



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case no: 887/2021

In the matter between:

CORAL LAGOON INVESTMENTS 194

(PTY) LTD

FIRST APPELLANT

ASH BROOK INVESTMENTS 15

(PTY) LTD

SECOND APPELLANT

and

CAPITEC BANK HOLDINGS LIMITED

RESPONDENT

Neutral citation: *Coral Lagoon Investments 194 (Pty) Ltd and Another v*

Capitec Bank Holdings Limited (Case no.887/2021)

[2022] ZASCA 144 (24 October 2022)

Coram: ZONDI, GORVEN and HUGHES JJA and WINDELL and
CHETTY AJJA

Heard: 5 September 2022

Delivered: 24 October 2022

Summary: Contract – agreement not to sue – *pactum de non petendo anticipando* – enforcement thereof not against public policy.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Wille J, sitting as court of first instance).

The appeal is dismissed with costs on an attorney and client scale, including the costs of two counsel.

JUDGMENT

WINDELL AJA (ZONDI, GORVEN and HUGHES JJA, and CHETTY AJA concurring)

[1] This is an appeal against an order of the Western Cape Division of the High Court, Cape Town (the high court). The order directed the appellants, Coral Lagoon Investments 194 (Pty) Ltd (Coral) and its holding company, Ash Brook Investments 15 (Pty) Ltd (Ash Brook) to withdraw an action for damages against the respondent, Capitec Bank Holdings Limited (Capitec) (the 2020 action). In doing so the high court, per Wille J, enforced a clause not to sue contained in a written 'consent agreement' concluded between Capitec and the appellants.¹ Such a clause is known as a *pactum de non petendo* (the *pactum*). The high court found that the appellants had breached the *pactum* by instituting the 2020 action against Capitec. It further found that Capitec was entitled to specific performance of the consent agreement and that the use of motion proceedings was permissible. It also dismissed the appellants' counter application contending that the *pactum* is contrary to public policy. The appeal is with leave of the high court.

¹ There were also other parties to the consent agreement namely K2017134938 (South Africa) (Pty) Ltd (Bidco) and CB Employee Holdings (Pty) Ltd.

[2] Two main issues arise for determination in this appeal. Firstly, the interpretation of the consent agreement and, secondly, whether the *pactum*, which was a permanent one, was contrary to public policy.

Background

[3] Coral is wholly owned by Ash Brook, a broad based black economic empowerment consortium comprising 13 black shareholders in different formations. In 2006 Capitec, Coral, Ash Brook, the shareholders of Ash Brook (all of which are black persons and black-owned entities) and the Industrial Development Corporation (IDC) concluded a linked set of written agreements. Part of the set of agreements was a subscription of shares and shareholders agreement (the subscription agreement), concluded between Capitec and the appellants on 12 December 2006. The purpose of the subscription agreement was to facilitate and promote the achievement of the transformational objectives set out in the Broad-Based Black Economic Empowerment Act 53 of 2003 (B-BBEE Act), the Financial Sector Charter² (FSC) and the Codes of Good Practice on Black Economic Empowerment³ (the transformation practises). As a result, Capitec allotted and issued, and Coral subscribed for ten million ordinary shares in Capitec at R30 per share for a total subscription price of R300 million (the CPI shares). The CPI shares were equivalent to a 12,21 per cent stake in Capitec. The black shareholders leveraged finance of R285 million to fund the acquisition using a third party, the IDC.

[4] An important element of the subscription agreement are three sets of selling restrictions, aimed at keeping the CPI shares in black shareholders' hands. One of these selling restrictions is clause 8.3 of the subscription agreement. This clause provides that, should Coral in any manner endeavour to dispose of any of the CPI

² The South African Financial Sector Charter is a transformation charter in terms of the Broad-Based Black Economic Empowerment (B-BBEE) Act 53 of 2003. The Charter came into effect in January 2004.

³ Codes of Good Practice on Black Economic Empowerment published in General Notice 112 in *Government Gazette* 29617 of 9 February 2007, as amended from time to time.

shares to any entity or person who, in Capitec's opinion, does not comply with the B-BBEE Act and transformation practises, Capitec will determine the number of CPI shares sold and may require Coral to acquire an equal number of CPI shares and cause them to be registered in Coral's name.

