CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 03/16

In the matter between:

ABSA BANK LIMITED Applicant

and

CHRISTINA MARTHA MOORE First Respondent

JACQUES MOORE Second Respondent

Neutral citation: *Absa Bank Limited v Moore and Another* [2016] ZACC 34

Coram: Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J and Musi AJ

Judgment: Cameron J (unanimous)

Heard on: 2 August 2016

Decided on: 21 October 2016

Summary: reinstatement of mortgage bonds cancelled as a result of a fraudulent scheme — validity of cancellation — unjustified enrichment claim against the mortgagor whose debt was extinguished in the course of the fraud — proprietary remedy for unjustified enrichment claim

bond debt validly discharged — mortgage bonds accessory to debt — lack of evidence to support enrichment claim

ORDER

On appeal from the Supreme Court of Appeal (dismissing an appeal from the High Court of South Africa, Gauteng Local Division, Johannesburg):

1. Leave to appeal is refused, with costs, including the costs of two counsel.

JUDGMENT

CAMERON J (Nkabinde ADCJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J and Musi AJ concurring):

[1] At issue are five mortgage bonds that the applicant, Absa Bank Limited (Bank) formerly held over a residential property in Vereeniging (property). The property is the home of the respondents, Mrs Christina Martha Moore and Mr Jacques Moore (Moores). The Bank seeks leave to appeal against a decision of the Supreme Court of Appeal (SCA) which declared the discharge of the five bonds, in the course of a scam, valid.[1] The Court dismissed the Bank's appeal against the decision of the South Gauteng High Court, Johannesburg (High Court) that granted the Moores an order restoring their home to them.[2]

[2] But the High Court imposed a condition on the restitution. This was that the Moores' original mortgage bonds in favour of the Bank, which existed at the time of the fraud, be reinstated. The SCA undid that condition. It held this part of the

[1] *Absa v Moore* [2015] ZASCA 171; 2016 (3) SA 97 (SCA) (Lewis JA; Ponnan, Pillay and Saldulker JJA and Van der Merwe AJA concurring) (SCA judgment).

[2] *Moore v Sheriff for the District of Vereeniging* [2014] ZAGPJHC 230 (26 September 2014). The High Court name was subsequently changed to Gauteng Local Division, Johannesburg.

High Court order incompetent and unjustified. In the High Court, the Bank opposed all the relief the Moores sought. It no longer does. Its sole grievance, and the only issue in its application for leave to appeal, is its quest to restore the High Court order re-imposing over the Moores' property its five original bonds.

Background and litigation history

[3] The SCA judgment sets out the facts lucidly.[3] It is not necessary to repeat them. At their centre is the Brusson scam, the brainchild of Mr Mike Brusson. Many homeowners and banks were taken in by it. The scam took this form: a fraudster preyed on property-owners in distress by offering them a chance, as the scam's brochure put it, to "make money without capital outlay or risk". A loan, on favourable terms, would be advanced to the home-owner. The home-owner's property would serve as security. Repayment would be through Brusson.

[4] The brochure sets out the mechanism through which this is achieved. A "Brusson partnership investor" purchases the home-owner's property, in an Offer to Purchase, but immediately sells it back to the home-owner, in a Deed of Sale. The "investor" and the home-owner complete and sign both documents, and in addition a Memorandum of Agreement. This records the respective obligations of Brusson, the "investor", and the homeowner.

[5] Crucially, the brochure explains, "the client retains ownership of his/her home". But that was the scam. It was a lie. The client did not retain ownership. She lost it. The instantaneous "resale" was bogus. Unsuspectingly, she had signed her ownership away. The "Deed of Sale" was a worthless piece of paper that would never take effect. Crucial to the scam was that the fraudsters had to obtain title. And its lucrative part was that the "investor" promptly took ownership of the property, and acquired a significant bank loan, presumably in cash, against the security it afforded.

[3] SCA judgment above n 1 at paras 1-14.

[6] Hundreds of home-owners suffered losses, as did banks countrywide. The amounts run into many tens of millions of rands. Sometimes the bank advancing money on the strength of the home-owner's property was the same as that of the home-owner. Sometimes it was a different bank. In each case, the cash proceeds of the newly registered bond seem to have been shared between Brusson and its confederate in the fraud, the "investor".

[7] Importantly, Brusson also provided funds to the home-owner. That, after all, was why she had approached Brusson and why she signed the documents placed before her – for a loan. If the loan wasn't forthcoming, the home-owner would cry foul and the scam would quickly unravel. The loan helped keep the home-owner sweet – at least for long enough to allow the swindlers to make off with the cash advance obtained from the bank on the security of the property.

[8] The "investor" (or Brusson) of course made no, or very few, payments on the new bond to the lending bank. The fraudsters had no interest in sustaining the bond repayments. In due course, the lending bank's debt recovery processes moved into action, and retook the home. At the point where the home was sold in execution, or where the duped homeowners were evicted, the swindle was made bare to home-owner and bank.

[9] That is what happened here. The Moores, financially distressed, saw a Brusson advertisement. Attracted by the offer of a low-exposure loan, they followed up. At the Brusson offices in Pretoria, they signed an "Offer to Purchase", a "Deed of Sale" and a "Memorandum of Agreement". The Moores say they did not read the brochure, but their evidence on what Brusson told them, which the Bank did not seek to contradict, is consonant with it. Their "investor" was Mr Sunnyboy Kabini. They never met him. Soon after, an amount of R157 651 was paid into their bank account. Cash. Their affidavits don't reveal who paid. Nor do the Moores attach their bank statements to reveal the source. The Moores, like the Bank, are sparse on details. But they believed the payment was from Brusson, and that it was veritably the loan they

had sought. They were told their repayments to Brusson were R6 907.03 per month, over three years.

