

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: _____/2019

In the matter between:

CORAL LAGOON INVESTMENTS 194 (PTY) LIMITED First Applicant

ASH BROOK INVESTMENTS 15 (PTY) LIMITED Second Applicant

and

CAPITEC BANK HOLDINGS LIMITED First Respondent

CAPITEC BANK LIMITED Second Respondent

THE TRANSNET SECOND DEFINED BENEFIT FUND Third Respondent

ERIC ANTHONY WOOD N.O. Fourth Respondent

TRUSTEGIC (PTY) LTD Fifth Respondent

NOTICE OF MOTION

TAKE NOTICE THAT the Applicants intend applying to this Court, at the hearing of the application under case number 24805/2017 (“**the Wood urgent application**”), for the orders in the following terms:

- 1 Directing, in terms of the Uniform Rules of Court *alternatively* section 173 of the Constitution, that:

- 1.1 this application be determined as a matter of urgency and that the Applicants' failure to comply with the usual forms and periods of service provided for in Uniform Rule 6 be condoned; and
 - 1.2 this application be consolidated and heard with the Wood urgent application.
- 2 Declaring that the withholding of approval and/or consent by the First Respondent, Capitec Bank Holdings Limited, to the disposal of shares by the Applicants to the Third Respondent, pursuant to the settlement agreement concluded on 8 August 2019, which settlement agreement is attached as Annexure "X3.3" to Dr Eric Wood's founding affidavit ("**the settlement agreement**") is:
- 2.1 unreasonable as contemplated in clause 13.7 of the Subscription of Shares Agreement concluded between Ash Brook, Coral Lagoon and the First Respondent on 12 December 2006 ("**the Agreement**");
 - 2.2 in breach of the First Respondent's contractual duties of good faith as contemplated in clause 13.11 of the Agreement *alternatively* the common law; and
 - 2.3 unlawful, inconsistent with and unconstitutionally infringes upon the Applicants' fundamental rights to equality, dignity and property in terms of sections 9, 10 and 25 of the Constitution, respectively and/or the Broad-Based Black Economic Empowerment Act, 53 of 2003 ("**the B-BBEE Act**").

- 3 To the extent necessary, directing the First Respondent to provide approval and/or consent for the disposal of shares by the First Applicant to the Third Respondent in terms of the settlement agreement.
- 4 Ordering costs against any of the Respondents that oppose this application, including the costs of two counsel.
- 5 Granting further and alternative relief.

TAKE NOTICE FURTHER THAT the accompanying affidavit of **LITHA MVELISO NYHONYHA** (together with the annexures thereto) will be used in support of the application, and will be supplemented to the extent necessary.

TAKE NOTICE FURTHER THAT:

- 1 Any party that intends to oppose the application, it is required:
 - 1.1 after the receipt of this notice of motion or any amendment thereof, to deliver notice to the Applicants that they intend to oppose by **Thursday, 5 September 2019** and in such notice to appoint an address within 15 kilometres of the office of the Registrar at which they will accept notice and service of all process in these proceedings; and
 - 1.2 to deliver any affidavit they may desire in answer to allegations made by the Applicants by **Monday, 9 September 2019**, in which event the Applicants will deliver their replying affidavit by **Thursday, 12 September 2019**.

- 2 If no such notice of intention to oppose is given, application will be made to this Court for an order in terms of the notice of motion on **Monday, 16 September 2019** at 10h00 or so soon thereafter as counsel may be heard.

Dated at SANDTON on this the 2ND day of **SEPTEMBER 2019**



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**THE REGISTRAR OF THIS COURT
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FOUNDING AFFIDAVIT

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I, the undersigned,

LITHA MVELISO NYHONYHA

make the following statement under oath:

- 1 I am an adult male businessman and a director of each of the Applicants. I reside at 18 Clonmore Road, Bryanston, Johannesburg.
- 2 I am authorised to depose to this affidavit on the Applicants' behalf.
- 3 The facts contained herein are within my own personal knowledge and are to the best of my knowledge and belief both true and correct, unless the contrary is clear from the context.
- 4 Where I make legal submissions, I do so on advice received from the Applicants' legal representatives, which advice I believe to be true and correct.

THE PARTIES

- 5 The First Applicant is Coral Lagoon 194 Proprietary Limited ("**Coral Lagoon**"), with registration no. 2006/026277/07, a private profit company duly registered and incorporated in accordance with the company laws of the Republic of South Africa and having its registered address at 35 Ferguson Road, Illovo, Johannesburg.

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- 6 The Second Applicant is Ashbrook 15 Proprietary Limited ("**Ash Brook**"), with registration no. 2006/034744/07, a private profit company duly registered and incorporated in accordance with the company laws of the Republic of South Africa and having its registered address at 35 Ferguson Road, Illovo, Johannesburg.
- 7 The First Respondent is Capitec Bank Holdings Limited ("**Capitec Holdings**") with registration no. 1999/025903/06, a public profit company duly registered and incorporated in accordance with the company laws of the Republic of South Africa and having its registered address at 1 Quantum Street, Techno Park, Stellenbosch.
- 8 The Second Respondent is Capitec Bank Limited ("**Capitec Bank**"), with registration no. 1980/036695/06, a public profit company duly registered and incorporated in accordance with the company laws of the Republic of South Africa and having its registered address at 1 Quantum Street, Techno Park, Stellenbosch.
- 9 The Third Respondent is Transnet Second Defined Benefit Fund ("**TSDBF**"), a retirement fund established in terms of section 14B of the Transnet Pension Fund Act, No. 62 of 1990 and having its principal place of business is at Tower 2, 13th Floor, 102 Rivonia Road, Sandton.
- 10 No order is sought against the Second Respondent and Third Respondents; they are cited merely by virtue of the interest they might have in the outcome of these proceedings.

- 11 The Fourth Respondent is Eric Anthony Wood ("**Dr Wood**"), the first applicant in the urgent application brought in this Court under case number 24805/17 ("**the Wood urgent application**"). Dr Wood purportedly brings the Wood urgent application in his capacity as a trustee for the Zara Share 1 Trust IT 01484/06 ("**the Zara Trust**").
- 12 The Fifth Respondent is Trustegic (Pty) Ltd ("**Trustegic**"), the second applicant in the Wood application. Trustegic purportedly brings the Wood urgent application in his capacity as a trustee for the Zara Trust.
- 13 For the reasons that will be set out by Regiments in its answering affidavit in the Wood urgent application, and which position the Applicants accept to be correct, it is disputed that the Zara Trust (through Dr Wood and Trustegic) acts independently of the Dr Wood and, indeed, Dr Wood merely abuses its separate legal personality as its controlling mind. It is submitted that policy considerations dictate that the Zara Trust's separate legal personality should be 'pierced' and all references to the Zara Trust and Dr Wood should be considered to be one and the same.
- 14 All the other interested parties have been cited in the Wood urgent application, which the Applicants submit is inter-related to this application and with which the Applicants submit this application should be consolidated, as will be expanded on below.

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THE PURPOSE OF THIS APPLICATION

- 15 Regiments Capital (Pty) Ltd ("**Regiments Capital**") holds a 59.82% interest in Ash Brook. Ash Brook is a Black-owned company, a B-BBEE consortium of various investors. Ash Brook owns 100% of the shares in Coral Lagoon, which in turn owns 1 354 435 shares in Capitec Holdings.
- 16 Regiments Capital, its directors and related entities ("**Regiments parties**") and Coral Lagoon concluded a settlement agreement with the TSDBF on 8 August 2019 ("**settlement agreement**"). In terms of the settlement agreement Coral Lagoon will sell its shares in Capitec Holdings to TSDBF and utilise the proceeds to settle claims launched against the Regiments parties by TSDBF.
- 17 The settlement agreement is subject to Regiments Capital and Coral Lagoon obtaining Capitec Holdings' consent, which is defined as:
- "Capitec Consent' means the written agreement and consent of Capitec to the sale and purchase of the Sale Shares [810,230 ordinary shares in Capitec Holdings] in the form of consent attached to this [settlement] Agreement as Schedule 1.1.6."*
- 18 A copy of the settlement agreement, along with the envisaged consent form in Schedule 1.1.6 of the settlement agreement, are attached to the founding affidavit in the Wood urgent application as Annexure "X3.3".
- 19 The Regiments parties oppose the relief sought by Dr Wood in the Wood urgent application on several grounds that will be dealt with fully in the affidavit I will depose to and file, on behalf of the Regiments parties, answering to Dr

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Wood's application, whereas I have deposed to this affidavit on behalf of Coral Lagoon, as one of the parties to the settlement agreement, and Ash Brook. Included in the Regiments parties grounds for opposing the Wood urgent application is that Dr Wood failed to establish as a matter of fact or law that there is any basis to interdict or impugn the settlement agreement, or scupper its implementation by way of anti-dissipatory relief because:

- 19.1 the decision taken by Regiments parties' respective boards of directors to authorise the conclusion of the settlement agreement was properly taken as a matter of fact;
- 19.2 Dr Wood suffers no prejudice as a result of the decision taken by Regiments parties' respective boards of directors to conclude the settlement agreement; and
- 19.3 if the interdicts sought by Dr Wood were granted, they would have the effect of prejudicing the Regiments parties by causing its liquidation, but also cause prejudice to the remaining shareholders of the Regiments entities, Ash Brook and Coral Lagoon and their respective creditors as the value of the Capitec Holdings shares would remain subject to their current restraints and thus not become realizable on commercial terms or otherwise in respect of the remaining Capitec Holdings shares.

