

**IN THE SEYCHELLES COURT OF APPEAL**

**[Coram: S. Domah (J.A) , A.Fernando (J.A) , M. Twomey (J.A)]**

**Civil Appeal SCA 40/2013**

**(Appeal from Supreme Court Decision 11/2010)**

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Charles Alfred Moulinie

Appellant

Versus

Government of Seychelles

1<sup>st</sup> Respondent

Attorney General

2<sup>nd</sup> Respondent

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Heard: 11 April 2016

Counsel: Mr. P. Boullé for Appellant

Ms. A. Madeline for Respondents

Delivered: 22 April 2016

**JUDGMENT**

S. Domah (J.A)

- (1) On 7 December 2011, this Court remitted a long-standing constitutional claim with a chequered history to the Constitutional Court for the purpose of determining the quantum of compensation to be paid to an owner divested of his landed property prior to 1993. Having heard the matter, the Constitutional Court made an award. As a matter of law, however, the then learned Chief Justice Egonda-Ntende, with whom M. Burhan J. and G Dodin J. concurred, made the award on the basis that, as per the applicable law: i.e. section 14 of Schedule 7 of the Constitution of the Republic of Seychelles, the Court could only assess and give compensation which was payable as at the date referred to in the Constitution, which in this case is 1993. With a deduction of an amount paid, that amounted to SR4,584,600.00. It was the contention of the appellant that the rate applicable should be the current market value

of the properties and not the 1993 rate. In the estimation of the appellant, that sum amounted to SR52,316,451.00. It is this burning issue which has come to us on appeal.

- (2) The appellant has raised 4 grounds of Appeal. In the interest of simplification in a case which has already generated volumes upon volumes of typescripts, loads and loads of documents and involved various professionals, officers and experts at various stages in an application that started in 1993, we shall cull the gist of the grounds of appeal rather than reproduce them. Under Ground 1, it is the contention of the Appellant that the Constitutional Court misapplied the orders made by this Court in assessing the quantum, which should have been calculated on the current market value rather than value as at 1993. Under Ground 2, the argument is that the facts of this case do not attract the application of paragraph 14(1) of Schedule 7 of Part 3 of the Constitution which deals with claims whereas the present matter deals with compensation. Ground 3 challenges the valuation of the two experts and the Court's appreciation of their evidence. Ground 4 challenges the conclusion of the Constitutional Court according to which it was not clear whether the transactions relating to the properties *in lite* took place before or after the coming into force of the 1993 Constitution.
- (3) The respondents resisted the appeal and supported the judgment of the Constitutional Court in their Heads of Argument. Learned counsel, however, while submitting before us, supported the interpretation given by the Constitutional Court but sought in aid paragraph 14(3) which, according to her, could mitigate the harshness resulting from that interpretation. In other words, her submission has been that a payment of interest could be envisaged, conceding that there were special circumstances to this case which warranted its invocation. Paragraph 14(3) provides for the payment, "*in special circumstances ... of such interest as may be just.*" Asked what would be the rate on the 1993 market price, she stated that it could only be the 4% legal rate which is currently applied but she needed more time to know more. Asked whether such a solution was acceptable, learned counsel for the appellant declined to entertain that option. To him, his case was, purely and simply, one for full compensation at the current market rate and not the 1993 rate.

(4) To decide the issue, we need to examine Schedule 7, Part III of the Constitution of the Republic of Seychelles before applying the law to the particular facts of this case. First as to the applicable law.

