Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: A 526/2013

Before: The Hon. Mr Justice Binns-Ward
The Hon. Mrs Justice Fortuin
The Hon. Mr Justice Henney

Date of hearing: 30 July 2014
Date of judgment: 21 August 2014

In the matter between:

JOHN MORLEY Appellant

And

ENGELA JOHANNA LAMBRECHTS Respondent

JUDGMENT

BINNS-WARD J:

[1] On 10 December 2009, the appellant, then a sixty-two year old retired businessman, entered into two deeds of contract with the respondent, a seventy-two year old widow who is of meagre means and confined to a wheelchair. Both agreements concerned Erf 6112, Bellville, a residential property that has been the respondent's home for many years. The respondent's father had built the dwelling house there. The respondent was the registered owner of the property, which was unencumbered. She had come into it by inheritance. The municipal valuation of the property was R670 000. Shortly before the deeds of contract were executed, an estate agent had appraised the market value of the property at R800 000.

[2] The two deeds of contract were interrelated. The first was a deed of sale in terms of which the respondent sold the property to the appellant for R310 500. It contained a clause by which the respondent, as seller, '*irrevocably authorise*[d] *the transferring attorneys to pay* [to the appellant, as purchaser] *from the proceeds of the purchase price*' an amount of R35 000 '*as a deposit and nine months' rental in terms of the Agreement of Lease herein incorporated by reference*'. Its provisions also authorised the conveyancing attorneys to make various other deductions from the proceeds, with the effect that that the seller might look forward to a receipt of net proceeds of only about R200 000 on the sale of the property. The second deed of contract was the aforementioned '*Agreement of Lease*'. In terms of the contract of lease the respondent undertook to rent the property for a period of one year from the date of transfer into the appellant's name in terms of the deed of sale. The deed of lease provided that the rent would be R3 500 per month and that the respondent would pay '*9 (nine) months' rental in advance from the proceeds of any sale and the Rent monthly in advance on or before the 2nd (Second) business day of every month thereafter*'. A 'non-refundable' deposit of R3 500 was also payable by the respondent. The second deed granted the respondent the option to (re)purchase the property for R357 075. The option could be exercised on at least three months' notice in writing to be given at least three months prior to the expiry of the lease.

[3] There were no costs in the transaction for the purchaser. The conveyancing fees and transfer duties fell to be paid by the seller, instead of the purchaser as is customary. They were stipulated to be in the sum of R30 000, which was way above the amount that would ordinarily have been payable having regard to the applicable conveyancing fee guidelines and the fact that a property transfer at a consideration of R310 500, assuming the price represented fair market value, would not be dutiable. The seller would also pay to the purchaser an option fee calculated at five per cent of the property's appraised market value (R800 000), which equated to the commission that the purchaser paid to Property Rescue which had brokered the transaction. The option fee was payable from the proceeds of the sale upon date of transfer. It was one of the aforementioned deductions. The seller would also pay for the insurance of the property for a year after its transfer to the purchaser.

[4] Why would the respondent have entered into such a transaction on the extraordinarily disadvantageous terms described in the preceding paragraphs? The answer is to be found in the evidence.

[5] The respondent's fifty-two year old son (cited as the fourth respondent in the proceedings in the court a quo) had become unemployed and over-indebted. He was under debt counselling in terms of the National Credit Act 34 of 2005. He was in desperate need of funds, but, unsurprisingly, unable to access further credit by virtue of his over-indebted position. He came across an advertisement in *Die Burger* newspaper, which he thought might provide him a way to get the money he needed.

[6] The advertisement had been placed by the Vrey brothers. They were cited in the proceedings at first instance as the first and second respondents. They operated under the business name 'Property Rescue'. Their business operation was targeted at fixed property owners who needed to raise cash, but who, despite having unencumbered equity in their property, were unable, by reason of straitened circumstances, to borrow from mainstream lenders.

[7] The scheme of the operation was that the first and second respondents would find a buyer for the property of a prospective borrower that was willing to transact on the basis reflected in the deeds of contract entered into by the respondent in this matter. The property would be 'sold' well below its market value. The evident purpose of the sale was to generate the funds that would finance the loan required and cover the costs entailed, including the exorbitant conveyancing charges, the pre-paid rental in terms of the linked lease agreement and the brokerage commission charged by Property Rescue (which in this case amounted to nearly 13 per cent of the sale price). The seller would remain on in the property as a tenant for a fixed period with the option of repurchasing it within that period at a premium over the selling price. The advantage to the purchaser was that he was guaranteed a return on investment of at least the amount equivalent to the premium in the option price (in this case just over 15%) plus the rentals obtained in terms of the lease (calculated at 12% per annum of the option price). If the option were not exercised, the purchaser would derive the even greater advantage of obtaining the benefit of the considerable difference between the purchase price and the property's market value plus the rentals obtained in terms of the lease. In the current case, at 842/310, that would represent a likely return on investment for the purchaser of over 270% within a year. Having regard to the financial status of the sellers in such cases,

the likelihood of their being able to exercise the option was self-evidently remote.[1] The supposed benefit to the seller was that the net proceeds of the sale afforded him access to funds that he was unable to borrow from high street lenders. If the seller exercised the option and repurchased the property, the end result would thus be closely analogous to that which would have pertained had he borrowed the funds in terms of a short-term mortgage loan at very high interest and transaction costs.

[8] Objectively, it is patent that only the ill-advised and desperate would be likely to enter into such a transaction as seller and borrower. Objectively, it is equally apparent that the purchaser and effective lender in the transaction expected to probably obtain the property free of any option rights at a fraction of its market value. Why else would he agree to pay a commission of five per cent of the property's *market value* to the broker? The commission in fact exceeded the sum of the difference between the selling price and the price at which it notionally could be repurchased in terms of the option.

[9] Pursuant to the advertisement he had seen in *Die Burger*, the fourth respondent met with the first respondent, Dewald Vrey. The fourth respondent's own property was heavily mortgaged and thus not amenable to be turned to account under the scheme. Vrey and the fourth respondent agreed, however, that the respondent's property, unencumbered as it was, lent itself for use in terms of Property Rescue's aforementioned scheme. The fourth respondent wanted to borrow R200 000. He approached his mother and asked her if she would be willing for her property to be used as security for the loan he required. He assured her that he would be able to repay the amount from the proceeds of his retirement savings, which he expected to be able to realise in three years' time when he attained the qualifying age of 55. The respondent agreed to her son's request. The fourth respondent then worked with Dewald Vrey to implement the transaction.

