

SOUTH AFRICA / JUDGMENT

Fegen and Another v Mphakathi (348/2012) [2013] ZASCA 100 (9 September 2013) [2013] ZASCA 100

COURT

Supreme Court of Appeal

BEFORE

Navsa, Tshiqi, Pillay, Van der Merwe, Swain

CASE / FILE NUMBER

348/2012

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 348/2012

Reportable

In the matter between:

SHAWN MARK FEGENFIRST APPELLANT

BRENDA YVONNE FLORENCE FEGENSECOND APPELLANT

and

DOUGLAS MPHAKATHIRESPONDENT

Neutral citation: Fegen v Mphakathi (348/2012) [2013] ZASCA 100 (9 September 2013)

Coram: Navsa, Tshiqi & Pillay JJA & Van der Merwe & Swain AJJA

Heard: 16 August 2013

Delivered: 9 September 2013

Summary: Successive sales of immovable properties – prescription raised by a second purchaser in relation to first purchaser's right to enforce registration of transfer – onus discussed – held that there had been an ongoing acknowledgement of liability by the seller to the first purchaser to transfer as against payment of the purchase price – renunciation of benefit of prescription – second sale set aside by high court on basis that the second purchaser had knowledge of prior sale – held that the first purchaser had established on balance of probabilities that second

purchaser had knowledge in the form of *dolus eventualis* of the prior right to obtain transfer of the property – second purchaser wilfully shut his eyes to the possibility of the prior rights and deliberately refrained from ascertaining the true position – Appeal against decision of the Eastern Cape High Court accordingly dismissed.

Order

On appeal from: Eastern Cape High Court, Mthatha (Miller J sitting as court of first instance):

1. The appeal is dismissed.
2. The appellants are ordered to pay the respondent's costs of the appeal.

NAVSA ADP & SWAIN Aja (tshiqi & pillay jja & van der merwe aja concurring):

The present dispute was caused ostensibly by the conduct of Justice Sigcau, the King of the Pondos (the King), selling two immovable

properties described as erf 711 and erf 712 Port St John's, successively. First, he sold those properties to Mr Douglas

Mphakathi (Mphakathi) and thereafter, prompted by the first appellant, Mr Shawn Fegen (Fegen), to him and his wife, the second

appellant, Mrs Brenda Fegen (Mrs Fegen). The King subsequently transferred the properties into their names. When the Fegens as a consequence gave notice to Mphakathi, who occupied the properties, to vacate, he responded by way of an application to the Eastern Cape High Court, Mthatha, seeking orders declaring the second sales null and void and setting aside the agreements

concluded between the King and the Fegens, as well as the transfer of these properties to them.

That application was opposed by the Fegens but the King, who was joined as third respondent, chose to take no part in the proceedings.

Mphakathi alleged that the Fegens were aware of the prior sale agreements between him and the King and acted *mala fide* in concluding the subsequent sale agreements. The application was referred for the hearing of oral evidence on 2 December 2004, solely on the issue of whether the Fegens 'were fraudulent and/or *mala fide*' when they entered into the subsequent sale agreements.

The hearing commenced before the High Court (Miller J) on 25 October 2005 and was subsequently adjourned on 24 November 2005 to afford the Fegens an opportunity to obtain the evidence of the wife of the King, who was referred to as the Queen of the Pondos. The matter then resumed after a delay of almost five years on 19 July 2010, at which stage the Fegens no longer wished to lead any further evidence, but raised two further issues which it was agreed

would be dealt with on affidavit. These issues were that Mphakathi had allegedly tampered with the sale agreement concluded between him and the King in respect of erf 711, which rendered 'the validity of the agreement and the [credibility] of the applicant highly questionable', and that the respondent's claim for transfer of the properties against the King had prescribed. We will in due course comment on prescription being raised so late in the day.

The court below held that the explanation advanced by Mphakathi as to the alteration of the sale agreement was not so improbable that it could be rejected out of hand as untruthful. For present purposes, that aspect need detain us no further. The court below also held that although Mphakathi's claim for transfer of the properties as against the King had prescribed, this had 'no bearing on the question whether the sale and the transfer of the properties' to the appellants were unlawful or not and did not constitute a defence to the claim of the respondent. On the merits of Mphakathi's claim, it held that the probabilities were that the Fegens took delivery of the properties with knowledge of their previous sale to Mphakathi. The court below accordingly granted an order declaring the agreements of sale concluded between the Fegens and the King void and of no force and effect and set aside the transfer of the properties to them.

