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THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 21700/2021

DATE: 4TH AUGUST 2023

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

GUMBI, ZAMANI PETRUS

First Applicant

GUMBI, BHEKI HUMPHREY

Second Applicant

GUMBI, THABO CHARLES

Third Applicant

and

MASTER OF THE HIGH COURT, JOHANNESBURG

First Respondent

FNB FIDUCIARY (PTY) LIMITED

Second Respondent

GUMBI, NOMVULA ESTHER

Third Respondent

GUMBI, NSIZWA GODFREY

Fourth Respondent

Neutral Citation: *Gumbi and Others v The Master of the High Court and Others (21700/2021)* [2023] ZAGPJHC --- (04 August 2023)

Coram: Adams J

Heard: 01 August 2023

Delivered: 04 August 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 04 August 2023.

Summary: Opposed application – interpretation of Last Will and Testament – the *nudum praeceptum* principle discussed – if no 'gift over', then such condition to be disregarded – if 'gift over' provided for, then bequest stands unless condition fulfilled – bequest can never be regarded as *pro non scripto*, only condition – property to be transferred to heiress – the applicants' application dismissed.

ORDER

- (1) The first, second and third applicants' application is dismissed with costs.
 - (2) It is hereby ordered and directed that any and all immovable properties registered in the name of Siphon Collen Gumbi ('the deceased'), who died on 27 February 2020, shall be transferred to and registered in the name of the third respondent.
 - (3) The first, second and third applicants, jointly and severally, the one paying the other to be absolved, shall pay the third respondent's costs of the application.
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JUDGMENT

Adams J:

[1]. The first, second and third applicants are the biological sons of one Siphon Collen Gumbi ('the deceased'), who passed away on 27 February 2020, and the third respondent is the surviving wife. The fourth respondent is the brother of the deceased and all of the foregoing persons are the heirs and legatees in the Last Will and Testament of the deceased. This opposed

application concerns a dispute in relation to a clause in the Last Will and Testament of the deceased.

[2]. The applicants apply for an order declaring a clause 3 of the Last Will and Testament of the deceased as *pro non scripto*. Additionally, they seek an order that the fixed and immovable properties of the deceased be dealt with and distributed amongst his heirs as if he had died intestate. The applicants seek the aforesaid relief on the basis that the aforesaid clause 3 incorporates a so-called *nudum praeceptum*, which, so the applicants contend, should be completely disregarded. The third respondent, who is the only one opposing the applicants' application, contends that, in terms of the applicable legal principles, the applicants are not entitled to the relief claimed.

[3]. The issue to be considered in this application is simply whether, all things considered, the applicants make out a case and a valid cause of action which translate into the relief claimed by them. That issue is to be decided against the factual backdrop and the facts in the matter as set out in the paragraphs which follow.

[4]. The deceased, who at the time of his death on 27 February 2020 was married to the third respondent in community of property, executed his Last Will and Testament on 25 February 2011. In the relevant parts, clauses 3 and 4 of the Will reads as follows;

'3. I bequeath the residue of my estate to my wife, Nomvula Esther Gumbi (ID[...]), with the proviso that she survives me by a period of 7 (seven) days.

It is my wish that my fixed property shall not be sold but retained as a family home for my children.

4 Failing my wife to the residue, I bequeath the residue of my estate in equal shares to my children Petrus Zamani Gumbi (born[...]), Bheki Humphrey Gumbi (ID[...]) and Thabo Charles Gumbi (ID[...]) or the survivors of them, provided however, that should any of them predecease me leaving issue, alive at the date of my death, such issue shall receive *per stirpes* that share which their deceased parent would have received if living. It is my wish that my fixed property shall not be sold but retained as a family home for my children.' (My emphasis).

[5]. The dispute between the parties revolves around the interpretation of clause 3, quoted above. It is the case of the applicants that the said clause

incorporates a *nudum praeceptum* and, as such, should be disregarded and declared *pro non scripto*. This would then mean, so the submissions on behalf of the applicants go, that the immovable property in the deceased estate should be dealt with on the basis that the deceased died intestate.

[6]. The third respondent disagrees. Her evidence was that the fixed property, that they owned when the will was executed in 2011, was disposed of during 2015, whereafter she and the deceased acquired a second property during 2016 and the intention was that she would become the owner of that property on the death of the deceased to the exclusion of the applicants. All the same, the issue in dispute between the parties can and should be decided on the basis that clause 3 is indeed a *nudum praeceptum* and the question to be asked is simply what legal consequences flow from such a provision. The point is simply that the said clause, properly interpreted, provides that the residue of the estate of the deceased, which clearly includes immovable property registered in the name of the deceased, was bequeathed to the third respondent. There is, however, a proviso to the effect that the third respondent should not sell the fixed property in the estate, but same should be retained 'as a family home' for the children of the deceased. The difficulty is that the will does not make provision for the eventuality of the third respondent selling or attempting to sell the fixed property. This is the very definition of a *nudum praeceptum*.

[7]. Therefore, the question to be considered is what are the consequences of that particular clause in this matter.

