160/1959

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G.P.-S.1256339—1956-7—4,000. S. U.D.J. 219.

In the Supreme Court of South Africa.
In die Hooggeregshof van Suid-Afrika.

{ APPELLATE [redacted] Division.)
[redacted] Afdeling.)

Appeal in Civil Case.
Appèl in Siviele Saak.

EXEC. TEST. EST. LATE CHRISTOFFEL A. NEL *Appellant,*

versus

COMMISSIONER FOR INLAND REVENUE *Respondent*

Appellant's Attorney Webber + Son *Respondent's Attorney* Naude + Naude
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate Graeme Duncan Q.C. *Respondent's Advocate* P. Schock Q.C.
Advokaat vir Appellant D.B. Mollens Q.C. *Advokaat vir Respondent* D Knight

Set down for hearing on
Op die rol geplaas vir verhoor op Thursday, 12th November, 1959.

(CPD)

(A)

~~1456.~~

~~10.45 p.m.~~
9.42 a.m.

C.A.V.

Postea: Thursday, 19th November 1959.
Appeal dismissed with costs.

J. van Blerk,
Rep.

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

JOHANNA CATHERINA NEL, N.O. Appellant

and

THE COMMISSIONER FOR INLAND REVENUE. Respondent

Coram:Steyn C.J.,Beyers,Malan,Van Blerk et Ramsbottom JJ.A.

Heard: 12th November, 1959. Delivered: 12-11-1959

J U D G M E N T

RAMSBOTTOM J.A. :- This is an appeal from the judgment of van WINSEN J., in the Cape Provincial Division, dismissing, in part, an application brought by the appellant against the respondent. An appeal to the full bench of the said division was noted, and the parties have consented in writing to the appeal being brought direct to this Court.

On January 17th 1947, the late Christoffel Andreas Nel, to whom I shall refer as the donor, donated to his son Christoffel Andre Nel, who was then a minor aged 13 years, four pieces of immovable property of which the donor was the owner. On March 1st 1947 these four properties were transferred to the donor's said minor son, subject to

certain/.....

certain conditions. The donor as father and natural guardian of his said son had authorised his acceptance of the transfer subject to the said conditions, and transfer was accepted accordingly.

Three of the said properties, namely the remaining extent of the farm Karree Kloof, the remaining extent of Portion 2 of the farm Rietfontein, and the portion called Kampie of a portion of the farm known as Rietfontein A, were transferred, subject, in each case, to the following "special conditions" imposed by the donor.

"(1)The said land shall be subject to the reservation in favour of.....Christoffel Andreas Nel.....of a life usufruct..... registered this day.

(2) That upon the death of the appearer's principal, the said Christoffel Andreas Nel, during the lifetime of his wife Johanna Catherina Nel.....to whom he is married out of community of property she being the mother of the said Christoffel Andre Nel, he the said son and transferee shall be bound and obliged within three (3) consecutive months after the death of the appearer's principal to execute a notarial deed in favour of his said mother whereby he shall pay to his said mother a monthly sum of twenty pounds (£20) payment of such sum to commence within three (3) consecutive months after the death of the appearer's principal and to comtinue during the mother's lifetime, and further the said son shall by means of the said notarial deed grant to his mother the life usufruct over the property described in paragraph 4 hereinafter mentioned.

(3) That should the said son come to die during the lifetime of the appearer's principal,without leaving any lawful children

of/.....

of his own, the said property shall again revert to and be an asset of the appearer's principal.

(4) That should the said son become of age during the lifetime of the appearer's principal, he shall not have the right to sell or mortgage the said property or any portion thereof, without first obtaining the written consent of the appearer's principal."

The fourth property, which was "portion "3 (a portion of portion 2) of the farm Rietfontein" was transferred by paragraph 4 of the deed of transfer which is referred to in condition (2) above. It would appear from certain conditions under which this property was transferred that it was used for residential purposes. The transfer of this property was subject to the "special conditions" (1),(2),(3) and (4) that I have quoted above except that the obligation imposed ~~by~~ on the donor's son by condition (2), in respect of the usufruct, read

"And further the said son shall by means of the said notarial deed grant to his mother the life usufruct over the said property."

The four "special conditions" were thus inserted in the transfer of each of the four properties.

The donor died in June 1954 and was survived by his widow, whom he had appointed as his executrix, and by his said son. The widow, in her capacity as executrix testamentary, was the applicant in the court below and is the appellant in this appeal.

The/.....

The usufructs which had been held by the donor over the properties that he had donated to his son formed part of the donor's estate, for the purposes of estate duty, by reason of section 3 (1) (b) and 3 (4) (c) of Act 29 of 1922. The appellant contended however, that, in determining the dutiable amount of the estate, the respondent was obliged to make deductions in terms of section 4 (a) (vii)(1) of the Act. That paragraph of section 4 (a) provides that :-

"The dutiable amount of any estate shall be determined by making the following deductions from the total value of all property included therein in accordance with the last preceding section, that is to say :-

(vii) the value of any usufructuary or other like interest referred to in paragraph (c) of sub-section (4) of section three which was enjoyed by the deceased over property -

(1)over which,on the death of the deceased,the surviving spouse acquires a usufructuary or other like interest."