With the leave of the court below the Fegens appeal that judgment and associated orders. Needless to say, the King did not appeal. The main grounds advanced on appeal were as follows:

6.1 The court below had erred in finding that the prescription of Mphakathi's claim to demand transfer of the property as against the King had no bearing upon the relief sought by Mphakathi as against the Fegens. In addition, the notice of motion in these proceedings had not interrupted the running of prescription, because it did not constitute a process in which Mphakathi claimed 'payment of the debt' in terms of s 15(1) of the Prescription Act 68 of 1969 (the Act) – the debt being Mphakathi's right to claim transfer of the properties. It was contended that the motion proceedings in the court below were not a preliminary step in the enforcement of Mphakathi's claim against the King for transfer of the properties. It was submitted that at the time when the present proceedings were instituted, Mphakathi did not have a complete cause of action for transfer, because he was at that date in default of his payment obligations in terms of the agreements concluded with the King.

6.2 The court below had erred in deciding that Mphakathi had discharged the onus of proving on a balance of probabilities that the Fegens had taken delivery of the properties with knowledge of the prior sale of the properties to Mphakathi.

The details upon which the present appeal is to be decided are set out hereafter in this and the paragraphs that follow. On 15 June 2000 Mphakathi purchased the two properties from the King. The purchase price for erf 711 Port St John's was R150 000 and for erf 712 R110 000. Deposits of R20 000 in respect of each sale were required and duly paid by Mphakathi. In terms of the agreements he was entitled to take immediate occupation of the properties. He intended, with the knowledge and approval of the King, to cultivate crops to enable him to produce income to pay the balance of the purchase price, by instalments of R20 000 every three months.

However, Mphakathi was thwarted. He was unable to take occupation of erf 711 as it was unlawfully occupied by an entity described as Khulisanani Farming Project, which comprised a number of people who were cultivating the property. In October 2001 he launched proceedings which culminated in the grant of a Writ of Ejectment by the high court on 9 July 2003, almost two years later. There is no gainsaying Mphakathi's assertion that he had agreed with the King to institute those proceedings and that the costs incurred by him in doing so would be deducted from the purchase price. Mphakathi began cultivating crops on the property during the ploughing season towards the end of 2003.

Although the precise month is in dispute between Fegen and Mphakathi, it is common cause that Fegen had visited Mphakathi on the properties during this period and that a conversation had taken place between them. What is in dispute is the precise nature of those discussions. Fegen maintained that Mphakathi had said emphatically that he was the owner of the properties, whereas Mphakathi maintained that he had said he was in the process of buying the properties. According to Fegen any misunderstanding was not caused by him but was as a result of the intermittent use of a Xhosa interpreter. Mphakathi and the interpreter, both of whom testified in the court below, were strenuous in their denial of any misunderstanding. What is clear from his evidence is that Fegen knew before the discussions referred to in the previous paragraph had taken place that Mphakathi had taken steps to evict unlawful occupiers from erf 711. It is equally clear that a Mr Faber, from whom Fegen had bought a neighbouring piece of land, had also told him about these evictions. Fegen said he would accordingly not deny that Mphakathi had been involved in protracted litigation to evict the occupiers. Mr Faber, when asked by Fegen who was the owner of the properties, replied that he thought it was Mphakathi. Fegen said that when he met Mphakathi for the first time he saw that the properties had been cultivated and that there were crops. He had commended Mphakathi for the good work he was doing. Thus it is clear that the picture that presented itself to Fegen was one of Mphakathi being firmly ensconced on the land.

It is important to note that it is undisputed that Fegen had, during the discussions referred to above, offered to buy the properties

from Mphakathi and to pay more for them than he had paid, but that even on that basis Mphakathi had refused to sell.

