



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case no: 69/2023

In the matter between:

CUDUCAP (PTY) LTD

Appellant

and

PHILIPPUS JOHANNES DE BRUYN

Respondent

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

Coram: MOLEMELA P, MBATHA, MEYER AND GOOSEN JJA AND BLOEM AJA

Heard: 13 March 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time of hand-down is deemed to be 11h00 am on 29 April 2024.

Summary: Joinder – appeal court taking point of non-joinder *mero motu* - 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 will not prejudicially affect such 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.

ORDER

On appeal from: Western Cape Division of the High Court (Erasmus J, Saldanha and Slingers JJ concurring, sitting as court of appeal):

1. The appeal is upheld with costs, including those of two counsel where so employed.
2. The order of the full court of the Western Cape Division of the High Court granted on 13 September 2022 is set aside and replaced with the following order:
 - '(a) The appeal is upheld with costs, including those of two counsel where so employed.
 - (b) The order of the Western Cape Division of the High Court granted on 11 December 2020 is set aside and replaced with the following order:
 - (i) The matter is remitted to the High Court to consider which third parties who may have a direct and substantial interest in the litigation should be joined in the suit.
 - (ii) The costs of the application are reserved until the final determination of the application.'

JUDGMENT

Meyer JA (Molemela P and Mbatha and Goosen JJA and Bloem AJA concurring):

[1] The appellant, Cuducap (Pty) Ltd (Cuducap), appeals an order of the full court of the Western Cape Division of the High Court, per Erasmus J with Saldanha and Slingers JJ concurring, (the full court), setting aside an eviction order granted by the Western Cape Division of the High Court, per Magona AJ (the high court), against the respondent, Mr Philippus Johannes de Bruyn (Mr de Bruyn), from a residential immovable property situated at 11 Rotterdam Street, Goodwood, Western Cape (the

property), and replacing it with an order that was not claimed. The appeal is with special leave of this Court.

[2] First, the pertinent background facts, which are largely common cause. 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. In addition, a fixed term lease agreement is concluded 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).

[3] 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.

[4] On 1 June 2013, an instalment sale agreement was concluded between Cuducap and Mr de Bruyn, in terms of which the property was resold to Mr de Bruyn for the total amount of R1 528 500.77, payable over five years as follows: (a) an initial instalment of R750 147.22 payable on or before 1 June 2013. This initial instalment was calculated as the balance of the purchase price due by Cuducap to Mr de Bruyn, whereafter it was divided by 59 months to determine the 'rental' of R12 714,36 payable by Mr de Bruyn to Cuducap; (b) 59 monthly instalments of R2 500 also payable as 'rental' by Mr de Bruyn to Cuducap from 1 June 2013, totaling an amount of R147 000; and (c) a final payment of R630 853.55 payable by Mr de Bruyn to Cuducap on 1 April 2018. On 1 June 2013, a lease agreement was also concluded between Cuducap and Mr de Bruyn. In terms thereof: (a) Cuducap leased the property to Mr de Bruyn for a period of 59 months from 1 June 2013 to 1 April 2018; and (b) Mr de Bruyn was obliged to pay monthly rental in the amount of R12 714.36 plus an additional monthly rental in the amount of R2 500.

[5] 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.

[6] 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, in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act) (the eviction application). Mr de Bruyn opposed the eviction application, essentially on the grounds that the three agreements are interrelated and constitute a transaction that is *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.¹ Cuducap, on the other hand, argued that there are 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'.

[7] The high court held that the instalment sale agreement and the lease agreement were 'contrary to public policy', 'void *ab initio*', and therefore 'unenforceable'. It held that the deed of sale 'was an independent agreement', valid, and that Mr de Bruyn was an unlawful occupier who occupied the property without the consent of Cuducap. It, therefore, granted the following order on 11 December 2020:

- '1. The application succeeds.
2. The First Respondent [Mr de Bruyn], and all other unlawful occupiers who occupy the property, situated at 11 Rotterdam Street Goodwood, Western Cape (hereinafter "the property") and who purport to hold title thereto by virtue of the First Respondent's unlawful occupation, be evicted from the property from 31 January 2021.
3. In the event of the First Respondent, and all those unlawful occupiers holding title under him, failing and/or refusing to vacate the property on the date so ordered, the Sheriff or his lawfully appointed Deputy is hereby authorized to enter upon the property and evict the First Respondent, along with all those unlawful occupiers holding title under him from 01 February 2021;
4. The First Respondent is to pay the costs of this application.' (The eviction order.)