[10] The Vrey brothers used a *pro forma* document for the purposes of establishing the framework or structure of the transactions executed under their scheme. The document was labelled in the evidence as a 'term document' (or '*werksblad*'). It was used to explain the transaction to the clients; in this case the fourth respondent,

[1] The appellant had been involved in five such transactions through the offices of Property Rescue and an attorney, Mr Arno Schipper of C&A Friedlander Inc., and the seller had not exercised the option to repurchase in a single one of them.

representing the seller, and the appellant, as the purchaser. Its content tells a story. The term document completed in respect of the transaction concerning the respondent's property is set out below. It was partly in Afrikaans. I have translated the Afrikaans content into English for the reader's convenience.

PROPERTY RESCUE FOR:

Property Value	R800 000.00
Bond	
Rates & taxes	R3,000.00
9 month's rent+ deposit	R35,000.00
Funds needed	R200,000.00
Insurance	R2,500.00
TOTAL	R240,500.00

PURCHASE PRICE:

Funds required:	R240,500.00
plus Facility Fee	R40,000.00
plus Registration fee	R30,000.00
TOTAL PURCHASE PRICE	**R310,500.00**

BUY BACK PRICE: 12 months

Total Purchase price	R310,500.00
plus 15%	R46,575.00
TOTAL BUY BACK PRICE	**R357,075.00**

Dewald 076 380 8269

LEASE	12 mths	
Monthly rental	R3 500.00	

(1% of buy back price)

AFFORDABILITY:

Income Husband	
Income Wife	
Total earnings	
Estimated mortgage	

Owner(s) ……..

Physical Adress 4 Martin str

Chrismar

Postal address …….

Postal code ……..

Home Tel: ……..

Cell phone Numbers

Rental will be adjusted as and when in line with the applicable repo-rate as determined by the Reserve Bank

Would you like a broker to visit you in respect of cover for the contingency of death before the buy-back occurs.

YES ☐ NO

OWNER ……

OWNER …….

Date ……

HSE 160 m² x R3500pm² *560,000*

Plot 640 m² *SAT* *140,000*

700,000

DEAL!

(The italicised script at the bottom right of the document represents notes that the appellant had made in handwriting on his copy of the term sheet.) The term sheet demonstrates how the price and the option price were determined. The figures had nothing to do with the market and everything to do with the seller's borrowing requirement and the costs associated with satisfying it, including a minimum 15% nominal return for the investor/purchaser.

[11] The appellant was also introduced to the transaction consequent upon an approach by the Vrey brothers. He had previously been involved in a similar transaction with them and the attorney they used, one Arno Schipper. The appellant testified that when he was first introduced to the scheme he had had reservations about its 'legitimacy' and had sought and received assurances that it was above board from both Gert Vrey and Schipper. He appeared, however, to regret having made this disclosure and was notably coy under cross-examination in explaining just what it was about the nature of the transactions that had given rise to any feelings of unease.

[12] The deeds of contract were executed at or near the offices of C&A Friedlander Inc. They were the conveyancing attorneys appointed in terms of the deed of sale and also the agents to whom the rentals had to be paid in terms of the agreement of lease. The matter was attended to by Schipper, who was a director of C&A Friedlander at the time.[2] The respondent was brought to the premises for the purpose of signing the contract documentation by her son. Her son went into the attorneys' offices, where he was taken through the documents by Schipper. The second respondent, Gert Vrey, was also present. Schipper, however, left the meeting to attend to other business when the cession of proceeds and related contract documentation to be described below were dealt with. Any explanation given to the fourth respondent in connection with that documentation, which went to the provision of 'bridging finance', was given only by Gert Vrey. The contract documentation was then taken by Gert Vrey and the fourth respondent to the respondent for signature. She had remained waiting in the vehicle in the car park outside the attorneys' offices because she had been unable to go into the building because of her physical disability.

[13] The respondent maintained that she had not appreciated the nature of the documents she signed. She testified that she would never have agreed to sell her

[2] The evidence suggests that Schipper subsequently became a consultant at the firm.

property because it was the only home she had, and she did not have the means either to repurchase it in terms of the option, or acquire an alternative property in which to live. She understood that she was merely providing the property as security for a loan to her son, which he would be in a position to repay from his retirement fund payment. Gert Vrey testified that he stood by the car window next to the respondent and took her through the content of the documentation that she signed. The respondent denied that she was given any explanation of the import of the documents that she signed. She testified that Vrey said she could sign because everything had been gone through in the attorneys' office and found to be 'in order'. She said that Vrey merely pointed out on each page where she should place her signature or initials. She did not have her spectacles with her and claimed that she would in any event have had difficulty reading the documents.

[14] The trial judge was justifiably unimpressed with the quality of Vrey's evidence, but even if one were to accept his version of events it would appear that the respondent had considerable difficulty in understanding the transaction. This much is evident, for example, from his description of her repeated questioning of how it could be that she should become a tenant in her own property. It was also evident from his evidence under cross-examination that Gert Very did not understand material provisions of the contracts himself, which would have limited his ability to properly explain them.

[15] The documentation signed by the respondent while sitting in the parked motor vehicle included not only the two deeds of contract already described, but also a deed of cession in terms of which she ceded the entire net proceeds of the sale to Propfund (the trading name of an entity known as Capcon Finance (Pty) Ltd, a registered credit provider in terms of the National Credit Act, of which attorney Schipper appears to have been the sole director and shareholder) and an acknowledgment of debt in terms of which the respondent acknowledged herself to be indebted to Propfund in the sum of R88 485,60 plus R130,20 per day from 28 days after the making of two payments referred to in the deed of cession to date of payment of the purchase price to the respondent. It is evident on a reading of the cession together with the acknowledgment of debt that the cession was to provide security for an immediate advance (described as 'bridging finance') to be made by Propfund to the respondent's son in the sum of R80 000, plus commission thereon in the sum of R4000 to be paid to Property Rescue (the Vrey brothers). The sum of R80 000 was an advance towards the R200 000 loan

requirement of the respondent's son that had been the foundation for the entire transaction. An amount totalling R178 598 was subsequently paid to the fourth respondent in the implementation of the transaction. Various further 'bridging finance' advances were made to the fourth respondent at his request and in the discretion of Schipper. The difference between the total amount of R178 598 actually paid to the fourth respondent and the original R200 000 borrowing requirement was accounted for by the cost of the 'bridging finance', in respect of which Propfund appears to have charged interest at the rate of about 35 per cent per annum. It was largely advanced by way of a loan by Propfund in advance of the transfer of the property in terms of the sale agreement between the respondent and the appellant. It is clear that Propfund funded the loan from the money paid in by the appellant soon after the execution of the deeds of contract in lieu of providing the payment guarantee contemplated in terms of the deed of sale. Propfund paid interest to the appellant on the funds deposited by the appellant into the trust account of C&A Friedlander until the transfer of the property. Schipper testified that the appellant had probably been paid interest at the prime lending rate.