[10] The deal seemed to have worked for them: they kept their house, had cash in hand, and had reduced debt instalments. But this didn't last. Their financial situation only got worse. Within six months of signing away their home, Mrs Moore applied under the National Credit Act[4] for debt review. Her newly incurred debt to Brusson was restructured. The Moores made some repayments under the debt review, though they seem to have paid very little to Brusson – barely more than R15 000.

[11] Brusson had little reason to care. By this stage of the fraud it had already raked in a good sum from the lending bank on the strength of the home-owner's property. Whatever Brusson received in "repayments" from the duped home-owner was extra profit on the scam. Mr Kabini, Brusson's confederate, had presumably benefitted, too. What exactly happened to the proceeds of the loan the Bank advanced to Mr Kabini is not clear, because the Bank has not provided the Court with the bond account statements that would reveal the cash flow. I return later to why this matters.

[12] A year after the agreements were signed, Brusson sent a lawyer's letter to the Moores, complaining that they hadn't paid their instalments on the bogus agreements. Cheeky. But it seems otherwise to have been content to let the scam run its course. Which it did. Inevitably, Mr Kabini, the "investor" in whose name the Moores' home was now registered, defaulted on his payments to the Bank. The Bank obtained a default judgment against him. When the Bank was about to sell the property in execution, the Moores, in alarm, sprang into action. They sought help from the Legal Resources Centre, which since then has represented them. The sale was interdicted. Proceedings were then instituted to recover their home, on the basis that they never intended to sell it.

[4] 34 of 2005, sections 86-7.

[13] Despite strenuous opposition from the Bank, the High Court granted the Moores an order declaring the Brusson agreements invalid, setting them aside and undoing their effects. More fully, the order was that (a) the fraudulent agreements the Moores had signed were invalid, unlawful and of no force and effect; (b) the Moores were entitled to restitution of their property, purportedly transferred to the fraudster; and (c) the mortgage bond registered by Mr Kabini in favour of the Bank, on the strength of the invalid transfer to him, was also invalid and set aside.

[14] The Bank appealed, unavailingly, to the SCA. That Court held that, since the Moores and other victims of the Brusson scam were hoodwinked as to what they were being led into, the agreements they signed were void. The transactions were invalid not for simulation, but for fraud.[5] And because the Moores had no genuine intention to transfer ownership of their home to Mr Kabini – having been assured they would retain ownership – the purported transfer under the agreements was ineffectual to convey valid title to him.[6] He, in turn, had no valid title on which to offer the Bank security. Hence the mortgage bond registered at his instance was also invalid.

[15] All this the Bank now accepts. It fights only the SCA's reversal of the condition the High Court imposed on the restitution of the property to the Moores – that their home become subject, once more, to the bonds previously registered with the Bank.

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[5] SCA judgment above n 1 at paras 26-7, affirming the analysis by Nicholls J in *Radebe v Sheriff for the District of Vereeniging* [2014] ZAGPJHC 228 (25 September 2014).

[6] Applying *Legator McKenna Inc v Shea* [2008] ZASCA 144; 2010 (1) SA 35 (SCA); and *Nedbank Ltd v Mendelow NNO* [2013] ZASCA 98; 2013 (6) SA 130 (SCA) at para 12:

> "It is trite that where registration of a transfer of immovable property is effected pursuant to fraud or a forged document, ownership of the property does not pass to the person in whose name the property is registered after the purported transfer. Our system of deeds registration is negative: it does not guarantee the title that appears in the deeds register. Registration is 'intended to protect the real rights of those persons in whose names such rights are registered in the Deeds Office'. And it is a source of information about those rights. But registration does not guarantee title, and if it is effected as a result of a forged power of attorney or of fraud, then the right apparently created is no right at all."

The Bank's arguments

[16] The Bank raises two distinct arguments as to why the bonds should be reinstated. First, as a matter of law, the Bank submits that the cancellation of the bonds was part of a greater fraudulent scheme, and therefore must be unwound. If, however, the cancellation was valid, then the Bank contends that the Moores have been enriched at its expense, and the appropriate remedy is to reinstate the security the Bank previously held over the Moores' home.

[17] The Bank contends that the cancellation of the Moores' existing mortgage bonds was an integral part of the fraud. The entire scheme – the Moores' sale to Mr Kabini, the registration of their property in his name, the cancellation of the Moores' old bonds and the registration of his new bond – was a fraud. Each part of the scheme was equally bad. And each part of it was integral to the rest of the scheme. The Moores' bonds had to be cancelled to induce the Bank to accept Mr Kabini's title to the property as security and for it to accept him as bond debtor in the place of the Moores.

[18] The Bank says the discharge of the Moores' debt to the Bank was invalid because it was part of the scheme and was tainted with fraud (*contra bonos mores*). Since the discharge of the existing bonds was invalid, the Moores' debt to the Bank remains intact. It follows that the High Court was right to order that their bonds should be reinstated.

[19] One cannot, the Bank urges, pick out any pure pieces from the tangle and preserve them intact. If the Moores are to have their house back, with the result that the Bank loses its security against Mr Kabini's void title, then the Bank must have back the debt the Moores owed it, secured as it previously was against their title. Fraud, the Bank says, unravels all.[7] Alternatively, if this argument fails, the Bank contends that this Court should develop the law of unjustified enrichment to afford the

[7] *Afrisure CC v Watson NO* [2008] ZASCA 89; 2009 (2) SA 127 (SCA) at para 38, quoting Lord Diplock in *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1982] 2 All ER 720 (HL) at 725H.