- 20 Coral Lagoon has previously unsuccessfully sought Capitec Holdings' consent for the sale of its shares without response.

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- 21 The settlement agreement concluded on 8 August 2019 and the Wood urgent application launched by Dr Wood on 16 August 2019 prompted the Regiments parties, Ash Brook and Coral Lagoon's attorneys on 19 August 2019 to request Capitec Holdings to urgently provide the consent as required in the settlement agreement or indicate on what basis such consent was refused by 21 August 2019.
- 22 On 21 August 2019, Capitec Holdings responded by, for reasons I will show, unreasonably withholding its consent. As a reason for withholding its consent Capitec Holdings claims that the sale of Coral Lagoon's shares in Capitec Holdings would reduce Capitec Holdings' Black ownership and therefore affect its Broad-Based Black Economic Empowerment ("B-BBEE") accreditation.
- 23 As a result of Capitec Holdings' refusal, Coral Lagoon and Ash Brook find themselves in the following untenable position:
- 23.1 Capitec Holdings benefitted greatly from its Black shareholding. Despite having undergone the significant risk of investing (and re-investing) in Capitec Holdings faithfully for approximately 13 years, Capitec Holdings now seeks to strip the Regiments parties, Coral Lagoon and Ash Brook (and their respective shareholders) of all the growth of their shareholding and opportunistically benefit from Capitec Holdings' own refusal of consent by imposing a historical strike-price of R30 per share on the Coral Lagoon – being the trading

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price of a Capitec Holdings share at the time the Coral Lagoon's initially invested 13 years ago;

23.2 Despite its Black shareholders having fully paid for their shareholding, which shareholding was acquired at R30 (which was above the market price of R28,78 at the time of the acquisition). In other words despite that the Black investors were not offered any discount, and they remained committed to their investment for three years longer than any B-BBEE scheme in the financial services sector, Capitec Holdings refuses to permit them to deal freely with this shareholding, treating these shareholders like second class citizens and demanding that they only sell their shares to other Black investors, in respect of which a significant discount is imposed and the identity of which Capitec Holdings has the final say; and

23.3 Despite Regiments Capital and related entities facing the peril of liquidation in which the value of their shareholding in Ash Brook, Coral Lagoon and Capitec Holdings may be utterly and completely destroyed through opportunistic fire-sales at discounts of up to 70% of their value, Capitec Holdings expresses no duty of fealty or good faith to impart value to these committed shareholders and instead weaponizes its consent as a means to enrich itself through an egregiously outdated buy-back mechanism. As a matter of fact Capitec Holdings recently and opportunistically attempted to acquire the same shares we are now asking consent to sell at a 50% discount. A copy

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of the correspondence relating to Capitec Holdings' opportunistic offer is attached as Annexure "LN1".

23.4 The great peril that will befall the Regiments Capital, Coral Lagoon and Ash Brook (and their respective shareholders) as a result of Capitec Holdings' actions and the urgent attempt by Dr Wood to derail the settlement agreement with TSDBF has left Coral Lagoon and Ash Brook with no choice but to urgently turn to this Court for relief.

24 Thus the purpose of this application by Ash Brook and Coral Lagoon is:

24.1 First, to oppose the Wood urgent application, specifically the prayers sought in paragraphs 3.1 and 3.2 of the notice of motion to the Wood urgent application;

24.2 Second, to set out the basis for a declaratory and mandatory order that the withholding of approval and/or consent by the First Respondent, Capitec Bank Holdings Limited, to the disposal of shares by the Applicants to the Third Respondent, pursuant to the settlement agreement is:

24.2.1 unreasonable as contemplated in clause 13.7 of Subscription of Shares Agreement concluded between Ash Book, Coral Lagoon and the First Respondent on 12 December 2006 ("**the Subscription Agreement**"). A copy of the Subscription Agreement is attached as Annexure "LN2";

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24.2.2 in breach of the First Respondent's contractual duties of good faith as contemplated in clause 13.11 of the Agreement and/or the common law; and

24.2.3 unlawful, inconsistent with and unconstitutionally infringes upon the Applicants' fundamental rights to equality, dignity and property in terms of sections 9, 10 and 25 of the Constitution, respectively and/or the Broad-Based Black Economic Empowerment Act, 53 of 2003 ("**the B-BBEE Act**").

24.3 Third, directing the First Respondent to provide approval and/or consent for the disposal of shares by the Applicants to the Third Respondent in terms of the settlement agreement.

24.4 Finally, to apply for consolidation of this application with the Wood urgent application because the determination of the interdictory relief sought by Dr Eric Wood and the relief sought by the Applicants in this application are inter related, incapable of determination in the absence of each other and may conveniently be disposed by this court in one judgment. To this end, a copy of this application shall also be served on all parties to the Wood urgent application on account of the interest they might have in the outcome hereof and the fact that this affidavit also serves to oppose that application.

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THE BACKGROUND

The shareholding in Capitec Holdings

- 25 On 13 December 2006, Coral Lagoon, as part of a B-BBEE consortium, purchased 10,000,000 shares in Capitec Holdings at a price of R30.00 per share for a total of approximately R300 million. The shares were equivalent to a 12.21% stake in Capitec Holdings. Capitec Holdings is listed on the Johannesburg Stock Exchange and owns 100% of Capitec Bank. The average closing share price between 10 November and 12 December 2006 was R28.78, which illustrates that these shares were not purchased at a discount to the market value, but arguably, were purchased at a premium to the market price.
- 26 The Industrial Development Corporation ("IDC") financed R285 million of the subscription price. The IDC subscribed for preference shares issued by Coral Lagoon at a variable rate of 80% of First National Bank's prime rate. Capitec subscribed for preference shares worth R15 million that were issued by Ash Brook in return for a 5% stake in the company for the Capitec Bank Share Empowerment Trust. The Capitec Bank Share Empowerment Trust was initially a shareholder of Ash Brook, but was later removed from the Ash Brook shareholding by Capitec Holdings; the Applicants are thus not aware of how any consent to sell, transfer or dispose of the shares owned by the Capitec Bank Share Empowerment Trust has been responded to by Capitec Holdings.

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- 27 Coral Lagoon is a wholly-owned subsidiary of Ash Brook. The shareholders of Ash Brook were: Keabetsoe Holdings (31.85%); the Batho Batho Trust (20%); Regiments Capital (Pty) Ltd (18%); Nozala Investments (5%); Lemoshanang (5%); Mdumo (4.65%); Koma Trust (3.5%); the Capitec Bank Share Empowerment trusts (5%); Rorisang Basadi (3%); and four individuals with 1% each (4%). As it will appear more fully below, these shareholdings have changed over the years, as and when other shareholders disposed of their shares.

“The oppressive restrictive clauses on Black shareholders as contained in the Subscription Agreement”

- 28 Clauses 8 and 9 of the Subscription Agreement between Ash Brook, Coral Lagoon and Capitec Holdings (“**restrictive clauses**”) provides:

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- 8.2 *Should any shareholder of [Ash Brook] breach any of the Selling Restrictions then Holdings will determine the percentage shareholding in [Ash Brook] dealt with in contravention of the Selling Restrictions. [Coral Lagoon] hereby grants Holdings the option to purchase an equal percentage of the Holdings Shares from [Coral Lagoon], within 30 days after Holdings becomes aware of such a breach, at R30.00 plus interest at the Johannesburg Interbank Rate (‘JIBAR’) calculated from the Completion Date up to the date on which Holdings exercises the option, or the market price, whichever is the lowest at the date when Holdings exercise the option.*
- 8.3 *Save for the provisions of the Facility Letter, should [Coral Lagoon] sell, alienate, donate, exchange, encumber, or in any other manner endeavour to dispose (‘sold’) any of the Holdings Shares to any entity or person who, in Holdings’ opinion, does not comply with the BEE Act and Codes, Holdings will determine the number of Holdings Shares sold and [Coral Lagoon] will within 30 days after requested thereto by Holdings acquire an equal number of Holdings shares and cause same to be registered in [Coral Lagoon’s] name.*

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8.4 [Ash Brook] may not sell, alienate, donate exchange, encumber, or in any other manner endeavour to dispose ('sell or sold') any of its shares in [Coral Lagoon]. Should [Ash Brook] sell any of its shares in [Coral Lagoon], then Holdings will determine the percentage shareholding in [Coral Lagoon] sold and [Coral Lagoon] hereby grants Holdings the option to purchase an equal percentage of the Holdings Shares from [Coral Lagoon], within 30 days after Holdings becomes aware of such a breach, at R30.00 plus interest at the Johannesburg interbank Rate ('JIBAR') calculated from the Completion Date up to the date on which Holdings exercises the option, or the market price, whichever is the lowest at the date when Holdings exercise the option.

