

SOUTH AFRICA / JUDGMENT

Vundle and Another v Master of the High Court, Mthatha and Another (2595/2019) [2020] ZAECMHC 28 (21 July 2020)

[2020] ZAECMHC 28

COURT

Eastern Cape High Court, Mthatha

BEFORE

Dawood

CASE / FILE NUMBER

2595/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL

DIVISION: MTHATHA)

CASE

NO. 2595/2019

In

the matter between:

NTOMBIYOMZI

VUNDLE

1ST APPLICANT

MTHUTHUZELI

M NALA

2ND

APPLICANT

And

THE MASTER OF THE HIGH

COURT,

MTHATHA

1ST

RESPONDENT

AKHONA

LUMWANA

2ND

RESPONDENT

JUDGMENT

DAWOOD J:

1. The applicant herein sought the following relief:

“That the Second Respondent’s objection to the transfer of Erf 9 Flagstaff from the estate Late Nomvuyiso Justicia Lumkwana to the first applicant be and is hereby declared unlawful, null and void. That the First Respondent be and is hereby directed to endorse the transfer of Erf 9 Flagstaff from the estate Late Nomvuyiso Justicia Lumkwana to the First Applicant. That the costs of this application be paid by any of the Respondents who opposes the application. Granting the applicants such further and/or alternative relief as the Honourable Court deems meet.”

2. The second respondent opposed the application and the first respondent being the master of the high court unfortunately failed to file either a notice to oppose, a notice to abide nor a report but chose to remain supine despite the fact that this application clearly called for some form of response from him considering the fact that some of the heirs in respect of this particular property were minors at the time, and at least one still appears to be.
3. I will for present purposes accept that the lock down may have played a role in his inaction.
4. I shall however not delay the proceedings further by requesting a report from him in light of my findings that appear below.
5. The first point to be determined is whether or not the applicants “claim” has prescribed.

A) Prescription

- i) The second respondent in his supplementary heads inter alia stated the following in this regard at paragraphs 16-18:

“As indicated above the First Applicant contends that she concluded the sale agreement in respect of the property in its entirety in September 2015 and also paid transfer fees or costs in 2015.

It is submitted in light of her contention above the obligation on the part of the seller to deliver the property to the First Applicant arose in September 2015 and therefore the prescription began to run from the date. The First Applicant however only launched these proceedings in July 2019, a period which is more than 3 years.

Accordingly it is submitted that the First Applicant’s cause of action or the debt that she seeks to enforce in these proceedings has prescribed and therefore a declaratory order should not be granted because it relates to a debt that has prescribed and which cannot be enforced.” (My emphasis)

- a) The applicant in response thereto stated as follows:

“In this matter, the debtor (the Second Applicant) being the seller and the executor in the estate late Nomvuyiso Justicia Lumkwana acknowledges in these proceedings that the First Applicant is entitled to take transfer of the property concerned pursuant to the deed of sale signed on 2nd September 2015. Not only has the Second applicant acknowledged that the First applicant is entitled to the transfer of the property concerned but he has joined hands with the First applicant in launching these proceedings.

Accordingly, the Second Applicant has continued to acknowledge the right of the First Applicant to receive transfer of the property even in these proceedings alternatively he must be taken to have renounced his right to rely on prescription. As far as the First applicant is concerned the Second Applicant has left her under no illusion that the agreement is still alive.

It should not be forgotten that, he, the Second Applicant, is the one the duty is cast upon to deliver the property concerned to the First Applicant.

Another point that needs to be emphasised is that the First Applicant in these proceedings does not seek to compel the Second Applicant to effect transfer (the Second Applicant fully accepts that responsibility) but is seeking the endorsement of the First Respondent.” (My emphasis)

- b) The second respondent reply at paragraphs 2-5 was simply that it was self-evident from the applicant’s papers and it was unnecessary for him to plead it:

“It is submitted that although the defence of Prescription is not pleaded in the Second Respondent’s Answering affidavit this defence is however, very much apparent from the Applicant’s own founding affidavit. The Second Respondent is therefore entitled to raise this defence because its factual foundation is very clear from the Founding Affidavit. (Own emphasis)

Furthermore, the fact that this defence is raised in the heads of argument does not prejudice the First Applicant because the First Applicant has an opportunity to deal with this defence in argument on the basis of the factual foundation which is contained in her own affidavit. It is submitted that in the circumstances of this case both parties have been invited by Court to present written submissions on the issue and it will not be consistent with the principle of legality to ignore the defence of Prescription because to do so will not be consistent with the principle of legality.