Bank a proprietary remedy. This argument depends, importantly, as we will see, on the premise that the Bank's money was used to discharge the Moores' debt.

[20] At the centre of the Bank's argument lies the complaint that the Moores have benefitted, at its expense, from an unmerited windfall. At the time the fraud was perpetrated, the Moores owed the Bank some R145 000. Now, after the fraud, they owe it nothing. Their bond debt was extinguished in the course of the fraud. In addition, soon after signing the dud documents, they received some R157 651 in cash. So, the Bank says, the Moores have done very well out of the fraud – but the Bank is left to suffer. It contends that it should at least get back the security it enjoyed over the Moores' property before the fraud.

[21] The Bank seeks restitutionary subrogation, which it says the English law affords a creditor in its position.[8] This remedy would recognise that, in releasing the Moores' bonds and accepting Mr Kabini as its secured creditor, the Bank did not take the risk that Mr Kabini's security would prove worthless. It advanced Mr Kabini the money to discharge the Moores' bond debt on the supposition that he had good title to offer instead. That not being so, it must be restored to the benefit of the security it had against the Moores' property.

The Moores' argument

[22] The Moores contend that the discharge of their bond debt to the Bank was valid and effectual. This was because their loan agreement with Brusson entailed that their bond debt would be discharged. And their loan agreement was itself effectual. The fact that the whole scheme was a fraud does not mean that the loan agreement, under which their bond debt was discharged, was automatically invalid. At worst, they say, Brusson's fraud gave them, as its victims, a choice: cancel the agreement or keep it going. They have never cancelled the agreement. So the discharge performed under it remains valid.

[8] See *Brocklesby v Temperance Permanent Building Society* [1895] AC 173 (HL); *Butler v Rice* [1910] 2 Ch 277; and *Ghana Commercial Bank v Chandiram* [1960] AC 732 (PC).

[23] The Moores meet the Bank's alternative argument with the contention that they have not been enriched. This is because they still run the risk that the trustees of the insolvent estates of the fraudsters, Brusson or Mr Kabini, could sue them for the benefit they received when their bond debt to the Bank was eliminated, as well as for the cash advance they received. Hence, the Moores say, the Bank has no enrichment claim against them.

Assessment

[24] The Bank's contention that the discharge of the debt the Moores owed it and that the cancellation of their bonds must be undone, so as to restore the Bank to its pre-fraud position, depends on the proposition that the agreements under which the discharge and cancellation occurred were vitiated by the Brusson fraud – and hence that payment of the Moores' debt was ineffective. Likewise, the Bank's alternative complaint that the Moores gained a windfall at its expense is predicated on the notion that the Moores' debt was discharged with the proceeds of the loan it extended to Mr Kabini.

[25] We can assess the Bank's submissions only on the information before us – and that information emerges rather patchily from the papers. Mr Kabini's mortgage bond was attached to the summons on which the Bank obtained default judgment against him for the amount outstanding on the bond he registered against the Moores' home. The Moores included it in their founding affidavits when they interdicted the sale of their home. The bond records that Mr Kabini "has become indebted" to the Bank, and that the capital amount of his debt is R480 000.

[26] In its answering affidavit to the Moores' interdict application, the Bank tells us little more. It says only that the Moores' mortgage bonds "were cancelled simultaneously with registration of transfer" to Mr Kabini. Further, "simultaneously with the transfer of the property into [Mr Kabini's] name, a mortgage bond was

registered over the property in favour of" the Bank. Finally, the Bank says, "the proceeds of the loan were paid" to Mr Kabini.

[27] This is conspicuously meagre. This from a large continent-wide institution, in whose electronic records these transactions must have been recorded, and whose attorneys must have handled both the registration of Mr Kabini's bond and the cancellation of the Moores'. The exact mechanisms and monetary pathways remain mysterious. How did Mr Kabini accomplish the fraud? And were the Bank's conveyancers party to it? We are left at a loss. The result is that we do not know precisely how the Moores' bond debt was discharged.

[28] For the Bank to say only that Mr Kabini was paid "the proceeds of the loan" leaves us in the dark. How much was Mr Kabini paid, and how? In cash? Into an account he held with the Bank? Into an account someone else held with the Bank? Or into an account he held with a different bank? Into an account someone else held with a different bank? Nor does it say how the Moores' bond debt was discharged. Did the Bank deduct it from the proceeds of the loan it advanced to Mr Kabini? If so, was this by a book write-off of the Moores' debt within the Bank's accounts systems once Mr Kabini was substituted as mortgagor? Or by some other means? Or was there an independent payment into the Moores' bond account (by Brusson, as the Moores contend)? And if so, who was the depositor? Mr Kabini or someone else?

[29] To one conversant with banking practice, these questions may seem ingenuous, and the answers obvious. But from an evidentiary point of view, we know, and can infer or assume, none of it. We can only go on what the Bank tells us in the evidence before us. And that is gapingly absent.

[30] The Bank at all events was taken in. It was duped into believing that Mr Kabini held good title to the Moores' property. Thinking he had purchased the property, when he had not, its loan to him was advanced on the supposition that he was able to give it security for the advance, when he could not.

[31] If, despite the holes in its evidence, we assume in favour of the Bank that it was Mr Kabini who paid the Moores' bond debt, he certainly acted, as the Bank contends, fraudulently in doing so. Does this mean that his payment of the Moores' bond debt was ineffectual?

