

DISPUTE RESOLUTION ALERT

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To sue, or not to sue?
A discussion on agreements not to sue

Parties sometimes include a clause in their agreements to the effect that they are not entitled to sue one another (what is known as a *pactum de non petendo*) (*pactum*). The question arises as to whether such clauses are enforceable, or whether they infringe on the constitutional rights of the would-be suing party and/or are contrary to public policy.



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The recent Supreme Court of Appeal (SCA) case of *Coral Lagoon Investments 194 (Pty) Ltd and Another v Capitec Bank Holdings Limited* [2022] ZASCA 144 924 (October 2022) considered this issue.

The matter came before the Western Cape High Court as Coral Lagoon Investments 194 (Pty) Ltd (Coral Lagoon) and Ash Brook Investments 15 (Pty) Ltd (Ash Brook) instituted proceedings against Capitec Bank Holdings Limited (Capitec), despite the fact that an agreement not to sue existed between the parties. The High Court enforced the *pactum*, awarded specific performance to Capitec and dismissed the counter application by Coral Lagoon and Ash Brook that the *pactum* was contrary to public policy. Coral Lagoon and Ash Brook appealed the decision to the SCA. The SCA's decision is discussed below.

FACTS

In 2006, the two appellants, Coral Lagoon and Ash Brook, the respondent, Capitec, and the Industrial Development Corporation (IDC) entered into a set of written agreements, which included a subscription of shares and shareholders agreement between the respondent and the appellants (subscription agreement). The purpose of this agreement was to promote the achievement of transformational objectives. Accordingly, Coral Lagoon subscribed for 10 million ordinary shares in Capitec, equivalent to a 12,21% stake in Capitec, the acquisition having been funded by the IDC.

The subscription agreement contained a selling restriction providing that if Coral Lagoon disposed of its shares to a party that did not comply with Capitec's transformation objectives, then Capitec may require Coral Lagoon to acquire the equivalent number of shares. All parties understood this to mean that Capitec's consent was required for Coral Lagoon to trade in the shares.



The Legal 500 EMEA 2022 Results graphic features the 'The Legal 500' logo in white on a dark blue background with diagonal lines. To the right, '2022 RESULTS' is written in large white letters. Below the logo, the text 'EMEA' is centered. The graphic lists several law firms and individuals recommended for dispute resolution.

The Legal 500 EMEA 2022 recommended our **Dispute Resolution practice** in **Tier 1** for dispute resolution.

The Legal 500 EMEA 2022 recommended **Tim Fletcher** as a leading individual for dispute resolution.

The Legal 500 EMEA 2022 recommended **Kgosi Nkaiseng** and **Tim Smit** as next generation lawyers for dispute resolution.

The Legal 500 EMEA 2022 recommended **Rishaban Moodley, Jonathan Witts-Hewinson, Lucinde Rhodie, Clive Rumsey, Desmond Odhiambo, Mongezi Mpahlwa, Corné Lewis, Jackwell Feris** and **Kylene Weyers** for dispute resolution.

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In 2017, Coral Lagoon sold over 3 million shares to a subsidiary of a 100% black-owned company, Petratouch (Pty) Ltd (Petratouch), after having received Capitec's consent.

In 2019, Coral Lagoon sought to dispose of around 800,000 shares to the Transnet Second Defined Benefit Fund, however Capitec refused to give its consent. As a result, the appellants instituted an urgent application to declare the lack of consent to be in breach of Capitec's duty of good faith to the appellants. In this application, Capitec for the first time argued that the subscription agreement did not require its consent to sell the shares and did not entitle Capitec to impose further restrictions on the sale of shares by Coral Lagoon.

As a result of Capitec's assertion, in 2020 the appellants instituted an action against Capitec claiming that but for Capitec's conduct, Coral Lagoon would not have concluded the Petratouch transaction at a discount, which amounted to a loss of over R1 billion.

AGREEMENT NOT TO SUE

The Petratouch transaction included a written consent agreement between Capitec and the appellants. The purpose of this agreement was to waive the selling restrictions in the subscription agreement, as otherwise the Petratouch transaction could not proceed without breaching the selling restrictions. As a result, Capitec proposed including the *pactum* in the consent agreement, which was agreed to by the appellants.

The court discussed how a *pactum* is no different to any other agreement in that it gives rise to various rights and correlative duties. In this case, it involved a right not to be sued, with no time limit. Such a *pactum*, one operating in perpetuity, is allowed in our law.

SPECIFIC PERFORMANCE

As a result of the breach of the *pactum*, Capitec argued that it was entitled to specific performance, i.e. for the *pactum* to be enforced. The appellants argued that Capitec could rescind the consent agreement or claim damages as per the breach clause in the consent agreement. However, the clause specifically stated that the remedies were "*without prejudice to any other remedies to which Capitec Holdings may be entitled in law*". Accordingly, the court exercised its discretion and found that specific performance was acceptable in the circumstances. However, before finally confirming that Capitec could enforce the *pactum*, the court had to deal with the arguments raised by the appellants that a constitutional right cannot be waived and that the *pactum* is against public policy.

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CONSTITUTIONAL RIGHT AND PUBLIC POLICY ARGUMENTS

Section 34 of the Constitution (the access to courts provision) gives everyone the right to have any dispute resolved in a fair public hearing before a court or another independent and impartial tribunal or forum. The appellants argued that this right cannot be waived, as would be the case if the *pactum* was enforced. The court, however, found that the appellants were informed of their rights and voluntarily elected to consent to the *pactum*. The court then went on to determine whether the *pactum* was consistent with public policy.

The starting point for public policy inquiries is that parties should comply with the contractual obligations that they freely and voluntarily undertook. Courts then need to balance an individual's dignity and autonomy in regulating their own lives against contracts which may infringe on constitutional values (under the guise of freedom of contract).

The appellants argued that it would be unfair to enforce the *pactum* as it would oust their right of access to court. They also alleged that their black economic empowerment status was relevant, Capitec had a duty to protect the value of their shares, and they did not have equal bargaining power.

The court pointed out that the consent agreement contained a clause which stated that the parties were "*free to secure independent legal and other professional advice*" and that the appellants spent over R16 million on such legal advice. Furthermore, there was no evidence that the parties did not have equal bargaining power and there are not special rules that apply specifically to contracts aimed at achieving transformation objectives. Finally, the *pactum* did not prevent the appellants from suing Capitec for breaching the consent agreement or matters unrelated to the 2017 Petratouch transaction. In essence, the court found that the *pactum* was limited and reasonable, and that the appellants agreed to include the

pactum as the benefit of concluding the Petratouch transaction was worth the cost of not suing Capitec. Accordingly, the *pactum* was not inconsistent with public policy, and the court dismissed the appeal.

POINTS OF INTEREST

Since the *pactum de non petendo* is a part of our law and can be enforced, the wording of the *pactum* in an agreement is vital. For example, it may be prudent to limit the *pactum* to a specific claim and time period, instead of being applicable to any and all legal proceedings and existing in perpetuity. Surrounding clauses and wording in the preamble of the agreement may also play an important role in validating a *pactum* clause. Parties ought to obtain independent legal advice, and pay close attention to the types of claims and the period covered by any intended *pactum*, as well as the context in which the *pactum* clause exists with reference to the records and clauses in the balance of the agreement.

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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