9. PRE-EMPTIVE RIGHTS

9.1 No shareholder of [Ash Brook] ('BEE shareholder') shall sell, alienate, donate, exchange, encumber or in any other manner endeavour to dispose ('sell or sold') its shares in [Ash Brook], except under the conditions as set out below:

9.1.1 if any BEE shareholder ('the disposer') wishes to sell his [Ash Brook] shares, he shall give Circle Capital Global (Pty) Ltd registration number 2005/043132/07 ('Circle') a right of first refusal to purchase such [Ash Brook] shares subject to the condition that the disposer shall give Circle written notice of the fact that he wishes to dispose of his shares, which notice shall be deemed to include an offer for a pro rata portion of the disposer's loan account and shall stipulate the number of shares which are being offered ('the offer shares') and the price (which shall be South African currency) and the terms of payment required;

9.1.2 Circle shall have an irrevocable option for a period of thirty (30) days from the date of receipt of the notice referred to in clause 9.1.1 to purchase the disposer's shares, for the price and on the terms set out therein;

9.1.3 if Circle, elects not to exercise its option to acquire the offer shares, then such shares shall be offered to the shareholders of [Ash Brook] pro rata to their shareholding in [Ash Brook] ('the offerees') who shall, for a further period of fourteen (14) days from the date of expiry of the option period referred to in 9.1.2 above, be entitled pro rata to their shareholding in [Ash Brook] to acquire such remaining shares;

9.1.4 if any of the offerees elects not to exercise its option to acquire the offer shares, then such shares shall be offered to Regiments Capital (Pty) Ltd Registration number: 2004/023761/07 ('Regiments') who shall, for a further period of fourteen (14) days from the date of

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expiry of the option period referred to in 9. 1.3 above, be entitled to acquire such remaining shares;

- 9.1.5 *if, after expiry of the further option period provided for in clause 9.1.4 , there shall remain any offer shares ('the remaining shares') which have not been acquired by Regiments, then the disposer shall request Holdings for a period of ninety (90) days from the date of expiry of the further option period referred to in clause 9.1.4 to sell the remaining shares to another Black Economic Empowerment shareholder or consortium at a price no lower and on terms no less onerous than those stipulated in the notice;*
- 9.1.6 *if the sale referred to in 9.1.5 does not take place during the ninety (90) day period aforesaid, then [Ash Brook] will, within 90 days, repurchase the remaining shares from the disposer at a price no lower and on terms no less onerous than those stipulated in the notice;*
- 9.1.7 *only after and if [Ash Brook] elect not to buy back the shares referred to in 9.1.6, then the disposer will be allowed to sell the shares to a recognized Black Economic Empowerment buyer, such a buyer to be first approved by Holdings."*

29 The effect of the restrictive clauses are thus, *inter alia*:

- 29.1 if any Ash Brook shareholder breaches the selling restrictions, Capitec Holdings have the option to purchase an equivalent percentage of shares at the lowest of R30 plus interest from the completion date (when the transaction was concluded) up to the date when the option was exercised or the market price.
- 29.2 within 90 days, Ash Brook would amend its articles of association to provide that none of its shareholders would be able to sell, alienate, encumber or in any manner deal with its shares except under certain conditions that related to companies that had pre-emptive rights to buy the shares.

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29.3 various pre-emptive rights were allocated amongst Capitec Holdings' Black shareholders. The companies with first, second, and third pre-emptive rights were Circle Capital Global (Pty) Ltd; Regiments Capital; and Ash Brook. Only if none of these companies were able to exercise their rights, the shares could be sold to another Black-owned company.

30 The objective of the restrictive clauses was to preserve Capitec Holdings' Black ownership status and compliance with the Financial Sector Charter.

31 However, the functional effect of the restrictive clauses on Black shareholders are that Black shareholders are precluded from selling their shares and realising their true market value, while other shareholders can freely trade their shares without any restrictions.

32 I am advised and submit that the restrictive clauses are inconsistent with:

32.1 the objectives of BEE as outlined in sections 2(a), (b), and (e), as well as the preamble of the Broad-Based Black Economic Empowerment Act, 53 of 2003 ("**B-BBEE Act**") because, amongst others, even though the B-BBEE shareholders have fully paid for their shares in Capitec Holdings they may not realise the true value of the shares and are obliged to sell at a significant discount and this does not achieve the intended object of placing Black shareholders at an empowered position similar to that of the general shareholders of Capitec Holdings;

32.2 industry best practices in structuring of B-BBEE transactions in general, especially in the financial sector because, amongst others, B-

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BBEE shareholders of other major entities in the financial sector have realised the value of their B-BBEE shares upon the maturity dates of the entities' respective B-BBEE schemes – unlike the shareholders of Ash Brook and Coral Lagoon;

32.3 B-BBEE policy and legislation, specifically the Financial Sector Charter, because, amongst others, the B-BBEE shareholders of Ash Brook and Coral Lagoon are in fact not truly empowered because even though their shares are fully paid they are unable to trade their shares freely and as they wish to trade the shares. The Ash Brook and Coral Lagoon shareholders are to keep their shares in Capitec Holdings against their will and to the exclusive benefit of Capitec Holdings;

32.4 generally, the spirit, object and purport of the B-BBEE Act; and

32.5 may have the effect of a "*fronting practice*" as defined in the B-BBEE Act, particularly as framed in article (b) and (c) of the definition of "*fronting practice*" in section 1 of the B-BBEE Act. I say so because Capitec Holdings purports to perpetuate a continued B-BBEE status in circumstances where they know or should know that such a continued status deprives the B-BBEE shareholders of the opportunity to commercially realise the value of their shares despite the fact that they have fully paid for the shares over a period of time.

33 In addition to the specified violations of the B-BBEE Act, this also constitutes unfair discrimination. The selling restrictions apply in perpetuity. They

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constitute a violation and deprivation to Coral Lagoon and Ash Brook of their rights to property and dignity, which are guaranteed by the Constitution.

33.1 In violation of the B-BBEE shareholders' rights to dignity, there is no constitutional or policy objective under the B-BBEE legislative framework to treat B-BBEE shareholders of Capitec Holdings shares differently to any other shareholders owning Capitec Holdings shares. To insist on the refusal to consent, knowing that the effect thereof would be a substantial diminution of the B-BBEE shares, upon disposal, demeans the dignity of the B-BBEE shareholders.

33.2 In violation of the B-BBEE shareholders' rights to equality, Capitec Holdings' refusal to consent treats the B-BBEE shareholders in a substantially discriminatory manner, compared to the other Capitec Holdings shareholders. This discrimination is purely founded upon race and is therefore presumed to be unfair. In any event, the discrimination is founded upon an illegitimate and self-serving interest of Capitec Holdings' wishes to perpetuate its B-BBEE status even when there is no basis for it. Lastly, it is also markedly inconsistent with the conduct of Capitec Holdings' competitors whose B-BBEE shareholders have realised the commercial value of their shares upon the maturity date of their respective B-BBEE schemes.

33.3 Moreover, in violation of the B-BBEE shareholders' rights to equality and not to be discriminated against unfairly, as I show later, Capitec Holdings has voluntarily decided to treat other B-BBEE shares differently from the B-BBEE shares in Ash Brook and Coral Lagoon,

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because Capitec Holdings agreed that the acquisition of up to 5% of its shareholding by another B-BBEE entity, Lebashe Investment Group (Pty) Limited (**Lebashe**), should only be subjected to a fixed term restrictive condition, which began in 2015 and will expire in 2022. There is therefore no reason why the B-BBEE shareholders in Ash Brook and Coral Lagoon should continue to be treated differently and adversely through the evergreen restriction clauses, or at all.

- 33.4 In violation of the B-BBEE shareholders' rights to property, Capitec Holdings' refusal to give consent has the effect of enabling Capitec Holdings to acquire the shares held in Ash Brook and/or Coral Lagoon at the strike price of R30 per share when in truth and in fact the closing trading price as at 29 August 2019 was R1079.53. On this basis Capitec Holdings is therefore able to acquire the shares at a markedly reduced price to the prejudice of the B-BBEE shareholders and thereby deprive those shareholders of their rights to their property. The deprivation is acute in this instance because the B-BBEE shareholders have fully paid for their shares and do not owe any financial consideration to Capitec Holdings for those shares. Nor is there any reasonable basis for Capitec Holdings to withhold its consent. There is therefore no reason why Capitec Holdings should deprive the B-BBEE shareholders of the commercial value of their shares by the device of withholding consent.