[16] The appellant came to the attorneys' offices sometime later on the same day that the contract documentation had been signed by the respondent. He countersigned the deeds of sale and lease. He said that he was unaware of the deed of cession and of the arrangement whereby funds were advanced to the fourth respondent. He also claimed to have been unaware of the investment of the funds deposited by him for the settlement of the purchase price with Propfund. He said he had understood that his advance payment would be held in an interest bearing account in terms of s 78(2A) of the Attorneys Act 53 of 1979. The property was transferred into the appellant's name on 5 March 2010.

[17] The respondent failed to pay any monthly rental in terms of the lease agreement after the expiry of the nine-month pre-paid rental lease period and remained on in the property, despite demands by the appellant that she vacate it. The appellant sold the property to a third party for R780 000, after the option provided to the respondent in terms of the agreement of lease had lapsed. He instituted eviction proceedings against the respondent so as to be able to give vacant possession of the property to the third party purchaser. The respondent was made aware that the property had been sold by

the appellant when the third party purchaser visited the property and informed her that he had bought it.

[18] The respondent instituted proceedings on motion in October 2011 in terms of which she claimed an interim interdict prohibiting the alienation of the property by the appellant pending the final determination of an action to be instituted by her for an order declaring (i) that the sale agreement concluded between herself and the appellant be legally cancelled and (ii) that she was not obliged to make restitution to the appellant in respect of the amounts paid by him in terms of the sale agreement. She alleged that she had entered into the deeds of contract under a misguided apprehension as to their import. This was due to the second respondent and/or her son having misrepresented the position to her. She alleged that the appellant must have appreciated that she had been misinformed to enter into such a disadvantageous contractual arrangement and thus had been under a duty to make certain that she had been properly informed of the implications of the contracts. (The notice of motion was later amended to include a prayer for an order to achieve the cancellation of the registration of the transfer of the property with the appellant's name, alternatively, one directing the appellant and C&A Friedlander to effect transfer of the property back into the name of the respondent. There is no indication on the record that notice of the amended relief was given to the Registrar of Deeds in terms of s 97 of the Deeds Registries Act.)

[19] The appellant opposed the application. He averred that he knew nothing about the respondent's understanding of the contracts when she had signed them. He maintained he was entitled to accept that she was an adult person of full capacity who was exercising her freedom to contract. He averred that he had reasonably inferred that by her signature thereto the respondent had been content to bind herself to the terms of the deeds of contract. She was in any event not entitled to rely on any misrepresentation made by a third party such as Schipper or the second respondent for the purpose of cancelling the contract entered into with him; cf. *Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 (4) SA 72 (SCA) and *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) at 479G-H, amongst others. He also asserted that he had had no knowledge that the object of the transaction had been to fund a loan to the fourth respondent.

[20] An order was taken by agreement between the parties that the application should be referred for trial, with the affidavits to stand as pleadings. The respondent was given

leave to institute a conditional claim in reconvention, in terms of which, contingent upon the respondent succeeding with the first part of her claim for declaratory relief, he claimed repayment of the purchase price plus interest.

[21] The trial took place before Weinkove AJ. He found for the respondent and made an order setting aside the sale agreement 'on the grounds that it [was] void *ab initio* alternatively voidable'. He declared that the respondent was not obliged to make restitution to the appellant and directed that the registration of transfer of the property into the appellant's name be cancelled, alternatively that the appellant and C&A Friedlander attorneys should, at their cost, effect transfer of the property back into the respondent's name. He dismissed the conditional claim in reconvention. The appellant's application for leave to appeal was refused by the court a quo, but leave to appeal to the Full Court was subsequently granted by the Supreme Court of Appeal in terms of s 20(4)(b) of the Supreme Court Act 59 of 1959 read with s 52(1) of the Superior Courts Act 10 of 2013.

[22] The court a quo found that the respondent had been 'an honest witness, albeit naïve and of limited intelligence'. It found that she had signed the documentation presented to her by Gert Vrey in the car park on 10 December 2009 in the belief that it recorded her agreement to pledge the property as security for the repayment of a loan to be advanced to her son. Weinkove AJ held that if the respondent had understood what she was called upon to sign she would have appreciated that it would be 'suicidal' to enter into the agreements, as she did not have the means to exercise the option to repurchase the property and she had nowhere else to live. I do not think those findings can be faulted. A factor which the learned acting judge did not mention, but which affords support for the findings he made, was the respondent's understanding that her son would come into the retirement savings, from which she understood the loan was to be repaid, only in three years' time, in other words well beyond the expiry of the option. That, of course, still leaves for consideration the effect of the *caveat subscriptor* rule in the circumstances.

[23] The court a quo also held that despite its ostensible components of sale, lease, and option to repurchase, the transaction was in substance a money lending transaction, with the property used as security. There is much to be said for that view inasmuch as the object of the transaction was concerned, as distinct from the nominal character of its individual contractual components. It is supported by a number of characteristics of

the transaction. It was a transaction that was confessedly put together by the Vrey brothers, apparently with the co-operation of Mr Schipper, wearing his 'bridging finance' company director's hat, for persons who were not able to borrow money conventionally. As the judge a quo noted with reference to the evidence of Dewald Vrey, the advertisements placed by Property Rescue were directed at persons who wanted to borrow money, not at persons who wanted to sell their property. Indeed, the advertised business philosophy of Property Rescue was to assist financially distressed persons not to lose their fixed properties. The 'purchase price' was not determined as a purchase price ordinarily would be between buyer and seller, that is on the basis of a reconciliation of their respective estimations of the market value of the subject matter; it was determined instead with reference to the sum of money required by one of the parties as a loan and the costs involved in in providing it. The option price was calculated to allow the 'purchaser' a return on capital outlay if the loan were repaid, and not with reference to the value of the property. The very provision of the option, in the context of an arrangement that would give the 'seller' continued possession of the *res vendita*, was more consistent with a lending arrangement than a sale. The 'rental' was also not a function of the market for accommodation of the nature provided by the property, but fixed instead at one per cent of the option price per month. The contemporaneously executed cession of proceeds and acknowledgement of debt served to confirm that the object of the transaction was to meet the 'seller's' borrowing requirement.