It is submitted that in these proceedings the issue of prescription is clearly established from the application papers which both constitute pleadings and evidence. It is therefore not improper that it be raised in argument particularly where both parties have been given opportunity to deal with it as it is the case in these proceedings.”

- c) The applicant has correctly pointed out that a party seeking to rely on prescription must raise the issue in his pleadings and this has not been done in the second respondent’s answering affidavit which is where it was required to be raised. His heads of argument, do not fall under the ambit of the definition of pleadings.
- d) In *Fegen v Mphakathi*[1] it was inter alia held:

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. 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." (own emphasis)

And it was further held:

"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 594B-C. 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 329-330.

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. 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.

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." (My emphasis.)

- e) In applying the dicta aforesaid to the present matter it is evident the second respondent:
 - i) Failed to raise the point in his pleadings;
 - ii) That the second applicant, being the executor wants to transfer that property to the first applicant and wishes to enforce the sale agreement and is precluded from doing so by the conduct of the second respondent, rightly or wrongly and accordingly the agreement is still alive.
 - iii) The agreement was indeed concluded in 2015.
 - iv) The documents were given to the transferring attorney.
 - v) The second respondent lodged complaints with the Master (the first respondent herein and then with the transferring attorney.
 - vi) It was only in 2017 that a meeting was held at the transferring attorney's offices and the matter seemed to have limped along through 2018 as well.
 - vii)

The executor clearly as is evident from him being cited as a co-applicant was intent on continuing with the sale.

- viii) The delays resulted from the Second Respondent's objections and not the conduct of the contracting parties.

ix) The second respondent cannot be seen to be relying on her conduct to state that the agreement has prescribed where the parties thereto, again correctly or incorrectly, seek to enforce the same and have taken numerous steps to obtain transfer.

x) It would, on the papers, have only become clear during the meeting in September 2017 that the second respondent was denying consenting to the sale.

xi) There were clearly delays but there appears to have been on-going discussions even until 2019 when correspondence was sent from the second respondent's attorney to the transferring attorney.

xii)

The intention of the parties to the agreement, being the executor as seller and the first applicant as the purchaser, is still to continue with the agreement, so the issue of prescription does not arise vis-à-vis the contracting parties.

xiii) The agreement accordingly in the circumstances of this case has not prescribed and the first applicant is entitled to seek enforcement of the agreement.

xiv) The issue of prescription even if properly raised in the pleadings would nonetheless be dismissed on the aforementioned grounds.

xv)

Accordingly the second respondent's point in limine in respect of prescription is dismissed.

6. I now turn to the merits of the application.

B) Merits

a) The applicant had requested that the matter be referred to the hearing of oral evidence in light of the disputes of fact that emerge from the papers.

b) I was initially in agreement but upon closer scrutiny of the relevant documents, despite the disputes of fact, the First Applicant has serious problems on the merits of the application on the papers as they stand, even without regard being had to the opposition of the Second Respondent.

c) It would have been an exercise in futility to refer a matter that is doomed to fail and cause the parties to incur unnecessary additional costs.

d) The parties were accordingly given an opportunity to deal with my concerns, by making further written submissions in respect of specific queries I raised since initially it was agreed that if the point in limine was dismissed the matter would be referred to the hearing of oral evidence.

e) The first issue pertains to the fact that the first agreement in respect of the lower part of Erf 9 was fatally flawed in that it was not entered into by the duly appointed executor at the

time.

- f) The second respondent has eloquently set out the response to my query in his further written submissions as follows:

“2.1 The First Applicant avers that on the 15th February 2010 she bought a portion of the undivided property described as ERF 9, Flagstaff, from one Babalwa Lumkwana, and she attached a deed of sale marked as annexure “NV3”.

2.2. The First Applicant further avers that she was aware that ERF 9 property belonged to the Estate of the late Justicia Lumkwana and that the deceased had bequeathed the property to her grandchildren who include Babalwa, who sold to her the property.

2.3. Annexure “NV3” reflects the following:

- (a) That the Seller is Babalwa Lumkwana, and there is nothing recorded which qualifies her to be acting as an agent of the other beneficiaries or grandchildren of the deceased.
- (b) With regard to the property being sold the deed of sale describes it as” on ERF 09:- being portioned on the other side opposite back road for the purposes this sale as per agreement between the parties, supra, “.