[32] Generally, payment is a bilateral act – one that, in the absence of agreement to the contrary, requires the cooperation of payer (usually the debtor) and payee (the creditor). Equally generally, discharge of a debt requires an agreement[9] between the debtor (or party acting in the name of the true debtor) and creditor to that effect.[10] But even assuming that the debt-discharge agreement was between the Bank, as the Moores' creditor, and Mr Kabini, who, acting on their behalf, paid off their bond debt, it does not follow that the discharge was ineffectual because Mr Kabini was a crook.

[33] This is because, in contrast to some other systems,[11] our law is extraordinarily generous in how a debt may be paid. It allows payment of a debt without the consent – and even without the knowledge – of the debtor. This contrasts with the position of the creditor, whose knowledge of and assent to payment are required.[12] It is well

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[9] *Vereins-Und Westbank AG v Veren Investments* [2002] ZASCA 36; 2002 (4) SA 421 (SCA) (*Vereins*) at para 11; and *Burg Trailers SA (Pty) Ltd v Absa Bank Ltd* [2003] ZASCA 55; 2004 (1) SA 284 (SCA) at para 7. In *Vereins*, the payer was the debtor, and the question was whether the creditor / payee intended to receive payment. The SCA held it did.

[10] *Absa Bank Ltd v Lombard Insurance Company Ltd, Firstrand Bank Ltd v Lombard Insurance Company Ltd* [2012] ZASCA 139; 2012 (6) SA 569 (SCA) (*Lombard*) at para 18:

> "To discharge a debt it must be paid in the name of the true debtor. Generally, the discharge of a debt requires an agreement between the parties to that effect. . . . It requires the parties to be in agreement as to the debt, whether that of the payer or that of a third party, to be paid."

[11] According to the United States *Restatement (Second) of Contracts* (1981), a debt can be discharged by a stranger, but not against the will of the debtor. The debtor – in the *Restatement's* terminology, the obligor of the original duty – can disclaim the benefit of either a promise or performance and deprive it of its effect as discharge. *Restatement* § 278(2) provides that "[i]f an obligee accepts in satisfaction of the obligor's duty a performance offered by a third person, the duty is discharged, but an obligor who has not previously assented to the performance for his benefit may in a reasonable time after learning of it render the discharge inoperative from the beginning by disclaimer." The comments explain that the obligor, "like any intended beneficiary, has the power to disclaim the benefit of the third person's performance and deprive it of its effect as a discharge". That is consistent with § 306 (a beneficiary may disclaim a promise for his benefit within a reasonable time and render any duty to himself inoperative).

[12] *Volkskas Bank Bpk v Bankorp Bpk (t/a Trust Bank)* [1991] ZASCA 57; 1991 (3) SA 605 (A) at 612C-D explicitly rejected the proposition that "payment may be made without knowledge thereof by the creditor". It

established in both our common law jurisprudence and case law that a debt owing by A to B "may be extinguished by a payment made by a stranger to B in discharge of that debt even if A is unaware of such payment".[13] This proposition is supported by long-standing common law authority in the Roman-Dutch sources. These hold that a debt paid by a third party in the name of the debtor extinguishes the debt, even when payment is unauthorised, or even if the debtor opposes it.[14] The debtor is discharged, willy-nilly. This does not apply to the discharge of an obligation which by its nature can be properly performed only by the debtor in person.[15]

[34] In our law, even a deposit into an account of a fraudster is effectual to transfer ownership in the money. The victim is left with only a personal claim against the fraudster – and a concurrent claim against the fraudster's curators in the case of a sequestration.[16] Consistent with this position is also that a debt is paid when the creditor / payee receives the money from the bank, whether payment was authorised or not.[17]

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asserted instead that payment is a bilateral juristic act that, unless agreed otherwise, requires the cooperation of debtor (or payer) and creditor.

[13] *Info Plus v Scheelke* [1998] ZASCA 21; 1998 (3) SA 184 (SCA) at 192D.

[14] See *Commissioner for Inland Revenue v Visser* 1959 (1) SA 452 (A) (*Visser*) at 458A-B ("It is not essential to the validity of the payment, that it be made by the debtor, or any person authorised by him; it may be made by any person without such authority, or even in opposition to his orders, provided it is made in his name, and in his discharge, and the property is effectually transferred; it is a valid payment, it induces the extinction of the obligation, and the debtor is discharged even against his will."), citing Grotius 3.39.10 and Voet 46.3.1; and *Lombard* above n 11 at para 17 ("his power of vindicating stolen property from a third party possessing in good faith fails nevertheless when stolen money has been paid by a thief to a creditor of his who receives it in good faith, or has been counted out by way of price for a thing sold, and has been either used up or mixed with other money; for cash is regarded as used up by the latter process; moreover cash of another which has been used up in good faith by a creditor can neither be vindicated nor claimed in a personal action"), citing Voet 6.1.8.

[15] *Bousfield v The Divisional Council of Stutterheim* (1902) 19 SC 64 at 70-1, citing Voet 46.3.1.

[16] *Whitehead v Dumas* [2013] ZASCA 19; 2013 (3) SA 331 (SCA) at paras 13-5 and 23-4.

[17] *B&H Engineering v First National Bank* [1994] ZASCA 152; 1995 (2) SA 279 (A) (cheque payment from one bank to another effectual to extinguish debt, even though drawer did not authorise payment). *Standard Bank of SA Limited v Oneanate Investments (Pty) Ltd* [1997] ZASCA 94; 1998 (1) SA 811 (SCA) (*Oneanate*) seems to be contrary but is not. The question was whether the payer intended to make payment. The Court concluded that it did not. The case concerned book entries in two accounts held at the same bank. A bank reversed both a credit in one account, which was in overdraft, and a simultaneous debit in a second account held by it, because neither the debit from the one account nor the payment into the other had been authorised. The credited account holder argued that the credit could not be reversed because it discharged the account's then-outstanding balance. The Court rejected this argument on the factual basis that the particular discharge was conditional on recognition of the corresponding debt. It was "obvious from the conduct of the parties that the credit to the account . . . was conditional upon a recognition of the corresponding debit" by the debited account holder. Since the debited account holder denied authorising the debit, the bank was entitled to reverse the credit.

