

IN THE SEYCHELLES COURT OF APPEAL

[Coram: S. Domah (J.A), A.Fernando (J.A), J. Msoffe (J.A)]

**Constitutional Appeal SCA CP03/2015
(Appeal from Constitutional Court Decision CP 10/2011)**

Josephine Claude Marise Berlouis	1 st Appellant
The Government of Seychelles	2 nd Appellant
The Attorney General	3 rd Appellant

Versus

Lise Morel Du Boil	Respondent
--------------------	------------

Heard: 01 August 2016
Counsel: Mr. Basil Hoareau for the 1st Appellant
Mr. Jayaraj Chinnasamy for the 2nd & 3rd Appellants
Mr. Frank Ally for the Respondent
Delivered: 12 August 2016

JUDGMENT

A. Fernando (J.A)

1. All three Appellants have appealed against the decision of the Constitutional Court dated 27th of October 2015, which held that the transfer of land parcel B 4417 by the Government of Seychelles to J. C. Marise Berlouis did not convey any lawful title on to J. C. Marise Berlouis and was void ab initio.
2. J. C. Marise Berlouis in her Notice of Appeal filed on the 16th of November 2015 had named Lise Morel Du Boil as the 1st Respondent, the Government of Seychelles as the 2nd Respondent and the Attorney General as the 3rd Respondent. There is also a Notice of Appeal from the Attorney General and the Government of Seychelles filed on the 2nd of December 2015, as the 1st and 2nd Appellants

respectively, naming Lise Morel Du Boil as the 1st Respondent, and J. C. Marise Berlouis as the 2nd Respondent.

3. J. C. Marise Berlouis has filed the following grounds of appeal:

- i. “The Constitutional Court erred in law and on the evidence in failing to hold that as the Appellant was in possession of parcel B 4417 and was a bona fide purchaser of the said parcel for valuable consideration, the transfer of parcel B 4417 to the Appellant could not be cancelled as per the provisions of section 89(2) of the Land Registration Act.
- ii. The Constitutional Court erred in law and on the evidence in failing to hold that the obligations on the 2nd Respondent to return any parcel of land in terms of schedule 7 and part III of the Constitution, did not apply to parcels of land which are not owned by the Government of Seychelles at the time the Constitutional petition is instituted.” (verbatim)

By way of relief J. C. Marise Berlouis had prayed “to quash the decision of the Constitutional Court and consequently hold that parcel B 4417 is rightly and legally owned by the Appellant and to award costs to her”. (verbatim)

4. The Notice of Appeal of the Attorney General and the Government of Seychelles sets forth the following grounds of appeal:

- i. “The Constitutional Court erred in law and on fact in failing to appreciate that as the Appellants were not in possession of parcel B 4417 and the transfer to the 2nd Respondent was not barred by any legal encumbrance and was a bona fide transferor of the said parcel for valuable consideration, the transfer of parcel B 4417 to the 1st Respondent is thus erroneous.
- ii. The Constitutional Court erred in law and on fact in failing to appreciate the scheme of schedule 7 and part III of the constitution, and that it did not apply to parcels of land which are not owned by the 1st Appellant at the time constitutional petition was instituted.
- iii. The constitutional Court has erroneously interpreted the provisions of schedule 7, Part III Paragraph 14 in violation of the decision of this Honorable Court of Appeal in Moulinie case that there could be monetary compensation for lands that cannot be transferred.” (verbatim)

By way of relief the Attorney General and the Government of Seychelles has prayed “to quash the decision of the Constitutional Court and consequently

hold that parcel B 4417 is rightly and legally done by the 1st Appellant and render justice.”(verbatim)

5. At the very outset we wish to state that it was improper for the Attorney General to appeal against the judgment of the Constitutional Court, in person, when no order had been against him. In fact the Attorney-General had been made a party to this case by Lise Morel Du Boil in compliance with rule 3(3) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules. The position of the Attorney-General under rule 3(3) is that of an amicus curiae. However as the principal legal adviser to the Government he has a right to defend the Government when there is no conflict of interest between the position he will be taking up as an amicus curiae and in relation to the defence he will be raising for the Government.
6. In view of what had been stated above we have decided to treat this appeal as one made by J. C. Marise Berlouis as the 1st Appellant and the Government of Seychelles as the 2nd Appellant. Lise Morel Du Boil is treated as the Respondent to this appeal.
7. Land parcel B 4417 consisting of 1952 Sq M, which is the subject matter of this case, is the sub-divided portion of land parcel B 608 which was 177,600 Sq M situated at La Misere that was compulsorily acquired by the 2nd Appellant on the 16th of April 1987 under the provisions of the Land Acquisition Act, 1977, from its owner France Morel du Boil.
8. The Respondent to this appeal, who is the spouse of France Morel du Boil and the Executor to the estate of the late France Morel du Boil, had instituted this case before the Constitutional Court as Petitioner, against the Government of Seychelles; under the provisions of Part III, Schedule 7 of the Transitional provisions of the 1993 Constitution of the Republic of Seychelles; for the return of land parcel B 4417 along with other parcels of land, which originally consisted of land parcel B 608. She had instituted the case under the provisions of paragraph 14(4) of Part III, Schedule 7 of the Constitution, which has been referred to at paragraph 9 below. Since at the time of the institution of this case land parcel B 4417 had been transferred to the 1st Appellant by the 2nd Appellant, the 1st Appellant had intervened in the case and was made a party to it. In this case we thus concern ourselves only in respect of land parcel B 4417 as the appeal is restricted to that parcel of land. The Respondent was required, as stated earlier, in