2.4. It is submitted that this deed of sale is invalid and unenforceable for non- compliance with the provisions of Section 2(1) of the Alienation of Land Act 68 of 1981, which is referred to hereinafter as the Act.

2.5. In the first instance, based on the version of the first Applicant as set out above, the seller was one of the beneficiaries and not the owner of the property but the property is an asset that forms part of the deceased estate.

2.6. The First Applicant in her Replying affidavit avers inter alia that, the Second Respondent “voluntarily elected that she be represented by Babalwa and thereafter received the proceeds of the sale in the form of her share “.

2.7. The First Applicant’s averment referred to above, if her version were to be accepted for a moment, simply means that Babalwa concluded the said deed of sale with the First Applicant as an agent of the other deceased’s grandchildren who were nominated as beneficiaries in the deceased’s last Will.

2.8. It is submitted that as this impugned deed of sale does not disclose on the face of it that Babalwa concluded the deed of sale on behalf of other beneficiaries the sale itself is invalid. See in this regard, *BOOYSEN AND OTHERS v BOOYSEN AND OTHERS* 2012(2) SA 38 (GSJ) AT 43I–44A where the Court said “ In the present matter the argument advanced on behalf of the respondents, that *Mills No v Hoosen* is not applicable since the seller there acted in a representative capacity, is misplaced . The contrary is in fact true. The *Mills NO v Hoosen* matter deals with the legal status of a deceased estate. It was held that as the representative of the estate, the seller omitted to disclose that he entered into the contract of sale on behalf of the executor

and, as a consequence, parol evidence was necessary in order to establish the true identity of the seller. The sale was held to be invalid as there was non-compliance with the Alienation of Land Act

2.9 It is accordingly submitted that for the said reasons the first deed of sale is invalid and cannot be enforced.

2.10. It is submitted that the first sale agreement is also invalid for non-compliance with the provisions of Section 2(1) of the Act in that it fails to describe the Merx or the property that is being sold with reasonable certainty. If one has regard to the deed of sale, Annexure NV3, one is left uncertain as to where is this ERF 09 is located in the world.

2.11. It is submitted that it is trite that the written contract in its entirety where land is the subject of sale must at least contain all the material terms and the terms must be described in such a manner that the court must be able to ascertain with reasonable certainty the terms of the contract. Accordingly as this deed of sale does not describe the property that is being sold it is submitted that it is invalid and unenforceable. SEE: CHRETIEN AND ANOTHER v BELL 2011 (1) SA 54 (SCA) AT PARA 8- 13

3

It is submitted that this agreement is invalid for non-compliance with the provisions of Section 2 (1) of the Act in that the sale was concluded by Babalwa Lumkwana who was not the executor and also failed to disclose that she was acting on behalf of the other beneficiaries as their agent.

- g) The first applicant although she claimed she was unaware that the agreement had to be concluded by the executor conceded that it was not concluded by him.
 - h) The fact that the first applicant was unaware of this does not make the agreement lawful, it may well entitle her to a claim against the deceased estate in respect of monies expended on the basis of unjust enrichment and entitle her to exercise a lien on the structures she had erected that improved the property until she is compensated. The first purchase and sale agreement is not valid or enforceable as it stands and has not been ratified by the present executor.
 - i) The additional points that the agreement does not state that Babalwa concluded the agreements on behalf of the other beneficiaries and that the property was not properly described are further factors that render the agreement invalid for non-compliance with the relevant provisions of the Act as correctly pointed out by the second respondent.
7. I now turn to the second agreement as it relates to the first applicant:
- a) The second agreement on the face of it is in respect of the entire Erf 9, See NV5, NV7 and NV9 “the seller sells to the purchaser who purchases the undermentioned property Erf 9 Flagstaff.”

- (i) The second agreement concluded accordingly clearly appears to be in respect of the entire premises.
- (ii) This does not seem to accord with the intentions of the party so there is a common error which in itself would invalidate the agreement.
- (iii) The first applicant clearly has indicated that this was not the true intention of the parties since she had, in her mind, already purchased the lower portions and this sale was only intended to be for balance of the Erf.
- (iv) However, the most serious shortcomings arise from the discrepancies in the amounts allegedly paid and the fact that the Master was not approached prior to launching the present application.
- (v) The second respondent once again concisely and eloquently sets out the shortcomings in this regard in his submissions in response to my queries which bears repeating herein:

“4.