[35] Indeed, a thief who pays her own debts with stolen funds extinguishes those debts, provided the creditor who receives and accepts payment is innocent.[18] Thus, an employee who steals money and deposits it for her own benefit in various accounts that are in debit, effectually extinguishes those debts, although the amounts that remain in credit can be recovered by the victim.[19] Our law goes further. Provided the

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"Once such payment was not made by [the debited account holder] because it did not recognise the debit to its account it could not be said that [the debited account holder] had paid anything to [the credited account holder] and accordingly that [the latter] had paid the bank". The bank was accordingly entitled to reverse the credit on the basis that it was merely a book entry, dependent on authorisation. The Court distinguished *B&H Engineering* on the basis that in that case "there had been an actual payment by a bank to a third party" at a different bank, and not a mere book entry between two accounts at the same bank. *Oneanate* is accordingly authority regarding book entries made between two or more accounts held at the same bank. Our case law appears to regard credits and debits within one bank differently from payments between banks (see *Volkskas Bank Bpk* above n 12 at 610H-611G).

See also FR Malan & JT Pretorius "Credit Transfers in South African law (1)" (2007) 69 *THRHR* 379 at 602 where the authors state that "credit transfers in South African law are effected by means of payment orders by a customer to his bank pursuant to the general bank and customer agreement, or general mandate, in terms of which the bank is obliged to give effect to payment orders of the customer". This extract supports the position in *Oneanate*, namely that the bank was entitled to reverse the credit entry on the basis that there had been no authorisation (i.e. payment order) or recognition of the corresponding debit on the part of the debited account holder. Not permitting a reversal of the credit in these circumstances would seem to be contrary to the nature of payment instructions, which the authors describe as one of mandate. On transfers in general, the authors state:

> "The term 'credit transfer' is something of a misnomer. It involves neither 'funds' in the sense of notes and coins nor a physical transfer of funds. The transaction is executed by virtue of a series of mandates resulting in the crediting of the beneficiary's account. . . . In an economic sense a 'transfer' of value has been achieved but no transfer of any kind in the sense of the term used in the law of property or obligations.
>
> A debit transfer, on the other hand, is initiated by the creditor who instructs his bank to collect payment of a certain, and mostly recurring, debt from the debtor. A debit transfer is also referred to as a 'direct debiting' or a 'debit order' and it can be said that, in distinction to the credit transfer where the debtor 'pushes' the funds to the account of the creditor, the creditor in the case of a debit transfer 'pulls' the funds to his account. The authority of the debtor's bank to debit the account of the debtor rests on either his express, tacit or subsequent agreement. A debtor may also authorise his bank in advance to effect payment of debts by means of a debit transfer in which event the transaction between the debtor and his bank can be characterised a mandate. It would appear that any credit to the creditor's account has provisional effect only, subject to the debit transfer order being paid."

This analysis of transfers supports the proposition that a "credit to [an] account . . . [is] conditional upon a recognition of the corresponding debit" (*Oneanate* at 822G–H). Since this feature was lacking in *Oneanate* there was no payment. *Oneanate* seems to be authority for the proposition that, in order for a credit entry not to be reversed, there must have been a fulfilment of the condition attached to such credit, namely authorisation or recognition of the corresponding debit. Put differently, *Oneanate* does not permit cancellation or reversal of a credit entry once payment has been effected in cases where the debtor expressly requested the bank to facilitate the debit payment.

[18] *Lombard* above n 10 at para 18.

[19] Id at para 19.

payee / creditor is innocent, payment of another's debt, even by a thief, with stolen funds, operates to extinguish the debt.[20]

[36] In short, payment is a bilateral act requiring the cooperation of the payer and the payee – but not the debtor.[21] The payer is usually the debtor, but doesn't have to be. If A owes money to B, and C decides to pay off the debt, then C (payer) must intend to pay, and B (payee / creditor) must intend to accept the payment. But A (debtor) does not have to know of or consent to the payment.[22]

[37] The debtors here were the Moores. The practical effect of this doctrine is that if, despite the lack of evidence, we assume in favour of the Bank that Mr Kabini paid the Moores' bond debt, his payment was effective to discharge their debt, even if he did so in fraud of the Bank with funds the Bank provided.[23] Whether Mr Kabini paid the debt on the Moores' behalf, by a book deduction from his own freshly advanced bond loan, or by some other means, the Bank accepted it and the payment was valid. The Moores no longer owed the Bank anything.

[38] So does "fraud unravel all" here? Can the maxim help the Bank by undoing the debt discharge and the bond cancellation? The Moores insist that the fraud related to the documents they signed, and that their true agreement with Brusson was to receive a loan – not the transactions in the pieces of paper they signed. The Moores contend that in fact there was genuine consensus between them and Brusson that Brusson would advance them moneys by way of a loan – and that it was this agreement that was given effect to when the credit appeared in their account a few months later. The fact that the three written agreements did not actually specify a loan

[20] *Visser* above n 14.

[21] *Vereins* above n 9 and *Volkskas Bank Bpk* above n 12 must be understood in this light.

[22] *Visser* above n 14.

