

IN THE SEYCHELLES COURT OF APPEAL

ATTORNEY GENERAL

APPELLANT

VERSUS

**JOSEPH MARZORCCHI
CHARLES MARZORCCHI**

**1ST RESPONDENT
2ND RESPONDENT**

Civil Appeal No. 8 of 1996

(Before: Silungwe, Ayoola & Adam JJ.A)

Mr. A. Fernando for the Appellant
Mr. P. Boulle for the Respondents

RULING OF THE COURT

(Delivered by Silungwe, J.A.)



This matter comes before us by way of a notice of motion in which the first and second respondents are the applicants and the appellant is the respondent. For the purpose of this Ruling, the parties will retain their original positions and so continue to be referred to as appellant and first and second respondents, respectively.

This matter was initially brought before the Court of Appeal as an appeal from the Constitutional Court and it raised constitutional issues pertaining to land acquisitions.

After judgment had been delivered, the respondent filed a notice of motion together with an accompanying affidavit to move "for an order that the appeal be re-heard on the ground that the respondents were not heard before judgment was delivered" by the Court. The appellant's counsel filed an affidavit the substance of which was that the Court may have given an impression that his arguments would not be accepted. It is probable in such circumstances that the respondents' counsel may not have been called upon to be heard. It is, therefore, prudent to err on the side of caution and assume that there might have been an irregularity of the nature complained of.

At the hearing of the motion on April 6, 1998, Mr. Boulle, learned counsel for the respondents, urged the Court to exercise its inherent jurisdiction to entertain the application and to set aside the judgment for the purpose of rectifying an irregularity of the nature complained of.

In aid of his argument, Mr. Boulle draws attention to paragraph 558 of Halsbury's Law of England, Vol. 26, 4th Edition, which reads:

"558. Amendment or setting aside on non-compliance with rules of courts. Where in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of the rules of court, whether in respect of time, place, manner, form or content or in any other respect, the failure is to be treated as an irregularity and does not nullify the proceedings, every step taken in them or any document, judgment or order in them. However, on application made by summons or notice on the ground that there has been such a failure, the court, on such terms as to costs, and otherwise as it thinks just, may set aside, wholly or in part, the proceedings, any step taken in them or any judgment, order or document in them, or exercise its powers to allow amendments and to make such order dealing with the proceedings generally as it thinks fit."

In conclusion, Mr. Boulle asks the Court to consider the possibility of a differently constituted Bench to re-hear the case at the next session of the Court.

Mr. Fernando, learned senior state counsel, resists the application on the ground that the Court has no jurisdiction to entertain it. In doing so, he relies, inter alia, on the provisions of Article 120 (1) and (4) of the Constitution; Rule 15(2) of the Court of Appeal Rules; paragraph 390 of Halsbury's Laws of England, Vol.29, 4th Edition, which deals with the doctrine of *functus officio* in the Magistrates' Court; and paragraphs 550 and 557 of the said Halsbury's Laws

of England, Vol. 26, pertaining to conclusiveness of judgments; and to amendments of clerical or incidental mistakes, respectively.

The critical question for determination is whether the Court has jurisdiction to set aside its own judgment on account of the irregularity and to make an order for a re-hearing of the appeal.

We are here not concerned with the question of rectifying a clerical or incidental mistake, but are faced with what appears to be an irregularity which taints the validity of the proceedings and renders them a nullity. In such a situation, the doctrine of *functus officio* has no application and is therefore, of no consequence. Further, where a procedural irregularity of the nature complained of has occurred, as in this case, a judgment or an order given in these proceedings, must surely be treated as a nullity. In the circumstances, the Court must exercise its inherent jurisdiction to set aside the said judgment or order.

We find that paragraph 556 of Halsbury's Laws of England, Vol.26, 4th Edition, is not only germane to our situation here, but it is also instructive. The paragraph is in these terms:

"556. Amendment after entry of judgment or order. As a general rule, except by way of appeal, no court, judge or master has power to rehear, review, alter or vary any judgment or order after it has been entered either in an application made in the original action or matter or in a fresh action brought to review the judgment or order. The object of the rule is to bring litigation to finality, but it is subject to a number of exceptions. For example, a clerical error or an error arising from an accidental slip or omission may be corrected under rules of court or the court's inherent jurisdiction. The court has inherent jurisdiction to vary or clarify an order as to carry out the court's meaning or make the language plain or to amend it where a party has been wrongly named or described unless this would change the substance of the judgment. The court will treat as a nullity and set aside, of its own motion if necessary, a judgment entered against a person who was in fact dead or a non-existent company or, in certain

set aside, of its own motion if necessary, a judgment entered against a person who was in fact dead or a non-existent company or, in certain circumstances, a judgment in default, or a consent judgment. Where there has been some procedural irregularity in the proceedings leading up to the judgment or order which is so serious that the judgment or order ought to be treated as a nullity, the court will set it aside."

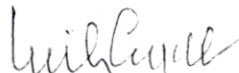
The foregoing paragraph commends itself to us. We are, therefore, satisfied that the irregularity before us being a serious procedural irregularity rendered the proceedings a nullity. Consequently, the judgment is set aside. The order of the Court is that the appeal be re-heard by a differently constituted majority of the Bench.

There will be no order as to costs of the hearing of this application.

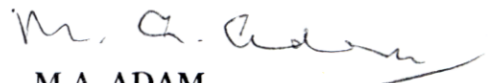
Dated at Victoria, Mahe this *9th* day of April, 1998.



A.M. SILUNGWE
JUSTICE OF APPEAL



E.O. AYoola
JUSTICE OF APPEAL



M.A. ADAM
JUSTICE OF APPEAL

Handed down
Adam JA