[5] It was always Capitec's and the appellants' understanding of clause 8.3 that Capitec's consent was required for Coral to trade in the CPI shares. However, in court proceedings instituted by the appellants against Capitec in September 2019 (which I deal with later in the judgment), Capitec stated that it had realized that clause 8.3 is concerned with the *consequences* for Coral of selling any of its CPI shares to an entity or person who, in Capitec's opinion, does not comply with the B-BBEE Act and transformation practices. The effect of this concession was that Coral did not need Capitec's consent to sell its CPI shares. Capitec's understanding of clause 8.3 was recently affirmed by this Court in *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*.⁴

[6] In any event, after holding the shares for 5 years, Coral sold 5 284 735 CPI shares to the Public Investment Corporation in 2012 in order to repay its debt to the IDC. Coral obtained Capitec's consent prior to the transaction. In addition, Capitec required as a condition of its consent that the CPI shares be subject to a further locked-in period of 10 years. That meant that the shareholders in Ash Brook would not be entitled to dispose of, or trade, their CPI shares in the open market during the locked-in period. The CPI shares were sold at a 15 per cent discount to the market.

[7] From about 2014 there was ongoing dissatisfaction about the selling restrictions by Ash Brook and its shareholders. In 2016 the appellants instituted action against Capitec and its subsidiary, Capitec Bank Limited, in which they

⁴ *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA).

challenged the validity of certain provisions of the subscription agreement (the 2016 action). They specifically sought an order that they were entitled to dispose of their shares without the selling restrictions. In 2018, the 2016 action was removed from the pre-trial roll for purpose of settlement negotiations. It has not been re-enrolled and is still pending.

[8] In 2017, Coral sought to sell 3 360 830 of its CPI shares to a subsidiary of a 100 per cent black-owned company called Petratouch (Pty) Ltd (the 2017 Petratouch transaction). It involved numerous parties and the transaction was embodied in numerous agreements. By then, Capitec's relationship with the appellants had deteriorated. At the time the appellants had remained invested in Capitec for over 10 years and had already fully repaid the funding for the CPI shares provided by the IDC. The CPI shares were thus fully owned by the appellants without any residual financial obligations to third parties.

[9] Consistent with the practice adopted by the parties in the previous transactions, Coral sought Capitec's consent for the 2017 Petratouch Transaction. Capitec agreed, subject to certain conditions, inter alia, that Petratouch could only sell the CPI shares to people who are black persons approved by Capitec in writing, and further that the purchaser had to enter into a written agreement with Capitec on substantially the same terms. Coral accepted the conditions and sold the CPI shares to Petratouch. One of the agreements constituting the 2017 Petratouch Transaction was the consent agreement entered into between Capitec and the appellants, which contains the *pactum*.

[10] After the 2017 Petratouch Transaction, Coral held 1 354 435 CPI shares. In 2019 Coral sought to dispose of 810 230 CPI shares to the Transnet Second Defined Benefit Fund. When Capitec was called upon to consent to the sale, it refused. The appellants launched an urgent application seeking to declare the refusal of consent to be in breach of Capitec's duty of good faith to the appellants. It is in this application that Capitec, for the first time, indicated that clause 8.3 of

the subscription agreement did not require Capitec's consent to sell the CPI shares and did not entitle Capitec to impose further restrictions on a sale of CPI shares by Coral.

[11] On 19 June 2020 the appellants instituted the 2020 action against Capitec. They claimed, in broad terms, that, but for Capitec's conduct, Coral would not have concluded the 2017 Petratouch Transaction at a discount of 52 per cent to the prevailing 30-day weighted average, amounting to a loss of R 1,225 billion. This led to the application before the high court that is the subject of this appeal. Capitec's main claim in the high court was that the 2020 action should be withdrawn because the appellants agreed in clause 7.1.6.2 of the consent agreement not to institute legal proceedings against Capitec in which they sought to use or rely upon the 2017 Petratouch Transaction or any part of it.⁵

[12] Before the hearing of the application in the high court, Capitec filed its plea in the 2020 action. In the plea Capitec raised special defences which were similar to the objections in its application. It also pleaded to the merits of the 2020 action.

Agreement not to sue

[13] Capitec's consent to the 2017 Petratouch Transaction was embodied in the written consent agreement, entered into between Capitec and the appellants. The purpose of the consent agreement was for Capitec to waive various rights in connection with the selling restrictions imposed in terms of the subscription agreement so that the 2017 Petratouch Transaction could proceed. Without these waivers, which Capitec was not obliged to make, the 2017 Petratouch Transaction would have breached the selling restrictions in the subscription agreement. Because of certain concerns (dealt with below), Capitec proposed the inclusion of the *pactum* in the consent agreement, to which the appellants agreed. It is necessary to quote the clause containing the *pactum* in extenso:

⁵ Capitec also sought alternative relief, directing the appellants to refer their claims for arbitration.

