

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) NOT REPORTABLE
(2) OF INTEREST TO OTHER JUDGES

CASE NUMBER: 2022-060488

DATE: 09th February 2024

In the matter between:

LEBASHE INVESTMENT GROUP (PTY) LTD

First Applicant

TSHEPO DAUN MAHLOELE

Second Applicant

And

CORAL LAGOON INVESTMENTS 194 (PTY) LTD

First Respondent

ASHBROOK INVESTMENTS 15 (PTY) LTD

Second Respondent

PHILLIP BORUCHOWITZ N.O

Third Respondent

Neutral Citation: *Lebashe Investment Group (Pty) Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others (2022-060488) [2024] ZAGPJHC --- (09 February 2024)*

Coram: R. Strydom, J

Heard: 11 August 2023

Delivered: 09 February 2024 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded

to *Court Online* and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 09 February 2024.

Summary: This is an Application for the review and setting aside of an interim arbitral award in terms of S 33(1)(b) of the Arbitration Act 42 of 1965 ('the Act') and for a declaratory that in terms of S 3(2)(c) of the Act the arbitration agreement should cease to have effect.

The Applicant ('Lebashe') and the First Respondent ('Coral') and Second Respondent ('Ashbrook') entered into a settlement agreement concerning a dispute about Capitec shares. The settlement agreement contained an arbitration clause to adjudicate disputes. After the dispute was referred to arbitration the Court confirmed a provisional restraining order in favour of the National Director of Public Prosecution pursuant to the provision of S 26 of the Prevention of Organised Crimes Act 121 of 1998 ('POCA') and appointed a curator bonis ('the curator').

In terms of the restraint order Coral and Ashbrook were prohibited from "*dealing in*" restraint property pending the proceedings in terms of Chapter 5 of POCA to preserve assets.

Pursuant to a Special Plea filed by Lebashe in the arbitration, Lebashe, inter alia, challenged the arbitrator's jurisdiction to continue with the arbitration as this would constitute "*dealing in*" property, under restraint.

The arbitrator made an interim award dismissing the Special Plea.

In the review before Court it was found:

- i. The arbitrator could have decided upon his own jurisdiction;
- ii. Lebashe could have taken the arbitrator's decision pertaining to his jurisdiction on review at any stage, despite the arbitrator's directive that the arbitration proceedings before him should continue.
- iii. In the context of POCA the phrase "*dealing in*" should be narrowly interpreted and would not include a determination of Coral and Ashbrook's rights to shares despite the finding that the claims would constitute property as envisaged in POCA.
- iv. The applicants failed to make out a case for the setting aside of the arbitration agreement as required in S 3(2)(c) of the Act.

Lebashe's application was dismissed with costs.

ORDER

It is ordered that:

- (1) The application is dismissed with costs, such costs to include the costs of two counsel.
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JUDGMENT

STRYDOM, J:

Introduction

- [1] This judgment pertains to Part B of an application emanating from an interim award by the third respondent (the Arbitrator) in arbitration proceedings instituted by the first and second respondents, Coral Lagoon Investments 194 (Pty) Ltd and Ashbrook Investments 15 (Pty) Ltd (collectively referred to as Coral) against the applicants, whom I will refer to collectively as “Lebashe”. The award was in respect of the Lebashe’s special plea which sought a stay of the arbitration proceedings pending the conclusion of the proceedings in terms of Chapter 5 of the Prevention of Organised Crimes Act¹ (POCA), alternatively pending a resolution by the High Court of any dispute relating to the meaning and effect of the restraint order; whether the arbitral proceedings are lawful; and whether the curator has the power or capacity to act herein.
- [2] Part A of the application, in which the applicants sought the stay of the arbitration proceedings currently pending before the Arbitrator was dealt with in the urgent court before Moultrie AJ and an order dismissing the application, with costs, was handed down on 13 February 2023.
- [3] In Part B, which is currently before this court for adjudication, Lebashe seeks an order (i) setting aside the interim arbitration award (the award) of 14

¹ 121 of 1998.

November 2022 in terms of section 33(1)(b) of the Arbitration Act² (the Act); and (ii) a declarator in terms of section 3(2)(c) of the Act that the arbitration agreement between Lebashe and Coral of 17 April 2018 shall cease to have effect with reference to the dispute referred to arbitration by Coral on 18 March 2022.

The origins of the dispute

- [4] In April 2015, Lebashe acquired 5,284,735 shares in Capitec Bank Holdings Limited. Coral claimed that it had an indirect interest in the acquisition of the Capitec shares and commenced arbitration proceedings against Lebashe seeking a disgorgement of profits and the transfer of shares.
- [5] On 17 April 2018, the parties concluded a written settlement agreement to resolve the arbitration proceedings. Lebashe agreed to transfer “13% of the Equity Economic Benefit in the Ring-Fenced Portfolio” to Coral subject to the terms and conditions contained in the written settlement agreement, which was made an award by the arbitrator, retired Judge Nugent.
- [6] A dispute subsequently arose between the parties concerning the parties’ interpretation of the settlement agreement, and, in particular, the phrase “13% of the Equity Economic Benefit in the Ring-Fenced Portfolio”. On the one hand, Coral interprets it to mean that Lebashe was, in effect, required to transfer 687 016 of the Capitec shares to it. Lebashe, on the other hand, interprets it to mean that the value Coral was entitled to receive equates to 8 157 shares, which it has already transferred to the curator. On 18 March 2022, Coral initiated the arbitration proceedings against Lebashe. The underlying claim was instituted by Coral on the basis that the second applicant (Mahloele) had breached his fiduciary duties to Coral; made a secret profit for himself and for Lebashe; and had misappropriated Coral's corporate opportunity. Coral's case was that Mahloele had caused Lebashe to purchase the warehoused Capitec shares at a discount despite the entitlement to purchase these shares being, to Mahloele's knowledge, due to Coral.