[23] Even if we imagine – what no one suggests – that the Moores colluded with Mr Kabini, and that he as part of a joint fraudulent scheme paid their bond debt, the discharge would still be valid under *Visser* id and *Lombard* above n 10 – the Bank would have received payment by means of an intentional payment from Mr Kabini. In this imaginary scenario, presumably, the Bank in its role as lender / creditor would of course have a direct claim against the Moores for fraud – but this does not touch the discharge of their debt.

agreement did not detract from the parties' consensus about a loan. Counsel for the Moores called the three documents the parties signed "pieces of paper".[24] In contracting for that loan, the Moores were themselves the victims of a fraud. This meant that they had a choice. A person induced to contract by the fraudulent representations of another may either stand by the contract or claim its rescission.[25] This means that the Moores' loan agreement with Brusson was voidable at their option. But it was not inherently without legal effect. Unless the Moores chose to rescind the agreement because of the fraud, Brusson remains bound by it.

[39] And Brusson cannot avoid being bound by relying on its own fraud to invalidate the loan agreement. Still less can a third party – the Bank – disregard the loan agreement because of Brusson's fraud. The maxim is not a flame-thrower, withering all within reach. Fraud unravels all directly within its compass, but only between victim and perpetrator, at the instance of the victim. Whether fraud unravels a contract depends on its victim, not the fraudster or third parties.

[40] Does the Brusson fraud unravel the cancellation of the Moores' bonds? The answer, equally, must be No. The bonds were accessory to the main debt they owed to the Bank.[26] The main obligation was validly cancelled. It follows with logical inevitability that the accessory obligation was discharged too.[27]

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[24] Even if there had been no "meeting of the minds" between Brusson and the Moores, it does not follow that no valid loan came into existence. Our law of contract has long recognised quasi-mutual assent as a source of contractual obligation: since it would be unrealistic for contractual liability to be based solely on the parties' subjective, and possibly hidden, intentions. So where dissensus is not readily apparent, the party who acts contrary to the apparent consensus may well be held bound. This protects a contracting party unable to dispute the other's denial of their "true" intention. See *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* [1992] ZASCA 56; 1992 (3) SA 234 (A) per Harms AJA at 239I-J: "the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention?"

[25] *Bowditch v Peel and Magill* 1921 AD 561 per Innes CJ at 572-3, citing Voet 4.3.3-4 and 4.3.7.

[26] For the accessorial principle see *Kilburn v Estate Kilburn* 1931 AD 501 at 506; *Thienhaus NO v Metje & Ziegler Ltd* 1965 (3) SA 25 (A) at 32F-G; and *Grobler v Oosthuizen* [2009] ZASCA 51; 2009 (5) SA 500 (SCA) at para 21.

[27] In *Nulliah v Harper* 1930 AD 141 at 151-2 and 155, the Appellate Division (the predecessor of the SCA) held that where immovable property is mortgaged, payment of the mortgage obliges the mortgagee *pari passu* to cancel the bond or cause it to be cancelled in the Deeds Registry.

[41] Given this conclusion, the Bank pressed an alternative argument. This laid emphasis on the fact that it was operating as a creditor in dual aspect – first, in the loan it had already advanced to the Moores and, second, in the new loan it was advancing to Mr Kabini. Its argument was that, if the Moores' bonds were effectually cancelled, they must nevertheless be reinstated in its favour, since the use of its money to discharge the debt those bonds secured was on condition that it retained security over the property.

[42] In other words, the Bank should be restored to its security under its agreement with the Moores because it provided the funds from which the Moores are now benefiting, and because it never intended to expose itself to debt, whether to the Moores or Mr Kabini, minus the security of the Moores' property. At no stage in any of these transactions did it assume the risk of an insolvency that would leave it without cover. It had security – the Moores' property. It lent Mr Kabini the money to pay the Moores' bond debt only on condition that it would continue to have a mortgage bond over that same property. It should therefore be granted a remedy. This should put it "in the shoes of the party who held the secured debt that its loan was used to discharge".[28]

[43] For three main reasons this argument, too, cannot be sustained. First, the argument depends on disaggregating the capacities in which the Bank acted in the transactions – first as lender to the Moores, and then as lender to Mr Kabini. But, if its premise is logically sustained, it creates an insuperable problem for the Bank,

[28] In addition to the cases the Bank invoked, the American *Restatement (Third) of Restitution and Unjust Enrichment* (2011) § 57 provides for subrogation as a remedy:

> "(1) If the defendant is unjustly enriched by a transaction in which property of the claimant is used to discharge an obligation of the defendant or a lien on the defendant's property, the claimant may obtain restitution
>
> (a) by succeeding to the rights of the obligee or lienor against the defendant or the defendant's property, as though such discharge had not occurred, and
>
> (b) by succeeding to the collateral rights of the defendant in the transaction concerned.
>
> (2) Recovery via subrogation may not exceed reimbursement to the claimant.
>
> (3) The remedy of subrogation may be qualified or withheld when necessary to avoid an inequitable result in the circumstances of a particular case."

since, if the first lender were in fact a different bank, on what terms and conditions would the Court be able to impose a new bond in its favour as second bank?[29] The problem is elided in the Moores' case, because the Bank is both first and second lender and, presumably, it seeks the reinstatement of the Moores' bonds on the terms in force when they were cancelled. But if that were not so, what would be the terms of the Moores' new repayment obligations? And, if there is no answer to that question, should the Court determine them? For the Bank's argument to succeed, the Court would have to create an entirely new contract between it, as "bank 2", and the Moores. But how? What would be the payments and the repayment period? At what interest rate? What forfeiture and cancellation and other provisions? Must the Court exercise a general equitable jurisdiction to determine these contractual terms itself? The whole matter is impossible.[30]

[44] All this shows vividly why the conclusion the SCA reached was right. It said that the Court "cannot make a contract between the Bank and the Moores".[31]

[45] Second, the argument supposes that the Moores were enriched at the Bank's expense. This is by no means clear. Were they enriched? And if so was it at the expense of the Bank? The answers to both questions seem to be No. The release of the Moores' property from the bonds over them was not gratuitous. It came at a cost: their new debt to Brusson.