[24] There is also no doubt that the appellant appreciated that this was no ordinary agreement of purchase and sale that he was entering into. His evidence confirmed that he entered into the contracts on the basis of the information presented in the 'term document' quoted above.[3] It was that appreciation that made him doubt the propriety of the transaction enough to seek assurance from attorney Schipper that it was above board. The obvious basis for the doubt was the self-evident proposition that any person desperate enough to access the liquidity in their fixed property in terms of the transaction structure put together by Property Rescue was unlikely to be able to raise the money for the option price, with the likely result that the appellant would ultimately obtain the property at a fraction of its market value appreciating that no-one truly wishing to sell their property would do so at the 'price' he was paying and, to boot, bear

[3] At para [10].

the transfer costs and pay an exorbitant fee for an option to repurchase it within nine months. The premise for the transaction, namely the need to borrow money, was clearly apparent in the 'term document'. That the appellant appreciated that he stood to benefit grossly from the exploitative transaction is also reflected in his willingness to pay a commission to Property Rescue calculated at five per cent of the market value of the property. (The commission was disguised from the 'seller' in the terms of the contract, being described therein as an authorised deduction from the proceeds of the 'sale' due to the purchaser. In terms of the deed of sale the 'seller' irrevocably authorised C&A Friedlander to pay the amount of R40 000 to the 'purchaser' 'as compensation for extending the Seller an option to re-purchase the property'. It is common ground that the deduction was not paid by C&A Friedlander to the 'purchaser', but instead to Property Rescue. It is clear that the appellant, notwithstanding his professed reliance, when it suited his purposes, on the strict tenor of the deeds of agreement, did not expect anything different.)

[25] The evident object of the transaction did not, however, provide any basis to hold that the component agreements were not what they purported to be, namely a sale and a lease. The suggestion in the judgment of the court a quo that some form of simulation was entailed was misdirected. It was also unnecessary for the purposes of arriving at the decision which the trial court made. The contractual object of the transaction and the structure created for its achievement were nevertheless relevant considerations in the assessment of whether it is one that the law should uphold, a matter to which I shall come presently.

[26] The court a quo held that the Vrey brothers and the attorney, Schipper, had been the appellant's agents for the purpose of procuring the respondent's signature to the contract documentation. The trial judge found that they had been under a duty to ensure that the respondent was properly informed of the nature of the transaction she was being invited to enter into. It is well established that the *caveat subscriptor* rule - which expresses the position that a person who signs a deed of contract is ordinarily taken to have bound himself by the deed's provisions and it will not avail him to say that he had not read them; an articulation of the doctrine of quasi-mutual assent – does not apply if the document contains provisions of a special or unusual nature which the other party should reasonably have appreciated that the subscriber could not have expected to find incorporated in it; cf. e.g. *Slip Knot Investments 777* supra, at para 12; *Afrox Healthcare*

Bpk v Strydom 2002 (6) SA 21 (SCA) ([2002] 4 All SA 125) at para 36 There is a duty in such circumstances on the party who knows of the presence of such provisions to ensure that the other party is astute to them. A failure to discharge the duty can support the conclusion that the parties lacked the necessary *consensus ad idem* notwithstanding the appearances to the contrary reflected in the execution by them of a contract document. In such an event the contract is voidable at the instance of the mistaken party. The judge at first instance held that the provisions of the transaction in issue were so exceptionally onerous that there had been a duty on the part of Schipper and Gert Vrey to ensure that the respondent was fully aware of their import when she executed the deeds. He found that they had failed to discharge this duty of disclosure and that the appellant, as their principal, had to bear the consequences.

[27] In my view the evidence does not support the conclusion that the Vreys and Schipper were the appellant's agents for the purposes of concluding the agreements. On the contrary, they acted independently in introducing the appellant to what they considered to be an investment opportunity. Similarly, the respondent's son was attracted to their scheme by advertisements placed by the Vreys. If anyone had acted as the respondent's agent in the matter, it would have been her son. She in fact acted for herself in executing the deeds of contract. Schipper was under an ethical obligation to ensure that the respondent was properly apprised of the implications of the transaction, but that arose from his position as the representative of the conveyancing attorneys, and not because he was an agent of the 'purchaser'. It is clear that Mr Fourie, the actual conveyancer, merely acted on his colleague, Schipper's instructions. Schipper, who settled the terms of the deeds of agreement, also had a duty of disclosure towards the respondent by virtue of his proprietary interest in Propfund, which stood to profit out of the transaction.

[28] It remains to be considered, however, whether the appellant was not himself required in the peculiar circumstances to be satisfied that the respondent properly understood the contracts. In this connection counsel for the respondent submitted that the appellant should have been alive in the circumstances to the real possibility that the respondent did not appreciate the nature of the transaction and that she was alienating her home for a fraction of its market value, rather than merely agreeing to it being used as security for a loan. He submitted that this gave rise to an obligation on the appellant to have spoken up and assured himself that the respondent was not entering into the

transaction mistakenly. In the circumstances of the appellant's failure to have done so counsel argued that the respondent was entitled to rely on a lack of consensus between the parties to avoid the effect of her signature of the deeds of contract. I shall consider the validity of that argument later. It seems to me, however, that another issue, the possible invalidity of the transaction as being contrary to public policy, should be determined first.