With regard to this Deed of Sale, it is submitted that this contract too is invalid and unenforceable because it is tainted by fraudulent misrepresentation with regard to payment of the purchase price.

5

It is submitted that the following is discernible from the Applicant's own version.

5.1. The first Applicant says upon hearing that Bathandwa Zibobo was no longer interested in the property she agreed to buy the remainder or the upper portion of the property. ...

5.3. Annexure “NV7” itself describes the property that was being sold as ERF 9, Flagstaff in its entirety and not the Upper portion of the ERF 9, Flagstaff...

5.4 It is submitted that annexure “NV7” itself is tainted by fraud in so far as it describes the property that was being sold as the whole ERF 9 instead of the upper portion of ERF 9.

5.5. The first Applicant further avers that upon learning that the value of the property according to the Municipal evaluation, they were advised by the transferring attorneys to sign another deed of sale which would reflect R 1 142 000, 00.

5.6. Annexure “NV9” at its paragraph 1... records that “the purchase price is the sum of R 1 142 000, 00 (One Million One Hundred and Forty-Two Thousand Rand only) which has already been paid in full and by their signatures hereto the seller acknowledges receipt of payment of the purchase price in full”.

5.7 On first applicant's own version what is recorded in this deed of sale is a lie, a misrepresentation of fact because the first Applicant never paid such an amount at all.

5.8. It is submitted that this deed of sale is invalid because it is tainted by fraud perpetrated by both Applicants to the prejudice of the deceased's estate and the beneficiaries.

...

5.14. It is common cause that the second Applicant has never approached the Master in terms of Section 47 regarding the dispute about the sale of ERF 9, Flagstaff.

5.15. It is accordingly submitted that in light of that failure to approach the Master in terms of Section 47, this Court cannot therefore grant the orders sought by the Applicants in these proceedings as this Court cannot make a decision for the Master. ...

6.

As indicated above it is submitted that this application also falls to be dismissed on basis that it is tainted by fraud as alluded to above, particularly the recording in annexure NV9 that a purchase price in the sum of R 1 142 000, 00 had been paid when in fact and in truth no such money had been paid by the first Applicant and the second Applicant had never received such money on behalf of the estate or at all. It is submitted that this was a misrepresentation of fact.

7.

In the matter of QUARTERMARK INVESTMENTS (PTY) LTD v MKHWANAZI & ANOTHER 2014 (3) SA 96 (SCA) AT PARA- 25, where the court said that "As has already been mentioned, a valid underlying agreement to pass ownership, such as in this instance, contract of sale, is not required. However, where such underlying transaction is tainted by fraud, ownership will not pass despite registration of transfer. The high Court correctly found that the contract of sale between Ms Mkhwanazi and Quatermark was tainted by fraud. It follows from this and the fact that Ms Mkhwanazi had no intention to transfer ownership to Quartermark that the purported registration of transfer to Quatermark has no effect and Ms Mkhwanazi remained the owner of the property".

8. No allegation had been made that the first respondent has been approached in terms of section 47 to obtain his approval prior to approaching the court and launching the present application.

9. In *Kisten and Another v Moodley and Another*[2] the court held inter alia:

"In essence, the executor is authorized subject to the consent of the heirs/beneficiaries to sell the immovable property. Section 47(b) provides for the executor to sell the property subject to conditions as the Master may approve if the heirs are unable to agree on the manner and the conditions of sale. On what is contained in the affidavits, and in the absence of the Master and the parties' legal representatives' advice to the contrary, no such approach to the Master for approval for the sale of the immovable property by way of public auction has been made.

One does not know what the attitude of the Master is to such a sale nor is one advised whether such a sale will realize an amount to the benefit of the beneficiaries. One is not informed as to whether the Master approves of such sale or not. The second respondent can only sell the immovable property subject to the consent of all the heirs and subject to the approval of the Master. The requirements of the section are pre-emptory.” (Own emphasis)

It was further held:

“In Davis, the court was of the view that assets must be sold for the best possible price and a sale by public auction is not the norm. Where as in this instance, the heirs do not agree with the each other or the executor regarding the manner of realization of the assets, then the executor can only sell the property ‘in such manner and subject to such conditions as the Master may approve’.