[46] But, the Bank interposes, the Moores owe Brusson and Mr Kabini nothing. They were victims of their fraud. Brusson, Mr Kabini and their respective trustees in

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[29] This can be understood in this way:

> The Bank in its capacity as lender / creditor 1 contends that the discharge of the Moores' debt was invalid. But, in this capacity, what title does it have to complain about fraud between Kabini and the source from which he obtained the funds to discharge its debt (which happened to be the Bank, as lender / creditor 2)? By corollary, the Bank as lender/creditor to Mr Kabini asserts that the R480 000 loan it advanced to Mr Kabini was tainted by fraud. But how does this entitle it to claim that lender / creditor 1's discharge of debt was invalid?

[30] Gaius *Institutes* Book III. Law of Things at 193a (De Zulueta edition, Oxford University Press, London 1946).

[31] SCA judgment above n 1 at para 42.

insolvency have no claim against them. They have come away with no liabilities to anyone at all.

[47] The accuracy of this analysis depends on whether the Moores are vulnerable to a claim by the trustees of either Brusson's or Mr Kabini's insolvency (depending on who discharged their bond debt). The Bank's argument has some force. For, according to general principle, neither Brusson nor Mr Kabini can sue the Moores to reclaim what they were paid under the fraudulent contracts. The Moores, if they choose not to uphold the contract, could successfully raise the par delictum defence that a plaintiff who has rendered performance under a contract tainted with wrongdoing (turpitude) may not claim under it: *in pari delicto potior est conditio defendentis*.

[48] If Brusson is in liquidation and if Mr Kabini's estate has been sequestrated, their trustees may still be defeated by the Moores' par delictum defence. It would not be open to the trustees or liquidators of the estate of Mr Kabini or Brusson to argue that Brusson's or Mr Kabini's fraud should not be imputed to them. In principle, a thief's trustee in insolvency, whether curator or liquidator, cannot be in a better position than the thief.[32] Permitting the Kabini / Brusson trustees or liquidators to deny turpitude on their own part in response to a par delictum defence would place the trustees in a better position than the fraudster. But this is not the end of the enquiry. Overriding considerations of public policy[33] may conceivably entitle the trustees or liquidators to claim back from the Moores the benefit they gained in the fraud despite the par delictum defence. The SCA has recently permitted this.[34]

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[32] *Peterson NO v Claassen* [2005] ZAWCHC 44; 2006 (5) 191 (C) at para 37, approved in *Afrisure CC* above n 7 at para 41.

[33] According to the judgment of Stratford CJ in *Jajbhay v Cassim* 1939 AD 537 at 544-5.

[34] *Afrisure CC* above n 7 at para 47. *Afrisure CC* established that an amount transferred pursuant to an illegal contract can, in principle, be reclaimed. If a claimant seeking restitution has behaved dishonourably, the defendant can raise the par delictum rule as a defence. And this is so even against the liquidators of a company. They cannot claim that the defence finds no application on the basis that they themselves (as opposed to the company's directors or officers) did not act with turpitude. But the rule is not inflexible; it can be relaxed when public policy requires. In *Afrisure CC*, the SCA relaxed the par delictum rule and permitted the liquidators to recover, in the light of public policy considerations, notwithstanding the turpitude on the part of the claimant company.

[49] But even if the Moores were enriched, the Bank faced a further, perhaps more insuperable, hurdle. This was that it was not impoverished. The fraud cost it the Moores as its debtors. But in their stead it took Mr Kabini. Mr Kabini owes it the money it advanced to him – all R480 000 of it, plus interest as agreed. That was why the Bank obtained a default judgment against him for R500 067, plus further interest and costs. The Bank leaves us to assume that Mr Kabini is worth nothing. That seems reasonable. But the extant claim and the judgment enforcing it insuperably impede the Bank's assertion that the fraud impoverished it to the benefit of the Moores. What the Bank lost when the Moores ceased being its debtors it has gained in the claims it has against Mr Kabini.

[50] Alert to this dilemma, counsel for the Bank was driven during oral argument to abandon the Kabini default judgment, as well as any claims the Bank might have against Mr Kabini. Counsel for the Moores interjected that this was too late. And indeed so. Way too late. One induced to contract by fraud must choose between upholding the contract and rescinding it – and must do so within a reasonable time after knowledge of the deception.[35]

[51] Here the Bank knew from mid-2013, at the latest, that Mr Kabini had ensnared it and the Moores in the Brusson fraud. Despite knowing this, it held onto its default judgment against him – right through the High Court and appellate proceedings, until the morning of argument. That was understandable. The entire banking system was still assessing the repercussions of the fraud, and High Court judgments were gradually clarifying its impact.[36] But three years had passed. The Bank's omission to

[35] In *Bowditch* above n 25 at 572-3, Innes CJ related that one induced to contract by fraud "may either stand by the contract or claim a rescission". It follows, he said, that—

> "he must make his election between those two inconsistent remedies within a reasonable time after knowledge of the deception. And the choice of one necessarily involves the abandonment of the other. He cannot both approbate and reprobate".