[29] A significant part of the cross-examination of the appellant and the witnesses called in the course of the presentation of appellant's case in the court a quo appears to have been directed at showing that the transaction offended against public policy. It was also subliminally a theme in the judgment of the trial court and in the respondent's counsel's heads of argument on appeal. The question was not engaged directly, however, and the focus of the debate in the heads of argument in the appeal was on whether the respondent was entitled to avoid the effect of her execution of the deeds of contract on the grounds of an absence of contractual consensus. It appeared to us that the question of whether the transaction might be void by reason of being contrary to public policy called for proper consideration. In the peculiar context it is a question that it is convenient to address before the contentious issue of whether there was effective consensus. It is a question that can be decided assuming *ex hypothesi* in favour of the appellant that he was entitled to accept that the respondent had intended to contract with him in accordance the terms of the deeds of sale and lease. The legality of the contracts in the context of public policy is a question that falls to be determined quite independently of the contracting parties' intentions.

[30] In *Eastwood v Shepstone* 1902 TS 294 at 302, Innes CJ observed that the court 'has the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals. It is a power not to be hastily or rashly exercised; but when once it is clear that any arrangement is against public policy, the Court would be wanting in its duty if it hesitated to declare such an arrangement void. What we have to look at is <u>the tendency</u> of the proposed transaction, not its actually proved result'. (underlining supplied)

[31] The duty that a court has to raise the illegality of a contract *mero motu* when the parties to a dispute related to it have not done so themselves has been acknowledged in a number of cases; see e.g. *Hugo and Others v Transvaal Loan, F and M Co* (1894) 1 OR 336 at 341, *Green v De Villiers and Others* (1895) 2 OR 289 at 293, *The Weston*

Distributing Company v Carter Brothers Products (Pty) Ltd 1945 NPD 467 at 472, *Yannakou v Appollo Club* 1974 (1) SA 614 (A) at 623G-H, *Goodgold Jewellery (Pty) Ltd v Brevadau CC* 1992 (4) SA 474 (W) at 479H-480C and *Long Oak Ltd v Edworks (Pty) Ltd* 1994 (3) SA 370 (SE) at 373H-374C, and cf. *Ryland v Edros* 1997 (2) SA 690 (C) at 710A-B. We therefore gave counsel notice prior to the hearing of the appeal to be prepared to address the question. We are grateful for the supplementary heads of argument that both counsel subsequently submitted on the issue.

[32] The applicable principles were summarised by Smalberger JA in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 9B-G:

> No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. In the words of Lord Atkin in *Fender v St John-Mildmay* 1938 AC 1 (HL) at 12 ([1937] 3 All ER 402 at 407B - C),
>
> > 'the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds'
>
> (see also *Olsen v Standaloft* 1983 (2) SA 668 (ZS) at 673G). Williston on *Contracts* 3rd ed para 1630 expresses the position thus:
>
> > 'Although the power of courts to invalidate bargains of parties on grounds of public policy is unquestioned and is clearly necessary, the impropriety of the transaction should be convincingly established in order to justify the exercise of the power.'
>
> In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom.
>
> > '(P)ublic policy demands in general full freedom of contract; the right of men freely to bind themselves in respect of all legitimate subject-matters'
>
> (*per* Innes CJ in *Law Union and Rock Insurance Co Ltd v Carmichael's Executor* ([1917 AD 593] at 598) - and see the much-quoted aphorism of Sir George Jessel MR in *Printing and Numerical Registration Co v Sampson* (1875) LR 19 Eq 462 at 465 referred to in *inter alia*, *Wells v South African Alumenite Company* 1927 AD 69 at 73.[4] A further relevant, and not unimportant, consideration is that 'public policy should properly take into account the doing of

[4] 'If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice.'

> simple justice between man and man'- *per* Stratford CJ in *Jajbhay v Cassim* 1939 AD 537 at 544.

[33] This, of course, begs the question of what is understood by the term 'public policy' for these purposes. Smalberger JA provided the following explanation at 7I – 8D of *Sasfin*:

> Our common law does not recognise agreements that are contrary to public policy (*Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 891G). This immediately raises the question what is meant by public policy, and when can it be said that an agreement is contrary to public policy. Public policy is an expression of 'vague import' (per Innes CJ in *Law Union and Rock Insurance Co Ltd v Carmichael's Executor* 1917 AD 593 at 598), and what the requirements of public policy are must needs often be a difficult and contentious matter. Wessels *Law of Contract in South Africa* 2nd ed vol 1 para 480 states that '*(a)*n act which is contrary to the interests of the community is said to be an act contrary to public policy'. *Wessels* goes on to state that such acts may also be regarded as contrary to the common law, and in some cases contrary to the moral sense of the community. The learned author '*Aquilius*' in one of a series of articles on 'Immorality and Illegality in Contract' in 1941, 1942 and 1943 *SALJ* defines a contract against public policy as
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> > 'one stipulating performance which is not *per se* illegal or immoral but which the Courts, on grounds of expedience, will not enforce, because performance will detrimentally affect the interest of the community'
>
> (1941 *SALJ* 346). Wille in his *Principles of South African Law* 7th ed at 324 speaks of an agreement being contrary to public policy 'if it is opposed to the interests of the State, or of justice, or of the public'. The interests of the community or the public are therefore of paramount importance in relation to the concept of public policy. Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy, not be enforced. (Cf Cheshire, Fifoot and Furmston's *Law of Contract* 11th ed at 343.)

Compare also *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA) at para 22, where it was accepted that '[t]here might well be circumstances in which an agreement, unobjectionable in itself, will not be enforced because the object it seeks to achieve is contrary to public policy'.

[34] In his concurring judgment in *Brisley v Drotsky* 2002 (4) SA 1 (SCA); 2002 (12) BCLR 1229, at para 91-92, Cameron JA added a post-Constitutional gloss to the notion, stating:

> The jurisprudence of this Court has already established that, in addition to the fraud exception, there may be circumstances in which an agreement, unobjectionable in itself, will not be enforced because the object it seeks to achieve is contrary to public policy. Public policy in any

> event nullifies agreements offensive in themselves - a doctrine of very considerable antiquity. In its modern guise, 'public policy' is now rooted in our Constitution and the fundamental values it enshrines. These include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism.
>
> It is not difficult to envisage situations in which contracts that offend these fundamentals of our new social compact will be struck down as offensive to public policy. They will be struck down because the Constitution requires it, and the values it enshrines will guide the courts in doing so. The decisions of this Court that proclaim that the limits of contractual sanctity lie at the borders of public policy will therefore receive enhanced force and clarity in the light of the Constitution and the values embodied in the Bill of Rights. (footnotes omitted)

Cameron JA's remarks were referred to with approval in *Barkhuizen v Napier* 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 at para 59.

