THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 117/2009

In the matter between:

STANLEY ELLIAS LEKETI **Appellant**

and

MOGALE ANDREW TLADI N.O. **First Respondent**

FILIKANA HICKABOTH PETLELE **Second Respondent**

ALBERT MOERANE **Third Respondent**

THE REGISTRAR OF DEEDS **Fourth Respondent**

Neutral citation: *Leketi v Tladi* (117/09)[2010] ZASCA 38 (30 March 2010)

Coram: MTHIYANE, NUGENT JJA, HURT, GRIESEL and SALDULKER AJJA

Heard: **5 March 2010**
Delivered: **30 March 2010**

Summary: Prescription – Plaintiff's claim based on fraud committed on 25 June 1969 – claim only instituted in February 2004 – special plea of prescription upheld – held at the trial and on appeal that by exercising reasonable care knowledge of minimum facts necessary for plaintiff to institute claim could have been

obtained in time – argument that fraud was a continuing wrong rejected.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Thlapi AJ sitting as court of first instance):

'The appeal is dismissed with costs.'

JUDGMENT

MTHIYANE JA (Nugent JA, Hurt, Griesel and Saldulker AJJA concurring)

[1] The appeal is against the judgment and order of the North Gauteng High Court (Thlapi AJ) upholding a special plea of prescription and dismissing with costs, the appellant's claim against the executor (the first respondent) and the second and third respondents, the beneficiaries of the estate of his grandfather, the Late Albert Mogale (Albert), for a declarator and vindicatory relief aimed at recovering from that estate immovable property, known as Nooitgedacht No. 287 situated in the District of Rustenburg (the property), which he alleged was the property of his father, the Late George Mogale (George), who died on 5 January 1966.

[2] The appellant alleged that on 25 June 1969 Albert fraudulently caused the property to be transferred and registered in his name, by representing to the Registrar of Deeds, Pretoria (the fourth respondent) that he was the only male heir of George and thus entitled to the property upon intestate devolution according to Black custom. Albert also failed to

disclose that George was survived by three children from his marriage with the appellant's mother, Safira Mogale. These children were: the appellant born on 7 April 1959, Audrey Mogale born on 17 February 1953 and Merona Maledu born on 22 August 1955.

[3] On 18 June 1974 Albert executed a will in which he bequeathed the disputed property to the second and third respondents and two other persons (now deceased) in equal shares as sole and universal heirs. The appellant and his sisters, Audrey and Merona, are not mentioned in the will.

[4] Although Albert's alleged fraud took place on 25 June 1969 the appellant's summons commencing action was only served on the first to third respondents between 9 February 2004 and 13 May 2004. The fourth respondent, was only served on 20 July 2005.

[5] Only the first respondent pleaded to the summons, the others elected to abide by the decision of the court. The first respondent filed a special plea of prescription, in which he alleged that the appellant's claim had become prescribed by lapse of time. He contended that as the claim fell due on 15 June 1969, when the property was transferred to Albert (regard being had to the circumstance that the appellant attained majority on 7 April 1980), the running of prescription against the appellant had been delayed until 7 April 1981 under the provisions of s 13 of the Prescription Act 68 of 1969. The first respondent contended further that, as the summons was served more than three years after 7 April 1981, the appellant's claim had become prescribed and accordingly fell to be

dismissed with costs.

[6] The appellant replicated that he could not have instituted action earlier because, until about 6 August 2003, he had had no knowledge of 'the identity of the defendants and the facts from which the debt arose'. He averred that he only gained knowledge of 'the proper identity' of the defendants and facts giving rise to the cause of action on or about 6 August 2003, after obtaining information from certain documents in the national archives in Pretoria. The documents referred to are the following:

- 'a copy of the decree of divorce between Safira Mogale and George Mogale;
- confirmation that the property in issue belonged to George Mogale;
- documents relating to the winding up of the estate of George Mogale;
- a declaration by Albert Mogale that he was the sole surviving male heir of George Mogale.'

[7] The sole question for decision at the trial was therefore whether the appellant's claim had become prescribed, given that the fraud which formed the basis of the claim took place on 25 June 1969 and summons commencing action was only served in February 2004. It is not in dispute that because of the appellant's minority at that stage, (he was only 10 years old in 1969) leaving aside the question of whether or not he knew of the fraud, the completion of prescription was delayed by virtue of the provisions of s 13 of the Prescription Act. Section 13 of the Act provides:

'(1) If –

(a) the creditor is a minor . . .

the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).'

In the context of this case the 'day' referred to in para (a)(i) is the day the appellant turned 21, viz 7 April 1980. Thus, in terms of s 13(1)(a), the completion of prescription against the appellant would have been deferred until 7 April 1981.