[8]. The legal principles relating to a *nudum praeceptum* are, in my view, as follows. If a testator bequeaths property to a beneficiary, but prohibits him or her from dealing with the property in a certain way, for example, alienating the property, such a prohibition will only be valid if someone else has been nominated by the testator to take the property should the beneficiary contravene the prohibition. If no provision is made for a substitute or a so-called 'gift over' in the event of contravention of the prohibition, the prohibition is called a *nudum praeceptum* or nude prohibition and is not legally binding. It bears emphasising

that it is the condition which is the *nudum praeceptum*, which is unenforceable and is to be regarded as *pro non scripto*, and not the clause in terms of which the bequest is made.

[9]. An example of a *nudum praeceptum* is a provision to the following effect: 'I bequeath my farm to my son on condition that he will never be allowed to sell or encumber the farm'. Such a provision in a Will is unenforceable and the bequest should be made to the son without any conditions attached to same. On the other hand, the condition would be enforceable if the bequest was formulated thus: 'I bequeath my house to my son on condition that he will never be allowed to sell or encumber it. Should he endeavour to sell or encumber the house, it will devolve upon my daughter'.

[10]. A *nudum praeceptum* burdens a bequeathed property with a condition that the heir can never sell the property, and such a condition cannot be registered against the property. In that regard, the learned Authors of *Wills and Trusts: A Practical Commentary on Wills and Trusts* by R P Pace and W Van Der Westhuizen, (Lexis Nexus SA), opines as follows: -

'Should the testator fail to appoint a further beneficiary on the condition being fulfilled, the resolute condition is considered to be a *nudum praeceptum* and will be disregarded.'

[11]. This, in my judgment, is an accurate summation of the law in relation to the doctrine of *nudum praeceptum* – no 'gift over, no condition'. The rule of nude prohibition is not itself a rule of construction, but rather a rule imposed in the interests of the freedom of owners to deal with their property as they choose. I reiterate that this does not mean that the bequest must be considered invalid, but that the heir receives the inheritance free of the condition.

[12]. The learned Authors, Olivier, Strydom and van den Berg, of *Trust Law and Practice*¹, explains the *nudum praeceptum* principle as follows: -

'A testator who attempts to deprive his fully contractually competent legatee or heir of the right to control, or to dispose of the property bequeathed to him, by placing the property in the hands of an administrator, or by imposing a restriction on alienation, will not normally bind the beneficiary. Such restrictions are regarded as nude and not enforceable.'

¹ Olivier, Strydom and van den Berg: *Trust law and Practice*, at pg 2-11;

Such restrictions can be binding if provision is made for a successive beneficiary if the first taker should fail to abide by the imposed restrictions.’

[13]. I respectfully adopt this view and the authors’ elucidation of the legal principles relating to *nudum praeceptum*.

[14]. Applying these principles *in casu*, I conclude that clause 3 and the bequest in terms thereof should stand on the basis that the condition imposed by the testator amounts to an unenforceable *nudum praeceptum*. Even if the condition that the fixed property be retained as a family home of the children is to be interpreted as a ‘gift over’, the applicants’ application should still fail. The simple point is that, in terms of the applicable legal principles, the conditional bequest can never be treated and regarded as *pro non scripto*. It is only the condition which can be treated as such in the event that no ‘gift over’ is provided for. The applicants’ case and their cause of action is therefore ill-advised and misconceived – it is not sustainable. And for that reason alone the application should fail.

[15]. Moreover, the proviso and its effect would only kick in in the event of the condition being fulfilled, which is not the case pleaded *in casu*. The applicants cannot possibly claim that the bequest should be redirected when the condition is not met.

[16]. For all of these reasons, I am of the view that the first, second and third applicants are not entitled to the relief claimed in this opposed application, which falls to be dismissed.

Costs

[17]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. See: *Myers v Abramson*².

[18]. I can think of no reason why I should deviate from this general rule. The first, second and third applicants should therefore pay the third respondent’s costs of this application.

² *Myers v Abramson*, 1951(3) SA 438 (C) at 455

[19]. I therefore intend awarding costs in favour of the third respondent against the first, second and the third applicants, jointly and severally, the one paying the other to be absolved.

Order

[20]. Accordingly, I make the following order: -

- (1) The first, second and third applicants' application is dismissed with costs.
- (2) It is hereby ordered and directed that any and all immovable properties registered in the name of Sipho Collen Gumbi ('the deceased'), who died on 27 February 2020, shall be transferred to and registered in the name of the third respondent.
- (3) The first, second and third applicants, jointly and severally, the one paying the other to be absolved, shall pay the third respondent's costs of the application.

L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	1 st August 2023
JUDGMENT DATE:	4 th August 2023 – judgment handed down electronically
FOR THE FIRST, THE SECOND AND THE THIRD APPLICANTS:	Advocate J Chabangu
INSTRUCTED BY:	Makudubela Attorneys, Lakefield, Benoni
FOR THE THIRD RESPONDENT:	Advocate M J Ranala
INSTRUCTED BY:	M L Mateme Incorporated, Mondeor, Johannesburg
FOR THE FIRST, SECOND AND FOURTH RESPONDENTS:	No appearance
INSTRUCTED BY:	No appearance