Fegen stated that he had believed Mphakathi when the latter had said that he was the owner of the properties. According to Fegen he then went about establishing whether there was another property in the vicinity owned by the King. When he approached the King he was referred to the Queen who told him that they had various riverfront properties for sale. It is apparent that Fegen's dealings were mainly with the Queen. Fegen, apparently to obtain certainty and clarity, contacted an estate agent, Ms Debbie Fourie, who assisted him to examine maps of the area and to locate riverfront erven. After locating the position of these properties, including erven 711 and 712, Fegen faxed copies of the relevant map to the Queen indicating to her that these two erven were the properties in respect of which Mphakathi claimed ownership. The Queen denied that Mphakathi owned those properties and accused him of lying. She informed Fegen that

Mphakathi was leasing the properties from the King. Fegen asked for a copy of the lease, which the Queen could not produce. According to Fegen she did, however, inform him that Mphakathi had paid a 'little deposit'. No clarification was sought or provided in regard to this aspect. Fegen did not explore the question of ownership or of the lease any further with the Queen. He adopted the attitude that 'it's got nothing to do with me'. Notwithstanding this avowed posture, Fegen nevertheless approached the Department of Land Affairs in Mthatha to establish who owned those properties. They informed him that the properties were registered in the name of the King. Fegen explained that these enquiries and responses emboldened him to approach the Queen and conclude agreements of sale with the King apparently without meeting him, for the purchase of erf 711 and erf 712 for the sum of R30 000. However, the deed of transfer in respect of the properties reflects the price as R25 000. This anomaly remains unexplained.

Fegen did not return to Mphakathi to take up the question of ownership with him, as one would have expected him to. He testified that he did not consider that he had a duty to do so. Fegen conceded that if he had gone to Mphakathi and told him what the Queen had said, Mphakathi could have shown him the sale agreements. He would not have bought the properties and the present litigation could have been avoided. Fegen acknowledged that he should have gone back to Mphakathi with the information he had obtained concerning the properties. He had never told his attorneys about the conflict between what the Queen and Mphakathi had said concerning the properties. Fegen said he had no idea what the agreement was between Mphakathi and the King because he did not want to go and involve himself in other people's agreements.

The facts set out in the preceding paragraphs are material *inter alia* to a conclusion on the bona fides of the Fegens. Before dealing with the conclusions of the court below in this regard, it is necessary to deal with the prescription point raised on behalf of the Fegens.

As pointed out earlier, this issue was raised five years after the conclusion of oral evidence. It will be recalled that the referral to oral evidence was restricted to the issue of bona fides on the part of the Fegens. It is significant to note that during those proceedings the following exchanges between the parties' legal representatives, Mphakathi and Miller J1 took place in relation to the question of whether the agreements between Mphakathi and the King remained extant:

'Mr Hobbs: And have you from your – the income you derive from your farming have you paid any money to the king, the third respondent?

Mr Dukada: M'Lord, I'm – with due respect, I'm objecting to this type of questioning. My humble submission is that

it's not relevant to the case that is before you, M'Lord, the – that is the – that is another matter, the question of the sale between the applicant and the third respondent, with due respect, M'Lord.

Mr Hobbs: M'Lord, with respect, the man is relying – he's seeking to establish that he has an agreement which is binding. I think it's trite law, if one wants to seek to enforce an agreement that you have to tender or perform your obligations in terms of that agreement too. . . .

Mr Dukada: . . . The question of this – the performance or the nonperformance under the contract, that is an issue that is between the seller – the third respondent and the applicant.

Court: Yes, but is that contract still in existence?

. . .

Court: . . . I'm just asking you, is there an allegation that is still in – is it common cause? Let's put it that way, that it's in existence?

Mr Dukada: As far as the papers are concerned it's common cause, there's nothing which raises that as an issue – it's not raised as an issue. Otherwise it could – supposing at the end of the day, M'Lord, Your Lordship would let's say set aside the deed of transfers here, then we get for another second stab(?) for the applicant to enforce his rights. Then it's only when he enforces his rights then that he would meet – if any, he would meet the . . . (intervention).

Court: Yes, but you see, we have here a situation where the third respondent is not represented here, right?

Court: So my prime concern is whether – and if I'm told that it's common cause that that contract's in existence,

that's fine as far as I'm concerned. But I don't want to go ahead not knowing whether or not that contract –

those contracts, when I say still in existence, have not been cancelled.