[8] In this context and for the purposes of considering the provisions of the Prescription Act, the appellant is the 'creditor' and any obligation on the part of the estate of Albert to restore to its rightful owner, property which he fraudulently appropriated is a 'debt'[1] as described in s 11(d) of that Act. In terms of the section the ordinary period of prescription for the 'debt' is three years from the date upon which a debt becomes due. However, the matter is further complicated by s 12(3) which provides:

'A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.' (emphasis added)

[9] It is obviously difficult for the first respondent to get past the appellant's bald assertion that he only obtained knowledge of the fraud on 6 August 2003 when he obtained documents from the national archives in Pretoria. It is a statement that can only be tested against the probabilities in the light of the totality of the evidence presented at the trial. The trial judge rejected the appellant's version that he did not know that the farm

[1] In *Barnett & others v Minister of Land Affairs & others* 2007 (6) SA 313 (SCA) it was said at para 19: 'Though the Act does not define the term "debt," it has been held that, for purposes of the Act, the term has a wide and general meaning and that it includes an obligation to do something or refrain from doing something.' After referring to other relevant authorities Brand JA went further to say there is no reason why the term 'debt' would not include 'a claim for the enforcement of an owner's right to property.' He cited with approval *Evins v Shield Insurance Co Ltd* 1979 (3) SA 1136 (W) at 1141F-G where King J said: 'The word "debt" in the Prescription Act must be given a wide and general meaning denoting not only a debt sounding in money which is due, but also, for example, a debt for the vindication of property.'

belonged to his father, George, and that he only came to know about this on 6 August 2003. The learned judge concluded that '[i]n all probability the appellant and his sisters knew or were told even before they became majors that their right (to the property) stemmed from the fact that the farm had belonged to their father.' The judge set out grounds for this conclusion. She said:

'1. Even before plaintiff's birth George had been frequenting the farm. According to Ntlatseng, on the date of plaintiff's birth George had gone to the farm in Rustenburg.

2. According to Maureen, George used to visit them at their maternal grandfather's home in Rustenburg. He came from the farm driving his tractor;

3. Maureen approached Hilda and pieces of corrugated iron and a table were pointed out as the only remaining items from their home belonging to them. In my view the home referred to then was the one in which George lived on the farm. In all probability, Maureen went to see Hilda, about the farm which belonged to her father.

4. Maureen accompanied Hilda to see Hugh Parkes, the attorney. In my view, it is unlikely that she would have gone to Johannesburg, if not to establish first hand, the reason why they could not inherit the farm. The possibility is there that she was informed of Albert's Last Will and Testament.

5. Their uncle Nnakgolo George undertook to ensure that they received what rightfully belonged to them to the exclusion of the other grandchildren.

6. Independently they reported Albert's estate to the Master in Mmabatho. Hilda, Albert's surviving spouse or the other grandchildren did not feature.'

[10] Although the above reasons are in themselves compelling, in my view, the real question for decision in this appeal is whether on a consideration of the totality of the available evidence, it can be said that the appellant could not have acquired knowledge of the fraud on the part of Albert on 25 June 1969, 'by exercising reasonable care', as required in the proviso to s 12(3) of the Prescription Act.

[11] One only has to look at his version to come to the conclusion that he took no steps at all, let alone 'reasonable' steps, to enforce his claim in a manner envisaged in s 12(3) of the Prescription Act. The appellant and his sisters, Audrey and Merona, knew all along that they were going to inherit the property, as Albert's intestate heirs. The appellant says he did not know that the property belonged to his late father, George, nor was he aware that Albert had made a will bequeathing the farm to the second and third respondents and two other persons (now deceased). Albert died in 1976. Understandably he was too young then to do anything about the matter. But after graduating from medical school in 1983 he could have taken steps to find out in whose name the property was registered. Instead what did he do? After completing his medical degree, he set up practice in Thaba Nchu in 1984 and later went to practise in Bloemfontein in 1985. Subsequently he moved to Potchefstroom during 1986 and finally settled in Springs during 1987.

[12] The appellant testified that he only started applying his mind to the property issue in 1986 and 1987 when he returned to practise in Gauteng. In reply to a question in cross-examination he said it did not strike him as strange that after 11 years the property, which was his entitlement, had not yet been transferred and remarked somewhat curiously:

'It was not strange for me at that point because at that point there was no dispute / I came back from my studies and I needed to inquire who was then taking care of the property.'

It is clear from the above remark that claiming the property was the least of his priorities. He was more concerned about who was taking care of the farm because he had obtained information that there was a company

that was carrying on mining operations on it and another person who had planted sunflowers there. It is not clear from the record what those enquiries yielded.

[13] Two years later in 1989 the appellant and his sister Merona went to consult an attorney, Mr Makhambeni, to seek advice on how to deal with the 'people that were mining granite' on the farm and those 'who had planted sunflower for the trading' purposes. There is no indication that the appellant sought to instruct Makhambeni to enforce his entitlement to the farm. Makhambeni requested them to obtain the marriage certificate of their parents, confirming that they were born of George and their mother, Safira Mogale. They were also asked to obtain copies of death certificates of George and Albert and some confirmation that George was the son of Albert.

