THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Cuducap (Pty) Ltd v De Bruyn (Case no 69/2023) [2024] ZASCA 62 (29 April 2024)

Today the Supreme Court of Appeal (SCA) handed down judgment upholding an appeal, with costs, including those of two counsel where so employed, against the decision of the Western Cape Division of the High Court, Cape Town (the high court).

During 2012, Mr de Bruyn experienced financial problems and became unable to repay his monthly mortgage loan repayments owing to Absa Bank Ltd (Absa), which debt was secured by a mortgage bond over the property. He was introduced to a certain Ms Yvette Fourie (Ms Fourie), a representative of a business called Mortgage Recovery. That business assisted persons in financial distress who owned an immovable property by introducing them to an investor. The investor would purchase the property from such person in distress (the deed of sale), conclude an instalment sale agreement (instalment sale agreement) in terms of which the person in distress purchases the property back from the investor, and a fixed term lease agreement in terms of which the person in distress rents the property from the investor (lease agreement) while making payments under the instalment sale agreement. The investor would apply for mortgage loan finance and a mortgage bond would be registered against the title deed of the property. The proceeds of the mortgage loan finance would be utilised to pay the debts of the person in distress and a portion would be paid to the investor (the new owner of the property). Ms Fourie introduced Mr de Bruyn to such an investor, Cuducap, represented by its only two directors, Mr Helperus Retzma Joe van Ryneveld and Ms Engela Wilhelmina van Ryneveld (the Van Rynevelds). They, on behalf of Cuducap, agreed to invest in the property. On 28 January 2013, a deed of sale was concluded in terms of which the property was sold to Cuducap for R1,6 million. Ownership of the property subsequently passed to Cuducap, who held the property under Title Deed No. T23763/2013. Cuducap financed its acquisition of the property by means of a mortgage loan it obtained from Standard Bank Ltd (Standard Bank), which loan was secured by means of the registration of a mortgage bond over the property. It paid Absa the outstanding amount of R443 500, which was owing by Mr de Bruyn on his Absa mortgage loan, and the mortgage bond in favour of Absa was cancelled. It also paid Mr de Bruyn the cash amount of R215 250.00. On 1 June 2013, an instalment sale agreement was concluded between Cuducap and Mr de Bruyn, in terms of which agreement the property was resold to Mr de Bruyn for the total amount of R1 528 500.77, payable over five years. Mr de Bruyn made the monthly payments of R2 500 (on average) for the period 1 June 2013 to 1 July 2016. He thereafter failed to pay to Cuducap any further amount, and also not the final amount of R630 853.55 due on 1 April 2018. Cuducap, in turn, failed to duly repay to Standard Bank its monthly mortgage loan instalments. Standard Bank obtained default judgment against Cuducap and the Van Rynevelds qua sureties, and became entitled to sell the property in execution. On 6 August 2018, Cuducap caused a letter of demand to be sent to Mr de Bruyn wherein he was afforded a period of 30 days within which to remedy his breaches. He failed to do so. Cuducap provided him with a cancellation notice on 6 September 2018, and demanded that he vacate the property. Cuducap wished to sell the property by private treaty before Standard Bank had caused it to be sold in execution by public auction at a lesser forced sale price. Mr de Bruyn refused to vacate the property.

On 29 October 2018, Cuducap initiated proceedings in the high court, claiming the eviction of Mr de Bruyn 'and all other unlawful occupiers who occupy the property' from the property. Mr de Bruyn opposed the eviction application, essentially on the grounds that the three agreements were interrelated and constituted a transaction that was *contra bonos mores* and, therefore, unlawful and invalid. He maintained that the property should be re-transferred to him. He argued that similar schemes were declared 'fraudulent schemes' or to be contrary to public policy. Cuducap, on the other hand, argued that there were material distinctions between the cases relied upon by Mr de Bruyn and the facts of the eviction application in *casu*, rendering these authorities to have no real application. The high court held that the instalment sale agreement and the lease agreement were 'contrary to public policy', '*void ab initio*', and therefore 'unenforceable'. However, It held that the deed of sale was an independent agreement and thus valid, and that Mr de Bruyn was an unlawful occupier who occupied the property without the consent of Cuducap.

Unsatisfied with the eviction order, Mr de Bruyn, with leave of the high court, appealed to the full court. It held that all three agreements, on a proper interpretation, must be dealt with as one compactum. It further held that if the one falls, the whole deck of cards collapse. The transaction, according to the full court, was a scam. It, therefore held that the appeal succeeded insofar as the court *a quo* did not declare the sale agreement unlawful as well. Aggrieved by the full court's order, Cuducap appealed that order in this Court. Its main issue on appeal was whether the full court was correct in setting aside an eviction order granted by the high court against Mr de Bruyn and whether the contracts where *contra bonus mores.*

The SCA held that it was not competent for the full court to make that order, because according to this Court, the full court granted relief that was not sought by Mr de Bruyn. Furthermore, the full court made findings adverse to Standard Bank's interests, without it being a party to the proceedings before the full court and the high court. This Court further held that a court would not deal with matters where a third party who may have a direct and substantial interest in the litigation was not joined in the suit or where adequate steps could not be taken to ensure that its judgment would not prejudicially affect the party's interests, nor would it make findings adverse to any person's interests, without that person first being a party to the proceedings before it. Given the specific facts of this matter, the SCA held that there could be no doubt that Standard Bank as the mortgagee, had a direct and substantial interest and it could be prejudicially affected by the judgment of the court. Courts have consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without having that party joined in the suit, or if the circumstances of a case permit, taking other adequate steps to ensure that its judgment did not prejudicially affect that party's interest. Given the circumstances of this case, the SCA in conclusion held that the appropriate order would be to remit the matter to the court of first instance so that it could take appropriate steps to safeguard the interests of parties who may have a direct and substantial interest in the litigation. In the result the appeal was upheld with costs, including those of two counsel.

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