'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 the Transaction (or any part thereof).

(Transaction warranties)'.

It is common cause that the word 'Transaction' in the clauses above refers to the 2017 Petratouch Transaction and that 'Legal Proceedings' refers to the 2016 action.

The interpretation of clauses 7.1.6.1 and 7.1.6.2

[14] The appellants contend that clauses 7.1.6.1 and 7.1.6.2 are warranties that do not give rise to the rights and obligations that Capitec contends for. It is submitted that the only basis for the inclusion of the clauses was to protect Capitec in the 2016 action.

[15] It is trite that interpretation is, generally speaking, an objective process of attributing meaning to the words used in a document, read in the context of the document as a whole and having regard to the apparent purpose of the words.⁶ It is a unitary exercise which must be approached holistically: simultaneously considering the text, context and purpose.⁷ In addition, extrinsic evidence may be admitted as relevant to context and purpose.⁸

⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para [18].

⁷ *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (6) SA 1 (CC) para [65].

⁸ Footnote 1 para 47. Unterhalter AJA remarked, that 'reasonable disagreements as to the relevance of such evidence should favour admitting the evidence and the weight of the evidence

[16] The point of departure in interpreting the subject clauses is the text. The introductory words in Clause 7.1.6, read with 7.1.6.1 and 7.1.6.2, make clear that the institution of legal proceedings by Coral and Ash Brook and its related entities against Capitec are not permitted under two distinct circumstances. Clause 7.1.6.1 is specifically directed to the 2016 action. It stipulates that the appellants (and its related and inter-related persons) shall not use or rely on the 2017 Petratoch Transaction in the 2016 action or any other legal proceedings related to the 2016 action. Clause 7.1.6.2 is framed in wider terms. It applies not only to the 2016 action but to *any legal proceedings* against Capitec where the appellants seek to use or rely upon the 2017 Petratoch Transaction. The singular purpose of the words used in clause 7.1.6.2 is clearly to prevent the appellants from instituting any future legal proceedings against Capitec in which it seeks to use or rely upon the 2017 Petratoch Transaction.

[17] The context in which the parties agreed to the *pactum* is similarly clear. In the introduction to the consent agreement, it is recorded that the appellants and other parties had proposed the 2017 Petratoch Transaction to Capitec (clause 1.2). Various steps in the 2017 Petratoch Transaction required the consent or approval of Capitec in terms of the subscription agreement (clause 1.3). The parties requested Capitec to consent to those steps (clause 1.3). Capitec was willing to provide that consent on the terms and subject to the conditions in the consent agreement (clause 1.4). Clause 7.1.6 then addressed Capitec's two main concerns: Clause 7.1.6.1 prevents the appellants from using or relying upon the 2017 Petratoch Transaction in the 2016 action; and clause 7.1.6.2 prevents the appellants from instituting any other legal proceedings in which it will use or rely upon the 2017 Petratoch Transaction. Clause 7.1.6.2 clearly does not refer to the 2016 action.

may then be considered. It is this enquiry into relevance that will determine the admissibility of the evidence'.

[18] The appellants contend that on the assumption that clause 7.1.6.2 only applies to new litigation in which it seeks to escape ‘from the selling restrictions’, it is not triggered by the 2020 action as the 2020 action does not relate to the ‘selling restrictions’. In support of this contention the appellants refer to Capitec’s founding affidavit in which it stated that at the time the 2017 Petratouch Transaction was concluded, it was ‘concerned that [the appellants] intended to use the 2017 Petratouch Transaction to either support that litigation, or to institute new litigation in which it sought to escape from the Selling Restrictions’.

[19] The passage in the founding affidavit referred to above is not the only instance in the founding affidavit where Capitec explained the reason for the inclusion of the *pactum*. Capitec also averred that it gave its consent for the 2017 Petratouch Transaction only because it knew that the appellants could not subsequently hold the 2017 Petratouch Transaction against it in litigation. Clause 7.1.6. catered for both the 2016 action (which attacks the selling restrictions directly) and any legal proceedings other than, and in addition to, the 2016 action.