The salient facts

² 42 of 1965.

- [7] Coral referred this dispute to arbitration during or about March 2022. Before this on 18 November 2019, this court granted a provisional restraint order against inter alia, Coral in terms of section 26 of the POCA. This provisional restraining order was for some period lifted, but on 3 May 2022, this court confirmed the provisional restraint order on slightly amended terms (the restraint order). Lebashe was initially not aware of the restraint order but on or about 3 May 2022, it became aware thereof. Having learned of it, Lebashe immediately contested the validity of the arbitral proceedings on 5 May 2022, broadly on the view it has taken that the effect of the order is to place the restraint property beyond the control of the affected parties into the hands of the *curator bonis* pending the outcome of the criminal proceedings. Coral duly surrendered its claims in the arbitration to the *curator*. Lebashe was of the view that in terms of paragraph 5 of the restraint order, Coral and any other person, including the arbitrator, with knowledge of the order, is prohibited from “*dealing in any manner*” with the property, except as required or permitted by the restraint order. It was of the view that the restraint order does not require or permit the property to be dealt with in the arbitration.
- [8] The arbitrator was tasked with disposing of the “jurisdiction issue” raised by Lebashe regarding the lawfulness of the arbitration proceedings and or whether he has jurisdiction to continue to preside over the dispute regardless of the effect of the restraint order. It was agreed between Coral, Lebashe, and the Arbitrator that the question of whether or not the arbitration could lawfully continue would be decided by the arbitrator by way of a special plea. The circumstances under which the special plea and replication were brought and argued by the parties before the arbitrator will be dealt with in more detail hereinbelow.
- [9] The arbitrator dismissed the special plea and found that he has jurisdiction to adjudicate the dispute, that the proceedings would not be unlawful and ordered the continuation of the arbitration.
- [10] Dissatisfied with this decision, Lebashe brought an urgent application in two parts – A and B. Part A was for an interim stay of the arbitration pending a decision of Part B. Part B is opposed by Coral on the basis that the arbitrator’s

interim award was correctly made and that Lebashe failed to make out a case for the review of the arbitrator's decision as required in terms of section 33(1) (b) of the Act. Further, a case has not been made out for relief in terms of section 3(2)(c) of the Act. Coral argued that Lebashe's application is an abuse of process.

Issues to be determined

- [11] Various questions arise pertaining to the section 33 review instituted by Lebashe. The first is whether the restraint order would prohibit the arbitrator and the parties from *dealing with* the claims in the arbitration. Should the court find that the restraint order did not prohibit continuation of the arbitration, as this would not infringe upon the restraint order which prohibits "*dealing in any manner with any property*" under restraint, the review should be dismissed. If the court finds that the continuation of the arbitration would constitute "*dealing in the property*" under restraint, then the question would be whether the terms of the restraint order clothed the curator with the authority to grant the parties permission to nevertheless proceed with the arbitration. If the court finds that the continuation of the arbitration would constitute "*dealing in the property*" in contravention of the restraint order, then the jurisdiction of the arbitrator to continue with the arbitration becomes questionable. In this context, the court will have to decide whether Lebashe submitted itself to the jurisdiction of the arbitrator by agreeing that he could pronounce on his jurisdiction, as he in fact did.
- [12] The first step in deciding the jurisdiction of the arbitrator is to consider how it came about that the arbitrator was asked to decide on his jurisdiction despite the restraint order. The original referral of the disputed claims to arbitration was done pursuant to the settlement agreement between the parties which was made an award by the previous arbitrator.
- [13] Clause 9 of the settlement agreement deals with Dispute Resolution and, inter alia, the referral of disputes to arbitration. Clause 9.6 determines that the arbitration shall be conducted in accordance with the AFSA Commercial Rules. These rules provide that an arbitrator can pronounce on his or her

jurisdiction. Clause 9.7.10 provides that the arbitrator shall have the power to decide on the validity of his/her appointment and the extent of his/her powers and such decision (once made) will not go on review but may be subject to appeal.

- [14] When Lebashe became aware of the restraint order on or about 3 May 2022, it immediately started to consider the lawfulness of the continuation of the arbitrator to determine Coral's claims. Shortly after this Lebashe addressed a letter to Coral's attorneys in which it was mentioned that the restraint order would preclude Coral from seeking relief in the arbitration. On 6 May 2022, a pre-arbitration meeting was held where nothing specifically was minuted in relation to the restraint order. It was noted that only the final award of the arbitrator shall be subject to a right of appeal by either party.
- [15] A power of attorney that was provided by the curator to Coral to continue with the proceedings was attacked on the basis that the curator does not have the power or capacity to represent Coral in pending proceedings and/or to continue with such proceedings against Lebashe. Lebashe concluded that the pending proceedings cannot lawfully continue as Lebashe will be at risk for their costs should same be awarded to it.
- [16] It was further stated that the arbitrator does not have the power to determine the questions of whether the pending proceedings are lawful and/or whether the curator has the power or capacity to act therein. It was stated that this issue can only be determined by the High Court.
- [17] On 20 June 2022, a further pre-arbitration meeting was held presided by the arbitrator. It was minuted that by agreement between the parties, the jurisdiction issue raised by Lebashe will be dealt with by way of a pleaded case in accordance with a timetable that was set.
- [18] On or about 1 July 2022, Lebashe filed its special plea averring that in terms of the restraint order, Coral was ordered to surrender all its property into the custody of the curator bonis. This included Coral's claims against Lebashe as this constitutes "*property*". It was pleaded that Coral as well as Lebashe and the arbitrator are prohibited from dealing with the claims and the arbitration

