



## CONSTITUTIONAL COURT OF SOUTH AFRICA

### **Absa Bank Limited v Christina Martha Moore and Another**

**CCT 03/16**

**Date of judgment: 21 October 2016**

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### **MEDIA SUMMARY**

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*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 21 October 2016 at 10h00, the Constitutional Court handed down judgment in a matter involving a bank's right to reinstate mortgage bonds, cancelled as a result of a fraudulent scheme. The Court also considered what remedy, if any, would be just and equitable amongst innocent victims of the fraud.

The first and second respondents (the Moores) owed money to the applicant, Absa Bank Limited (Absa). Their debt was secured by five mortgage bonds registered over their home. Unable to meet their bond repayments, the Moores approached Brusson Finance (Pty) Limited (Brusson) for a loan. They mistakenly thought the agreements they signed were to obtain a loan from Brusson. In fact, the whole scheme was a fraudulent scam, in which Brusson caught both the Moores and Absa. In reality, the agreements provided for the sale of the Moores' home to Mr Kabini (an 'investor' and confederate of Brusson) followed by a re-sale of the property back to the Moores.

To fund the purchase of the property, Mr Kabini received a loan from Absa. Mr Kabini's loan was secured by registration of a new mortgage bond in favour of Absa over the very same property. Absa cancelled the Moores' existing mortgage bonds when the Moores' debt was paid off.

But Mr Kabini defaulted on his bond repayments. Absa then obtained default judgment against him. The judgment declared that the property could be sold in execution. On learning that their home was about to be sold to settle Mr Kabini's debt, the Moores took action.

The Moores successfully prevented the sale of their property. They then applied to the High Court for an order that they were entitled to return of the property since they never intended to transfer ownership to Mr Kabini.

The High Court found in favour of the Moores. It ordered the return of their home – but it did so on condition that the Moores’ five original mortgage bonds in favour of Absa were reinstated.

Absa appealed to the Supreme Court of Appeal (SCA) against the entire judgment. The SCA dismissed Absa’s appeal – but it found in addition that Absa had not asked for the reinstatement of its original bonds that the High Court granted. In any event, the High Court could not order the Moores to pay an amount they did not owe to Absa, nor to register bonds over their property as security for that amount. The SCA, while dismissing Absa’s appeal, amended the High Court order to provide for return of the property to the Moores unconditionally, without the original mortgage bonds being reinstated.

Before the Constitutional Court, Absa no longer contested the return of the Moores’ property to them. It argued only that it was entitled to reinstatement of the original mortgage bonds on the basis that fraud unravels all. The cancellation of the Moores’ original mortgage bonds was not valid, as it was part of the broader, fraudulent Brusson scheme. Given this, Absa contended it had a right to reinstatement of the original bonds. If, however, the bonds’ cancellation was valid, then Absa argued that the Moores had gained a windfall at its expense. The appropriate remedy for this was to reinstate the security Absa previously held over the Moores’ home.

In a unanimous judgment by Cameron J, (Nkabinde ADCJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J and Musi AJ concurring) the Court refused Absa leave to appeal with costs.

Absa argued that settlement of the debt the Moores owed it and cancellation of their bonds must be undone. The Court pointed out however that this argument depended on a finding that the agreements under which the discharge and cancellation occurred were invalid as a result of the Brusson fraud – and hence that payment of the Moores’ debt was ineffective. Absa’s alternative complaint, that the Moores gained a windfall at its expense, depended on a finding that the Moores’ debt was paid with the proceeds of the loan Absa made to Mr Kabini.

On Absa’s first argument, the Court held that, generally, payment is a bilateral act – one that, in the absence of contrary agreement, requires the cooperation of the payer and the payee. The one paying the debt, the payer, is usually the debtor – but doesn’t have to be.

The Court criticised Absa for not explaining in evidence exactly how the Moores’ bond debt to it was paid off during the Brusson fraud.

But even assuming in favour of Absa that the agreement to pay the Moores’ debt was between Absa, as the Moores’ creditor, and Mr Kabini, who paid off their bond debt for them, it did not follow that because Mr Kabini was a crook his settlement of the Moores’ debt was not effective. This was because our law is extraordinarily generous in how a debt may be paid. Our law allows a debt owing by A to B to be paid by a stranger to B in discharge of that debt even if A is entirely unaware of the payment.

All that is required is that the payer (C) must *intend to pay* and B (the payee / creditor) must *intend to accept* the payment. But A (the debtor) does not at any stage have to know of or consent to the payment.

The practical effect of this was that if, despite the lack of evidence by Absa, Mr Kabini, who was part of the fraud, paid the Moores' bond debt, his payment was effective to discharge their debt to Absa, even if he did so with funds Absa provided.

On Absa's alternative argument, the Court again criticised the absence of evidence. This made it impossible for the Court to conclude that the Moores' debt had been paid with funds Absa provided to Mr Kabini. It was thus impossible to conclude that the Moores had been unjustifiably enriched at Absa's expense. Absa's argument could also not succeed because it required the Court to create an entirely new contract between Absa and the Moores.

Absa also still had its claim against Mr Kabini, with a default judgment against him in hand. This meant Absa had not been impoverished. It abandoned the default judgment and its claims against Mr Kabini during oral argument. But this was far too late. This meant it could not claim enrichment against the Moores.

For these reasons, the Court rejected Absa's arguments and refused to grant leave to appeal. Absa was ordered to pay the Moores' costs, including the costs of two counsel.