- 34 Notably, Capitec Holdings has at various instances previously granted its consent to various share sale transactions involving the B-BBEE shares. It's

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approach to such consents has therefore generally been arbitrary and inconsistent.

34.1 On 29 February 2012, with the permission of Capitec Holdings, Coral Lagoon sold 53% of its shares to the Public Investment Corporation (“PIC”) at a price of R156.11 a share. This was equivalent to R825 million.

34.2 Coral Lagoon redeemed its IDC preference shares and remained with 47% of the original allocation, which were subject to restrictive clauses. Three years later, in May 2015, Petratouch, which later became Lebashe, paid the PIC R2.7 billion for the shares PIC had purchased from Coral Lagoon. The shares, which were equivalent to a 4.57% stake in Capitec, have 7-year selling restrictions until 2022.

35 In July 2017, Petratouch paid R1.2bn to purchase a 2.7% shares in Capitec Holdings. Lebashe bought these shares from Coral Lagoon through a fairly complex structure that saw certain of the shareholders of Ash Brook essentially selling out at a discount of more than 50% to their market value due to the restrictions explained above. After these transactions, Coral Lagoon owned shares worth the equivalent of a 1.17% stake in Capitec Holdings. The other shareholders opted not to sell at that discount.

36 At the close of trading on 12 February 2019, Capitec Holdings was the country’s fifth largest bank with a market capitalisation of R137.9 billion. The B-BBEE shareholders (excluding Black directors and executives of Capitec Holdings who held shares in their individual capacity) had an 8.64% stake in

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Capitec Holdings that was worth R11.9 billion. Coral Lagoon's 1.17% stake was worth R1.6 billion.

Litigation between the TSDBF and the Regiments parties

37 TSDBF launched legal proceedings against thirteen defendants including the Regiments parties, in the Johannesburg Local Division of the High Court (under case number: 29652/17) on 10 August 2017. TSDBF initially claimed an amount of approximately R232 million and, pursuant to an amendment, increasing its claim to approximately R585 million.

38 Subsequent to launching the main action, TSDBF launched ancillary applications throughout the course of 2018. These ancillary proceedings culminated in various judgments and orders:

38.1 A judgment and order of Adams J dated 15 March 2018 relating to Regiments providing security for TSDBF's claims in the main action following an article being published in the Sunday Times that decision been had taken by the Regiments companies in early 2018 to wind up the Regiments group. A copy of the order is attached to the founding affidavit deposed to by Dr Eric Wood in the urgent application as Annexure "X5.1";

38.2 Tsoka J granted an anti-dissipation order dated 20 July 2018 in favour of TSDBF, which had the effect of restraining the Regiments parties from dealing with their assets, including the shares held in Capitec Holdings, pending the finalisation of the main action by TSDBF. A copy

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of the order is attached to the founding affidavit deposed to by Dr Eric Wood in the Wood urgent application as Annexure "X5.2"; and

38.3 Van der Linde J granted another anti-dissipation order dated 18 December 2018 in favour of TSDBF. A copy of the order is attached to the founding affidavit deposed to by Dr Eric Wood in the Wood urgent application as Annexure "X5.3".

39 The TSDBF main action and the ensuing court orders had a detrimental effect on Regiments and its businesses, including restricting the company's ability to raise finance and the loss of significant business opportunities.

40 The Regiments' board was well aware that litigation is inherently risky and costly. Regiments potential liability to TSDBF might become unmanageable if interest were allowed to accumulate on the TSDBF claim only for TSDBF to obtain a judgment in due course.

41 Accordingly, these and other factors led Mr Magandheran Pillay and I, as the directors of Regiments, to engage in settlement discussions with TSDBF. These discussions took place through the course of 2019.

The settlement between the TSDBF, and the Regiments parties and Coral Lagoon

42 Ultimately, a settlement was reached and a written settlement agreement was signed on 8 August 2019. The parties to the settlement agreement are TSDBF, Regiments Capital, Regiments Fund Managers, Coral Lagoon, Mr Pillay and me. A copy of the settlement agreement is already attached to

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the founding affidavit deposed to by Dr Eric Wood in the Wood urgent application as Annexure "X3.3".

43 In terms of the settlement agreement the Regiments parties agreed to pay to TSDBF an amount of R500 million in full and final settlement of TSDBF's claims against the Regiments parties:

43.1 The payment of the settlement amount would be done utilising the proceeds of the sale of 810 230 of the shares owned by Coral Lagoon in Capitec Holdings to fully and finally settle the litigation between TSDBF and the Regiments parties.

43.2 As a condition precedent to the effectiveness of the settlement agreement, the Regiments parties and Coral Lagoon would obtain Capitec Holdings' consent to sell its shares as agreed to in the settlement agreement;

43.3 The interest commencement date is 15 July 2019;

43.4 The fulfilment date for the conditions precedent is 6 September 2019;

43.5 The effective date of the settlement is five days from the fulfilment of the conditions.

44 Settling with TSDBF is in the best interests of the Regiments parties for the following reasons:

44.1 The Regiments parties are unable to raise finance by way of encumbering or otherwise dealing with its assets as a result of the

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restraint orders, which the Regiments parties are required to do to meet creditors' demands. This had resulted in, amongst others:

44.1.1 one of Regiments' creditors applying for the winding up of Regiments and one of its subsidiaries, Cedar Park Properties 39 (Pty) Ltd ("**Cedar Park**"), which owns the Kgoro property adjacent to the Sandton Gautrain Station; and

44.1.2 one of Regiments' subsidiaries, Little River Trading (Pty) Ltd ("**Little River Trading**"), being placed under business rescue pursuant to pressure from Nedbank to execute on a guarantee by Little River Trading of Regiments' debt.

44.2 The Court orders granted throughout the proceedings between TSDBF and the Regiments parties have to date resulted in the Regiments parties losing significant opportunities. For example, in 2018 Coral Lagoon had the option to purchase a further 240 000 Capitec Holding's shares with the net value of the option being approximately R660 per share. However, due to the restraint orders, Regiments was unable to exercise this option which resulted in a significant opportunity being lost.

44.3 The settlement agreement will mitigate the risk of Regiments and Cedar Park being liquidated. Liquidation would likely have the negative effect of a distressed sale of Regiments' shares in Ash Brook and Cedar Park's shares in the Kgoro Consortium. Should this transpire, the result would be a significant loss in value and would prejudice creditors and shareholders.

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- 44.4 The directors of Regiments had resolved to apply for the Business Rescue of Regiments and Cedar Park. A business rescue moratorium would allow Regiments to wind down in a structured manner through negotiation, as opposed to an auction, for the benefit of all stakeholders, including shareholders and creditors. There is also the possibility that Cedar Park may be able to proceed with the development if it is able to trade freely once more and leverage its assets to raise funding.
- 44.5 The directors resolved that it is in Regiments and shareholders best interests to conclude the settlement agreement and free up the company's remaining assets before the value of such assets are potentially diminished to fire-sale values to the detriment of all. Once TSDBF had been settled there should be sufficient assets remaining to settle remaining creditors and leave value for shareholders.
- 44.6 If the claims of legitimate creditors are not settled then the liquidations of Regiments and Cedar Park (Kgoro) are the most likely scenarios. In such event the assets will have to be sold on a liquidation basis. Such sales notoriously realise substantially less than market value, on estimation less than 30% of the market value.
- 44.7 Litigation is risky and costly. Regiments potential liability to TSDBF might become unmanageable if interest were allowed to accumulate. This created an additional risk for Regiments.

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45 The necessary approvals were or are in the process of being obtained to authorise the Regiment parties and Coral Lagoon to conclude the settlement agreement with TSDBF:

45.1 The board of directors of Regiments Capital has passed the necessary resolutions authorising the conclusion of the settlement agreement and authorising the performance of its obligations in terms of the settlement agreement. A copy of the resolution is attached as Annexures "LN3"; and

45.2 The shareholders of the respective Regiments parties are in the process of passing the necessary resolutions authorising the conclusion of the settlement agreement and authorising the performance of their obligations in terms of the settlement agreements. The shareholders of Ash Brook are scheduled to meet on 4 September and the shareholders of Regiments Capital on 6 September. Copies of the shareholder meeting notices are attached as Annexures "LN4"- "LN5";

Capitec's refusal to grant consent

46 On 12 July 2019, the Regiments parties and Coral Lagoon wrote to Capitec Holdings to inform it of the settlement negotiations and sought its consent. A copy of the letter to Capitec Holdings' is attached as Annexure "LN6". In its letter the Regiments parties and Coral Lagoon stated that Coral Lagoon sought to sell its shares in Capitec Holdings, declaring a dividend to Ash Brook, who in turn would effect a share-buy back of Regiments Capital's

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shares in Ashbrook thus enabling Regiments Capital to raise funds to settle TSDBF's claims against the Regiments parties.