proceedings cannot lawfully continue. It was further averred that the curator does not have the power or the capacity to present the claimants in the arbitral proceedings and/or to continue with such proceedings. Further, that the purported power of attorney furnished on 24 May 2022 on behalf of the curator and Coral is invalid and of no force and effect.

- [19] Despite pleading that the arbitrator did not have the power or jurisdiction to determine any dispute in relation to the meaning and effect of the restraint order and/or the questions of whether the pending proceedings are lawful and/or whether the curator has the power or capacity to act herein, Lebashe participated in the proceedings before the arbitrator to decide these issues.
- [20] The relief that was sought by way of the special plea was for the staying of the arbitration proceedings pending the conclusion of the proceedings in terms of Chapter 5 of the POCA against Coral and/or the determination of any dispute by the High Court in relation to the meaning and effect of the restraint order and the questions of whether the pending proceedings are lawful and/or whether the curator has the power or capacity to act therein.
- [21] The anomaly of the procedure, that was followed to decide these issues, is that Lebashe, being aware that the arbitrator could adjudicate upon his own jurisdiction, participated in the proceedings to decide the special plea without first applying to court to stay the continuation of the arbitration. Pursuant to the special plea, Coral filed a replication in which it asked for the dismissal of Lebashe's special plea on the grounds that the continuation of the arbitration would not be in conflict with the restraint order, and in any event, that the curator provided Coral with a power of attorney, as it was entitled to do pursuant to the restraint order, to continue with the arbitration, and in the alternative, reserving the issue raised in Lebashe's special plea for determination by a court as a question of law upon application by any of the parties.
- [22] The parties argued the special plea before the arbitrator. On or about 14 November 2023, he delivered his interim arbitration award dismissing Lebashe's special plea which meant that the arbitration could continue.

[23] After the interim arbitration award was made, Lebashe asked Coral to agree to the stay of the proceedings pending a review application. This request was turned down and this led to the current application in part A and part B. As stated hereinabove, Part A was considered and dismissed on the basis that not even a *prima facie* case was made out for the relief sought. It is for this court now to decide Part B of Lebashe's application.

[24] The arbitrator observed as follows in paragraph 10 of the interim award:

"As is evident from the special plea, the jurisdictional challenge raised is of a limited nature. It is confined to the question whether I have the competence to determine a dispute in relation to the meaning and effect of the restraint order. And also, whether I can enquire into the lawfulness of the arbitration proceedings and whether the curator has the power or capacity to act therein."

[25] And further, in paragraph 12:

"It was also argued by the defendants that any interpretation of the restraint order would not be binding on any other party outside of the arbitration and would lead to uncertainty and complications. I disagree. Any interpretation of the restraint order would only determine the rights and obligations as between the claimants and the defendants. It would not have any binding effect on persons who are not parties to the arbitration and would not prejudicially affect them."

Discussion and analysis

[26] Lebashe maintains that the meaning and effect of the restraint order, and the questions of whether the arbitral proceedings are lawful and whether the curator has the power or capacity to act therein, are issues that only the High Court is empowered to deal with. Dissatisfied with the interim award, Lebashe relies on section 33 of the Act to review the decision of the arbitrator. The relevant portion of section 33 reads as follows:

"(1) Where –
(a) ...

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded his powers; or

(c) ...

the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.”

[27] The order reviewing and setting aside the interim award is sought on two bases, namely: that the arbitrator exceeded his powers and committed a gross irregularity.

[28] It was argued that when an arbitrator enquires into the scope of his jurisdiction, and even rule upon it, he does so at the risk that he might be wrong – in which case any award he makes will be invalid. It was argued that the court would finally determine the jurisdiction of an arbitrator, and therefore an arbitrator’s determination of a jurisdictional objection, is provisional. For this contention Lebashe relied on *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd*³, and *Canton Trading 17 (Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh NO*.⁴

[29] Lebashe submitted that the arbitrator did not have the power and competence of jurisdiction to interpret the restraint order for the simple reason that the order operates *in rem* whereas he acts in the narrow confines of a private arbitration between Coral and Lebashe only and he could not do so in the absence of those who are also affected and bound by the order, to wit, the other defendants and respondents to the restraint order, being the curator and the National Director of Public Prosecutions (the NDPP). It would not be competent for an arbitrator to interpret an *in rem* order, i.e. the restraint order, affecting other parties who are not parties to the arbitration.

³ *Radon Projects (Pty) Ltd v N V Properties (Pty) Ltd and Another* [2013] ZASCA 83; 2013 (6) SA 345 (SCA) at paras 28 – 30 (“Radon”).

⁴ *Canton Trading 17 (Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh N O* [2021] ZASCA 163; 2022 (4) SA 420 (SCA) at para 35 (“Canton”).