Mr Dukada: My observation, M'Lord, is that fortunately in this case the seller – the third respondent, the honourable king, was joined – he was joined. He's the party who was given an opportunity – if he could say, "At the time I concluded the contract of sale with the first respondent, the contract of sale between applicant and myself has been cancelled and cancelled . . . (indistinct).

Court: Look, I think we must just proceed on the basis that that contract is still in existence.'

As explained earlier, prescription was raised five years after evidence was concluded on the issue of the bona fides of the Fegens. The onus is on a party alleging that an obligation has been extinguished by prescription to plead and prove the necessary averments in this regard.² It is now necessary to have regard to what was stated in relation to the existence of the contract by Mphakathi in his founding affidavit by the Fegens in their answering affidavit, by the King in his affidavit in support of the eviction proceedings and by the Fegens in the supplementary affidavit raising the prescription point and Mphakathi's response thereto.

In his founding affidavit Mphakathi stated the following in respect of the agreements with the King:

'[They are] still in force as they had not been cancelled nor had they lapsed and in fact . . . are open ended and do not have an expiry date.'

The Fegens' response to this allegation in the answering affidavit was as follows:

'Whilst the applicant may have had a personal right against breach of the said agreements by the third respondent, that would not affect the rights [of] innocent third parties who unbeknown to themselves, entered into agreements with the third respondents which infringe on the applicant's right.' (Emphasis added – in relation at that stage to the only live issue between the parties.)

The King, in support of Mphakathi's application to evict the unlawful occupants of erf 711, said the following concerning the continued existence and enforceability of the agreement:

'I must state further that I sold Erf 711 Port St Johns to Mr MPHAKATHI as I owned it and the Deed of Grant in respect of this erf is enclosed. . . '

The King's affidavit is dated 4 April 2001. There is nothing to indicate that this view of the King's vizaviz Mphakathi in relation to the continued existence and enforceability of the agreements has since been recanted. If anything, the indications are to the contrary. We will in due course deal with the relevance of the second sale in relation thereto. The King, it appears, pointedly did not participate in the proceedings in the court below and his wife did not, as presaged by the Fegens, side with them by testifying in support of their case.

It is clear from what is set out in the preceding paragraphs that at the end of the oral evidence proceedings the continued existence and enforceability of the agreements between Mphakathi and the King were not in issue.

In the affidavit filed half a decade later, the Fegens say the following:

'12. The agreement of sale for Erf 711 provides for payment of the purchase price of R150 000.00 to be made by way of an initial

deposit of R20 000.00 and the balance of R130 000.00 payable in instalments of R20 000.00 every three months commencing 31 October 2000 until the balance is paid in full. The full purchase price would consequently become payable by Applicant on 30 April 2002.

13. The sale agreement for Erf 712 contains a similar provision for payment. In terms of this agreement, the purchase price of R110 000.00 was payable by way of an immediate deposit of R20 000.00 and the balance of R90 000.00 to be paid by

means of instalments of R20 000.00 commencing 31 October 2000 and thereafter every three months until the balance is paid in full. Consequently, the full purchase price would become payable by 31 October 2001.

14. On Applicant's own version in both his founding affidavit and the evidence led, all he has paid is the deposit in respect of both agreements namely R40 000.00. No further payments have been made. Applicant is apparently waiting for a loan from the Land Bank to materialise.

15. The transfer clause in both agreements is exactly the same. Transfer to the purchaser shall be effected as near as possible to the date of payment of the full purchase price.

16. It is submitted that Applicant's right to claim transfer of both properties from the King has prescribed. In a respect of Erf 712, the right prescribed on 1 November 2004 and in respect of Erf 711, the right prescribed on 1 May 2005. I say this because:

16.1. the aforesaid dates reflect a period of three years from the date that Applicant was obliged to pay the purchase price in full;

16.2. Applicant has taken no steps against the King within the three year period pertaining to each agreement to compel him to effect

transfer.'

Ultimately, in his affidavit, Mphakathi's response was that the enforceability and continued existence of the agreements was an issue between himself and the King and did not concern the Fegens and that prescription was not a valid defence to his application to have the agreements between him and the King set aside. Importantly, Mphakathi stated the following in his response:

... 'I have been advised by the Land Bank that the bank is ready to advance me money for the purchase price as soon as this case is finalized.'