[20] The context established that Capitec agreed to give its consent to the 2017 Petratouch Transaction only if the appellants agreed not to use or rely on the 2017 Petratouch Transaction or any part thereof against Capitec in the 2016 action or any other legal proceedings which they might institute against Capitec.

Is clause 7.1.6.2 a warranty?

[21] Clause 7, in which the *pactum* is located, is headed ‘Warranties, representations and undertakings by Ash Brook and Coral’. In Clause 7.1 it is recorded that ‘Ash Brook and Coral hereby give the following “warranties” to Capitec Holdings’. Clause 7.1.1 to 7.1.6 are also referred to in the agreement as ‘Transaction Warranties’. Clause 7.3 further states that the ‘transaction warranties are a material representation inducing Capitec Holdings to enter into this Agreement’.

[22] The appellants contend that clause 7.1.6.2, properly interpreted, is a warranty that 'reflected a position at the time the consent agreement was concluded'. The appellants submit the purpose of the clause was limited and does not give rise to legally enforceable rights and obligations beyond those specified in clause 7.4 which provides:

'If Ash Brook or Coral breach any of the Transaction Warranties, then Capitec Holdings shall be entitled to immediately without having to give notice as envisaged in clause 11, upon written notice to the other Parties and without prejudice to any other remedies Capitec Holdings may be entitled in law, forthwith revoke all or any of the consents, approvals, undertakings and confirmations envisaged in clause 6 *ab initio*, and/or exercise its rights pursuant to the Mandatory Acquisition Option and/or the Repurchase option as the case may be.'

At most, so it is argued, a breach of a warranty would give rise to a damages action, and not the 'drastic remedy' granted by the high court. In support of their argument the appellants rely, inter alia, on *Absa Bank v Swanepoel*.⁹ In that matter Cameron JA emphasised that not all terms in a contract create enforceable rights and obligations. He remarked that to establish whether a clause has an operational effect 'depends on what it says within its context in the contract, against the background in which the parties concluded it'.

[23] Although clause 7.1.6.2 is referred to as a 'warranty' in the consent agreement, there is no magic in the contractual terminology. As remarked by Hoexter JA in *Resisto Dairy v Auto Protection Insurance Co*:¹⁰

'The terms of the contract cannot be changed into suspensive conditions merely by calling them conditions precedent. A term of the contract may be so material that a breach of it will entitle the other party to repudiate the contract, and in the present case the parties have used the words "conditions precedent to any liability" to indicate that the so-called conditions are material terms of the contract.'¹¹

⁹ *ABSA Bank Ltd v Swanepoel* [2004] ZASCA 60; 2004 (6) SA 178 (SCA) paras 6-8.

¹⁰ *Resisto Dairy v Auto Protection Insurance Co* 1963 (1) SA 632 (A).

¹¹ *Ibid* at 644F-G.

[24] In *Parsons Transport (Pty) Ltd v Global Insurance Ltd*¹² this Court had to interpret certain clauses in an insurance contract. In dealing with the 'warranties', Mpati DP applied the approach adopted in *Resisto Dairy*, and held that they were material terms of the contract and did not 'become warranties merely because they are referred to as warranties in the schedule'.¹³ In *Protea Property Holdings (Pty) Ltd v Boundary Financing Ltd (formerly known as International Bank of Southern Africa Ltd) and Others*,¹⁴ Griesel J said:

'In the final analysis, there is no unanimity among the authorities as to what the expression "warranty" connotes, save that it is a contractual term. It accordingly becomes necessary, as pointed out by Farlam JA in *Masterspice (Pty) Ltd v Broszeit Investments CC*, "in every case where the expression is used, to examine the terms of the contract in question closely in order to endeavour to ascertain in what sense the parties have used it". (Footnotes omitted)

[25] Warranties, in the narrow sense, can give rise to contractual remedies if they were intended to do so. But, depending on the context, they can also be used in a wider sense to mean contractual undertakings.¹⁵ I have already dealt with the context in which the *pactum* was included in the consent agreement. Clause 7.1.6.2 was clearly intended to create obligations and afford rights and remedies. This is made clear by clause 7.4. Clause 7.1.6.2 is not a warranty in the true sense of the word, ie a representation about a past or present state of affairs.¹⁶ It is about how the appellants warrant or undertake that they shall not conduct themselves in future. It is a contractual undertaking. This interpretation is fortified by the use in the heading to clause 7 of the word 'undertakings'.

Breach of the consent agreement

¹² [2005] ZASCA 95.

¹³ *Ibid* para [7].