[30] This argument begs the question why Lebashe participated in the proceedings to have the special plea decided instead of first approaching the court for relief. The special plea raised the jurisdiction of the arbitrator considering the restraint order. The only way in which the arbitrator could have considered his own jurisdiction was to consider whether the restraint order, properly interpreted, prohibited the continuation of the arbitration. Certainly, if the arbitrator had found that the restraint order prohibited the continuation of the proceedings, Lebashe would have been satisfied. Now that the interim arbitral award went against it, it wants to review the finding.

[31] In my view, the arbitrator could have decided what impact the restraint order could have on his jurisdiction. Especially where Lebashe submitted to the jurisdiction of the arbitrator to decide his own jurisdiction, and further, bearing in mind that the decision made by the arbitrator would only be binding on the parties before him.

[32] A clear distinction should be drawn between a consideration of the jurisdiction to hear a matter and a consideration of the merits of a matter. If an award on the merits of a matter is made the grounds for a review would be limited to whether a gross irregularity was committed by the arbitrator or whether he exceeded his powers. A decision may be wrong but not reviewable. When the issue relates to a decision made by an arbitrator concerning his own jurisdiction such a finding, in my view, will always be reviewable in terms of section 33. The reason for this being that if an arbitrator finds that he has jurisdiction whilst he lacked jurisdiction, he would inevitably be committing an irregularity and exceed his powers by continuing with the arbitration. Not by considering the merits of the question around his jurisdiction but by wrongly concluding that he had the necessary jurisdiction. See, *Makhanya v University of Zululand*⁵ where it was found as follows:

“The first unsound proposition : *The court has no jurisdiction because the claim is a bad claim*

⁵ *Makhanya v University of Zululand* [2009] ZASCA 69; 2010 (1) SA 62 (SCA).

The submissions that were made before us by counsel for the University, when examined, came down to asserting that proposition. That submission was founded upon the allegations in the special plea that the two claims (the claim in the CCMA and the claim in the High Court) were the same claim. In truth that is not correct, but I will assume its correctness for present purposes. Upon that supposition counsel submitted that because the claim had been disposed of finally by the CCMA the High Court had no jurisdiction in the matter. Her submission, in short, was that the court had no power in the matter because the University had a good defence to the claim.

I have pointed out that the term 'jurisdiction', as it has been used in this case, and in the related cases that I have mentioned, describes the power of a court to consider and to either uphold or dismiss a claim. And I have also pointed out that it is sometimes overlooked that to dismiss a claim (other than for lack of jurisdiction) calls for the exercise of judicial power as much as it does to uphold the claim.

The submission that was advanced by counsel invites the question how a court would be capable of upholding the defence (and thus dismissing the claim) if it had no power in the matter at all. Counsel could provide no answer – because there is none.

There is no answer because the submission offends an immutable rule of logic, which is that the power of a court to answer a question (the question whether a claim is good or bad) cannot be dependent upon the answer to the question. To express it another way, its power to consider a claim cannot be dependent upon whether the claim is a good claim or a bad claim. The Chief Justice, writing for the minority in *Chirwa*, expressed it as follows:

'It seems to me axiomatic that the substantive merits of a claim cannot determine whether a court has jurisdiction to hear it'.⁶

- [33] Before this court, it was argued that Lebashe modelled its approach on the decision in *Radon* to first approach the arbitrator to consider his own jurisdiction. In this decision, it was found that an arbitrator could pronounce on his own jurisdiction but that pronouncement would not affect the rights of the parties to challenge that determination in court.

⁶ Id at paras 51–54.

[34] The question that remains is when the dissatisfied party should challenge the interim award pertaining to jurisdiction. At any time or only after a final award? Following the interim arbitration award the arbitrator directed that the arbitration should continue before him as he set a timetable for further documents to be filed. In essence, what the arbitrator directed determined the course that the arbitration should follow. That, in my view, did not preclude Lebashe from reviewing the award pertaining to jurisdiction. See, in this regard what was found by Nugent JA in *Radon* at paragraphs 26 to 30:

“There is a further issue that I think I ought to deal with lest further jurisdictional objections arise in the course of the proposed arbitration.

When confronted with the employer’s objection the arbitrator’s response was that he was bound to enter upon the arbitration nonetheless, and that the objection should properly be raised in the pleadings and dealt with accordingly, but the matter was taken out of his hands, because it was said he had no power to ‘determine his own jurisdiction’.

The response of the arbitrator cannot be faulted. When confronted with a jurisdictional objection an arbitrator is not obliged forthwith to throw up his hands and withdraw from the matter until a court has clarified his jurisdiction. While an arbitrator is not competent to determine his own jurisdiction that means only that he has no power to fix the scope of his jurisdiction. The scope of his jurisdiction is fixed by his terms of reference and he has no power to alter its scope by his own decision (in the absence of agreement to the contrary).

But that does not preclude him from enquiring into the scope of his jurisdiction, and even ruling upon it, when a jurisdictional objection is raised. He does so at the risk that he might be wrong – in which case an award he makes will be invalid – but in some cases it might be convenient to enter upon the arbitration nonetheless. As it is expressed in the fifth edition of Keating on Building Contracts (before the Arbitration Act 1996), in reliance on *Christopher Brown Ltd v Genossenschaft Oesterreichischer etc.*⁷

‘If the arbitrator’s jurisdiction is challenged he should not refuse to act until it has been determined by some court which has power to

⁷ *Christopher Brown Ltd v Genossenschaft Oesterreichischer etc* [1954] 1 QB 8.

determine it finally. He should inquire into the merits of the issue to satisfy himself as a preliminary matter whether he ought to get on with the arbitration or not, and if it becomes abundantly clear to him that he has no jurisdiction then he might well take the view that he should not go on with the hearing at all.'

