

IN THE SEYCHELLES COURT OF APPEAL

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

**Constitutional Appeal SCA CP 4/2016
(Appeal from Constitutional Court Decision CP 4/2012)**

Government of Seychelles	1 st Appellant
The Attorney General	2 nd Appellant

Versus

Nelson Robert Poole	1 st Respondent
Robert Marc Noddyn	2 nd Respondent
Patrick Noddyn	3 rd Respondent
Reem Limited	4 th Respondent

Heard: 05 April 2017

Counsel: Mr. Jayaraj Chinnasamy for the Appellants

Mr. Philippe Boullé for First Respondent

Mr. Frank Ally for Second and Third Respondents

Mr. Basil Hoareau for Fourth Respondent

Delivered: 21 April 2017

JUDGMENT

M. Twomey (J.A)

The facts and proceedings leading to the present appeal.

[1] In its decision dated 17 May 2016 in respect of a petition for compensation and/or return of land acquired by the First Appellant from the First Respondent on 1 October 1984, the Constitutional Court made several orders, of which the following is the subject of the present appeals:

- i. “[That] T767 is returned to the Petitioner (now First Respondent),
- ii. T3095 is returned to the Petitioner (now First Respondent),
- iii. T3094 is returned to the Petitioner (now First Respondent)”

[2] Procedural issues relating to the present appeal were heard and ruled upon by this Court in December 2016. These related to the fact that some of the land ordered to be returned, namely Parcels T767 and T3094 were in the hands of third parties, that is, the Second, Third and Fourth Respondents and that they had not been served and or given notice of the hearing of the petition. The Court found that their application had merit and ordered that they be given time to file affidavits which would be considered at the hearing of the substantive issues on appeal.

[3] The present appeals concern the substantive grounds raised in the appeals. There are three appeals from the Constitutional Court decisions: SCA2/2016, SCA3/2016 and SCA4/2016. The parties in all the matters are the same and therefore, for ease of reference, they shall be referred to as follows: The Government of Seychelles as the First Appellant, the Attorney General as the Second Appellant, Robert Nelson Poole as the First Respondent, Robert Marc Noddyn as the Second Respondent, Patrick Noddyn as the Third Respondent and Reem Limited as Fourth Respondent.

The Scheme for redress of land acquisitions before 1977.

[4] The appeals are made in regard to the transitional provisions of the Constitution of 1993 in relation to land acquisitions. We set out Part III of Schedule 7 of the Constitution which hereinafter will be referred to as the Scheme:

“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.”

(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.

[5] The Court’s attention has been drawn to the landmark decisions regarding this Scheme, namely *Moulinié v Government of Seychelles* (2016) SCCA 10 and *Berlouis and ors v Morel Du Boil* (2016) SCCA 16.

[6] *Moulinié* is authority that the following two important considerations must be looked into for claims under the Scheme when deciding whether land should be returned or compensation paid to the claimant:

*“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 (see *Moulinié* paragraph 6).*

[7] *Berlouis* considered what should happen in the event that acquired land is transferred to a third party whilst the claimant’s claim under the Scheme was being pursued. The Court stated that where the transfer takes place subsequent to such claims, the third party will be taken to have actual or deemed notice of the ongoing negotiations between the Government and the claimant, and for the Government to refuse to return land on the basis that it has been transferred to such third party would:

“make a mockery of the constitutional provisions under paragraph 14 of part III of the Constitution” (Berlouis paragraph 19).

[8] Perhaps before we consider the issues raised in the present case we might also reflect on this Court’s decision in *Atkinson v Government of Seychelles & ors* (unreported) (2007) SCA 1 which marked the departure of the Courts from previous authorities. *Atkinson* is apposite to the present case. In *Atkinson*, it was submitted by the Government that the right to property (limited by laws) as enshrined in Article 26 of the Constitution was superior to the Scheme. Hence, the Government sought to have the limitations to the right to property override the Government’s undertaking to return land to claimants under the Scheme.

[9] The Court disagreed, stating that Article 26 of the Constitution of Seychelles, which guarantees a citizen’s right to property, and the Scheme, which deals with the consequences of the application of the Lands Acquisition Act, are not related. It added:

“Under paragraph 14 (1) (a), once the procedural conditions of an applicant were met: namely, the applications have been timely and relate to the specified periods, the land is not developed and there is no government plan to develop it, there arises a clear constitutional obligation undertaken by the State to negotiate in good faith with the person not for any other reason than with a view to transferring back the land to the person. There is no reference made to section 26 of the Constitution. Accordingly, any excursion into section 26 or invocation of the State’s power to decide on the permissible limitations even under Article 26 is unwarranted and would be unconstitutional. In law, therefore the public interest element, otherwise valid under section 26, is not available on the facts of this case under paragraph 14 (1) (a). (Atkinson paragraph 22)

[10] In light of the above considerations we would now like to consider the claim by the First Respondent for the return of the three parcels of land which are the subject of this appeal.