[35] In my judgment, while the component contracts might withstand scrutiny through the prism of public policy despite their unfairness and commercial absurdity, the object to which their collective effect was obviously directed was contrary to the common law and also to the moral sense of the community. The object was also inimical to the protection, promotion and fulfilment of some of the basic human rights enshrined in chapter 2 of the Constitution.

[36] The object of the transaction was to achieve a situation in which credit could be advanced to a person who would not qualify therefor in terms of the currently applicable socio-economic legislation. The sale of the immovable property that was the credit receiver's home to the credit provider was to provide security for the redemption of the debt. It fell to be achieved in a way by which, if the credit receiver defaulted on repayment (i.e. by not exercising the option), the credit provider would obtain redemption against the value of the immovable property, not only to the extent of the redemption value of the debt, but to the much greater extent of the market value of the property. It was repeatedly emphasised by the appellant during his evidence – a refrain in which the Vrey brothers joined in harmony – that his object in entering into the transaction was to realise a return on his outlay, not to acquire the property for himself. The property was to provide him with 'cover' or 'security'. One of the inherent characteristics of the transaction, namely that upon default by the credit receiver the credit provider would obtain the right to retain the property free of any right by the credit receiver to get it back at a consideration related to the debt was thus indistinguishable in effect from a *pactum commissorium* in a mortgage contract. The

public policy considerations that, since Roman times, have rendered any such agreement void at common law are equally applicable in the context of the current matter. Indeed, the observations of De Villiers AJA in that connection in *Mapenduka v Ashington* 1919 AD 343 at 351-352, have an unmistakeable resonance when considered in the context of the facts of the current matter:

> The first question that arises is as to the validity of the *pactum commissorium*. Now the authorities are unanimous that while this species of pact is allowed in sale, it is illegal in pledge as being unduly oppressive to debtors. This has been the law ever since the time of the Emperor Constantine (C.8.35.L. ult.). Voet (20.1.25) expresses the view which has prevailed since then with clearness and force. After stating that such a pact in the contract of pledge, and hypothec was reprobated by Constantine as being harsh and replete with injustice, he proceeds to say (Berwick's translation): 'Inasmuch as if it might be agreed that when a debt is not paid within a certain time the creditor is to retain (as his own) the thing pledged for the debt, things of the greatest importance and value would often be ceded in payment of a very trifling debt; the debtor, needy and pressed by the straightened condition of his pecuniary circumstances, readily submitting to the insertion of hard and inhuman conditions (in the bond) and holding out to himself the promise of better times and fortune before the arrival of the day fixed by the *pactum commissorium*, and hoping that the asperity of the pact will be averted from him by payment; a slippery and fallacious hope, however, to which the event not rarely fails to respond. Nor does it matter whether such a pact has been interposed at the very time that the pledge or hypothec was created, or after an interval; because, so long as the same straitened circumstances of the debtor continue, a creditor can easily extort this hard condition from the untimely or at least grave difficulties of the unfortunate debtor, whatever may have been the reason for delaying and avoiding the exaction of the debt; so that therefore the reason of inequity argues just as strongly for the nullity of this pact when made after an interval.'

[37] It is clear that an important reason for the common law proscription is that such an agreement is oppressive to the borrower because his position is weaker than that of the lender at the time when the agreement is entered into and such an agreement gives to the lender the unfair advantage of being able to take for himself property far in excess of the *quantum* of the loan when the date for the payment of the loan arrives and the borrower is unable to repay; cf. *Meyer v Hessling* 1992 (3) SA 851 (NmS) at 863J-864A. As Cloete JA noted in *Graf v Buechel* 2003 (4) SA 378 (SCA), [2003] 2 All SA 123, at para 16, the rule laid down by Constantine was 'aimed at a dangerous tendency' and not at particular cases. The particular tendency in question is just as apparent in the type of transaction constituted by the contracts executed by the respondent and the appellant as it is in a pledge with a *pactum commissorium*. The rationale in the common law proscription is wholly reconcilable with the constitutional values of human dignity, fairness and reasonableness in the sense discussed in the Constitutional Court's judgments in *Barkhuizen v Napier* 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 and helpfully elucidated by Harms DP in *Bredenkamp and Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA).

[38] In the light of the conclusion that the transaction was void by virtue of its being contrary to public policy it is strictly unnecessary to determine the lack of consensus issue. I shall, however, deal briefly with it to do justice to the detailed arguments that were addressed to us on the point.

[39] The respondent's counsel relied on *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) in support of his abovementioned argument that there had been a lack of contractual consensus between the parties. In *Sonap*, Harms AJA confirmed that there was a duty on a contracting party to speak up when he was, or reasonably should have been, aware that the offer presented by the other party was probably mistaken and did not represent the offeror's true contractual intention. The learned judge expressed the position thus, at p. 241A-D:

> If he realised (or should have realised as a reasonable man) that there was a real possibility of a mistake in the offer, he would have had a duty to speak and to enquire whether the expressed offer was the intended offer. Only thereafter could he accept. Support for this can be found in *Sherry v Moss* (WLD 3 September 1952, unreported) but quoted by Ellison Kahn (*op cit* [*Contract and Mercantile Law through the Cases* 2nd ed vol 1] at 302) and *Slavin's Packaging Ltd v Anglo African Shipping Co Ltd* 1989 (1) SA 337 (W) at 342I-343E. Goudsmit *Pandecten-Systeem I* para 52 at 119 states in this context: '*Dolus malus kan ook zwijgen zijn, waar spreken plicht is*.' De Wet and Yeats *Kontraktereg en Handelsreg* 4th ed at 10 are of the view that '(v)*erder bestaan daar geen gegronde rede waarom iemand deur 'n verklaring verbind moet wees indien die ander moes geweet of vermoed het dat eersgenoemde waarskynlik nie bedoel het wat hy gesê het nie . .* '. See also *Hartog v Colin & Shields* [1939] 3 All ER 566 (KB); *Solle v Butcher* [1950] 1 KB 671 at 692-3. Asser (*op cit* [*Verbinternissenrecht* part II (1985)] at 153) states that a contract is voidable if '*de wederpartij in verband met hetgeen zij omtrent de dwaling wist of behoorde te weten, de dwalende had behoren in te lichten*'. The snapping up of a bargain in the knowledge of such a possibility would not be *bona fide*. Whether there is a duty to speak will obviously depend on the facts of each case. Compare *Diedericks v Minister of Lands* 1964 (1) SA 49 (N) at 54, 57G-H.