The position was fully explained by Devlin J in that case as follows:⁸

'I think that the answer to the question becomes clear if one bears in mind the fundamental principles which govern the acts of arbitrators in these matters. It is clear that at the beginning of any arbitration one side or the other may challenge the jurisdiction of the arbitrator. It is not the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to refuse to act until their jurisdiction has been determined by some court which has power to determine it finally. Nor is it the law that they are bound to go on without investigating the merits of the challenge and to determine the matter in dispute, leaving the question of their jurisdiction to be held over until it is determined by some court which had power to determine it. They might then be merely wasting their time and everybody else's. They are not obliged to take either of those courses. They are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties, because that they cannot do, but for the purpose of satisfying themselves, as a preliminary matter whether they ought to go on with the arbitration or not. If it became abundantly clear to them, that they had no jurisdiction as, for example, it would be if the submission which was produced was not signed, or not properly executed, or something of that sort, then they might well decide not to proceed with the hearing. They are entitled, in short, to make their own inquiries in order to determine their own course of action, but the result of that inquiry has no effect whatsoever upon the rights of the parties.'

[35] Clause 9.7.10 of the settlement agreement between the parties provides that the arbitrator shall have the power to decide on the validity of his/her own appointment and the extent of his/her own powers and such decision (once made) will not go on review but may be subject to appeal.

⁸ At 12-13.

- [36] It was argued on behalf of Coral that neither the fact that the arbitrator determined the question of his own jurisdiction in circumstances where his power to do so was not an exclusive or final one; nor the fact that he may have done so incorrectly; nor the fact that this may be expected to lead to uncertainty or inefficiency due to a potential need to relitigate the same issues in a different forum, if a court later reaches a different conclusion in due course, constitute an excess of powers or gross irregularity under section 33(1)(b) of the Act.
- [37] I do not entirely agree with this submission. A jurisdictional challenge can be decided by an arbitrator, but, as was submitted by Coral, it would not be final. If it is subsequently found by a court to be incorrect the arbitral award made whilst the arbitrator had no jurisdiction would constitute a nullity as the arbitrator would have exceeded his powers. A legality review or review in terms of section 33(1)(b) would be competent. This would not constitute a review where a decision was made on the merits of the matter or where a discretion was exercised which, in ordinary course, would limit the grounds and scope of a review.
- [38] The question rather, is when such a challenge should be launched by the party asserting that the interim award pertaining to jurisdiction was wrongly decided. I am satisfied that such a challenge in the form of a review of the interim award could be launched at any stage, despite the effect of the interim award being that the arbitration was not stayed.
- [39] There are unique circumstances in this matter. This is to be found in the fact that Lebashe only became aware of the restraint order after referral to arbitration on the merits of the matter. This is not a matter where an arbitrator had to adjudicate upon a dispute between parties and whether this dispute was covered by the arbitration agreement when the main dispute was initially referred to arbitration. In my view, Lebashe was entitled to follow the special plea procedure, whereby the question of whether the arbitration should be stayed on the basis of the changed circumstances brought along by the restraint order, prompting a consideration of this issue by the arbitrator.

Lebashe thereby endeavoured to convince the arbitrator to stay the arbitration pending the outcome of a court application.

- [40] In my view, Lebashe was entitled to take the interim award, which went against it on review, despite the terms of clause 9.7.10 of the settlement agreement. Section 33 of the Act provides such a right and, as was found in *Radon*, the parties' rights were not finally decided on the question of jurisdiction. Moreover, if the effect of the restraint order on the jurisdiction of the arbitrator is not considered by a court this would lead to unnecessary expense and a waste of time if it is later to be found by a court that the arbitrator had no jurisdiction pursuant to the restraint order.
- [41] It should be pointed out that this right of review at this stage relates to the question of jurisdiction of the arbitrator and not to the *locus standi* of Coral and/or the *curator bonis*, nor the authority of the directors of Coral to pursue the arbitration. The finding of the arbitrator in this regard, in my view, may be correct or incorrect, but is not reviewable at this stage.
- [42] The review of the jurisdiction of the arbitrator can be decided on the primary question of whether the arbitration proceedings and a subsequent award would constitute a breach of the restraint court order as it would constitute *dealing in property* in contravention of paragraph 5 of the restraint order. Put differently, has the restraint order caused the arbitrator to be stripped of his jurisdiction to deal with the claims of Coral?
- [43] In my view, the claims made by Coral in the arbitration proceedings constitute property as defined in section 1 of POCA. Coral asserts that it has a right for the transfer of valuable Capitec shares and payment of certain profits. The definition of "*property*" in POCA includes "*incorporeal things and includes any right, privileges, claims and any securities and any interest therein and all proceeds thereof*".
- [44] The question is rather whether Coral and the arbitrator by way of the arbitration were "*dealing in*" the property in contravention of the restraint order by continuing with the arbitration. If the answer to this question is that Coral

and the arbitrator are not “*dealing in*” the property by proceeding with the arbitration then the jurisdiction challenge and the review should be dismissed.