There is authority for the proposition that the invoking of prescription is not confined to an action between the original creditor and debtor in terms of s 17(2) of the act. In this regard see *Lipschitz v Dechamps Textiles GMBH* and another 1978 (4) SA 427 (C). It is on that case that the court below relied in holding that prescription in relation to Mphakathi's right to claim

transfer from the King could be raised by the Fegens. The court below went on to hold that that claim had prescribed and that there was no indication that the King had at material times acknowledged liability to transfer the properties to Mphakathi. Miller J went on to state that Mphakathi had also failed to claim transfer from the King. Paradoxically, Miller J then went on to hold that prescription was irrelevant to Mphakathi's claim for cancellation and transfer as his claim was based on the prior knowledge of the Fegens concerning his agreement with the King.

Prescription can, in terms of s 14 of the Act, be interrupted by an express or tacit acknowledgement of liability by a debtor to a creditor which, in the present case, would be the King in relation to Mphakathi in respect of the transfer of the properties. What s 14 contemplates is an acknowledgment of liability to the creditor or his agent, see *Pentz v Government of the Republic of South Africa* 1983 (3) SA 584 (A) at 594BC. It is also well established that the benefits of prescription, once it has been completed, can be renounced. It is significant to note that such renunciation is usually distinct from the concept of waiver. For the distinction between an

acknowledgement of debt interrupting prescription and renunciation of the benefits of prescription see *Brown v Courier* 1963 (3) SA 325 (N) at 329330. The agreements between Mphakathi and the King envisaged immediate occupation and the right of the purchaser to claim transfer would only arise after payment of the full purchase price. In the present case it is evident

from the details set out earlier in the judgment that the King was content to have Mphakathi take the necessary steps to evict the unlawful occupiers which, as pointed out, was a process that took close to two years. Furthermore, the King allowed Mphakathi to continue in undisturbed occupation up until Mphakathi received a letter to vacate from Fegen's attorney and to engage in what appears to be fairly large scale farming. It is abundantly clear that the King had supported the application to evict the unlawful occupiers and even when the application leading up to this appeal was launched, the King was equally happy not to enter the fray. In our view, the court below erred in concluding that there was no acceptable evidence upon which to base a conclusion that prescription (if it were held to apply) had not been interrupted by an acknowledgement by the King of the debt, and in not considering that ultimately the benefits of prescription might have been renounced.

Mphakathi was not a typically idle, careless or negligent creditor.³ He initially had to contend with not being given vacuo possessio. It took costly litigation and a long period of time before Mphakathi could take occupation of the properties he had purchased. Then he had to put up with the King purporting to sell the properties to the Fegens without notice to him. He had to litigate for a second time over an ever lengthier period – almost a decade – to defend his right to finally obtain transfer. The King was joined as a party to that litigation but chose not to contest Mphakathi's asserted right to set aside the transfer as part of the process of finally obtaining transfer. As far as Mphakathi is concerned the King left him under no illusion that the agreement was still alive up until he received the demand from the Fegens' attorney to vacate the properties. That notwithstanding, the King did not take any steps to place him on terms or to terminate the contract. It will be recalled that Fegen initially dealt with the Queen and not the King. It cannot be overemphasised that at no stage, until the notice to vacate, which fell within the prescriptive period, did the King intimate to Mphakathi or conduct himself so as to indicate that

he was not acknowledging his obligation to give transfer upon payment of the purchase price, nor did he take any of the above

steps. To sum up: There was a long standing acknowledgement of liability to transfer upon payment of the purchase price, up until the letter to vacate. When proceedings were lodged in the court below, the King chose not to contest an assertion of Mphakathi's right to demand transfer against

payment of the purchase price. The King must therefore be considered to have either continued his acknowledgment of liability to transfer, alternatively renounced his right to rely upon prescription. For the reasons set out above, the defence of prescription must fail. It could, with some justification be said that prescription as an issue in this case was diversionary.

In the light of these conclusions it is not necessary to deal with the submission on behalf of the Fegens, referred to in paragraph 6.1 above, namely that the application in the court below had not interrupted prescription in relation to Mphakathi's right to claim transfer from the King.

