



SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 26 November 2015

STATUS Immediate

***Absa v Moore* [2015] ZASCA 171**

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

The Supreme Court of Appeal today handed down judgment dealing with the consequences of a fraudulent scheme run by Brusson Finance (Pty) Ltd (Brusson) to which many consumers and banks have fallen victim. A number of divisions of the High Court have been faced with questions as to the validity of contracts signed by unwary people who have been misled as to their effect, and of mortgage bonds obtained by ‘owners’ of property party to the scam.

In this matter, the court below held that contracts induced by fraudulent misrepresentations made by Brusson were invalid, and that a mortgage bond registered over property fraudulently registered in favour of Absa Bank (the Bank), fell to be set aside. This court dismissed an appeal against that judgment.

The Moores owned a home in Vereeniging. In 2009 they ran into financial difficulty and could not pay bond instalments in respect of five bonds registered against their property in favour of the Bank. They also could not

pay other debts. The Bank would not advance further funds to them because of their bad credit rating. They chanced upon an advertisement placed by Brusson offering easy finance (loans) provided that consumers had properties to secure loans. They called a Brusson office and received faxed documents to be signed in order, they thought, to procure a loan from Brusson. The documents had not been filled in.

A few days later they went to a Brusson office and asked about the effect of the documents. It was explained that they needed to sign the papers in order to obtain a loan from Brusson and that their property would be subject to a bond as security for the loan. They signed the documents believing that was their effect. In fact, the documents purported to be a sale by the Moores of their property to a Mr Kabini, a resale to them by Kabini, the price being payable in instalments, but Kabini reserving ownership of the property until the price was paid in full, and a tripartite agreement between Brusson, Kabini and the Moores which required the Moores to pay monthly instalments and administrative fees to it and not to Kabini.

Shortly thereafter Kabini applied for a bond over the property of the Moores, which he had apparently bought from them and to whom it was purportedly transferred. The Bank granted a loan of R480 000 to Kabini and registered a bond over the property.

The Moores were required to pay monthly instalments to Brusson, which they believed to be repayment of the loan to them of some R157 000. But they could not afford these payments and others. They consulted a debt counsellor who applied on their behalf for a debt review under the National Credit Act 34 of 2005 to the Magistrates' Court Vereeniging. The court order allowed the Moores to pay Brusson a lesser amount each month.

When Brusson's attorney threatened them with legal action because they were in arrears, they consulted an attorney who wrote to the National Credit Regulator explaining their plight, and asking for advice on how to deal with

Brusson. He referred to a decision of the Free State High Court that had found that contracts entered into with Brusson, similar to those between it and the Moores, were simulated and invalid. The Moores took no further steps to clarify their position because they could not afford to pay legal fees.

In March 2011 the Bank obtained a default judgment against Kabini who was in default of his obligations under the bond registered in his name, and the court declared the property in Vereeniging specially executable. The Moores did not know of this until May 2013 when they received a letter (addressed to Kabini) from an entity known as Resque Financial Solutions advising that their property was to be sold in execution. They then approached the Legal Resources Centre (LRC), which had advised other victims of the Brusson scam. The LRC, on behalf of the Moores, brought an urgent application to prevent the sale, and later applied for orders that the contracts between the Moores were invalid, that the bond registered in favour of the Bank was also invalid, and that the property be restored to the Moores.

The Gauteng Division found that the contracts between Brusson, the Moores and Kabini were all invalid, and that the bond in favour of the Bank, registered in Kabini's name should be set aside, subject to the Moores paying to the Bank what it had received from Brusson and registering a bond in favour of the Bank. The court, following several other decisions, considered that the contracts were simulated and thus invalid.

On appeal, the SCA found that the contracts were not simulated in the sense that all parties had attempted to disguise the real nature of their transactions. But they were induced by the fraudulent misrepresentations made by Brusson: the Moores had never intended to sell their property to Kabini, and buy it back in terms of an instalment sale agreement. They had intended to borrow money from Brusson and to provide security for repayment by granting a bond over the property. The sale to Kabini was invalid, and the transfer of the property to Kabini was invalid because they had not had the requisite intention to pass ownership. And since Kabini was not the owner of the property, the bond over it registered in favour of the Bank was likewise invalid.

The SCA upheld the order of the Gauteng Division that the contracts and the bond granted by Kabini were invalid, but set aside the order requiring the Moores to register a bond in favour of the Bank and to repay to it what it had received from Brusson. The court did not have the power to make a contract between the Bank and the Moores.