[14] Merona obtained the requested documents from the Department of Home Affairs, Rustenburg, and when she returned to Makhambeni's office with them in 1990 she discovered that he had been struck off the roll of attorneys.

[15] In the meantime the appellant was having discussions with members of the family and the purpose and details of these meetings is far from clear from the record. Be that as it may, they culminated in the appellant meeting one of his aunts, Ms Nthlaseng Mogale, from whom he went to 'check' who was actually taking care of the farm. His aunt referred the appellant to her brother, George Nagole Mogale, who was 'the one who had been taking care of the farm'. The appellant and his

sister, Merona, went to visit the gentleman concerned and he assured them that he would see to it that the farm was returned to them. It appears from the record that this meeting took place around 1999. Arrangements were then made for the appellant and his sisters to go to Tlhabane Magistrates' court, presumably for the purpose of winding up the estate of Albert who died in 1976. The appellant's uncle, George Nagole Mogale, most unfortunately died in 2001 before the visit to the Tlhabane Magistrate's court.

[16] Merona ended up going to the magistrate together with her and the appellant's half brother, Sipho Leketi. On 21 September 2001 they were issued with a letter of authority which authorized them to take control of the assets of the estate of Albert. On 29 November 2002 the said letter of authority was withdrawn, when it was discovered that Albert had in fact died testate and consequently the first respondent was appointed the executor of the estate of Albert.

[17] The appellant is not an ordinary lay person. He is a medical practitioner, who qualified as such in 1983. He commenced his practice in 1984 and was certainly at that stage in a position to engage an attorney to secure transfer of the farm into his name. On his own version as early as 1978 there was never any dispute as to whom the farm (the property) was to go to.

[18] Obtaining a deed of transfer from the Deeds Registry would have provided the appellant with the required minimum facts for the institution of a claim against the estate of his grandfather, Albert, much earlier than

on 6 August 2003. It seems to me that the adverse operation of s 12(3) is not dependent upon a creditor's subjective evaluation of the presence or absence of 'knowledge' or minimum facts sufficient for the institution of a claim. In terms of s 12(3) of the Prescription Act the 'deemed knowledge' imputed to the 'creditor' requires the application of an objective standard rather than a subjective one. In order to determine whether the appellant exercised 'reasonable care' his conduct must be tested by reference to the steps which a reasonable person in his or her position would have taken to acquire knowledge of the 'fraud' on the part of Albert. (See *Drennan Maud & partners v Pennington Town Board*.[2]) On the application of that objective standard, it is clear that if the appellant had exercised reasonable care he could have acquired knowledge of the fraud, long before the claim prescribed, and thus the requisite minimum facts to enable him to institute his claim timeously.

[19] On the evidence, it is clear that the appellant's failure to institute action timeously was not due to his lack of or inability to obtain knowledge but rather to his dilatoriness as correctly found by Thlapi AJ. It took him 6 years (1981 – 1987) after his claim had prescribed to begin to make enquiries. It seems that he was more concerned about establishing the identity of the person who was 'taking care of the farm' so as to take up the issue as to who was conducting mining operations on the property and who were planting sunflowers. It then took him another 3 years (1987 – 1990) to consult an attorney for the first time. The appellant was not indigent and had the means to instruct an attorney. Then some 14 years passed before the appellant made enquiries about documents, which were ultimately retrieved from the National Archives,

[2] 1998 (3) SA 200 (SCA) at 209F-G.

Pretoria on 6 August 2003. In these circumstances it is difficult to disagree with the judge a quo's finding that the appellant's dilatory and nonchalant conduct was the key contributory factor to his purported inability to obtain 'knowledge' timeously.

[20] A further ground advanced by the appellant for his contention that his claim has not prescribed is that the fraud committed by his grandfather, Albert, on 25 June 1969 was a continuing wrong. Mr Bokaba for the appellant, argued that for as long as the property remained registered in the name of Albert, the claim remains alive. No authority was cited for the submission that a claim based on fraud does not become prescribed.

[21] The point is clearly without merit. Fraud is an act of deceit which resulted in a single act of transfer and registration which was completed on 25 June 1969. It is that single act which constitutes the appellant's cause of action and does not amount to a continuing wrong. (cf *Barnett & others v Minister of Land Affairs & others*[3])

[22] In the result and on either basis the appellant fails. The following order is made:

'The appeal is dismissed with costs.'

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K K Mthiyane

Judge of Appeal

[3] At 320I-321A.

APPEARANCES

APPELLANT:	T J B Bokaba SC (with him D C Mpofu) Instructed by Noko Inc, Pretoria Naudes, Bloemfontein
FIRST RESPONDENT:	F J Erasmus Instructed by Rooth Wessels Motla Conradie, Pretoria Rosendorff Reitz Barry, Bloemfontein