[45] The arbitrator decided this issue in favour of Coral by finding that Coral was not dealing with the claims, which he “*for present purposes*” accepted to constitute property, in contravention of the restraint order. This was done by way of contextual interpretation of the wording of section 26(1) of POCA, the aims of the Act, and the restraint order. He found that it was settled law that the purpose of a restraint order is to preserve the defendant’s assets pending the ultimate determination of the National Director of Public Prosecution’s application for a confiscation order in terms of section 18 of POCA.

[46] He found in paragraph 24 of the interim award that the “*obvious mischief that the restraint is designed to prevent is conduct such as the disposal, removal, sale, trading, encumbering, transferring or concealment of property.*”

[47] This finding is in line with the decision of the Constitutional Court (CC) in *Phillips and others v National Director of Public Prosecutions*,⁹ albeit there, the Constitutional Court only considered the powers of a curator and not those of a party under restraint as is the case in this matter. It reasoned as follows:

“In this court, the applicants sought to argue that the problem could not be resolved in the manner suggested by the SCA. In making this argument, they pointed to the terms of the restraint order itself which prohibits any person from ‘dealing in’ the properties subject to the restraint. In my view, although it may be that the restraint order could be read in the wide fashion proposed by the applicants, it is capable of a narrower meaning which would avoid disabling the curator in the manner contended for by the applicants. A narrower meaning of the restraint order is possible. The prohibition on people dealing in the property should be read to refer to selling or encumbering the property. Such a meaning would ensure that the purposes of the Act, which include the need to preserve property subject to a restraint order, are not defeated. If such a meaning is adopted, then the powers of the curator could be amended as suggested by the SCA or in any other suitable manner to ensure that the properties are used in an appropriate manner to guarantee

⁹ *Phillips and Others v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (2) BCLR 274 (CC); 2006 (1) SA 505 (CC) (“*Phillips*”).

income to cover maintenance and other costs of upkeep of the properties. In the circumstances, the applicants' argument that the powers of the curator bonis could not be amended must fail."¹⁰

[48] I am bound by this decision, which in any event, is in line with the arbitrator's reasoning and finding that the restraint order does not prohibit the continuation of the arbitration. I endorse the arbitrator's reasoning, with reference to case law contained in paragraphs 18 to 24 of his award which I quote in full:

"18. The words "dealing" or "dealing in" have a wide range of meanings. See *S v Mhlungu & Others* 1995 (3) SA 867 (CC) para 26; *S v Sellem* 1992 (2) SA 795 (A) at 800F-G and *R v Gibbons* 1956 (4) SA 494 (SR) B-F.

19. It is a fundamental rule of statutory interpretation that the intended meaning of a word or phrase in a particular statute is to be determined by the context in which it appears (see *Jaga v Donges, N. and Another* 1950(4) SA 653(A) at 662- 664, referred to with approval in *S v Makwanyane* 1995 (3) SA. para 10. Also see *S v Sellem supra* at 800G).

20. As was stated by Viscount Simmonds In *Attorney-General v HRH Prince Ernest Augustus of Hanover* [1957] AC 436 at 461.

"Words, and particularly general words, cannot be read in isolation; their colour and content are derived from their context."

21. It has been repeatedly emphasized that the meaning of a particular word or phrase in a statutory enactment must be consistent with its purpose and the obvious mischief that the statute was designed to prevent. (see *Stellenbosch Farmers Winery Ltd v Distillers Corporation (SA) Ltd* 1962 (1) SA 458(A) at 473F-G and 476E-F. The purpose of the Act is the contextual scene in which the phrase "dealing in any manner with the property" is to be considered

22. It is settled law that the purpose of a restraint order is to preserve the defendant's assets pending the ultimate determination of the National Director of Public Prosecution's application for a confiscation order in terms of s 18 of the Act. See *Fraser v Absa Bank Limited* 2007 (3) SA 484 (CC) para 58, and *National Director of Public Prosecutions v Kyrlacou* 2004 (1) SA 379 (SCA) para 5.

¹⁰ Id at para 54.

23. The effect of the restraint is to preserve the property so that it may in due course be realised in satisfaction of a confiscation order. It is to ensure that the property concerned is not disposed of or concealed in anticipation of such proceedings. (See *National Director of Public Prosecutions v Rebutzi* 2002 (2) SA (1)SCA para 4 and *National Director of Public Prosecutions v Rautenbach* 2005 (4) SA 603 (SCA) para 13.

24. The obvious mischief that the restraint is designed to prevent is conduct such as the disposal, removal, sale, trading, encumbering, transferring or concealment of the property. A textual indication that this the type of conduct aimed at is to be found in s 27 of the Act, which reads:

“In order to prevent any realisable from being disposed of or removed contrary to a restraint order, any police official may seize any such property if he or she has reasonable grounds to believe that such property will be so disposed of or removed”

[49] By giving effect to the arbitration agreement to decide whether Coral has a legitimate claim against Lebashe is not to defeat the prohibition against *dealing in property* restraint. The aim is rather to establish rights between contracting parties pertaining to the Capitec shares and simultaneously there is no interference with the preservation of the incorporeal property. Any award will only be binding as between the parties to the arbitration agreement, but a positive outcome for Coral would increase the value of its property holding under restraint. The aim of the restraint order to preserve and maintain property is not undermined. The narrow interpretation of *dealing in property* referred to in *Phillips* should be applied in the circumstances of this case.

[50] Coral already surrendered the rights to the proceeds of the claim to the curator. All which can be achieved by a final award is to establish a right between the parties to the arbitration pertaining to ownership of the Capitec shares. Neither the *curator bonis* nor the NDPP will be bound by the decision. They may elect to accept the outcome or reject same. It should be noted that these parties could have applied to intervene in this review proceedings. They have not. On the contrary, the curator by executing the power of

attorney which purported to appoint attorneys to act on behalf of Coral is indicative of the curator's support of the continuation of the arbitration.