The appellant contended that on the death of her husband she had acquired a "usufructuary or other like interest" over property over which the donor had, prior to his death, enjoyed a usufructuary interest, and therefore the value of the donor's usufructuary interest fell to de deducted from the value of his estate. The Commissioner for Inland Revenue accepted this contention in so far as it related to the fourth property, portion 3 of the farm Rietfontein, over which the donor

had/.....

had enjoyed a usufruct and over which the appellant was to be granted a usufruct, and in respect of that property there is no dispute. But the appellant contended that her right to receive £20 a month, which I shall refer to as the annuity, was "a usu- "fructuary or other like interest" which she had acquired, on the death of the donor, over property over which the donor had enjoyed life-usufructs and that the value of those usufructs also fell to be deducted. That contention was not accepted, and the appellant applied to the Cape Provincial Division for (inter alia) the following declaration:-

"That the value of the usufruct of the late Christoffel Andreas Nel reserved to him in terms of Deed of Transfer No.3235 of 1st March 1947 is deductible from the total value of his estate for the purpose of determining the amount of estate duty payable."

Van WINSEN J. held that the obligation which the donor had imposed upon his son by condition (ℌ2) of the transfers was an obligation personal to the son and did not constitute a burden upon the land. He held, therefore, "that the applicant was not "afforded "a usufruct or other like interest' over the immovable "properties transferred to her son, and accordingly no deduction "falls to be made under section 4(2)(vii) of the Death Duties "Act." He refused to make the declaration claimed, and the appellant has appealed.

The deduction provided by section

4(a)(vii)(1)/....

1950 (3) S.A.628, proceeded on the assumption that such a burden on land could be imposed and registered, and both Mr. Duncan and Mr. Schock, who appeared for the respondent, argued on the same assumption. Although the question was raised and argued in Registrar of Deeds (Transvaal) v. The Ferreira Deep Ltd. (1930 A.D. 169), it was not decided, and it has never been decided in this Court. In the view that I take it is not necessary to decide the point in this appeal. The point is one of importance, it has not been argued before us, and I think that it should be left open for future decision. I therefore express no opinion upon it.

Apart, however, from the question I have just mentioned, it was necessary for the appellant to show that in imposing condition (2) of the transfer to his son the donor sought to impose a burden on the land and not an obligation upon his son, personally, to pay the annuity to the appellant. The deed of donation itself is not before us. It was not suggested by counsel on either side that the terms of condition (2) of the transfers differed at all from the condition as set out in the deed of donation, and I assume therefore that there is no difference. There is no allegation of any extraneous facts in the light of which the condition must, or can, be interpreted/.....

-preted, and we must therefore interpret the condition without reference to any facts except those that appear from the transfer deed itself.

It will be convenient to quote again the material part of condition (2). The condition provides that upon the death of the donor during the lifetime of his wife "she being the mother of the said son,Christoffel Andre Nel, he the said son and transferee shall be bound and obliged within three (3) consecutive months after the death of the appearer's principal, to execute a notarial deed in favour of his said mother whereby he shall pay to his said mother a monthly sum of twenty pounds (£20) payment of such amount to commence within three consecutive months after the death of the appearer's principal and to continue during the mother's lifetime, and further the said son shall by means of the said notarial deed grant to his mother the life usufruct over the property described in paragraph (4) hereinafter mentioned. "

Mr. Duncan contended that on the proper interpretation of that condition the obligation to pay the annuity was imposed as a burden on the land,and consequently the appellant's right to the annuity was a right over land. His argument was that the fact that the donor imposed upon his son the duty of executing a notarial deed granting to his mother the annuity and the usufruct shows that his intention was that a burden should be imposed on the land. The donor did not wish to create a fideicommissum because he did not wish to impose a

restraint/.....

restraint on alienation; he wished a personal servitude to be granted in favour of his widow; but since section 67 of the Deeds Registries Act of 1937 was not applicable, the only way in which the servitude could be granted was by way of a notarial deed. This,he argued, afforded the only reasonable or rational explanation of why the donor directed the execution of a notarial deed and did not embody the obligation directly in the condition itself. The notarial deed had to be executed by the son, as owner, and to ensure that he would do so the donor imposed that obligation upon him as a condition in the deed of transfer. The fact that the annuity and the usufruct over the fourth property were to be granted in the same notarial deed showed that the donor intended both to be registrable rights in rem, and although he did not expressly say that the notarial deed was to be registered, that was implied, since a usufruct, to be valid against third parties, must be registered. If the donor had intended that the obligation to pay the annuity was to be personal to the son it would have been sufficient to require the grant of the servitude alone to be by way of notarial deed.