compliance with rule 3(3) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules, to make the Attorney-General a respondent to the said case.

9. We reproduce herein Part III of **Schedule 7 of the Constitution**:

“PART III - COMPENSATION FOR PAST LAND ACQUISITIONS

Past Land Acquisition

14. (1) The State undertakes to continue to consider all applications made during the period of twelve months from the date of coming into force of this Constitution by a person whose land was compulsorily acquired under the Lands 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 the land back to the person;

(c) where the land cannot be transferred back **under subparagraphs (a) or subparagraph (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.

(2) For the purposes of subparagraph (1), the value of the land acquired shall be the market value of the land at the time of coming into force of this Constitution or such other value as may be agreed to between the Government and the person whose land has been acquired.

(3) No interest on compensation paid under this paragraph shall be due in respect of the land acquired but Government may, in special circumstances, pay such interest as it thinks just in the circumstances.

(4) Where the person eligible to make an application or to receive compensation under this paragraph is dead, the application may be made or the compensation may be paid to the legal representative of that person.” (emphasis placed by us)

So far as this case is concerned we wish to emphasize the following matters:

- a) The negotiations under this provision has necessarily and always to be in good faith and should continue until a decision is arrived at between the Government and the applicant, and the status quo of the land has to be maintained while the negotiations are ongoing.
 - b) The relevant date to consider whether the land has been developed or not or whether there is a Government plan to develop it; is the date of the receipt of the application under paragraph 14.
 - c) It is only where the land cannot be transferred back in the circumstances set out under subparagraphs (a) or subparagraph (b), the issue of compensation would arise.
 - d) The circumstances in which the land cannot be transferred back would be:
 - i. Where the land has been developed, or
 - ii. Where there is a Government plan to develop the land and the person from whom the land was acquired is unable to satisfy the Government that he would implement the Government plan or a similar plan
10. As regards the facts of this case after the coming into force of the 1993 Constitution; negotiations had commenced between the Respondent and the 2nd Appellant under paragraph 14(1) of Part III of Schedule 7 of the Constitution in respect of the remaining portions of land of land parcel B 608, namely sub-divided parcels B 693 and B 694, which were registered in the name of the Government of Seychelles and which included B 4417. The written correspondence between the 2nd Appellant and the Respondent dated 24th August 2007, 14th October 2008, 9th December 2008 and 19th May 2009 shows this. The Government had after coming into force of the Constitution transferred land parcel B 693 to the Respondent and sub-divided land parcel B 694 into land parcels B 1346 and B 1347. The Government had thereafter transferred land parcel B 1346 to the Respondent on the 19th of October 1994. Thereafter the Government had sub-divided land parcel B 1347 into parcels B 4418 and B 4417 (B 4417 is the subject matter of this case). On the date of the coming into force of the 1993 Constitution, namely 21st June 1993, land parcels B 4417 and B 4418 was registered in the name of the Government in the land register. After protracted negotiations agreement was

reached in accordance with paragraph 14(1) of Part III of Schedule 7, in respect of most of the land parcels which originally consisted of B 608 either for its return or payment of compensation, except land parcel B 4418 and B 4417, (*B 4417 is the subject matter of this case*). Land parcel B 4417 had been transferred to the 1st Appellant by the 2nd Appellant on the 1st of April 2010. It is the position of the Respondent that such transfer had taken place after the commencement of the negotiations between her and the 2nd Appellant and thus the 2nd Appellant had acted fraudulently and in bad faith in denial of the Respondent's rights to recover ownership of parcel B 4417 and in contravention of the State's obligations under part III of Schedule 7 of the Constitution and the Respondent's constitutional right to property. It is the position of the Respondent that B 4417 had not been developed since its acquisition and prior to its transfer to the 1st Appellant. This has not been challenged by the Appellants. There is also no evidence that there had been a Government plan to develop land parcel B 4417 from the time of its acquisition and up to the time of its transfer to the 1st Appellant.