[51] After the hearing of this matter when the judgment of this court was still reserved, Lebashe filed supplementary heads of argument to bring to the court's attention the recent judgment of Vally J, in *Regiments Fund Managers (Pty) Ltd and Others v Nel NO and Another*¹¹ pronouncing on the effect of the restraint order on the status and powers of directors of the same companies which were the subject matter of the decision in this court.

[52] In *Regiments*¹², Vally J found that the effect of the restraint Order—

“[I]n its entirety is the removal of all the power of the boards of the applicants, and the transferring of that power to the curator – albeit with certain constraints being placed on the curator regarding expenditures that he may wish or have to shoulder. The power the boards had prior to the Order is now bestowed upon the curator. Put differently, the effect of the Order is to place the applicants' property beyond the control of the boards and place it into the hands of the curator.”

Read as a whole then, the phrase 'dealing in' can only mean conducting the business of or engaging in the affairs of' the property. The applicants are thus prohibited from engaging in the affairs of the property or conducting any business with or on behalf of the property.”

[53] Coral submitted that this decision was clearly wrong and that this court was not bound by it. Moreover, an application for leave to appeal was filed which suspended the judgment and order. In my view, this judgment has to be considered. Only execution is suspended. The judgment is not eradicated.

[54] In *Regiments* the court did not refer to or dealt with *Phillips*. As stated hereinabove, this court is bound by the decision in the Constitutional Court on the issue what will constitute *dealing in* property in contravention of the restraint order unless this judgment is to be distinguished from this matter. It was argued on behalf of Coral that the Constitutional Court judgment is completely different “as questions of leasing, selling or encumbering

¹¹ *Regiments Fund Managers (Pty) Ltd and others v Eugene Nel N.O. and another* Case No 2022-007672; 1 December 2023 (*Regiments*)

¹² *Id* at paras 7-8.

immovable property simply do not arise.” It was argued that the question was rather whether Coral could litigate with property under the restraint order. The CC in *Phillips* dealt specifically with section 26 of POCA and, in my view, is not distinguishable to the extent that it does not provide authority how the concept of *dealing in* property should be applied in context of a restraint order.

[55] The court was referred to the decision in *S v Mhlungu*¹³. In my mind this decision is not authority for how the words *dealing in* property should be interpreted in context of section 26 of POCA. In *Mhlungu* the phrase “*to deal with*” was interpreted in general terms and certainly not in context of POCA as was done in *Phillips* some years later by the same court.

[56] Vally J in *Regiments* found that the restraint order effectively denuded the directors of Coral (and Ashbrook) of all power and control over their property. This finding would be correct if the prosecution of the arbitration proceedings would constitute *dealing in* restraint property. If not, this would not have such a result.

[57] I find that Coral and the arbitrator will not be “*dealing in*” the property in contravention of the restraint order by continuing with the arbitration. The arbitrator has the required jurisdiction to adjudicate upon the claim of Coral. The arbitrator found that the arbitration proceedings do not amount to *dealing in* property in contravention of the prohibition contained in paragraph 5 of the restraint order. I agree with such conclusion. The restraint order did not strip the arbitrator from his jurisdiction to decide the dispute. Consequently, the arbitrator has not committed any gross irregularity in the conduct of the arbitration proceedings nor has he exceeded his powers as contemplated in section 33(1)(b) of the Act.

[58] Issues raised and decided in the *Regiments* decision pertaining to *locus standi* and authority are issues which fall outside the ambit of jurisdiction and was, or should be, dealt with in the arbitration with reference to the applicable rules governing the arbitration. If Lebashe is dissatisfied with an award in this regard it should follow available remedies after the final award.

¹³ *S v Mhlungu and Others* [1995] ZACC 4; 1995 (3) SA 867; 1995 (7) BCLR 793 (CC) at para 26 (“*Mhlungu*”).

The Power of Attorneys signed by the Curator and Directors of Coral.

- [59] The arbitrator found these powers of attorney to be valid and not unlawful as the arbitral proceedings would not contravene the prohibition against dealing with the restraint property. I came to the same conclusion. I do not intend to repeat in this judgment all the sections in the Act and the restraint order which were referred to by the arbitrator in his award suffice to refer to paragraph 17 of the restraint order which specifically provides that the curator may, where it is expedient for the effective execution of the order, authorize any person who is capable of acting on his behalf to exercise any powers, duties and authority conferred upon him, and may engage such agents, sub-contractors or service provider that he deems necessary, provided that the expenditure incurred in this regard is subject to the controls set out in Annexure B to the order.
- [60] Annexure B is aimed at establishing a framework for the payment and curtailment of cost and other implications of holding the property and determine the most appropriate management of each asset, including the cost of administrating the asset and any possible depreciation in the value.
- [61] Legal fees are pertinently dealt with in paragraphs 19 and 20 of Annexure B. In paragraph 19 it is provided that legal costs for any person in relation to property subject to curatorship could only be paid if ordered to do so by a court or with the written consent of the NDPP. Paragraph 20 deals with the taxation of such costs.
- [62] The curator was aware of this requirement when he signed the power of attorney as it was specifically recorded that any legal costs incurred for purposes of the claim referred to arbitration are subject to ratification in terms of paragraphs 19 and 20 of Annexure B at a later stage.
- [63] In *Regiments*, the curator was cited as a respondent in an application by, *inter alia* Coral, for an order authorising the curator to make intercompany loans between the applicants in order to allow for the payment of the legal costs, “*subject to the approval by the directors of the applicable applicants.*”.