I do not think that Mr. Duncan's argument can be accepted. Condition (2) provided for what should be done if the donor should die and if his wife and his son should survive him. The donor knew that the son would be well provided for whether he was of age or was still a minor

and whether or not any of the properties had been sold. The donor wanted his widow to have the use of the residential land, and he wished his son to contribute something towards her maintenance. The donor knew that the son, as owner, would have to grant both the annuity and the usufruct, and he imposed upon him the obligation to do so. Accordingly, he provided that within three months of his death his son was, by the solemn act of executing a notarial deed, to take upon himself the duties towards his mother that had been imposed by the condition. That he intended the son to take the obligation to pay the annuity upon himself personally appears clearly from the words used, namely, "he, the son and transferee shall be bound and obliged " .....to execute a notarial deed in favour of his said mother " whereby he shall pay to his said mother a monthly sum of £20." In my opinion the imposition of a personal obligation could hardly have been more clearly expressed. I think that Mr. Duncan's argument attributes to the donor a knowledge of the technicalities of conveyancing that is not warranted and I think that the answer to the argument is that if the donor had possessed such knowledge he would have required his son to execute a notarial deed in favour of his mother whereby he and his successors in title should pay the annuity, or he would have used some other suitable words to show that the annuity was be to a burden

on the land and was to be paid by the owner for the time being. Whether he had possessed a knowledge of conveyancing or not, if that had been his intention he would have expressed it, and he would not have left it to be inferred from the fact that he bound his son to execute a notarial deed. So far from expressing an intention that the duty of paying the annuity was to fall upon successive owners of the land, he used clear language to ensure that that duty would be undertaken by his son.

The argument from the fact that the grant of the usufruct was to be made in the same notarial deed as the grant of the annuity is likewise based upon the assumption that the donor possessed a knowledge of conveyancing. In one condition the donor had imposed an obligation to make two grants. The obligation was to be performed by the execution of a notarial deed. In the context, I do not think that the fact that the donor stated that the servitude was to be granted "by means of the said notarial deed" gives rise to the inferences that Mr. Duncan ~~wishes~~ asks us to draw. There was no reason why both grants, one imposing a personal duty upon the son and creating a jus in personam in favour of the mother and the other granting a right which on registration would become a jus in rem should not be made in one deed. The one right would be registrable and would be perfected only on registration, and the other would not be

registrable/.....

registrable; but the condition said nothing about registration of the notarial deed. In regard to the usufruct a registrable right would have been granted, and no difficulty would be experienced in effecting its registration. In regard to the annuity, the right would not be registrable or, if the Registrar of Deeds should register it on the principle applied in ex parte Geldenhuys (1926 O.P.D.155), registration would not convert it into a right in rem. I cannot accept the argument that the only reason why the donor required his son to execute a notarial deed was that he wished to impose a burden on the land. I think that his reason, which was quite rational, was that he wished his son, to whom he was giving so much, to bind himself in solemn form to give something to his mother, namely the usufruct of the residential land and an annuity of £20 a month.

Mr. Duncan's main argument having failed, I do not propose to deal in detail with several ancillary points which he used to support the inference that the annuity was intended to be charged on the properties, but I shall deal briefly with some of them. An argument was based on the fact that the obligation upon the son was imposed as a "condition" of transfer, an apt expression for the imposition of a burden upon the land. I think that, in its context, the expression

was/.....

was not less apt for the imposition of a personal obligation upon the son. It was also suggested that the donor would wish to secure the annuity by charging it upon the land. This is a matter of speculation, but I think that the probability is the other way. After the donor's death the son was at liberty to sell any of the properties or subdivisions thereof. If the annuity was to be a burden on the land, on the sale of the land the son would be released and in course of time the widow might have to look to several owners, strangers to her, for the payment of her annuity. It is more likely that the donor would have trusted his son to keep his promise and perform his obligation. Moreover, it is difficult to see how the burden would be imposed on the land. If the annuity was to be an interest in land "like a servitude," it would be payable out of the fruits or profits of the land burdened. It would not, then, fall on the fourth portion of land over which the appellant was to have a life usufruct. The burden would have to fall on the other three properties, and there is no indication as to the proportion in which the obligation would be divided among them or as to what would happen if the properties were sub-divided. These considerations militate against the appellant's contention.

The fact that the condition is

repeated/.....

repeated as a condition of the transfer of each of the four properties is of no assistance to the appellant. Although the four properties were transferred in one deed, there were four transfers. Only one annuity was to be granted, but the granting of that annuity was made a condition of each transfer; the obligation was one and indivisible and was personal to the donee.

I agree with van WINSEN J. that the right to the annuity is not a right over land, and that being so the appellant is not entitled to claim a deduction in terms of section 4 (a) (vii) (1) of the Death Duties Act.

The appeal is dismissed with costs.

W. H. Rumpff.

Steyn C.J.)
Beyers,J.A.) Concur.
Malan, J.A.)
Van Blerk,J.A.)