¹⁴ *Protea Property Holdings (Pty) Ltd v Boundary Financing Ltd (formerly known as International Bank of Southern Africa Ltd) & Others* [2007] ZAWCHC 39; 2008 (3) SA 33 (C) para 39.

¹⁵ See Wessels: *The Law of Contract in South Africa* 2 ed Vol 2 paras 3044 and 3049.

¹⁶ *Lewis Ltd v Norwich Union Fire Insurance Co* 1916 AD 509.

[26] The claim against Capitec in the 2020 action is based on four causes of action, which are all framed in the alternative. Capitec's synopsis of the four claims can be summarized as follows:

1. Claim A: This is a contractual claim for damages based on a breach of duty of reasonableness and good faith allegedly owed in terms of the subscription agreement, alternatively the common law duty of good faith, and what the appellants described as the duty to achieve BEE. It is alleged that Capitec breached these duties by imposing a condition that its consent be obtained for the 2017 Petratoch Transaction, which caused Coral to sell its CPI shares at a discount.
2. Claim B: This is a delictual claim for damages based on an alleged grossly negligent and/or fraudulent material misrepresentation by Capitec that the 2017 Petratoch Transaction was conditional upon Capitec's consent.
3. Claim C: This is a delictual claim for damages based on pure economic loss allegedly suffered by Coral as a result of Capitec's breach of duty to 'not engage in conduct that diminished or reduced the value of [Coral's and Ash Brook's] proprietary interest in the [Capitec] shares'. Capitec allegedly breached this duty by facilitating the 2017 Petratoch Transaction.
4. Claim D: This is a statutory claim for damages based on an allegation that Capitec engaged in a fronting practice in contravention of the B-BBEE Act, which amounted to conduct or the conducting of Capitec's business in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of Coral in terms of s 163(1)(a) and (b) of the Companies Act 71 of 2008 or which amounted to unfair discrimination on the basis of race as contemplated in s 7 of the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000. Capitec allegedly engaged in a fronting practice by requiring the appellants to sell their sale shares at a discount.

[27] It is clear from the above that the appellants 'use or rely on' the 2017 Petratoch Transaction in support of their claims. But, if there was any doubt, the

following paragraphs in the particulars of claim, describing the conduct causing loss, make it plain:

'96. At the time of the 2017 Petratouch Transaction, Capitec maintained that Coral was prohibited from disposing of its CPI shares without Capitec's consent.

97. As a condition for granting its consent, Capitec required that Coral could only sell its CPI shares subject to the requirement of Capitec's consent as to the identity of the purchaser and the terms on which the sale takes place, including subjecting the Sale Shares to further restrictive conditions as a condition of its consent as reflected in the Framework Agreement, the Capitec Consent Agreement and the Relationship Agreement to persuade BidCo to conclude the transaction.¹⁷

98. At the time of imposing this condition, Capitec knew or would have known with the exercise of reasonable care, that imposing this condition would have the effect of the Black shareholders having to sell the Sale Shares at a significant discount of 52% of their market value, given the highly restrictive nature of the restrictive conditions.

104. But for Capitec's conduct in breach of one or more of the legal duties pleaded below, Coral would not have concluded the 2017 Petratouch Transaction and would have been able to sell its CPI shares to any Black purchaser at a discount of at most 5% of the value of the Sale Shares.'

[28] To finally test if the claims in the 2020 action contravene clause 7.1.6.2, is to ask whether they can be sustained without using or relying upon the 2017 Petratouch Transaction. The answer is no. The institution of the 2020 action clearly breached the undertaking not to sue.

Remedy

The nature of a pactum de non petendo in anticipando

[29] A *pactum de non petendo in anticipando* forms part of our law.¹⁸ It is a contractual undertaking not to institute an action. The appellants contend that our courts have recognised such a *pactum* only (a) as a defence and (b) to grant a

¹⁷ The particulars of claim define "Sale Shares" as meaning the shares sold by Coral in the 2017 Petratouch Transaction.

¹⁸ *Miller v Dannecker* 2001 (1) SA 928 (C); *Tuning Fork (Pty) Ltd t/a Balanced Audio v Greeff and Another* [2014] ZAWCHC 78; 2014 (4) SA 521 (WCC) para 43 (iv).

temporary stay of proceedings to afford a debtor an opportunity to repay, alternatively (c) as part of settling (compromising an already existing dispute).