47 In addition the Regiments parties and Coral Lagoon informed Capitec Holdings that its Black ownership will not be adversely affected should Coral Lagoon sell its shares in Capitec Holdings.

48 Particularly, the Regiments parties and Coral Lagoon referred Capitec Holdings to the Codes of Good Practice on Broad-Based Black Economic Empowerment ("**B-BBEE Codes**"), issued under section 9(1) of B-BBEE Act and the Financial Sector Codes:

48.1 The Regiments parties and Coral Lagoon noted that the Financial Sector Codes recognize BBEE ownership after the disposal of shares by Black investors provided—

48.1.1 the Black shareholders held the shares for at least three years;

48.1.2 the net value must have been created for the benefit of Black people; and

48.1.3 transformation has taken place within the measured enterprise using the comparable B-BBEE recognition level from the period of entry of Black participants to their exit; and

48.2 Pursuant to the introduction of the continued recognition principle, also known as the once empowered always empowered principle, the effect of which would be that if Coral Lagoon sold its share in Capitec

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Holdings that its Black ownership will not be immediately adversely affected because of the application of the once empowered always empowered principle.

- 49 The Regiments parties and Coral Lagoon requested Capitec Holdings to confirm that the shareholders of Ash Brook were free to trade in their shares, without the application of the restrictive clauses; Ash Book is free to trade in its share in Coral Lagoon; and Coral Lagoon is free to trade in its shares in Capitec Holdings. Alternately, that Capitec Holdings would waive its rights in terms of the restrictive clauses and allow the Regiments parties and Coral Lagoon to trade in their shares.
- 50 On 17 July 2019, Capitec Holdings wrote to the Regiments parties and Coral Lagoon to inform them that it disagreed with their interpretation of the Financial Sector Codes. Therefore, Capitec Holdings refused to waive its rights in terms of the restrictive clauses and did not consent to the Regiments parties and Coral Lagoon disposing of their shares. Capitec undertook to "*respond more fully... as soon as practically possible*". A copy of the letter from Capitec Holdings is attached as Annexure "LN7".
- 51 On 19 August 2019, the Regiments parties and Coral Lagoon wrote a second letter to Capitec Holdings to inform Capitec Holdings that a settlement agreement had been concluded and that one of the conditions of the settlement were for Capitec Holdings' to consent to Coral Lagoon selling its shares in Capitec Holdings to TSDBF. Capital Holdings was called upon to urgently provide its consent by 21 August 2019, or to explain the basis for its

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refusal to consent. A copy of the letter to Capitec Holdings' is attached as Annexure "LN8".

52 On 21 August 2019, Capitec Holdings responded to both the 12 July and 19 August letters. A copy of the letter from Capitec Holdings' attorneys is attached as Annexure "LN9".

53 Capitec Holdings refused to consent to Coral Lagoon selling its shares in Capitec Holdings enable Regiments Capital (pursuant to an Ash Brook share buy-back arrangement) to settle the claims by TSDBF. The reasons given by Capitec Holdings were:

53.1 The Financial Sector Transformation Council is yet to publish the details of the requirements applicable to the partial continued recognition;

53.2 The period during which the continued recognition principle may be claimed by an entity is not set out in the Financial Sector Codes; and

53.3 The Regiments parties and Coral Lagoon were incorrect to state that a sale by Coral Lagoon of its Capitec Holdings shares will not affect Capitec Holdings' B-BEE status.

54 Capitec Holdings also noted that it has consented to Ash Brook and Coral Lagoon disposing of certain share in Capitec Holdings to enable them to settle third party funding obligations and taxes owing to the South African Revenue Service. Capitec Holdings also undertakes to consider any disposal

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of shares requests in good faith on a case by case basis and having regard to court orders restraining the Regiments parties, Ash Brook and Coral Lagoon from disposing of their respective share related to Coral Lagoon's shareholding in Capitec Holdings.

55 Capitec Holdings also contends that TSDBF is not compliant with the B-BBEE Act and the Codes as another reason for refusing to consent to the sale of the shares in terms of the settlement agreement.

56 On 27 August 2019, Capitec Holdings wrote to my co-director, Ms Jackie Huntley, setting out its stance on the proposed disposal by Coral Lagoon in respect of the settlement agreement.

57 Capitec Holdings stated that:

"1 We refer to the settlement agreement entered into between inter alios, Coral Lagoon and the Transnet Second Defined Benefit Fund ("TSDBF"), in terms of which Coral Lagoon has agreed to sell 810,230 ordinary shares in Capitec ("CPI Shares") to the TSDBF ("Settlement Agreement").

2 As you are fully aware:

2. The CPI Shares held by Coral Lagoon were issued to Coral Lagoon pursuant to the Subscription Agreement concluded between inter alios, Ash Brook Investments 15 Proprietary Limited ("Ash Brook"), Coral Lagoon and Capitec Bank Holdings Limited ("Capitec") on or about 13 December 2006 ("Subscription Agreement").

2.2 In terms of the Subscription Agreement –

2.2.1 Coral Lagoon is prohibited from disposing of any or all of the CPI Shares held by it to any entity or person who, in Capitec's opinion, does not comply with the Broad-Based Black Economic Empowerment Act, No. 53 of 2003 ("B-BBEE Act") and the Codes of Good Practice on black economic empowerment contemplated in section 9 of the B-BBEE Act ("Codes"), ("Qualifying Black Person"); and

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2.2.2 *should Coral Lagoon dispose of any CPI Shares held by it to any person who does not, in the opinion of Capitec, comply with the B-BBEE Act and the Codes, Capitec will be entitled to require that Coral Lagoon purchases a number of replacement CPI Shares as determined by Capitec ("Mandatory Acquisition Option").*

- 3 ***Since the TSDBF is not a Qualifying Black Person, a disposal by Coral Lagoon of any of the CPI Shares held by it to the TSDBF is prohibited in terms, and amounts to a material breach, of the Subscription Agreement and will, inter alia, trigger the Mandatory Acquisition Option.***
- 4 ***In the circumstances, should you or any of your representatives, in your respective capacities as a shareholder or director of Ash Brook or Coral Lagoon, authorise or otherwise facilitate, whether directly or indirectly (including by way of approving any shareholder or director resolutions), the disposal by Coral Lagoon of any of the CPI Shares held by it to the TSDBF, Capitec will consider you to have deliberately interfered with, or facilitated an unlawful breach of, the Subscription Agreement and Capitec will join you in any proceedings which it may institute in order to enforce its rights under the Subscription Agreement, including any proceedings brought to recover any damages suffered by it."***

58 I attach a copy of Capitec Holdings letter marked as Annexure "LN10".

59 It is clear from the letter that Capitec Holdings has indicated that should either Coral Lagoon or Ash Brook pass any of the required corporate approvals that are necessary for Regiments Capital to dispose of the Capitec shares to TSDBF that Capitec Holdings' stance is that such conduct is tantamount to a breach of the subscription agreement and that these shareholders will be punished by: (i) triggering the mandatory acquisition option; and (ii) instituting proceedings against these shareholders to recover damages.

60 It is clear from Capitec Holdings unequivocal stance that both Coral Lagoon and Ash Brook urgently require legal clarity on their respective rights and

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obligations under the subscription agreement as their consent is required by Regiments Capital to dispose of the Capitec shares to TSDBF. Should this Court not grant the relief urgently sought it would effectively allow Capitec Holdings to persist with its oppressive stance and effect its unreasonable refusal to consent through a second means; namely, threatening Coral Lagoon and Ash Brook in the manner it has if they seek to facilitate the disposal of the Capitec shares to TSDBF.

CAPITEC'S REFUSAL TO CONSENT IS UNREASONABLE AND UNLAWFUL

61 Capitec Holdings' refusal to consent to Coral Lagoon selling its shares to TSDBF is unreasonable primarily because:

61.1 Capitec Holdings' will not be adversely affected by Coral Lagoon's selling of the shares to TSDBF because of the continued recognition principle (also known as the once empowered always empowered principle); and

61.2 Capitec Holdings' refusal to grant its consent is in bad faith; Capitec Holdings is disproportionality prioritising its entitlement to refuse above the consequences that will befall the Regiments parties and Coral Lagoon.

62 The Regiments parties and Coral Lagoon will suffer irreparable harm if this application is not determined within the urgent timelines of the Wood urgent application.