[8] 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 held that '[i]f 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 succeeds insofar as the court *a quo* did not declare the sale agreement unlawful as well'. On 13 September 2022, it made the following order:

- '1. The appeal succeeds insofar as it relates to the two issues.

¹ *Absa v Moore* [2015] ZASCA 171; 2016 (3) SA 97 (SCA); *Absa Bank Ltd v Moore and Another* [2016] ZACC 34; 2017 (2) BCLR 131(CC); 2017 (1) SA 255 (CC); *Morley v Lambrechts* (A526/2013) ZAWCHC 124 (21 August 2014).

2. The court a quo's order, insofar as it relates to the main sale agreement, is hereby set aside and substituted with the following order:
 - a. It is declared that the transaction constituted by the deeds of sale executed by the appellant [Mr de Bruyn] and the respondent [Cuducap] on either 1 June 2013 or another date prior to that, is contrary to public policy and the agreement and its component parts is thus void *ab initio*.
 - b. It is declared that the deed of transfer (T23763/13) in terms of which title of Erf 1122. Goodwood, City of Cape Town was conveyed from appellant, Philippus Johannes De Bruyn (ID Number 601028 5019 082) to respondent, Cuducap (Pty) Ltd (Registration no 2012/198147/07), shall be cancelled by the Registrar, The Registrar of Deeds, Cape Town is directed to give effect to this declaration in the manner and with the effect contemplated in terms of s 6 of the Deeds of Registries Act, 47 of 1937. (The right of the Registrar of Deeds to require confirmation of this Order in the sense contemplated by s 97(2) of the said Act, if he considers it meet, is reserved).
 - c. It is declared that the mortgage bond in favour of Standard Bank in terms of which a mortgage bond was registered over Erf 1122, Goodwood, Cape Town shall be cancelled and the Registrar of Deeds, Cape Town is directed to give effect to this declaration in the manner and with the effect contemplated in terms of s 6 of the Deeds of Registries Act, 47 of 1937. (The right of the Registrar of Deeds to require confirmation of this Order in the sense contemplated by s 97(2) of the said Act, if he considers it meet, is reserved).
3. The respondent is to pay the costs of this application and the appeal.'

[9] It was not competent for the full court to make that order. It 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. The law on joinder is well settled. 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 will 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.²

² *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Ltd* [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) para 92; *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 559, also cited in *Transvaal Agricultural Union v Minister of Agricultural and Land Affairs and Others* [2005] ZASCA 12; 2005 (4) SA 212 (SCA) para 64; *Watson NO v Ngonyama and Another* [2021] ZASCA 74; [2021] 3 All SA 412 (SCA); 2021 (5) SA 559 (SCA) para 51.

[10] Mr de Bruyn alleged that the three agreements are interrelated, constitute a transaction that is *contra bonos mores*, unlawful, invalid, and that the property should be re-transferred to him. Given the high court's stance that the instalment sale agreement was 'contrary to public policy', 'void *ab initio*', and therefore unenforceable, the high court should not have adjudicated the application without first ordering the joinder of Standard Bank and any third party who may have a direct and substantial interest in the litigation. This is because the instalment sale agreement was the underlying *causa* for the mortgage bond that was registered in favour of Standard Bank. I am not suggesting that a mortgagee should be joined in every application for the eviction of an unlawful occupier under the PIE Act. However, given the specific facts of this matter, there can be no doubt that Standard Bank as the mortgagee, has a direct and substantial interest which may 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 does not prejudicially affect that party's interest.³ Given the circumstances of this case, the appropriate order is to remit the matter to the court of first instance so that it can take appropriate steps to safeguard the interests of parties who may have a direct and substantial interest in the litigation.

[11] In the result the following order is made:

1. The appeal is upheld with costs, including those of two counsel where so employed.
2. The order of the Full Court of the Western Cape Division of the High Court granted on 13 September 2022 is set aside and replaced with the following order:
 - '(a) The appeal is upheld with costs, including those of two counsel where so employed.
 - (b) The order of the Western Cape Division of the High Court granted on 11 December 2020 is set aside and replaced with the following order:
 - (i) The matter is remitted to the High Court to consider which third parties who may have a direct and substantial interest in the litigation should be joined in the suit.

³ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 559.

(ii) The costs of the application are reserved until the final determination of the application.'

P A MEYER
JUDGE OF APPEAL

Appearances

For appellant:	A Kantor SC with L L Zazeraj
Instructed by:	VWH Attorneys c/o Van Zyl Attorneys, Cape Town Symington & De Kok, Bloemfontein
For respondent:	J T Benadé
Instructed by:	Jacques van Niekerk Attorneys, Somerset West JL Jordaan, Bloemfontein