(5) Part III reads:

*“PART III  
COMPENSATION FOR PAST LAND ACQUISITIONS*

*“14(1). The State undertakes to continue to consider all applications made during the period of twelve months from the date of the coming into force of this Constitution by a person whose land was compulsorily acquired under the Land Acquisition Act, 1977 during the period starting June, 1977 and ending on the date of coming into force of this Constitution and to negotiate in good faith with the person with a view to –*

- a. where on the date of the receipt of the application the land has not been developed or there is no government plan to develop it, transferring back the land to the person;*
- b. where there is a government plan to develop the land and the person from whom the land was acquired satisfies the government that the person will implement the plan or a similar plan, transferring back the land to the person;*
- c. where the land cannot be transferred back under sub-sub-paragraphs (a) or sub-sub-paragraphs (b), -*
  - i. as full compensation for the land acquired, transferring to the person another parcel of land of corresponding value to the land acquired;*
  - ii. paying the person full monetary compensation for the land acquired; or*
  - iii. as full compensation for the land acquired, devising a scheme of compensation combining items (i) and (ii) up to the value of the land acquired.”*

- (6) As may be seen, two conditions apply for paragraph 14(1) to kick in so that the 1993 compensation would become payable. One is that, on the date of the receipt of the application, the land has been developed. The other is that on that date, there is already a government plan to develop it. In the absence of those conditions, government is under a constitutional duty to transfer back the land to the person from whom the property was acquired. A duty to transfer would occur even where there is a government plan to develop the land but the person from whom the land was acquired satisfies government that he will implement the plan or a similar plan. Now, where the land cannot be transferred because the case falls outside those situations, there arises a duty to give full compensation in cash or in kind: either transferring to the person another parcel of land of corresponding value to the land acquired or paying the person full monetary compensation for the land acquired; or devising a scheme of compensation combining items (i) and (ii) up to the value of the land acquired..
- (7) Now for the facts. The properties *in lite* are: the unreturned Praslin parcels derived from PR13 and the unreturned parcels at Les Mamelles: namely parcel V5320, parcel V7121, parcel V7122, parcel V11757 and V11756. Do these properties fall under the purview of the 1993 compensation regime? To answer this we have to ask the first question: were these properties developed before the coming into force of the Constitution. Clearly, on the facts they were not. Then we have to ask the next linked question: was there any government plans at the time of the application to develop them. Clearly, on the facts again, the answer is in the negative. The answer to those questions being in the negative, the properties should have been returned. Were they returned? They were not. What happened to the properties which were undeveloped and for which there were no plans for development and which were never returned. They were later sold to third parties.
- (8) On those facts, it cannot be said that the 1993 compensation regime applies to this case. As per paragraph 14(1)(c)(ii), the Constitution imposes the duty on government “to pay the person full monetary compensation for the land acquired.” This is the long and the short of the issue in this case.

- (9) True it is that paragraph 14(1) creates a special cause of action. But when it comes to the payment of compensation, far from derogating from the fundamental principle that full compensation should be paid, it reaffirms that principle so solidly enshrined in Article 20 of the Constitution. This takes us to that Article.
- (10) We should state that fine point, anxiously raised by learned counsel for the appellant, is not readily apparent to the unguarded. Indeed, there is more to paragraph 14(1) of Schedule 7 of Part 3 of the Constitution than meets the eye. Could the framers of the Constitution have created a regime in the Schedule to the Constitution which was in derogation of the Constitutional provisions regarding the fundamental rights and freedoms of the individual? Our answer must be in the negative. The 1993 compensation regime could only be a reaffirmation and an extension of those rights to pre-1993 events, in keeping with the right to property enshrined in Article 20 of the Constitution. Part III was a redeeming “tour de force” meant for the retroactive correction of past injustices along the newly introduced democratic principles. This is amply reflected in the choice of the title “Compensation for Past Land Acquisitions,” the content of the provisions and the specified implementation provisions. Designed to redress old wrongs, it cannot be used today to perpetuate those wrongs nor to create new wrongs. Why was the date 1993 introduced? Only to ensure that the compensation due was to be awarded on the basis of the current rate compensation. It was meant to dispel any doubt on whether the compensation for an application for past acquisitions should be made on the basis of the time of the acquisitions or the time of the application which was twelve months from the coming into force of the Constitution i.e. 1993. It basically pre-empted and settled any dispute that, no matter what were the dates of the acquisitions under the Lands Acquisition Act 1977, the rate applicable should be as at 1993, thus consecrating the universal principle of current rate compensation.
- (11) The Constitutional Court slipped into error when it decided, without alluding to the relevant facts and without giving any reasoned motivation, that “sub-paragraph (2) of paragraph 14 covers all eventualities arising under sub-paragraph 14(1). Had it addressed its mind to the only specified eventualities sub-paragraph 14(1) covered, it would have come to the conclusion that the case of the appellant did not fall within any of the situations envisaged by that sub-paragraph.