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- 63 In terms of the settlement agreement, interest on the amount to be paid by the Regiments parties will be charged from the interest commencement date being 15 July 2019 until the settlement amount is paid. The result is that the time that passes while Capitec Holdings has refused to consent to the sale of shares, the Regiments parties incur interest.
- 64 The interest at Prime Rate plus 2%, nominal annual compounded monthly on an amount of R500 million is significant and may even result in Regiment parties needing to dispose of additional assets to cover the interest earned by TSDBF.
- 65 It would therefore be in the interests of all the parties that this Court determine this application, about the reasonableness of Capitec Holdings refusal to consent.
- 66 Should the settlement agreement lapse because consent required from Capitec Holdings is not given, Regiments will probably have to be liquidated. Liquidation would likely have the negative effect of a distressed sale of Regiments' shares in Ash Brook. Should this transpire, the result would be a significant loss in value and prejudice creditors and shareholders.
- 67 The outcome of a liquidation sale (a fire-sale) of Regiments Capital's assets will, as a general matter of experience, cause Regiments Capital lose at an estimated 30% or more of the claimable market value of its assets when the assets are disposed under liquidation proceedings. TSDBF is a willing buyer of 810 230 of Regiments' Capitec shares at 90% of market value. Capitec

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Holdings need only consent to this sale and, subject to the outcome of this application, all creditors will be settled and the pensioners paid. Regiments Capital will have escaped the risk of liquidation.

68 The difference between liquidation and settlement (inherent in the matter being:

68.1 If all the suspensive conditions of the settlement agreement are fulfilled and the settlement is implemented, the Regiments entities will realise the marketable value of its assets at an amount of approximately R880 million.

68.2 Whereas, if the settlement agreement lapses the Regiments entities will only realise 70% of the marketable value of its assets, which will amount to approximately R616 million. Thus a difference of R264 million lost if the settlement agreement is allowed to lapse, and as a result the Regiments entities are liquidated. This is irrespective of any litigation risk this commercial reality is enough to settle.

69 A document showing the calculation of the difference is attached as Annexure "LN11".

70 Coral Lagoon is not spared of the prejudice that would flow from the failure of the settlement agreement. Regiments Capital controls Coral Lagoon through its shareholding in Ashbrook. Thus the diminution of value of the Regiments Capital shares in Ashbrook impacts adversely on Coral Lagoon. Moreover, the anti-dissipatory interdicts granted against the Regiments parties and the

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directors of Regiments Capital have a prejudicial effect on Ashbrook and Coral Lagoon, such that they cannot deal freely with their shares without subjecting themselves to discretion of the TSDBF, whether or not to grant its consent thereto. Unless the settlement agreement is effected, Coral Lagoon and Ashbrook run the risk of having to endure this prejudice for so long as the dispute between the Regiments parties and the TSDBF remains unresolved, which may be a considerable period. Having regard to the fact that the underlying investment held by Coral Lagoon in Capitec Holdings is exposed to constant market volatility and risk, such prejudice may be immense.

- 71 Moreover, as the letter of 27 August 2019 from Capitec Holdings makes clear, Capitec Holdings intends to trigger the punitive provisions in terms of the Subscription Agreement against each of Coral Lagoon and Ash Brook should they directly or indirectly participate in the settlement process. Aligned to this, Capitec Holdings also threatens to institute proceedings against Coral Lagoon and Ash Brook for damages.

Capitec Holdings will not be adversely affected because of the continued recognition principle

- 72 The Subscription Agreement was concluded on 12 December 2006, almost 13 years ago. Since then, similar empowerment transactions in the financial services sector have matured and the empowerment participating companies have been afforded the opportunity to realise the net attributable value of their respective shares in the respective companies they held shares in leading companies in the financial services sector.

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- 73 In terms of the continued recognition principle, the Financial Sector Code allows for the recognition of a portion of Black ownership after a Black participant has ceased being a shareholder of a company through the disposal of its shares in that company.
- 74 The continued recognition principle is applicable when:
- 74.1 The Black participants have held their shares in the company for a minimum of three years;
 - 74.2 The net value has been created for Black people; and
 - 74.3 Transformation has taken place within the measured entity using comparable B-BBEE recognition level from the period of entry of Black participants to their exit.
- 75 An evaluation of the Coral Lagoon shareholding in Capitec Holding has been conducted to determine whether the continued recognition principle would apply when Coral Lagoon disposes of its shares in Capitec Holdings. A copy of a report dated 11 July 2019 on the evaluation of continued recognition implication of a sale of the Capitec Holdings share is attached as Annexure "LN12".
- 76 In terms of the report the continued recognition principle would apply because:
- 76.1 Coral Lagoon has held its shares in Capitec Holdings for 13 years;
 - 76.2 The Coral Lagoon shares are fully paid and unencumbered; and

- 76.3 Transformation has taken place within Capitec Holdings as provided for in the B-BBEE certificates issued to Capitec Holdings in terms of the Financial Sector Code. In fact, Capitec Holdings' B-BBEE points have increased from a score of 59 points in the 2011 certificate to a score of 78 points in the most recent certificate.
- 77 Accordingly, the continued recognition principle would be applicable should Coral Lagoon dispose a portion or all of its shares in Capitec Holdings. It is thus unreasonable to restrain Coral Lagoon from disposing its shares because the interest or rights that Capitec Holdings purports to protect by refusing to consent to the disposal of the shares are not immediately compromised or endangered by the sale of the share.
- 78 The reasons Coral Lagoon has provided for disposing of the shares are similar to reasons given in other occasions when for instance Capitec Holdings consented to the disposal of Coral Lagoon's share to allow Coral Lagoon and the Regiments parties to settle their tax obligations with the South African Revenue Service and settle its debt with IDC. Therefore, as this is a comparable instance, where Coral Lagoon wishes to facilitate settlement by the Regiments parties of a significant liability to a state owned enterprise.
- 79 The consequences that will imminently arise from Capitec Holdings' refusal to consent to the settlement as allowing the Regiments parties to be freed from the orders restraining them from conducting business is the winding up of the Regiments parties; and the assets of the parties being sold at a significant discount under liquidation. This is an unenviable result that would be

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disproportionate to the decline in the Black shareholder ownership of Capitec Holdings. These consequences would effectively result in Regiments receiving no benefit from the growth in value of its shareholding, which it has paid for and has faithfully held onto at risk for some 13 years.

80 In line with the continued recognition principle (also known as the once empowered always empowered principle), an independent report compiled by the Centre for Economic Development and Transformation dated 2 April 2019, states that when the BEE shareholders of various entities in the financial services sector disposed of their shares in those entities, those companies retained their BEE accreditation score:

80.1 FirstRand Limited had its Black shareholders exit in 2015, and in 2018 its BEE score was at 25.28;

80.2 Sanlam Limited had its Black shareholders exit in 2014, and in 2018 its BEE score was at 23.73;

80.3 The Standard Bank of South Africa Limited had its Black shareholders exit in 2014, and in 2018 its BEE score was at 23.78;

80.4 Nedbank Limited had its Black shareholders exit in 2015, and in 2018 its BEE score was at 23;

80.5 Old Mutual Limited had its Black shareholders exit in 2015, and in 2018 its BEE score was at 21.17; and

80.6 ABSA Bank Limited had its Black shareholders exit in 2012, and in 2018 its BEE score was at 17.67.

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81 A copy of the report is attached as Annexure "LN13".

82 This report also illustrates that according to the research Capitec Holdings does not need to lock-in its Black shareholders in perpetuity to maintain its BEE status. Capitec Holdings had an ownership score of 16.54 points on its latest BEE Scorecard for 2018. It has met the conditions to continue to earn a majority of these points after the exit of Black shareholders. Capitec Holdings' Black shareholders have owned the shares for the minimum period of three years. The company has created significant net value for Black shareholders, which Coral Lagoon now seeks to realize. Notably, Capitec Holdings will also not suffer harm as there has been transformation in the company since the transaction was concluded in January 2007. According to Capitec's 2008 integrated annual report, the company had a BEE score of 41.56 points, when measured against the FSC. In 2018, Capitec had a BEE score of 78.04.

83 This is sufficient evidence contrary to Capitec Holdings' reasons for withholding its consent to Coral Lagoon selling its shares to TSDBF.

Capitec Holdings is acting not acting in good faith

84 I am advised that South Africa courts recognize that fairness and reasonableness are relevant considerations in the interpretation, performance and enforcement of contracts.

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- 85 I am advised that Capitec Holdings' interpretation of the Financial Service Codes and their disregard of the application of the continued recognition principle is untenable. However, Capitec Holdings has sought to hide behind their conservative interpretation of the Financial Sector Codes to anchor its refusal to consent to the selling of the shares in terms of the settlement agreement.
- 86 Considering that there is no immediate adverse effect of the sale of the Coral Lagoon shares to TSDBF on Capitec Holdings, there is therefore no justifiable reason for its refusal to consent to the sale. It is unreasonable and unfair to withhold consent merely because Capitec Holdings is entitled to do so in terms of the Subscription Agreement but to the utter disregard of Ash Brook and Coral Lagoon's rights – and how the refusal of consent would affect their rights.
- 87 The direct consequence for the Regiments parties and TSDBF finalising the settlement agreement is that public money will be repaid to the TSDBF; the Regiments parties will avoid liquidation, and their creditors' and shareholders' interests will be protected. Therefore without any reason, other than that it is what was agreed to between Coral Lagoon, Ash Brook and Capitec Holdings, the only reasonable inference is that Capitec Holdings does not care what happens to Ash Brook and Carol Lagoon. This is not an enforcement of the Subscription Agreement that is in line with public policy or the notion of fairness. It would be most inequitable to allow the settlement reached between the parties to lapse.