[30] A *pactum* is an agreement like any other. It is a contract that gives rise to rights and correlative duties. The nature of the right in question varies from case to case and is dependent on the text and the facts. Although the court in *Miller v Dannecker*¹⁹ held that the *pactum* merely suspends the enforcement of a contract, usually for a specific period or until the occurrence of some contingency, the court in that matter was dealing with a *pactum* that was temporary. In the present matter the limitation of the right not to be sued is not linked to time. The *pactum* in the present matter is one operating in perpetuity.²⁰ *Van Zyl* makes it clear that there is no bar in our law to such a *pactum*.²¹ Formulations emphasising time limitation or contingency aspects cannot therefore be said to mean that such features are requirements for a *pactum* to be valid.

Specific performance

[31] The law on specific performance is well established. Injured parties have the right of election whether to hold the parties in breach to their contract and claim performance by them for precisely what they had bound themselves to do, or to claim damages for the breach.²² It is in the court's discretion to award specific performance. The discretion must be exercised judicially upon a consideration of all relevant facts.²³ The ultimate principle is that the order which the court makes should not produce an unjust result such as in a situation where it is impossible for the appellants to comply with the order or if the order would operate unduly harshly on the appellants.²⁴

¹⁹ Ibid at 937A-B.

²⁰ *Van Zyl v Auto Commodities (Pty) Ltd* [2021] ZASCA 67; 2021 (5) SA 171 SCA.

²¹ Ibid para 32.

²² *Benson v SA Mutual Life Assurance Society* [1985] ZASCA 114; 1986 (1) SA 776 (A).

²³ Ibid at 783C.

²⁴ Ibid at 783 E-G.

[32] The appellants contend that Capitec was not entitled to specific performance. It was submitted that in the event of breach of the consent agreement Capitec could rescind the consent agreement or seek damages. They rely on clause 7.4 of the consent agreement (referred to earlier), which they argue caters for the only remedies a party can claim in the event of a breach.

[33] Firstly, clause 7.4 expands, rather than restricts, Capitec's remedies. It specifically provides that the remedies in 7.4 are 'without prejudice to any other remedies to which Capitec Holdings may be entitled in law'. Secondly, it is not clear what damages Capitec would be able to claim in these circumstances. The appellants were unable to identify any. Thirdly, specific performance in the present matter is possible and is not unprecedented. In *Rayden v Hurwitz*²⁵ the court granted an order that an action be withdrawn on the basis of a similar provision in an agreement.

[34] Capitec has the right to not be sued by the appellants where they use or rely upon the 2017 Petratouch Transaction. The appellants breached the *pactum* by instituting the 2020 action. Under the circumstances there is no reason why Capitec cannot enforce the *pactum* by instituting application proceedings aimed at compelling the appellants to comply and withdraw the 2020 action. The only issue is whether the ordering of specific performance in the circumstances of this case would result in an injustice. To answer this question, it is necessary to deal with the appellants' claim that the high court should not have enforced clause 7.1.6.2 because it would be contrary to public policy.

The enforceability of the *pactum*

[35] The appellants made two main submissions: first, that a constitutional right cannot be waived, and second, that the *pactum* is against public policy.

Waiver

²⁵ *Rayden v Hurwitz* 1932 CPD 336.

[36] Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. The issue whether this right can be waived was addressed in *Lufuno Mphaphuli & Associates Pty Ltd v Andrews (Lufuno)*.²⁶ That matter concerned whether parties to arbitration agreements could waive their right to a fair hearing. The majority held that where parties agree to arbitrate, they arguably do not so much as waive their s 34 rights as simply agree not to exercise them. O'Regan ADCJ, speaking for the majority said:

'If we understand section 34 not to be directly applicable to private arbitration, the effect of a person choosing private arbitration for the resolution of a dispute is not that they have waived their rights under section 34. They have instead chosen not to exercise their right under section 34. I do not think, therefore, that the language of waiver used by both the European Court of Human Rights in *Suovaniemi* and by the Supreme Court of Appeal in *Telcordia* is apt. Indeed, it may not be apt in relation to constitutional rights at all, but that is a topic for another day.'²⁷

[37] The high court applied *Lufuno* and found that the concept of waiver did not arise. It held that the appellants were fully informed of their rights and elected voluntarily to consent to the terms of the subject clause. It then proceeded with an enquiry to establish whether clause 7.1.6.2 was inconsistent with public policy. The high court cannot be faulted in its approach. The proper inquiry in the present matter is to determine whether the subject clause or its enforcement is consistent with public policy.²⁸

Public policy

²⁶ *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2009] ZACC 6; 2009 (4) SA 529 (CC).