[36] *Radebe* above n 5; *Barnard v Nedbank Limited* [2014] ZAGPPHC 723 (11 September 2014); *Leshoro v Nedbank Limited* [2014] ZAFSHC 69 (20 March 2014); *Mabuza v Nedbank Limited* [2014] ZAGPPHC 513 (26 June 2014); *Absa Bank v Boshoff* [2012] ZAECPEHC 58 (28 August 2012); *Cloete NO v Basson* [2010]

abandon the default judgment it obtained against Mr Kabini, for whatever reasons, leads inexorably to the inference that it made an election to uphold its contract with him. That means it cannot say it was impoverished and hence claim enrichment against the Moores.

[52] Third, the evidence. The evidence! Even if the Moores are immune from any claim by the fraudsters or their trustees, the Bank's threadbare patchwork of evidence disables its case. We simply don't know how the Moores' bond debt was discharged. The Moores say Brusson paid it from the loan it advanced to them. That is speculative. They attach no bond statements to show who paid their debt and how. The Bank for its part maintains that Mr Kabini paid the debt, and did so with its money. But its claim is equally speculative. If Mr Kabini paid the Moores' debt, why didn't the Bank show us the transactions? It could have done so. It could have attached Mr Kabini's bond account statements, as well as the Moores'. That would have saved us the mystery and the muddle.

[53] The Bank did not do so. We don't know why. It can't have been the press of litigation. The Moores lodged their urgent application to interdict the sale of their home in May 2013. They later supplemented this with a fuller founding affidavit in June 2013. The Bank's answering deposition was lodged much later, on 29 July 2013. That gave it five weeks to prepare its evidence. It offered almost none. The result is that its argument that it was Mr Kabini who paid the Moores' outstanding debt, through the loan he obtained from it, and not Brusson (from an undetermined source), is entirely speculative.

[54] Of course the Moores' claim that Brusson paid is equally speculative. But they are not trying to establish an enrichment claim. The Bank is. Its attempt must fail for want of any basis in the evidence to support it.[37]

ZAGPJHC 87 (4 October 2010); and *Ditshego v Brusson Finance (Pty) Limited* [2010] ZAFSHC 68 (22 July 2010).

[37] It doesn't seem unlikely that Mr Kabini used the R480 000 his fraud extracted from the Bank to pay R157 651 to the Moores, R145 000 to the Bank to settle the Moores' mortgage debt, and R168 000 to Brusson – but the

[55] It follows that the Bank's contention that an enrichment claim should be developed to restore it to the security it previously enjoyed over the Moores' property cannot, on these facts, be sustained. There may be circumstances in which it can. We need say nothing more now.

[56] Beneath these contentions lies the Bank's complaint that the Moores received an unmerited windfall at its expense. It is true that the Moores are better off now than before the fraud, and that the Bank, having lost its secured loan to the Moores, now has only an unsecured claim against Mr Kabini, who is probably good for nothing. But the Moores justly defend that this was not their fault. Their bond debt to the Bank was discharged because the Bank decided to take Mr Kabini, whom it thought now owned the property, as its debtor in their stead. It was the Bank that decided to grant a loan to Mr Kabini. We don't know what background checks it did, or could have done, on him. We know nothing about the conveyancing attorney whom it employed, and who accepted all the documents at face value. The discharge of the Moores' debt was not subject to a condition that Mr Kabini would prove a worthy debtor. And, on the facts before us, there is no basis to develop our law so as to impose one.

[57] In the way things have turned out, on what we have before us, the outcome is not unjust. The Bank, which enjoyed the institutional resources and power to protect itself against the fraudulent scheme, but didn't do so, has to suffer the loss its loan to Mr Kabini caused to it.

Moores are correct to maintain that "there is no evidence to support this postulate". Mrs Moore, in the same affidavit, rightly stated that "we have no idea" what happened between Mr Kabini and Brusson – or where the "cash came from that flowed from Brusson to the Moores and to [the Bank] in settlement of their mortgage debt" (at para 13 of the Moores' answering affidavit to Nedbank Limited's amicus curiae application, which this Court dismissed on 25 July 2016). Equally speculative is the Moores' assertion that Brusson, and not Mr Kabini, paid their mortgage debt to the Bank. This assumes, equally without evidence, that the Moores' bond was paid off by Brusson.

Leave to appeal

[58] In seeking leave to appeal to this Court, the Bank made great play of its property rights under section 25 of the Constitution. Those, it claimed, the SCA violated in setting aside the High Court's condition on restitution to the Moores. But when the written argument came in, there was nary a whisper about property rights. In fact, the Bank's contentions before this Court turned out to be largely fact-dependent: it accepted, rightly so, that each case would turn on its own facts.

[59] The Bank also contended in seeking leave that this case implicated the right to housing under section 26 of the Constitution, since if banks can't recover security lost through fraud, they will be reluctant to give bond loans to low-income applicants. This seems true, but as a basis for granting leave on its own it is entirely speculative. And, even if it weren't, the Bank's postulation regarding the future business practices of the banking industry does not by itself implicate a constitutional issue under section 26.

[60] Finally, the Bank's argument involved no new principle regarding payment or discharge of debts. And its evidence was lacking for this Court to develop the law to afford it a restitutionary remedy. In these circumstances, the jurisdiction of this Court is barely engaged. Leave to appeal must be refused.

Conclusion

[61] There is an order as follows:

1. Leave to appeal is refused, with costs, including the costs of two counsel.

For the Applicant:	G Marcus SC, K Hofmeyr and P Ramano instructed by Lowndes Dlamini
For the First and Second Respondents:	W Trengove SC, P M P Ngcongo, N Ferreira and H Cassim instructed by Legal Resources Centre