88 Capitec Holdings has always sought to purchase Coral Lagoon's shares at a significant discount. For instance, during 2018 Capitec Holdings approached Coral Lagoon proposing to purchase its shares at a 50% discount. Email correspondence of November 2018 between Capitec Holdings and Coral Lagoon are attached as Annexures "LN1". I therefore consider that their refusal to consent is part of Capitec Holdings plan to hold out until Coral Lagoon and Ash Brook have to sell their shares in the form of a fire-sale when Regiments entities are being liquidated.

89 Also betraying its opportunistic nature Capitec Holdings has written letters to Ash Brook shareholders threatening that if they approve the settlement agreement Ash Brook may breach the Subscription Agreement, which breach will result in the Capitec Holdings exercising the mandatory sale option and buy its shares back from Coral Lagoon at R30 per share being a significant discount to the current price of the Capitec Holdings shares. A copy of a letter to one of the shareholders of Ash Brook dated 27 August 2019 is already attached as Annexure "LN10".

THE RESTRICTIVE CLAUSE CAPITEC HAS RELIED ON TO REFUSE CONSENT ARE CONTRARY TO PUBLIC POLICY, UNLAWFUL AND UNCONSTITUTIONAL

Capitec is violating the constitutional rights of Ash Brook, Coral Lagoon and its shareholders

90 In the instance that this Court finds that Capitec Holdings refusal to grant consent to Coral Lagoon to sell its shares in Capitec Holding to settle the claims of TSDBF was reasonable as it is authorised by the Subscription Agreement, on the face of it the restrictive clauses violate public policy and the

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notion of fairness; it is unlawful, invalid and its enforcement is contrary to public policy; and it is objectively unconscionable.

91 I am advised that the First Respondent is obliged to respect, protect, promote and fulfill the constitutional rights of Ash Brook and Coral Lagoon on their own and together with their shareholders for the following reasons:

91.1 The shares they hold in Capitec were acquired by them pursuant to a Black economic empowerment scheme with the fundamental purpose being to give effect to their rights to equality as enshrined in section 9 of the Constitution, specifically section 9(2), and given effect in terms of the B-BBEE Act;

91.2 The shares have now been fully paid and are no longer subject to any financial encumbrances at the instance of the First Respondent or any other creditor;

91.3 The shares can no longer be subject to any restriction which has the effect of reducing their value at the instance of the First Respondent and thereby undermine the very objective for which the shares were acquired in the first instance; and

91.4 It is unconscionable, unfair and unconstitutional for the First Respondent to refuse the consent sought by Ash Brook and Coral Lagoon by relying on clause 8.2-8.4 and 9.1.1-9.1.7 of the Subscription Agreement in circumstances where there is no rational reason or need to invoke that clause.

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- 92 The effect of the perpetual restriction imposed by Capitec in the Agreement is that Black shareholders are precluded from selling their shares and realizing their true market value by virtue of the fact that these shareholders are Black, while other shareholders can freely trade their shares without any restrictions. In addition to the specified violations of the Act, this also constitutes unfair discrimination. The selling restrictions apply in perpetuity. They constitute a violation and deprivation to Coral Lagoon and Ash Brook of their rights to property and dignity, which are guaranteed by the Constitution.
- 93 It is in the interests of justice for this Court to make a determination on the constitutional validity and lawfulness of the restriction clauses because that determination will have a direct consequence on the Regiments parties, Coral Lagoon and TSDBF finalising the settlement agreement and ensuring that the dispute between those parties is fully settled. In addition, it would be most inequitable to allow the settlement reached between the parties to lapse. This would be costly and disproportionately to the interests of the Regiments parties, who have in good faith engaged in negotiations with TSDBF to ensure its claims are paid.
- 94 Notwithstanding that Coral Lagoon's shares in Capitec Holdings have been fully paid and unencumbered, Coral Lagoon is unable to trade in the shares and realise the value attributable to the shares:
- 94.1 Coral Lagoon cannot sell, alienate, donate, encumber, or in any manner endeavour to dispose or trade its shares on the JSE with any person who, in the opinion of Capitec Holdings, does not comply with

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"the BEE Act and the Codes" without incurring the obligation, upon demand by Capitec Holdings, to acquire in the open market an equal number of shares as it has sold, thus rendering Coral Lagoon's right to sell or trade the shares nugatory;

- 94.2 Ash Brook cannot sell, alienate, donate, encumber, or in any manner endeavour to dispose its shares in Coral Lagoon without incurring a punitive penalty through the exercise by Capitec Holdings of the option stipulated in clause 8.2 of the Subscription Agreement, which entitles Capitec Holdings to purchase from Coral Lagoon an equal percentage of Holdings Shares from Coral Lagoon at R30.00 plus interest at JIBAR calculated from the Completion Date up to the date on which Capitec Holdings exercises the option, or at the market price, whichever is the lowest at the date when Capitec Holdings exercises the option.
- 95 The primary reason for the limitation of Coral Lagoon's rights in the shares is that Ash Brook and therefore Coral Lagoon is a company owned by Black people as defined in terms of the B-BBEE Act. Their purchase and ownership of the shares was made subject to and restricted by conditions that do not apply to shareholders that are not Black in terms of the B-BBEE Act.
- 96 The limitations resultant from the restriction clauses are not in line with the objective and values of the B-BBEE Act as set out in section 1 of that Act. The consequence is that the Black shareholder end up window-dressing Capitec Holdings in order for Capitec Holdings to retain its B-BBEE certification scores

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and gain the material benefits that arise for the B-BBEE certification in perpetuity, whilst the Black shareholders are held against their will.

- 97 These limitations, especially considering that they have been in effect for 13 years are unreasonable and unjustifiably limit Coral Lagoon Black shareholders' rights to equality (section 9 of the Constitution); their right to dignity (section 10 of the Constitution); and their right to property (section 25 of the Constitution).

The Black shareholders are being unfairly discriminated against

- 98 The restrictive clauses are contrary to public policy, unconstitutional and invalid for one or more or all of the following reasons:

- 98.1 The restrictive clauses unfairly and unreasonably discriminate against Coral Lagoon and Ash brook, who have beneficial ownership to and interest in the restricted shares, in that:

98.1.1 They are precluded and restricted from realizing the true and market value of their shares when there is no justification for such restrictions;

98.1.2 By reason of the restrictive clauses Coral Lagoon and Ash Brook are unable to sell their respective shares at their market value when the rest of the shareholders of Capitec Holdings are entitled to do so at their free will;

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98.1.3 The restricted shares are fully paid and unencumbered, but cannot freely be traded on the JSE when the rest of shareholders in Capitec Holdings can and are entitled to freely trade their shares without such restrictions;

98.2 The restrictive clauses apply in perpetuity, notwithstanding the fact that all of the restricted shares have been fully paid, and there is no legitimate basis for their perpetual application;

98.3 The restrictive clauses are markedly inconsistent with the prevailing practices in B-BBEE transactions, which generally have a restriction on shares purchased or acquired by historically disadvantaged persons in such transactions for a limited duration, usually not more than 8 years from the date of conclusion of such transactions. Coral Lagoon is not being treated the same as other shareholders and because of the limited market it may sell its shares to if the restrictive clauses are enforced, Coral Lagoon always has to sell at a significant discount:

98.3.1 In May 2015, Petratoch, which later became Lebashe paid the PIC R2.7bn for the 5 284 735 shares it had purchased from Coral Lagoon. The shares, which were equivalent to a 4.57% stake in Capitec Holdings; and

98.3.2 In July 2017, Lebashe paid R1.2bn to purchase 3 125 067 Capitec Holdings shares, which were equivalent to a 2.7% stake in the company. Lebashe bought the shares from Coral

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Lagoon shareholders at a discount of more than 50% to their market value.

98.4 What is more, in the May 2015 Lebashe purchase the selling restriction period for the selling of the B-BBEE shares was limited to 7 years until 2022. This makes it patent that there is no legitimate and fair reason for the selling restrictions to operate in perpetuity for Coral Lagoon and Ash Brook. There is no rational or legitimate objective that justifies such discrimination against Coral Lagoon and Ash brook.

The Black shareholders' rights to dignity have been unjustifiably violated

99 In terms of section 10 of the Constitution everyone has inherent dignity and the right to have their dignity respected and protected;

100 By virtue of the restrictive clauses, the rights to dignity of Coral Lagoon or Ash brook are grossly violated in that they are both hindered from freely, and with dignity, exploiting their full rights as shareholders of Capitec Holdings, whose shares are publicly traded in the JSE by all other shareholders save for Coral Lagoon or Ash brook;

101 In the circumstances, the restrictive clauses, insofar as they are intended to enable Capitec Holdings or Capitec Bank to comply with the BEE requirements stipulated in terms of the B-BBEE Act, are grossly unreasonable and exceptionally disproportionate to the rights of Capitec Holdings or Capitec Bank that are sought to be protected thereby.

