



CONSTITUTIONAL COURT OF SOUTH AFRICA

Absa Bank Limited v Christina Martha Moore and Another

CCT 03/16

Date of hearing: 2 August 2016

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 2 August 2016 at 10h00 the Constitutional Court will hear an application for leave to appeal against a judgment of the Supreme Court of Appeal regarding: (i) a bank's rights regarding a mortgage bond declared invalid as a result of a fraudulent scheme; and (ii) what remedy of restitution would be just and equitable amongst the innocent victims of the fraud, including the bank and the homeowners.

Five mortgage bonds were registered over the home of Ms Christina Martha Moore and Mr Jacques Moore (the Moores) in favour of Absa Bank Limited (Absa). Unable to meet their repayments, the Moores approached Brusson Finance (Pty) Limited (Brusson) for a loan. When signing agreements with Brusson, the Moores mistakenly thought they were obtaining a loan from Brusson, with a further mortgage bond registered over their property as security for their debt.

However, the agreements in fact provided for the sale of the Moores' home to a third party (Mr Kabini), followed by a re-sale of the property back to the Moores after three years. Mr Kabini in turn received a loan from Absa to fund the purchase of the Moores' property. That was secured by a new mortgage bond registered over the property in favour of Absa. The Moores' existing bond debt was paid off and Absa cancelled the original five bonds.

Mr Kabini then defaulted on his bond repayments to Absa. Absa obtained default judgment against him. The judgment declared that the property – in which the Moores were still living – could be sold in execution. When they learnt that the property was about to be sold to settle Mr Kabini’s debt, the Moores successfully applied to halt the sale.

Thereafter, the Moores applied to the High Court for an order that: (i) the agreements they had signed were simulated and invalid; (ii) they were entitled to restitution of the property because they never intended to transfer ownership to Mr Kabini; and (iii) the mortgage securing Mr Kabini’s debt to Absa was invalid and should be set aside. The High Court upheld the Moores’ arguments. It ordered restitution of the property. But it added that, to do justice between the Moores and Absa, the Moores’ five original mortgage bonds in favour of Absa should be reinstated.

On appeal, the Supreme Court of Appeal (SCA) found that Absa had not requested the reinstatement of the five bonds granted by the High Court. In any event, the High Court could not direct the Moores to pay an amount they did not owe to Absa (since their bond debt had been discharged). Nor did the Court have power to register a bond over the Moores’ property as security for the amount. The SCA therefore dismissed Absa’s application for leave to appeal – but it amended the High Court order by striking out the reinstatement of the Moores’ bond debt to Absa. Instead, the Moores obtained restitution of their property without any conditions attached.

Before the Constitutional Court, Absa raises two arguments. First, it argues that fraud unravels all and that therefore the cancellation of the Moores’ original bonds was not legally effective. Hence, Absa has a right to an order reinstating the original bonds.

Second, Absa argues that, if the Court should find that the cancellation of the original bonds was effective, then Absa is nevertheless entitled to restatement of the bonds on the basis of unjustified enrichment. This is because Absa’s loan to Mr Kabini was used to discharge the Moores’ original bonded debt.

In response, the Moores submit that the various transactions comprising the fraudulent scheme must be separated out and their validity assessed independently. Absa chose to uphold the loan agreement with Mr Kabini and obtained default judgment against him. Therefore, the Moores argue, Absa cannot uphold the loan agreement and, at the same time, attempt to establish a claim against the Moores based on Mr Kabini’s fraud.