(12) The properties *in lite* were not returned to the previous owner. There were no developments on the properties on the date of the receipt of the application. There were no plans to develop them. Yet Government still held to the lands before they were transferred to third parties. Paragraph 14(1) (a) and (b) has no application. Accordingly, full compensation is payable under sub-paragraph 14 (1) sub-paragraph (c) (ii). This provision binds government, “*where the land cannot be transferred back under sub-sub-paragraphs (a) or sub-sub-paragraphs (b), ... paying the person full monetary compensation for the land acquired.*”

(13) It is to be noted that this part of the provision refers to full compensation and not compensation as at 1993. Accordingly, full compensation which means the current rate should be paid. To decide otherwise would be to go against the substantive article 20 of the Constitution and the appellant will have a clear cause of action under that Article: see **Chetty v. Government of Seychelles SCA 4 of 1989; Pillay v Government of Seychelles Cons 7 of 1994; Port Glaud Development Co Ltd v Attorney-General Civ A 20 of 1994; Bonte v Government of Seychelles Civ A 20 of 1996; Government of Seychelles v Shell Company of the Islands SCA 11 of 1998; Joseph Marzocchi & Anor v Government of Seychelles & Anor SCA 48 of 1999.**

(14) Article 20 (1) enshrines the Right to property:

“26. (1) *Every person has a right to property and for the purpose of this article this right includes the right to acquire, own, peacefully enjoy and dispose of property either individually or in association with others.*”

(15) Article 26 (3) reads as regards compensation:

“26. (3) *A law shall not provide for the compulsory acquisition or taking of possession of any property by the State unless-*

(a) ....;

(b) ....;

(c) ....;

(d) *the State pays prompt and full compensation for the property.*”

- (16) The drafters of the Constitution cannot have been amnesic of Article 20 when it came to Part III of Schedule 7 regarding the application of past acquisitions. In fact, they showed due regard to it when they not only created an action but also provided that the compensation for those pre-1993 injustices should be as per the market value as at 1993. A special regime meant to correct past injustice cannot be used to become a Charter for future injustices which a Constitutional Court interpretation of paragraph 14 would cause.
- (17) For the reasons given above, we allow the appeal.
- (18) What remains now is the issue of settling the quantum. This may only be effected on the evidence available. Unfortunately for us, while the evidence ushered in by the appellant is for the current market value: i.e. SRs52,316,451.00, that ushered in by the respondent is as at 1993: i.e. SRs4,584,600.00. To refer the case back to the Supreme Court would unduly protract the disposal of this case.
- (19) We should think there have been complications regarding the choice of the system for the previously proposed determination of quantum: i.e. *Ad Hoc* Administrative Tribunal, exchange of expert reports, mediation etc. Accordingly, we shall take it upon ourselves.
- (20) We use our powers under the Rules of the Court of Appeal and invite a report from a panel of three experts on the matter. This panel to comprise Ms Sabrina Zoe, for the Respondent, Mr Hubert Alton for the Appellant and another expert appointed by the Court: namely, Mr Daniel Blackburn.
- (21) This panel should strive to produce a joint report for the benefit of the court on the fair market value of the property as at the time of the claim. This report should reach us by mid July for disposal of this case in the August session. Any procedural issue arising in the process shall be resolved before the President of the Court of Appeal.
- (22) The appeal is allowed and case is sent back to the Registry for follow up on the disposal as indicated above.

**S. Domah (J.A)**

**I concur:.....**

**A. Fernando (JA)**

**I concur:.....**

**M. Twomey (JA)**

**Signed, dated and delivered at Palais de Justice, Ile du Port on 22 April 2016**