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102 Thus, there is no rational or legitimate objective that justifies the limitation imposed against Coral Lagoon or Ash brook on the use, enjoyment and exploitation of the rights to their shares in Capital Holdings and Coral Lagoon, respectively.

103 In terms of section 37 of the Companies Act all shares of any particular class authorised by a company have preferences, rights, limitations and other terms that are identical to those of other shares of the same class.

104 Thus, the limitation by Capitec Holdings of Coral Lagoon's rights in respect of its shares, through imposition of the restrictive clauses, are inconsistent with the law and thus invalid.

The Black shareholders' rights to property are unjustifiably violated

105 Section 25(1) of the Constitution provides *inter alia* that:

"[N]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

106 A share issued by a company constitutes property and is transferrable in any manner provided for or recognised by law. Thus shares, being incorporeal property, enjoy the protection provided for in the property clause of the Constitution;

107 The restrictive clauses constitute a deprivation to Coral Lagoon or Ash brook of their rights to property. There is no rational or legitimate or reasonable objective that justifies the limitation imposed against Coral Lagoon and/or Ash

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brook on the use, enjoyment and exploitation of their property - in the form of the Capitec Holdings' shares.

The limitation of the Black shareholders' constitutional rights by the restriction clauses is unreasonable and unjustifiable

108 As set out above the restrictive clauses in the Subscription Agreement between Capitec Holdings, and Coral Lagoon and Ash Brook operate in perpetuity and have been in place for 13 years. According to an independent report compiled by the Centre for Economic Development and Transformation (LN13) the validity of certain evergreen selling restrictions the Capitec Holdings restriction clauses are not precedented.

109 Generally, selling restrictions are usually imposed on B-BBEE investors in instances where there has been some form financial assistance by the company in which the B-BBEE shares are purchases. For Coral Lagoon and Ash Brook, the Industrial Development Corporation ("IDC") financed R285 million of the R300 million subscription price. The IDC subscribed for preference shares issued by Coral Lagoon at a variable rate of 80% of First National Bank's prime rate. Capitec only financed R15 million of the R300 million purchase price by subscribing for preference shares worth R15 million that were issued by Ash Brook in return for a 5% stake in the company for the Capitec Bank Share Empowerment Trust.

110 When compared to some of the top companies in the financial services sector it is apparent that restrictions clauses are in place for a limited period of time.

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The restrictive clauses in the top entities in the financial services sector operated for no longer 10 years:

110.1 The FirstRand Limited BEE transaction was concluded in 2005. The BEE shareholders exited in 2015. The selling restriction clauses were in operation for 10 years;

110.2 The Sanlam Limited BEE transaction was concluded in 2004. The BEE shareholders exited in 2014. The selling restriction clauses were in operation for 10 years;

110.3 The Standard Bank of South Africa Limited BEE transaction was concluded in 2004. The BEE shareholders exited in 2014. The selling restriction clauses were in operation for 10 years;

110.4 The Nedbank Limited BEE transaction was concluded in 2005. The BEE shareholders exited in 2015. The selling restriction clauses were in operation for 10 years;

110.5 The Old Mutual Limited BEE transaction was concluded in 2005. The BEE shareholders exited in 2015. The selling restriction clauses were in operation for 10 years; and

110.6 The ABSA Bank Limited BEE transaction was concluded in 2004. The BEE shareholders exited in 2012. The selling restriction clauses were in operation for 8 years;

111 This report was a result of in-depth research on Black ownership transactions within the top 25 mining companies on the JSE, the top 20 finance companies

on the JSE and the top 100 companies on the JSE. The research has not found a single BEE transaction that has evergreen selling restrictions. Goldfields, the mining company, implemented a 30-year selling restriction – the term of its mining license - when it sold a 10% stake in the South Deep mine in August 2010. However, the Black shareholders received an upfront payment of R825m as compensation for the selling restrictions. In the financial sector, most BEE transactions had 10-year selling restrictions, after which Black shareholders could sell their shares and realise value. The top 6 companies in the sector realized value of R65bn for their Black shareholders.

Pending High Court litigation in the Western Cape Division of the High Court, Cape Town

112 In September 2016, Coral Lagoon and Ash Brook launched an action in the Western Cape High Court, Cape Town (under case number 15765/16) against Capitec Holdings and Capitec Bank requesting an order:

112.1 Declaring the selling restrictions in the shareholders agreement invalid and unlawful and inconsistent with the provisions of the Constitution; and

112.2 Declaring that they are entitled to sell and dispose of their shares without the selling restrictions.

113 Coral Lagoon and Ash Brook argued that the restrictive clauses were contrary to public policy, unconstitutional and invalid. They unfairly and unreasonably discriminated against Coral Lagoon and Ash Brook. They could not sell or

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freely trade their fully paid and unencumbered shares to realise value while other shareholders could.

114 The restrictive clauses apply in perpetuity, despite the fact that the shares had been fully paid. The clause is inconsistent with prevailing practices in BEE transactions, which generally have restrictions that have a limited duration, usually not more than eight years, the court submission said. They constitute a deprivation to Coral Lagoon and Ash Brook of their rights to property, which are contained in the Constitution.

115 The restrictive clauses also violated their rights to dignity, which are also contained in the Constitution. The restrictive clauses were grossly unreasonable and inconsistent with the law. According to the Companies Act, 71 of 2008 ("**Companies Act**") all shares of a class must have preferences, rights, limitations and other terms that are identical to those of other shares of the same class. The matter remains pending. The pleadings have not been attached but may be made available to this Court at the hearing, should this Court deem it necessary.

URGENCY

116 The settlement agreement between Regiments parties, Coral Lagoon and TSDBF was signed on 8 August 2019. The settlement agreement is subject to conditions that have to be fulfilled by 6 September 2019. The Regiments parties and Coral Lagoon are in the process of approaching TSDBF to agree to an amendment of the fulfillment date.

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- 117 Although the Regiments parties, TSDBF and Coral Lagoon may agree (and have agreed) for the fulfillment date to be postponed, it is in the interests of justice for this application to be determined urgently because the settlement amount is incurring interest as from the date 15 July 2019.
- 118 On 12 July 2019 the Regiments parties and Coral Lagoon wrote to Capitec Holdings to inform it of the settlement agreement and sought its consent.
- 119 On 16 August 2019 the Wood urgent application was launched. The Regiments parties, Coral Lagoon and Capitec Holdings are cited as parties in that litigation.
- 120 On 19 August 2019 the Regiments parties and Coral Lagoon wrote a second letter to Capitec Holdings asking for Capitec Holding's consent.
- 121 On 21 August 2019 Capitec Holdings responded to the Regiments parties and Coral Lagoon's letters of 12 July 2019 and 19 August 2019 indicating its unreasonable refusal to approve and/or consent as set out earlier in this affidavit.
- 122 On 27 August 2019, Capitec Holdings set out its oppressive stance in its letter to Ms Huntley in respect of Coral Lagoon and Ash Brook. It is clear from this letter that both Coral Lagoon and Ash Brook urgently require legal clarity on their respective rights and obligations under the Subscription Agreement as their consent is required by Regiments Capital to dispose of the Capitec shares to TSDBF. Should this Court not grant the relief urgently sought it would



effectively allow Capitec Holdings to persist with its oppressive stance and effect its unreasonable refusal to consent through a second means; namely, threatening Coral Lagoon and Ash Brook in the manner it has if they seek to facilitate the disposal of the Capitec shares to TSDBF.

123 It is submitted that the Applicants have acted swiftly in prosecuting this Application, upon receipt of Capitec's refusal to consent dated 19 August 2019 and subsequent letter dated 27 August 2019.

124 Moreover, it is submitted that the time-periods afforded to Capitec Holdings are sufficient having regard to the urgent circumstances I have described and the fact that Capitec Holdings is well-aware of the present dispute. In particular, the TSDBF settlement and the need for its consent was known to Capitec Holdings at least from 12 July 2019 at which time Capitec Holdings failed and/or neglected to respond despite undertaking to "*respond more fully... as soon as practically possible*".

125 It is urgent that the Capitec Holdings consent is granted before the settlement agreement lapses; and since the Wood urgent application will entail a determination on the legality of the settlement agreement, it would be in the interests of justice for this Court to determine this application in conjunction with Dr Wood's urgent application.

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CONCLUSION

126 In conclusion, Ash Brook and Coral Lagoon persist with the relief sought in the notice of motion to which this affidavit is attached.



LITHA MVELISO NYHONYHA

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at Sandhurst on this the 02 day of SEPTEMBER 2019, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.



COMMISSIONER OF OATHS
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