

PARTICULARS OF CLAIM

1. The plaintiff is **CORAL LAGOON INVESTMENTS 194 (PTY) LTD**, a company with limited liability, duly incorporated and registered as such in accordance with the company laws of the Republic of South Africa, having its registered address at 91 Central Street, Houghton, Johannesburg.
2. The first defendant is **TSEPHO MAHLOELE**, an adult businessman and director of companies, carrying on business as such at 34 Impala Road, Chiselhurst, Sandton, Johannesburg.
3. The second defendant is **PETRATOUCH (PTY) LTD**, a company with limited liability, duly incorporated and registered as such in accordance with the company laws of the Republic of South Africa, having its principal place of business and its registered address at 34 Impala Road, Chiselhurst, Sandton, Johannesburg.
4. The plaintiff:
 - 4.1 was incorporated and registered during August 2006 as a special purpose vehicle to acquire shares in Capitec Bank Holdings Limited (“Capitec”) on behalf of a broad-based black economic empowerment consortium (“the consortium”);

4.2 is wholly owned by a company named Ash Brook Investments 15 (Pty) Ltd (“Ash Brook”).

5. Ash Brook, in turn, is owned by the various individual and corporate members of the consortium.

CLAIM A:

6. At all material times the first defendant has been a director of both the plaintiff and Ash Brook.

7. In his capacity as a director of the plaintiff, the first defendant owed the plaintiff the following fiduciary duties:

7.1 to exercise his powers in good faith and in the best interests of the plaintiff;

7.2 not to use his position as a director, or any information obtained whilst acting in the capacity of director, to gain an advantage for himself or for another person other than the plaintiff;

7.3 not to make a secret profit or otherwise place himself in a position where his fiduciary duties conflict with his personal interests;

7.4 not to misappropriate corporate opportunities available to the plaintiff.

8. On or about 12 December 2006, the plaintiff, Ash Brook and Capitec entered into a written agreement, the material terms of which, for present purposes, were as follows:

8.1 Capitec would allot and issue 10-million ordinary shares, with a par value of 1 cent each, to the plaintiff; and

8.2 the plaintiff would subscribe for these shares at a price of R30 per share

(“the Capitec subscription agreement”).

9. The first defendant represented both the plaintiff and Ash Brook in entering into the Capitec subscription agreement.

10. A copy of the Capitec subscription agreement is annexed marked “**PC1**”.

11. On 29 February 2012, the Government Employees Pension Fund (“the GEPF”), Capitec and the plaintiff entered into a written agreement, the material terms of which, for present purposes, were as follows:

11.1 the plaintiff would sell 5 284 735 ordinary shares in Capitec to the GEPF; and

11.2 the GEPF would pay a purchase price of R824 999 981 to the plaintiff for these shares

(“the GEPF sale agreement”).

12. The first defendant, together with Litha Nyhonyha, represented the plaintiff in entering into the GEPF sale agreement and the GEPF was represented by the Public Investment Corporation SOC Ltd (“the PIC”) in entering into the agreement.

13. A copy of the GEPF sale agreement is annexed marked “**PC2**”.

14. On 28 February 2012, prior to entering into the GEPF sale agreement, Ash Brook, on behalf of the plaintiff and on its own behalf, addressed a letter to Capitec in which it summarised the intention of the consortium in entering into the GEPF sale agreement. In particular, the letter confirmed that:

14.1 the plaintiff would sell a sufficient number of its Capitec shares to the PIC, representing the GEPF, so as to enable the plaintiff to redeem its current funding, costs and associated taxes; and

- 14.2 the PIC would warehouse the sale shares pending the structuring of a new black economic empowerment transaction to be negotiated in good faith between the PIC, the consortium and, potentially, additional black groups and/or individuals (“the warehoused shares”).
15. A copy of the letter, which is erroneously dated 28 February 2011 but was in fact written on 28 February 2012, is annexed marked “**PC3**”.
16. The letter, annexure “PC3”, was signed on behalf of the plaintiff and Ash Brook by all of the directors of both companies, including the first defendant.
17. On 29 February 2012, Capitec addressed a letter to the PIC confirming what was stated in annexure “PC3”. In particular, Capitec stated as follows:

“We refer to various discussions and written notice from Ash Brook Investments 15 (Pty) Ltd (“Ash Brook”) of the intention of the Capitec BEE consortium, being Ash Brook, Coral, and all of the shareholders of Ash Brook, to dispose of 5 284 735 of the ordinary shares in Capitec (“the sale shares”) to the Public Investment Corporation SOC Limited (“the PIC”). In terms hereof, the PIC will warehouse the sale shares until such time as a new black economic empowerment transaction is structured to facilitate refinancing of the Capitec BEE Consortium’s interest in Capitec. In terms of the sale agreement relating to the sale shares, the said shares will be restricted, i.e. they can only be sold to black parties.