The legal consequence of a failure by the other party to speak up when it reasonably should have done so, is that the mistaken party is not bound by what it appeared to have agreed.

[40] We were not referred to any authority in which the principles reflected in the *Sonap* judgment were applied to release a party from the consequences of his signature to a contract on the basis contended for in the current case. In the current case the

respondent executed deeds of contract which boldly proclaimed their character as agreements of sale and lease, respectively. She placed her signature on the deeds in places that clearly indicated that she was doing so as seller or lessee. Her position differed fundamentally from that of a contracting party that signs an agreement which contains a provision that a party in his position entering into the type of contract in question would not ordinarily have expected to have been inserted – for example the provision in a contract for a space at an exhibition to be held on given dates boldly indicated in the heading to the agreement that the exhibition organiser could, notwithstanding the indicated dates, hold it at any other time of his choosing and the exhibitor would in such event remain bound by the contract (*Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A)), or a term in a contract of post dispute insurance, in terms of which the premium would be payable only if the insured were successful in pending litigation, that provided the insured would nevertheless be liable for the payment of the premium if the insurer exercised a right to resile from the contract before the risk insured against could eventuate (*Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 (SCA)). In *Sonap*, the contract concerned the regularisation of arrangements concerning a previously agreed upon 20 year lease. The deed of contract executed by the parties, however, referred to a 15 year lease. It was held that the party who signed the document knowing of the change should reasonably have suspected that the other party might not have been astute to the ostensible reduction in the period of the lease and should have spoken up. In the current case the appellant had no reason not to accept that by her signature to the deeds of sale and lease the respondent intended to enter into the relevant transactions. The onerous and exploitative character of the terms of the transaction effected by the contracts was starkly obvious, and not at all concealed. As mentioned, the appellant's understandable unease was about the legitimacy of such a transaction because of its character. That is something quite different from a reasonable apprehension that the other party was not astute to some incongruous provision in the contracts and had executed the deed ignorant of its presence.

[41] Thus, if the determination of the appeal had turned on the *Sonap* principle based argument that the respondent was excepted in the particular circumstances from the operation of the *caveat subscriptor* rule, I would have found against the respondent.

[42] It remains to consider what the effect of the voidness of the transaction is on the transfer of the property into the appellant's name. The invalidity of the underlying sale agreement did not necessarily entail the invalidity of the transfer of the property.

[43] It is now authoritatively established that the abstract, as distinct from the causal, theory of transfer of ownership is applicable to the alienation of immovable property. As Brand JA noted in *Legator McKenna Inc and Another v Shea and Others* 2010 (1) SA 35 (SCA) at para 22, 'In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery - which in the case of immovable property is effected by registration of transfer in the deeds office - coupled with a so-called real agreement or "*saaklike ooreenkoms*". The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property (see eg *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein en 'n Ander* 1980 (3) SA 917 (A) at 922E - F; *Dreyer and Another NNO v AXZS Industries (Pty) Ltd* [2006 (5) SA 548 (SCA), [2006] 3 All SA 219] in para 17). Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, eg sale, ownership will not pass - despite registration of transfer - if there is a defect in the real agreement (see eg *Preller and Others v Jordaan* 1956 (1) SA 483 (A) at 496)'.

[44] It is clear that the respondent did not fully appreciate that the effect of the tenor of the deeds of contract that she executed was the alienation of her property. It is also clear that she did not intend thereby that ownership of the property be transferred to the appellant. Her intention was to pledge the property as security for the loan that she understood was being advanced to her son. In the circumstances ownership of the property did not pass to the appellant notwithstanding registration of transfer.

[45] This conclusion requires us to consider the appellant's contingent claim in reconvention. The trial court gave no reason for its decision that the respondent was not required to make any form of restitution to the appellant in respect of the purchase price paid by him. Had the court concluded that the agreement was unlawful by reason of being contrary to public policy it might have justified its decision on the basis of the *in pari delicto* rule, but that was not its approach. The transaction in question is not merely contractually unenforceable, it is void for being indistinguishable in character from that proscribed at common law. Performance having been given on both sides,

the appellant's contingent claim in reconvention, which is in the nature of an unjust enrichment claim, falls to be determined applying the equitable approach described in *Jajbhay v Cassim* 1939 AD 537, that is to do simple justice between the parties.

[46] In my judgment the respondent did not benefit from and was not enriched by the amounts deducted from the purchase price in respect of the grant of the option (in reality the commission paid to Property Rescue), the transfer costs and the insurance premium. These amounts totalled R72 500. The net proceeds that were in the result liable to be paid to the respondent from the sum of R275 000 paid by the appellant to the conveyancing attorneys were in the sum of R202 500. The difference between that amount and the total of R178 598 paid to the respondent's son, essentially at the respondent's instance or with her acquiescence, was accounted for by the costs of the cession and related bridging finance arrangements described in paragraph [15], above. The appellant was a stranger to those arrangements and there is no reason to reject his evidence that he had been ignorant of them. It would not be appropriate to take their effect into account for the purpose of quantifying the extent of the respondent's enrichment at the appellant's expense. The respondent's counsel submitted that the interest earned on the sum of R275 000 paid into trust by the appellant pending transfer of the property into his name should be taken into account in reduction of the extent of the amount of the respondent's enrichment. There is no merit in the submission. The interest in question was earned on the appellant's funds before any notional entitlement thereto accrued to the respondent and it does not fall to be computed in the respective enrichment or impoverishment of the two parties.

[47] The respondent's counsel also contended that the pleading of the contingent claim in reconvention was defective. He submitted that the claim had been pleaded as a *condictio sine causa*, whereas it should have been pleaded as a *condictio ob turpem vel iniustam causam*. Technically, the criticism is probably sound, but I do not consider that it should make any practical difference. The claim was premised on a finding by the court that the transaction was of no legal effect. As long as the court is astute in determining the claim to the public policy considerations that should inform its decision of a *condictio ob turpem causam* as distinct from one *sine causa*, no harm is done by dealing with the claim as if it had been properly pleaded. Certainly, there is no prejudice to the respondent in doing so in the circumstances of the current case.