²⁷ *Ibid* para 216. See also *Schoombee and Another v S* [2016] ZACC 50; 2017 (2) SACR 1 (CC); 2017 (5) BCLR 572 (CC) para 25.

²⁸ See *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 CC.

[38] In *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*,²⁹ the Constitutional Court held that public policy is the basis on which courts may decline to enforce contractual terms where the term itself or its enforcement would be contrary to public policy.³⁰ Public policy requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This is neither the only nor the most important principle, but is a factor that gives effect to the central constitutional values of freedom and dignity and is essential to the achievement of the constitutional vision of our society.³¹ In determining what public policy requires, courts must conduct a careful balancing exercise in which it has to ‘employ [the Constitutional] values to achieve a balance that strikes down the unacceptable excesses of “freedom of contract”, while seeking to permit individuals the dignity and autonomy of regulating their own lives’.³² This includes a consideration of various factors, including, but not limited to, whether the parties negotiated with equal bargaining power and whether they understood what they were agreeing to. This much is accepted by the appellants.

[39] Courts should use the power to invalidate a contract or not to enforce it sparingly and only in the clearest of cases.³³ This principle of perceptive restraint has been endorsed by the Constitutional Court subject to the caveat that the degree of restraint to be exercised must be balanced against the backdrop of our constitutional rights and values.³⁴ The principle of perceptive restraint flows from the underlying principle that contracts that are freely and voluntarily entered into should be honoured.³⁵

Is Clause 7.1.6.2 consistent with public policy?

²⁹ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* [2020] ZACC 13 (*Beadica*); 2020 (5) SA 247 CC.

³⁰ *Beadica* para 80.

³¹ *Ibid* paras 57 and 87.

³² *Ibid* para 71.

³³ *AB v Pridwin Preparatory School* [2018] ZASCA 150; 2019 (1) SA 327 (SCA) para 27.

³⁴ Footnote 28 paras 88-90.

³⁵ *Ibid* para 89.

[40] The appellants submit that clause 7.1.6.2 ousts their right to access to court. In general, with reference to, amongst others, *Barkhuizen v Napier*³⁶ and *Schierhout v Minister of Justice*,³⁷ they contend that a litigant will always be entitled, even at common law, to an adequate and fair opportunity to seek judicial redress and that it would be contrary to public policy to enforce a clause that does not afford such an opportunity.

[41] The appellants bear the burden of showing that clause 7.1.6.2 or its enforcement would be contrary to public policy.³⁸ The appellants allege that it would be unfair to enforce the clause because Capitec was a central participant in the 2017 Petratoch Transaction and its enforcement will have the effect that the appellants will not be able to exercise their s 34 rights of access to courts. They further contend that their status as BEE shareholders is relevant; that Capitec owed them a duty to protect the value of their shares; and they had no commercial power to prevent Capitec's alleged abuse of clause 8.3 of the subscription agreement.

[42] The following factors are instructive. Firstly, in clause 9 of the consent agreement it was agreed that the parties were 'free to secure independent legal and other professional advice (including financial and taxation advice) as to the nature and effect of all the provisions of the consent agreement and the other Transaction Agreements'. The appellants did just that. They were legally represented at the time of the negotiation and conclusion of the 2017 Petratoch Transaction. In fact, they obtained substantial independent professional and legal advice spending over R16 million.

[43] Secondly, the parties to the consent agreement were all experienced business people who engaged in detailed and complex negotiations over a period

³⁶ *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 CC (*Barkhuizen*).

³⁷ *Schierhout v Minister of Justice* 1926 AD 99.

³⁸ *Barkhuizen* para 58 and *Pridwin* para 27 (iv).

of time. They themselves shared Capitec's belief that its consent for the 2017 Petratouch Transaction was legally required. They specifically agreed in clause 9.3.1 and 9.3.2 that: (a) They had not placed any reliance upon any view expressed by any other party, except those express representations, warranties, covenants, undertakings and agreements set forth in the consent agreement and the other Transaction Agreements to which it is or will become a party; (b) The terms and conditions of the 2017 Petratouch Transaction were fair and reasonable in all the circumstances and were in accordance with the parties' commercial intentions; and (c) They had the necessary sophistication, knowledge and experience in financial and business matters and were capable of evaluating the merits, risk and suitability of entering into the consent agreement. There is no indication on the facts that the parties did not have equal bargaining power.