There is no merit in the submission by counsel representing the Fegens that because of the parol evidence rule, prescription had to be applied in absolute terms in relation to the date upon which failure to pay the first instalment was specified in each of the agreements. Incidentally, this point was raised before us by counsel on behalf of the Fegens and had not been taken until the eleventh hour in argument. The submission is unfounded for the reasons that follow. Mphakathi was not put on notice, in terms of the agreements, to comply with specified obligations, nor in the light of the King's failure to give him undisturbed possession, could this have occurred within the time periods provided for. In any event, in terms of the agreement, the King had a choice to cancel or enforce the agreement in the event of a failure by Mphakathi to meet his obligations and in respect of the granting of indulgences. As set out above, it is clear that the King, at all relevant times, in effect, acknowledged liability to effect transfer of the properties upon payment of the balance of the purchase price or renounced the benefits of prescription. The question of a waiver of contractual rights does not arise in the present case.

Returning to the question of bona fides, we are of the view that the court below cannot be faulted in its conclusion that on the probabilities the Fegens must have known that there had been a prior agreement between the King and Mphakathi for the sale of the properties.

In *Meridian Bay Restaurant (Pty) Ltd & others v Mitchell* NO 2011 (4) SA 1 (SCA) para 18, the following appears:

‘Thus C, the acquirer of the real right, does not need to have actual knowledge of B’s prior right. It suffices that C subjectively

foresaw the possibility of the existence of B’s personal right but proceeded with the acquisition of his real right regardless of the consequences to B’s prior personal right.’

Ponnan JA added that the reference to *dolus eventualis* in the judgment in *Associated South African Bakeries (Pty) Ltd v Oryx and Vereinigte Bäckereien (Pty) Ltd & andere* 1982 (3) SA 893 (A) echoed what was said by Ogilvie Thompson JA in *Grant v Stonestreet* 1968 (4) SA 1 (A) at 20F where he said the following:

‘. . . if a person wilfully shuts his eyes and declines to see what is perfectly obvious, he must be held to have had actual notice’

Applying that dictum to the following facts, the compelling conclusion is that Fegen at the very least subjectively foresaw the possibility that the King had previously sold the properties to Mphakathi, but purchased them reckless of the consequences to Mphakathi’s prior rights. Fegen wilfully shut his eyes to the possibility of Mphakathi’s prior rights and deliberately refrained from ascertaining the true position from Mphakathi.

30.1. Fegen was aware that Mphakathi vigorously asserted his right to occupy the properties.

30.2. Mphakathi permanently occupied the properties at all times by farming them.

30.3. Fegen had offered to buy the properties from Mphakathi and pay more for them than Mphakathi had paid but this was refused by Mphakathi.

30.4. The explanation given by the Queen to Fegen as to the basis upon which Mphakathi occupied the properties was extremely vague.

30.5. Fegen's attitude was that any agreement between the King and Mphakathi had nothing to do with him.

30.6. Fegen was unable to advance any plausible reason why he did not ask Mphakathi about the Queen's statements concerning his right to occupy the properties.

There was some debate before us what the consequences would be for the parties if the conclusion by the court below was confirmed. As debated before us and accepted by the parties it is beyond the scope of this judgment to enter into that debate.

In the light of the above the following order is made:

2. The appellants are ordered to pay the respondent's costs of the appeal.

M S NAVSA

ACTING DEPUTY PRESIDENT

K G B SWAIN

ACTING JUDGE OF APPEAL

appearances:

FOR APPELLANT: N J GRAVES sc

VENN NEMETH & HART, PIETERMARITZBURG

McINTYRE & VAN DER POST, BLOEMFONTEIN

FOR respondeNT: A R DUMINY

DZ DUKADA & CO ING, MTHATHA

MOLEFI THOABALA, BLOEMFONTEIN

¹These exchanges occurred during crossexamination of Mphakathi.

²See *Gericke v Sack* 1978 (1) SA 821 (A) at 827H828A and *Duvenhage v Eerste Nasionale Bank van SA Bpk* [2005] 4 All SA 41 (N) at 60AB and *J Saner Prescription in South African Law* (2012) at 3139.

³See *J Saner Prescription in South African Law op cit.*, 13 para 1.2 and the authorities there cited, especially *Road Accident Fund v Mdeyide* 2011

(2) SA 26 (CC).

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