The Master performs the function of considering the options placed by the non-consenting heirs as to the best manner to realize the property, and approves thereof. This is clear having regard to pages 15 and 16 of the Davis judgment where the court held:

‘. . . and it is only in the event of these heirs being unable to agree inter se that the Master’s jurisdiction to consider whether to approve the sale would arise.’

The Master in my view not only performs a supervisory role but a specialized role. The court should defer to the Master’s view unless same is clearly wrong or it can be shown on review that it was an improper exercise of such discretion. I agree with the sentiments expressed that courts should not ‘interfere with the exercise of discretion by a specialised official’ and should be hesitant to substitute its own ruling for that of the Master.

On the facts of this matter, the approach to court for orders in the counter application, specifically paragraphs 2, 21 and 3 is made without the differing views of the heirs being placed before the Master, and the executor’s views of the manner of realization of the property, ie by private treaty, public auction or by the heirs themselves. In addition, in the absence of the executor approaching the Master for him/her to exercise a discretion and make a decision to approve or otherwise the manner of realization proposed, this Court cannot make a decision for the Master and cannot usurp the role or function of the Master in s 47.

Prior to approaching the court the second respondent ought to have approached the Master in terms of s 47 for a decision. Absent such approach, this Court cannot make a decision for the Master. It can only deal with a decision once made, on review.

As part of his duties in preserving the assets of the estate one would have expected the second respondent to have taken the necessary steps to maintain the property and ensure that the highest possible price is obtained for it when sold. In the absence of more being said in the founding affidavits and why an approach to have him removed was not pursued, this Court cannot issue the orders sought. I accept that a number of attempts were made to resolve the issues and the disputes which came to naught but, nowhere in the affidavits is an approach to the Master dealt with. Whilst it may be cold comfort that the beneficiaries may have a claim against the second respondent should it be found he was negligent or remiss in preserving the assets to

ensure the property was sold for the best possible price, this Court cannot issue the orders absent a request to the Master.” (My emphasis.)

10. It is evident that the Second Applicant ought to have approached the first respondent to consent to the sale.
11. This was not done by the executor prior to him approaching this Court together with the first applicant to have the master/first respondent endorse the transfer to the applicant.
12. The master/first respondent has not been approached to consent to the transfer but the court is approached to simply have him endorse the transfer which clearly would amount to usurping his specialised function.
13. The agreement which the applicant’s seek to enforce is also tainted by misrepresentation to put it in its mildest form and borders on fraud in its most serious infractions.
14. The second agreement as already indicated does not reflect the true intention of the party regarding the description of the parties or the purchase price. There was no meeting of minds in this regard and accordingly no valid and binding agreement came into existence.
15. The agreement NV9 is tainted by fraud or misrepresentation in that it states that the purchase price reflected therein has been paid whereas as stated by the first applicant no such amount was paid nor was there an intention to pay that sum at any material time.
16. This agreement cannot be enforced or constitute a valid purchase and sale agreement let alone be the basis for this Court to consider granting the first applicant the relief she seeks.
17. The application accordingly on the first applicants own papers falls to be dismissed on the merits without even considering the second respondent version or the disputes of facts that arise from a consideration thereof.
18. I now turn to the issue of costs.
 - a) Despite the second respondent being successful in the main application, she has failed in the point in limine that she has raised on the issue of prescription, which had to be determined first.
 - b) In the circumstances the most equitable order to be made is that each party pay their own costs.

Order

19. I accordingly make the following order:
 - a) That the point in limine raised by the second respondent on the issue of prescription is dismissed.
 - b) That the application is dismissed.

c) That each party to pay their own costs.

DAWOOD J

JUDGE OF THE HIGH COURT

DATE HEARD:

21 MAY 2020

WRITTEN SUBMISSIONS RECEIVED: 18 JUNE 2020

DATE DELIVERED:

21 JULY 2020

FOR THE APPLICANTS:

MR SAPULANA

APPLICANT'S ATTORNEYS:

D. Z. DUKADA. & CO.

73 NELSON MANDELA DRIVE

MTHATHA

REF: VMS/tm

Tel: 0475310546

Email: duxlaw@telkomsa.net

FOR THE RESPONDENTS:

MR LINYANA

RESPONDENT'S ATTORNEYS:

LINYANA & SOMACALA INC.

ERF 208 BACK STREET

FLAGSTAFF

[1] 2013 JDR 1990 (SCA) at paras 18, 23-5 and 27.

[2] (KZD) unreported case no 13043/2012 of 22 July 2016 at paras 29-30, 33-7 and 39.

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