11. The Respondent through her Attorney had protested against the sub-division of land parcel B 1347 (*which came to be consisted of B 4417 and B 4418 after the sub-division*) by letter dated 19th May 2009. The contents of the letter marked and produced as I 12, are reproduced herein:

“It has been brought to my attention that a parcel of around 2000Sq m is being excised from the above land (*B 1347*) formerly belonging to Mrs. Lise Morel and the subject of our ongoing negotiations for its return. It is also my understanding that the excision is NOT for public purposes but for the interest of a third party who already has substantial land.

As you will appreciate, these negotiations are expected to be in good faith for the speedy return of the land. This is provided for in the Constitution and has been reinforced by the Courts. It is definitely not an act of good faith to excise and transfer to a third party any portion of the land.

I am therefore registering the strongest possible objection to the excision and transfer of any part of the land. I hope that the Government will live up to its theme of ‘Transparency’ and will desist from any shady, underhand transactions.

I would be grateful if you could confirm that the land will not be divided and transferred to any third party until negotiations are concluded and other legal options are exhausted.”

12. It is the position of the 2nd Appellant that they are unable to return the land parcel B 4417 to the Respondent because the land is no longer the property of the 2nd Appellant and thus has no title to it and that at the time the other parcels were returned to the Respondent, parcel B 4417 had already been transferred to the 1st Appellant for valuable consideration. It is the contention of the 2nd Appellant that land will not be transferred back under paragraph 14(1) of Part III of Schedule 7 of the Constitution not only where the land has been developed; but also when it is no longer the property of the Government. It is also the position of the 2nd Appellant that it was able and willing to transfer an alternative plot of the same or similar value to the Respondent but that offer had been rejected by the Respondent.
13. The 1st Appellant in adopting the position taken up by the 2nd Appellant submits that she had acquired land parcel B 4417 for valuable consideration and in good faith and thus a Bona Fide possessor. In the 1st Appellant's Skeleton Heads of Arguments it is stated that the 1st Appellant in her Affidavit filed before the Constitutional Court had averred that she had purchased B 4417 without any bad faith or fraudulent intent and without being aware of the allegation contained in the Petition that the 2nd Appellant was negotiating with the Respondent for the return of parcel B 4417 to the Respondent. Counsel for the 1st Appellant had stated in the Skeleton Heads of Arguments filed on behalf of the 1st Appellant that that there was no credible evidence to contradict the said averments. This we find is not correct.
14. The Respondent in her Affidavit filed before the Constitutional Court had averred that the 1st Appellant was fully aware that land parcel B 4417 was part of a parcel of land of great extent that had been compulsorily acquired from the Respondent's spouse and that the 1st Appellant very well knew, and that it was public knowledge that land parcel B 4417 was subject of a claim by the Respondent for its return. The Respondent had averred that the 1st Appellant knew her very well and also knew about the Respondent's claim for the return of land parcel B 4417 and all other parcels of land that had been compulsorily acquired from the Respondent's spouse. She had gone on to aver in her Affidavit that the 1st Appellant is her neighbour and resides in the Respondent's former family house that had been sold and transferred to the 1st Appellant's husband, under threat of acquisition as he was at the time of transfer, a Minister in the Government. These averments have not been denied or contradicted by the 1st Appellant. She had also averred that at the time land parcel B 4417 was transferred to the 1st Appellant, the 1st Appellant

was a high ranking or senior public officer with the 2nd Appellant. The Respondent had averred that the transfer of land parcel B 4417 to the 1st Appellant was effected in bad faith, was fraudulently done and contravened the 2nd Appellant's obligations under Part III of Schedule 7 of the Constitution. The 1st Appellant cannot deny ignorance of the Constitution and of its commitment therein to return lands compulsorily acquired under the Land Acquisition Act, in Part III Schedule 7.

