view, the public policy argument falls to be somewhat diluted.

[41] Further, the respondents' case is that it would be unfair to enforce the subject clause for the following reasons: that they claim that their transformation status as threshold shareholders is relevant: that the applicant owed to them a duty to protect the value of their shares and they claim that they had no commercial power to prevent the applicant's abuse of certain of the terms of the subscription agreement. These arguments bear scrutiny.

[42] In *Beadica*, it was effectively held that no unique rules apply to contracts designed to promote transformation and empowerment. The core reasoning was that any special rules would undermine section 9(2)[40] and so would:-

'*deter other parties from electing to contract with beneficiaries…or force beneficiaries to offset the increased risk by making concessions on other contractual aspects during contract negotiations*'[41]

[43] Besides, the applicant did not owe the respondents any contractual or general duty to protect the value of their shares in these peculiar circumstances. There is no such general duty in law, and also no contractual duty. It must also be borne in mind that in this matter the respondents were clearly possessed of equal bargaining power and the playing fields were level when the consent agreement was negotiated and concluded. The respondents warranted that they understood the terms of the consent agreement and they accepted the *transaction* to be reasonable and fair. The first respondent desired to enter into the

[40] The Constitution of the Republic of South Africa, 1996
[41] *Beadica* para 101

transaction so as to settle a tax liability of its own making. The first respondent elected to enter into the said share sale.

[44] In essence, the applicant seeks an order for specific performance. The respondents contend for a difference between a withdrawal and a dismissal of the current action proceedings at their instance. This is clearly a matter of judicial discretion. This discretion must be exercised judicially and must not produce an unjust result. Specific performance by the respondents is possible in that they could simply file a notice withdrawing the action against the applicant.[42]

[45] By contrast, if the court did not grant specific performance, it could be argued that this result would be unjust, against public policy and unduly harsh. I say this because in the consent agreement the respondents specifically agreed to not institute legal proceedings against the applicant wherein they sought reliance upon the *transaction*. When they did this it was with the full awareness of their rights and after obtaining independent legal advice. In my view, the respondents are in breach of the terms of the subject clause of the consent agreement by pursuing the action proceedings as currently formulated against the applicant. Further, taking into account the circumstances of this matter, neither the agreement not to sue, nor the enforcement thereof, violates against public policy.

[46] I say this further because it is now settled law that contractual interpretation is an objective process of attributing meaning to the words used in a document recited in the context of the document as a whole and having regard to the apparent purpose of those words.[43] Put in another way, if all references to the *transaction* were omitted from the

[42] *Rayden v Hurwitz*1932 CPD 336

[43] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18

respondents' particulars of claim, as currently formulated, the respondents would have no cause of action.

[47] In the result , in my view the respondents fall to be ordered to withdraw their current action against the applicant. It goes without saying that I accordingly need not deal with the alternative claim and counter-applications in connection with the referral of any disputes between the parties to the process of private arbitration. The subscription agreement[44], provides that any costs awarded in a dispute in connection with or arising from the agreements will be recoverable on an attorney and client scale. Further, the employment of at least two counsel in the circumstances was reasonable because of the range of questions of law raised in these proceedings.

[48] The following order is granted: -

1. That the respondents are hereby ordered to withdraw the action instituted by them in this court against the applicant (on or about the 19th June 2020, under case reference number 7532/2020), within (10) court days of date of this order.

2. That the respondents' counter-applications are dismissed.

3. That the respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the applicant's costs (including the costs of (2) counsel, where so employed) of and incidental to this application, and the

[44] Clause 14.2 as 'correctly'interpreted.

counter-applications on the scale as between attorney and client, as taxed or agreed.

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E D WILLE

(Judge of the High Court)