It is noted that the sale referred to above is an interim step in concluding the restructure of the financing of the Capitec BEE Consortium’s interest in Capitec and that further negotiations are ongoing to facilitate funding

for the repurchase of the sale shares from the PIC so as to ensure the maintenance of the restriction on the sale shares as contemplated above.”

18. A copy of Capitec’s letter to the PIC is annexed marked “**PC4**”.
19. In these circumstances, a corporate opportunity was available to the plaintiff to repurchase the warehoused shares at a future date, which corporate opportunity the plaintiff, at all material times, intended actively to pursue (“the plaintiff’s corporate opportunity”)
20. On 3 March 2015 the second defendant was registered and incorporated. The first defendant is a director and a shareholder of the second defendant.
21. During or about April 2015 the second defendant, represented by the first defendant, purchased all of the warehoused shares from the GEPF (“the purchase of the warehoused shares”).
22. The plaintiff is unaware of the actual sum paid by the second defendant for the purchase of the warehoused shares.
23. In concluding the purchase of the warehoused shares on behalf of the second defendant, the first defendant:

- 23.1 acted in breach of his fiduciary duty to exercise his powers in good faith and in the best interests of the plaintiff;
 - 23.2 utilised information obtained by him whilst acting as a director of the plaintiff to gain an advantage for himself and the second defendant;
 - 23.3 placed himself in a position where his fiduciary duties to the plaintiff conflict with his personal interests;
 - 23.4 misappropriated the plaintiff's corporate opportunity; and
 - 23.5 made a secret profit for himself.
24. In the circumstances the plaintiff is entitled to:
- 24.1 the benefit of the plaintiff's corporate opportunity which was misappropriated by the first defendant for his own benefit and the benefit of the second defendant;
 - 24.2 a full disclosure and accounting by the first and second defendants of the actual sum paid by the second defendant for the purchase of 5 284 735 ordinary shares in Capitec;

24.3 delivery of 5 284 735 ordinary shares in Capitec against payment by the plaintiff of the actual sum paid by the second defendant for the purchase of those shares; and

24.4 a full disclosure and disgorgement by the first defendant of whatever secret profit he made as a consequence of the conclusion of the purchase of the warehoused shares.

WHEREFORE the plaintiff prays for judgment, in respect of Claim A, against the first and second defendants as follows:

1. Declaring that the plaintiff is entitled to acquire the 5 284 734 ordinary shares in Capitec Bank Holdings Limited that were purchased by the second defendant during April 2015 (“the shares”).
2. Ordering the first and second defendants to provide a full disclosure and accounting of the actual sum paid by the second defendant for the purchase of the shares.
3. Ordering the second defendant to deliver the shares to the plaintiff against payment by the plaintiff of the amount disclosed and accounted for in prayer 2 above.

4. Ordering the first defendant to provide a full disclosure of and to disgorge to the plaintiff whatever secret profit he made as a consequence of the conclusion of the purchase of the shares.
5. Ordering the first and second defendants, jointly and severally, to pay the plaintiff's costs, on the scale as between attorney and client, including the costs occasioned by the employment of two counsel.
6. Granting the plaintiff further or other relief.

CLAIM B:

25. The first defendant was a director of the plaintiff within the 24 months immediately preceding this action.
26. By misappropriating the plaintiff's corporate opportunity in the manner set out above, the first defendant:
 - 26.1 grossly abused his position as a director of the plaintiff;
 - 26.2 used his position as a director of the plaintiff to gain an advantage for himself and for the second defendant as contemplated by

section 76(2)(a)(i) of the Companies Act, 71 of 2008 (“the Companies Act”);

26.3 used his position as director of the plaintiff to knowingly cause harm to the plaintiff, as contemplated by section 76(2)(a)(ii) of the Companies Act;

26.4 intentionally, alternatively by gross negligence, inflicted harm upon the plaintiff, as contemplated by section 76(2)(a) of the Companies Act;

26.5 acted in a manner that amounted to:

26.5.1 wilful misconduct; alternatively

26.5.2 gross negligence; alternatively

26.5.3 a breach of trust in relation to the performance of his directorial functions within and duties to the plaintiff.

27. As a consequence of the first defendant’s aforesaid conduct and the implications of his conduct listed in paragraph 26 above, the first defendant

falls to be declared a delinquent director in terms of section 162 of the Companies Act.

WHEREFORE the plaintiff prays for judgment, in respect of Claim B, against the first defendant as follows:

1. Declaring the first defendant as a delinquent director for a period of seven years, in terms of which the first defendant is prohibited from acting as a director of companies during that period.
2. Ordering the first defendant to pay the plaintiff's costs on the scale as between attorney and client, including the costs occasioned by the employment of two counsel.
3. Granting the plaintiff further or other relief.

SIGNED AT SANDTON ON THIS THE DAY OF JUNE 2015

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To:

THE REGISTRAR

HIGH COURT

JOHANNESBURG