[44] Thirdly, there are no special rules that apply to contracts designed to promote black economic empowerment. In *Beadica* the contract under scrutiny was part of an empowerment scheme and enforcing it would lead to the failure of a publicly funded BEE initiative. The Constitutional Court held that carving out special rules for BEE contracts would:

'... increase the risk of contracting with historically disadvantaged persons who benefit from the Fund. If the applicants were to succeed, it would establish the legal principle that enforcement of a contractual term would be inimical to the constitutional value of equality, and therefore contrary to public policy, where enforcement would result in the failure of a black economic empowerment initiative. This could, in turn, deter other parties from electing to contract with beneficiaries of the Fund, or force beneficiaries to offset the increased risk by making concessions on other contractual aspects during contract negotiations. These outcomes would, in effect, undermine the very objects that the Fund and section 9(2) seek to achieve'.³⁹

[45] The fact that the appellants are BEE shareholders of Capitec is therefore irrelevant. They were fully advised, fully informed, believed the terms were

³⁹ *Beadica* para 101.

reasonable and freely relinquished the right not to institute legal proceedings in which they use or rely on the 2017 Petratouch Transaction, in return for Capitec's consent to the 2017 Petratouch Transaction.

[46] Fourthly, the *pactum* was concluded in a particular context for a specific legitimate reason. Coral required the 2017 Petratouch Transaction to settle a substantial tax liability to SARS and to enable 71,3 per cent of Ash Brook's shareholders to exit the consortium. Coral chose to sell to Petratouch at the sale price with the result that R975 287 684 was paid out to the existing shareholders. At all material times, Mr Tshepo Mahloele was a director of both Coral *and* Petratouch. At the time of the 2017 Petratouch Transaction the appellants had already instituted the 2016 action in which they had sued Capitec over the legality of the selling restrictions in the subscription agreement. Capitec was concerned that the appellants intended to use the 2017 Petratouch Transaction to either support that litigation or to institute new litigation in which it sought to escape from the selling restrictions. But it did not want to stand in the way of a deal between the appellants and Petratouch. It therefore proposed the inclusion of the *pactum* in the consent agreement, to protect its interests, which the appellants agreed to. The appellants determined that the benefit that they would obtain from concluding the 2017 Petratouch Transaction was worth the cost of agreeing not to sue Capitec. Capitec was not a party to the 2017 Petratouch Transaction, it did not initiate the transaction nor did it directly benefit from it. As for the alleged duty owed to the appellants, no basis for such a duty was established by the appellants.

[47] Lastly, the clause does not prevent the appellants from suing Capitec for breach of the consent agreement, or for matters unrelated to the 2017 Petratouch Transaction. This is expressly set out in clause 7.2:

'For the avoidance of doubt, it is recorded that the provisions of clause 7.1.6 do not apply to a cause of action or claim resulting or arising from a breach by Capitec Holdings of any of the provisions of this Agreement, and shall not preclude another Party from instituting legal proceedings against Capitec Holdings in order for that Party to enforce compliance by Capitec Holdings with any of the provisions of this Agreement.'

What they agreed not to do was ‘use or rely upon the 2017 Petratoch Transaction’ to sue Capitec outside such a breach. The *pactum* went no further than was necessary to prevent very specific litigation. As such it is a limited and reasonable restriction on the appellants’ ability to litigate.

[48] Agreements not to litigate are not necessarily unreasonable. Most agreements of compromise, in which one party settles a claim against the other, as a matter of course entails an agreement by one party not to institute or persist with the same proceedings against the other party in the future. Each case must be assessed on its own terms undertaking the enquiry set out in *Barkhuizen*. On the facts in the present matter the *pactum* is consistent with public policy. In the premises, the appellants’ counter application was correctly dismissed.

[49] The subscription agreement and the consent agreement provide that costs will be recoverable on an attorney and own client scale. There is no reason why such costs, including the costs of two counsel, should not follow the result.

[50] In the result the following order is made:

The appeal is dismissed with costs on an attorney and client scale, including the costs of two counsel.

L WINDELL
ACTING JUDGE OF APPEAL

Appearances

For appellants: I V Maleka SC with T Scott

Instructed by: Mkhabela Huntley Attorneys Incorporated,
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For respondent: A M Breitenbach SC with M Bishop and P
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Instructed by: Van der Spuy, Cape Town
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