[48] In my judgment the trial court erred in not upholding the appellant's contingent claim in reconvention. Applying the approach enjoined in *Jajbhay v Cassim* supra, it should have made an award in his favour in the sum of R202 500. The amount of the award being subject to equitable determination, the claim was thus not one that properly could be characterised as liquidated before judgment was given. Interest will therefore be payable only as from date of judgment to date of payment.

[49] The last issue to be dealt with concerns costs. The trial court allowed the evidence of a number of witnesses who had been involved in similar transactions through Property Rescue to be adduced. The appellant's counsel had objected to the evidence on grounds of lack of relevance, but notwithstanding these objections the court allowed the evidence 'provisionally'. In his judgment the trial judge correctly decided to have no regard to this 'similar fact' evidence. The length of the trial was unnecessarily extended by reason of the leading of the evidence, but the judge declined to penalise the respondent in costs. The appellant submitted that the judge's decision in this respect was misdirected and that we should interfere with it on appeal irrespective of the result on the merits.

[50] It is trite that costs are a matter within the discretion of the trial judge and that an appellate court will interfere with a decision on costs only if there has been a material misdirection, or if the discretion has not been exercised judicially. In my judgment the judicial exercise of a discretion against giving the appellant the benefit of his objections to the leading of irrelevant evidence would entail the giving of cogent reasons for what on the face of it is a counterintuitive decision. The judgment of the court below is signally lacking in any reasoning in support of its decision to allow the respondent the costs incurred in the leading of evidence that should have been disallowed and to which objection had been raised by the appellant. In the absence of such reasoning, the decision appears to me to have been arbitrary. I consider that this is a case in which we can therefore legitimately intervene. The evidence should not have been allowed and the appellant's objections to its being led should have been upheld. I can conceive of no reason why the appellant should have been ordered to pay the respondent's costs incurred in the futile extension of the trial occasioned by the irrelevant evidence. In my view the trial court should either have limited the extent of the appellant's liability for the respondent's costs or have disallowed the costs attendant on the time taken up by the irrelevant evidence.

[51] In the current case the fact that the appellant should have substantially succeeded in his claim in reconvention was a further factor that should have informed which course to follow on costs. The claim in reconvention was inextricably bound up in the fate of the claim in convention and its outcome therefore did not lend itself to the making of discrete orders in respect of the costs in convention and in reconvention. The taxing master would find it an impossible task to determine with regard to the costs incurred in the hearing what should be allocated as between claim in convention and claim in reconvention. The trial may be taken for taxation purposes to have been run concurrently and indivisibly in respect of the claim and the contingent counterclaim.

[52] The most appropriate course in the peculiar circumstances in the context of the appellant's success with his contingent claim in reconvention and the time wasted as a result of the respondent having insisted against the appellant's objections in leading irrelevant evidence would have been to make no order as to the costs of the claim in reconvention and to direct that the appellant be liable for a substantial portion, but not all, of the respondent's costs in the claim in convention. Such an order would justly reflect the effect of the substantial success achieved by the respondent and the partial success achieved by the appellant. In my view the appellant should have been ordered to pay 75% of the respondent's costs of suit in the court below. The trial court should not have made a declaration about necessary witnesses; see *Transnet Ltd. t/a Metrorail and Another v Witter* 2008 (6) SA 549 (SCA); [2009] 1 All SA 164, in para 19.

[53] The balance of success in the appeal is also substantially in favour of the respondent, but it would be appropriate to mark the partial success achieved by the appellant on appeal in respect of his contingent claim in reconvention by directing that he be liable only for a substantial portion, rather than the whole, of the respondent's costs.

[54] The abovementioned conduct of Messrs Schipper and Fourie concerning the dealing with the money deposited in trust by the appellant and the failure by Schipper, as the attorney supervising the conclusion of the agreements, to disclose to the respondent his interest in Propfund and the profit he stood to make out of the transaction merits investigation by the Law Society.[5] The Registrar will therefore be directed to refer a copy of this judgment to the Law Society. Furthermore, Capcon Finance (Pty)

[5] See para 15, 16 and 27, above.

Ltd t/a Propfund's role in extending credit to persons under the scheme involved in this matter seems to us irreconcilable on the face of it with the conduct of a responsible registered credit provider in terms of the National Credit Act. The loans are extended to persons unlikely to be able to afford to them.[6] The matter deserves the attention of the National Credit Regulator, to be dealt with in terms of s 15 of the Act.

[55] In the result the following orders are made:

1. The orders made by the trial court are set aside and substituted by the following:

   (a) It is declared that the transaction constituted by the deeds of sale and lease executed by the appellant and the respondent on 10 December 2009 is contrary to public policy and the agreements were thus void *ab initio*.

   (b) It is declared that the deed of transfer (T 010752/10) in terms of which title to Erf 6112, Bellville was conveyed from the respondent, Engela Johanna Lambrechts (ID Number 380626 0073 082) to the appellant, John Morley (ID Number 470322 5077 085), 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 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) The respondent's attorney of record is directed to serve a copy of this Order on the Registrar of Deeds within 10 days of the date of this judgment and to file of record an affidavit confirming that compliance with this direction has been effected.

   (d) The respondent is ordered to pay the appellant the sum of R202 500 in satisfaction of the appellant's contingent claim in reconvention, together with interest thereon at the prescribed rate of 9% *per annum* from date of judgment to date of payment.

   (e) The appellant is ordered to pay 75% of the respondent's costs of suit in respect of the claim in convention.

[6] See s 81(3) of the National Credit Act.

(f) No order as to costs is made in respect of the appellant's contingent claim in reconvention.

2. Save as provided in terms of paragraph 1, the appeal is dismissed.

3. The appellant is ordered to pay 75% of the respondent's costs in the appeal, which shall include the costs of the applications for leave to appeal.

4. The Registrar is directed to forward a copy of this judgment to the Director of the Cape Law Society and to the Chief Executive Officer of the National Credit Regulator for their attention in terms of paragraph 54 of this judgment.

A.G. BINNS-WARD
Judge of the High Court

We concur:

C.M. FORTUIN
Judge of the High Court

R.C.A. HENNEY
Judge of the High Court