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In Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others 2022 (1) SA 100 (SCA) case, the Supreme Court of Appeal (SCA) was called upon to determine two key things: one, whether the consent of Capitec Bank Holdings Ltd (Capitec) was required before Coral Lagoon Investments 194 (Pty) Ltd (Coral) could sell a minority shareholding of approximately 1% in the JSE listed entity Capitec, part of a shareholding Coral had acquired in terms of a subscription-of-shares and shareholders agreement (agreement) entered into with Capitec, and two, if such consent was required, whether Capitec had unreasonably or in bad faith failed to grant such consent.

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Unterhalter AJA, in writing the unanimous judgment of the SCA, began by considering that the object of the agreement was to permit Capitec to increase its black shareholding, and thereby fulfilling its black-empowerment obligations in terms of the Broad-based Black Economic Empowerment Act 53 of 2003 (BEE Act). On the parties' initial reading of the agreement, whereby Coral subscribed for, and Capitec issued, 10 million ordinary shares to Coral, the Agreement required Capitec's consent should Coral wish to sell the shares to a third party. When Coral asked for that consent and was refused, Coral approached the Gauteng Local Division of the High Court, Johannesburg (High Court) for an order declaring that the withholding of consent was unreasonable and a breach of Capitec's contractual and common law duty of good faith. The order was granted by the High Court and Capitec appealed the order to the SCA.

CONSENT TO THE SALE OF SHARES

The SCA, in considering whether the Agreement actually required Capitec's consent to the sale of the shares, considered the principles of interpretation of contracts in our law. The starting point must always be the interpretation of the language or wording of the provisions of the contract. The High Court failed to commence with interpreting the relevant provisions, and instead proceeded first with an assessment of the context and Capitec's conduct, and only then considered the actual contents of the Agreement. The SCA however, began with a plain reading of the relevant provisions, before considering context and evidence outside of the contract.

The SCA held that the key clause in the agreement, clause 8.3, simply regulated the rights and obligations of Capitec and Coral, should Coral dispose of the shares it held in Capitec *"to an entity or person who, in the opinion of Capitec, does not comply with the BEE Act or its Codes"*. For convenience, the SCA called such a sale a "*demarcated sale*". In terms of clause 8.3, if Coral was to attempt a demarcated sale, then Capitec had the right to determine the number of Capitec shares sold, and Coral had the corresponding obligation to acquire an equal number of Capitec shares and register them in its name. Thus, nothing in the text of the clause prevented Coral from selling its Capitec shares, it merely meant that if a demarcated sale took place, Capitec could exercise its right to require Coral to acquire an equal number of Capitec shares.

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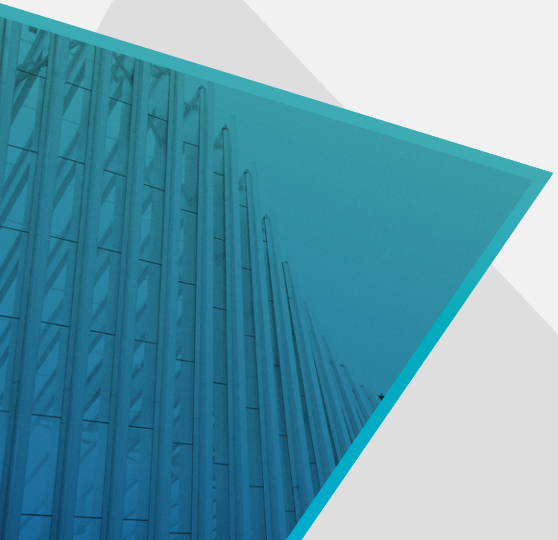
For the SCA, this is not a consent that is required from Capitec, but rather a consequence of Coral attempting a demarcated sale. On interpreting clause 8.3, the SCA found that Coral could sell its Capitec shares but must bear the consequences of doing so to a party who, in Capitec's opinion, does not comply with the BEE Act.

The SCA found that the rest of the Agreement, its context and the conduct of the parties did not point to any other legitimate interpretation. Commercial contracts are constructed with a design in mind, and the drafters choose words and concepts to give effect to that design. This means that interpretation starts with the wording and structure of the contract. Context, while vitally important, cannot be used to construct a meaning that is completely divorced from the text and its structure. A proper interpretation of the Agreement therefore led the SCA to conclude that Capitec's consent to the demarcated sale was not required.



GOOD FAITH OBLIGATION TO CONSENT

On the question of how concepts such as good faith play a role in our law of contract, the SCA stated that the authoritative case is the Constitutional Court decision in *Beadica 231 CC and Others v Trustees, Oregon Trust and Others* 2020 (9) BCLR 1098 (CC) (Beadica). Beadica affirmed that central to the law of contract is the principle that contracts freely entered into must be honoured. While good faith underlies and informs the law of contract, it is not a free-standing principle that can be used to interfere with contractual bargains or to enforce them.

These principles led the SCA to decide that even if Capitec's consent was required for the sale of shares by Coral, good faith cannot be invoked to determine the terms of a contract, nor can it justify imposing a duty on Capitec to give consent where it had the right to refuse consent. The concept of good faith could not be used to re-engineer the Agreement to require Capitec to consent to the demarcated sale, and then find that Capitec was in breach of a good faith duty by failing to give that consent.

While Capitec had initially been of the view that its consent was required for the demarcated sale, it then changed its mind on this point, stating that its consent was not required. Importantly, the SCA held that, even where a party changes its stance on an issue whether cynically or based on a better appreciation of the contract, this "*about-face*" does not permit a court to impose an agreement that the parties did not make.

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CONCLUSION

That Capitec wished to enforce its rights in terms of the Agreement could not be held to be a breach of good faith. Nor could good faith be marshalled to require Capitec to give consent, when the contract did not require it to do so. Ultimately, what Coral was seeking was a waiver by Capitec of its right to require Coral to repurchase the equivalent number of shares it wished to sell. The SCA concluded that Capitec had no obligation to consent, and invocations of good faith could not alter that position.

A key takeaway from this case is that concepts such as good faith and reasonableness, while increasingly important in our law, will not be used by the courts to create duties that are not founded upon the terms of the parties' agreement. Good faith can be used to elucidate the text, but not override it. Courts will not impose an agreement that the parties did not actually make, whether in the cause of good faith or any other abstract principle.

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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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