15. Even if it is to be said that the 1st Appellant did not have actual notice of the ongoing negotiations between the 2nd Appellant and the Respondent under schedule 7 part III of the Constitution the 1st Appellant certainly is deemed to have had 'constructive notice' of such negotiations in the given circumstances of this case. In **Bailey V Barnes (1894) 1 Ch 25** it was held that "A person has constructive notice of all facts of which he would have acquired actual notice had he made those inquiries and inspections which he ought reasonably to have made, the standard of prudence being that of men of business under similar circumstances." In **Jones V Smith (1841) 1 hare 43** and **Oliver V Hinton (1899) 2 Ch 264** it was said: "A purchaser has constructive notice of a fact if he – (i) had actual notice that there was some incumbrance and a proper inquiry would have revealed what it was, or (ii) has, whether deliberately or carelessly, abstained from making those inquiries that a prudent purchaser would have made."
16. Counsel for the 1st Appellant had taken up the position in the Skeleton Heads of Arguments filed on behalf of the 1st Appellant that the Respondent had instituted the constitutional petition one year after the Appellant had acquired parcel B 4417 and that the Respondent could have lodged a caution or restriction under the Land Registration Act, to prevent the transfer of parcel B 4417 and thus the Respondent had failed to act diligently to protect her interests. We are of the view that the Respondent cannot be faulted in regard to these allegations as the party with whom she was negotiating for the return of her land was none other than the Government and she had every right to expect of the Government to act in good faith and to keep up to its constitutional obligations.
17. Counsel for the 1st Appellant had further taken up the position in the Skeleton Heads of Arguments filed on behalf of the 1st Appellant that "The Constitutional Court failed to take into account that the Appellant as the registered proprietor of parcel B 4417 and having acquired the said property for valuable consideration and in good faith also enjoys the right to property as protected by article 26(1) of the Constitution. As such the Appellant could only be deprived of her property in

accordance with the law, i.e. in accordance with the provisions of section 89(1) of the Land Registration Act.” **Section 89 of the Land Registration Act** states:

“(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

It is clear that the Government had transferred land parcel B 4417 to the 1st Appellant in violation of its own obligations under paragraph 14 of Part III of Schedule 7 of the Constitution as there was an obligation on the part of the Government to “negotiate in good faith” with the Respondent in respect of her application for the return of land parcel B 4417 until a decision was reached under the said paragraph. The action of the Government was also in violation of the Respondent’s rights under paragraph 14 of Part III of Schedule 7 and the Respondent’s right to the return of her property under article 26 of the Constitution. This certainly was a mistake if not a fraud on the part of the Government.

Article 26 of the Constitution states:

“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.” The right to “acquire”, in our view, necessarily includes the right to the ‘resumption’ of properties under paragraph 14 of Part III of Schedule 7 of the Constitution.

18. In view of the unchallenged evidence of the Respondent as regards to how the 1st Appellant had knowledge about the Respondent’s ongoing negotiations with the Government for the return of land parcel B 4417, and or the ‘constructive notice’ that could be imputed to her, as stated earlier, it is difficult to conceive that section 89(2) would have application in this case. Even if section 89(2) has application, in our view a right given under a statute cannot certainly supersede the right given under paragraph 14 of Part III of Schedule 7 of the Constitution. Further **section 25 of the Land Registration Act** states: “Unless the contrary is expressed in the register, all registered land, shall be subject to the overriding interest of rights of compulsory acquisition, resumption,.....conferred by any written law and as may

for the time being subsist and affect the same, without being noted on the register.” (emphasis added by us). Here the written law “is the supreme law of Seychelles”, the Constitution. (vide article 5 of the Constitution). In **Black’s Law Dictionary, 9th edition**, ‘resumption’ has been described as “(1) The taking back of property previously given up or lost. (2) Hist. The retaking by the Crown or other authority of lands previously given to another (as because of false suggestion or other error).”

In view of what has been stated above we dismiss the 1st Appellant’s, first ground of appeal.

19. Both Appellants had in their Skeleton Heads of Arguments submitted that the constitutional obligation of the Government under paragraph 14 of Part III of Schedule 7 of the Constitution is to return land which is, in its possession, and relies on the wording in paragraph 14(1)(c) which makes reference to “where the land cannot be transferred back” to bolster their argument, and state that the remedy in such a situation is compensation. To transfer land to a third person, while negotiations are ongoing with the original owner for the return of such land, and then to take up the position that the land cannot now be transferred back is to make a mockery of the constitutional provision under paragraph 14 of Part III of Schedule 7 of the Constitution. We therefore dismiss the second ground of appeal raised by both Appellants.

20. The first ground of appeal raised by the 2nd Appellant has been dealt with in considering the appeal of the 1st Appellant and we therefore dismiss that ground of appeal. As regards the third ground of appeal raised by the 2nd Appellant we are of the view that the Moulinie decision has no relevance to this case and therefore dismiss the third ground of appeal.

21. In view of what has been stated above we dismiss the appeals of both the 1st and 2nd Appellants, confirm the judgment and declarations and orders made by the Constitutional Court and award costs of this appeal to the Respondent.

A. Fernando (J.A)

I concur:.

S. Domah (J.A)

I concur:.

J. Msoffe (J.A)

Signed, dated and delivered at Ile du Port on 12 August 2016