- [64] This relief was not granted as the directors of Coral and other applicants were, according to Vally J in his judgment, denuded of “*effective control over the applicants.*”¹⁴
- [65] The court found that the directors of Coral had no *locus standi* to represent Coral in arbitral proceedings. This decision is in contrast of what the arbitrator found and does not relate to the jurisdiction of the arbitrator. The award of the arbitrator was to the effect that he had the requisite jurisdiction to adjudicate the matter as the continuation of the arbitration would not amount to *dealing in* the property in contravention of the restraint order. The continuation of the arbitration would not perpetuate an illegality. The arbitrator was satisfied that Coral had the necessary *locus standi* to continue with the arbitration. Authority of the directors of Coral was not at issue. Importantly, the arbitrator made it clear that only the parties to the arbitration would be bound by any award made. I concurred with this conclusion.
- [66] It is not for this court to make a finding how the legal cost of the arbitration would be funded. More so, as the court in *Regiments* pertinently dealt with this issue. The payment of legal costs out of the restraint property may or may not amount to *dealing in* the restraint property. This is an issue, in my view, which should be dealt with by the NDPP and the curator.

The relief under section 3(2)(c) of the Arbitration Act

- [67] Lebashe seeks an order for a declaration that the arbitration agreement shall cease to have effect with reference to any dispute referred. Good cause needs to be shown. Lebashe argued in the main that the restraint order, and Coral’s surrender of its claim to the curator, means that the resolution of the dispute is no longer confined to Coral and Lebashe in the arbitration. The NDPP, the NPA and the curator are now involved in the arbitral process and have an interest in its outcome.
- [68] The onus is on a party seeking to set aside an arbitral agreement. In *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the*

¹⁴ *Regiments* above n 9 at para 14.

*Time Being and Another*¹⁵, Moseneke DCJ, as he then was, explained that the “onus to demonstrate good cause is not easily met” and that “[a] discretion to set aside an existing arbitration agreement must be exercised only where a persuasive case has been made out”.¹⁶

[69] Coral has not changed its legal status and only its assets were restrained in terms of the restraint order. The powers and duties of Coral’s directors has only been curtailed as far as the *dealing in* the assets under restraint are concerned. As was found hereinabove, Coral will not be *dealing in* the restraint assets by establishing a right to the disputed shares in Capitec. In any event, the restraint order is not a final order and may be uplifted at any stage or may culminate in a confiscation order.

[70] It seems to me that in such circumstances, the process of adjudicating the dispute which was referred to arbitration should not be halted despite the claim being surrendered to the curator. Guidance on this court’s enforcement of an arbitral award that may be at odds with a statutory prohibition can be gleaned from the Constitutional Courts jurisprudence on the need to weigh the importance of upholding the prohibition against the significant goals of private arbitration that the court has recognised. As stated in the majority judgment in *Cool Ideas 1186 CC v Hubbard and Another*¹⁷, while enforcing an arbitral award that contradicts a statutory prohibition is often contrary to public policy, this is not always the case. The majority put it thusly:

“The force of the prohibition must be weighed against the important goals of private arbitration that this court has recognised.”¹⁸

[71] In such circumstances, in my view the process of adjudicating the dispute which was referred to arbitration should not be interfered with. The claim, despite being surrendered to the curator, needs to be established as between

¹⁵ *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another* [2015] ZACC 35; 2016 (1) BCLR 1 (CC); 2016 (2) SA 1 (CC) at para 36 (“*De Lange*”).

¹⁶ *Id* at para 36.

¹⁷ *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC).

¹⁸ *Id* at para 56. See also, in this regard, *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) at para 235.

the parties to the arbitration agreement. Only the parties to the arbitration will be bound by the award, which in any event could be challenged by way of a review or an appeal at the conclusion of the arbitral process.

[72] Lebashe complained about the breach of confidentiality undertakings. The arbitration could proceed upholding confidentiality. Further, the award would be subject to the scrutiny of court as an arbitrator has no power to compel a party to comply with the terms of an award which only a court of competent jurisdiction can do.¹⁹ If Coral is successful in its claim, and if the shares are transferred to Coral, it would then be prohibited from *dealing in* the shares in contravention of the restraint order. That is the effect of surrendering the claim. The curator is not a *curator ad litem* with the power to litigate in the name of Coral.

[73] In my view, Lebashe has also not shown good cause for setting aside the arbitration agreement. It is for these reasons that Part B of the application falls to be dismissed with costs.

[74] On behalf of Coral it was argued that this application constituted an abuse of process as it was a delaying tactic. A punitive cost order was sought against Lebashe. In my view, Lebashe was entitled to have the jurisdictional issue decided in court. Lebashe has not abused the court processes.

[75] The following order is made:

Order

[76] The application is dismissed with costs, such costs to include the costs of two counsel.

R STRYDOM

¹⁹ Section 31 of the Arbitration Act.

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

Heard on: 11 August 2023
Delivered on: 09 February 2024

Appearances:
For the Applicants: Adv. G.D. Wickins SC
Instructed by: KWA Attorneys

For the Respondents: Adv. A. Bham SC
Instructed by: Tabacks Incorporated