Parcel T767.

[11] The Second and Third Respondents have objected to the return of Parcel T767 to the First Respondent on the following grounds:

1. It is registered in their names by court order settling the estate of their father Robert Louis Noddyn (the Deceased), their predecessor in title, who purchased the same from the First Appellant for the sum of SR130, 000 which deed of title is registered on 4 October 1984 and transcribed in Vol 72 No 72 in the *Repertoire* and Books at the Mortgage and Registration Office (Exhibit 2 of Second and Third Respondents' Affidavit).
2. The transfer was *bona fides* for valuable consideration.
3. By inadvertence, the Land Registrar failed to register T767 in the Deceased's name under the Land Registration Act, instead registering it into the name of the First Appellant which error was rectified on 29 February 1996 by transferring the same to the Deceased.
4. As T767 was owned by the Deceased on the coming into force of the Constitution, it is not land that was subject to return.
5. T767 has been developed by its sale and transferred to the Deceased and the Deceased occupied the same until his death on 23 November 2005.

[12] The Appellants have confirmed the averments of the Second and Third Respondents in their own grounds of appeal.

[13] The First Respondent has submitted in response that first, in terms of the definition of developed land, the sale of land to a third party does not constitute development within the framework of Schedule 7 Part III of the Constitution (*supra*) that secondly, at the time of coming into force of the 1993 Constitution, the land was legally owned by Government and thirdly that there was no development or plan to develop the land.

[14] We have given anxious consideration to the First Respondent's claim for the return of his land and specifically his old family home. We are not inured to his passionate calls for justice and the patent injury visited on him by the acquisition of his land and his long wait for judicial relief.

- [15] However, we also need to be cautious and judicious so as not to cause a further injustice to a *bona fides* third party.
- [16] We have scrutinised the decision in *Berlouis* in order to decide what might distinguish that case from the present one. We find obvious differences. In *Berlouis* the land was transferred to the third party whilst negotiations under the Scheme was underway and the third party, a high ranking government official, was deemed to have had notice of the negotiations between the Government and the dispossessed claimant. *Berlouis* also concerned a transfer to a third party after the promulgation of the Constitution and the Scheme whereas in the present case the transfer to the third party took place before the promulgation of the Constitution.
- [17] That said, we cannot however accept Mr. Boullé's two submissions regarding the applicability of the Scheme in regard to: first, that the owner of the land on the date of the coming into force of the Scheme was the Government of Seychelles, and; secondly, that there was in any case no development or plan to develop the land at acquisition.
- [18] As regards the first submission, it has been ably demonstrated both in the oral submissions of Counsel for the Second and Third Respondents, Mr. Ally, and also the documentary evidence appended to the two Respondents' affidavits that the land was indeed transferred to their predecessor in title before the Third Constitution and the Scheme came into force. It would be a legal fiction to conclude that the inadvertence of the Land Registrar to properly and correctly register the Deceased as the owner of Parcel T767 meant that he was not the owner of the land.
- [19] In any case, we note that registration under the Mortgage and Registration Act did provide property ownership to the Deceased although that Act only provided for a deeds registration system. The effect of the Land Registration Act was to perfect title and is more or less indefeasible. However, there was no question even under the Mortgage and Registration Act as to the binding nature of the transfer of Parcel T767 to the Deceased and as to who the owner of the land was.

[20] Mr. Boullé’s second proposition holds more water. We shall consider it in length later when we consider the claim in respect of Parcel T3095. It has no application as regards Parcel T767 for the simple reason that the land was acquired before the undertaking to return land or compensate for it fully was made by the First Appellant- the land having been bought in 1984 and the undertaking made in the 1993 Constitution. .

[21] In the landmark decision of *Moulinié*, the following apt comment was made by this Court. In the words of Domah JA:

“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 26 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.”

[22] In the light of the above and in view of the fact that the sale to the Deceased of Parcel T767 was done in 1984 at a time when the undertaking of the Government to return acquired land had not yet been made; such undertaking in 1993 cannot retrospectively bind *bona fides* purchasers for valuable consideration who cannot be considered to have had actual or constructive notice of the Government’s undertaking and the First Respondent’s claim (which was only to be made subsequent to 1993). It is for this reason that we cannot entertain the First Respondent’s claim for return of Parcel T767 and find instead that he must be compensated fully.

Parcel T3094

- [23] The Fourth Respondent has submitted that Parcel T3094 was transferred to it, a *bona fides* purchaser for valuable consideration, in December 2008 and cannot now be returned by the First Appellant to the First Respondent. It relies first of all on section 89(2) of the Land Registration Act, secondly, on the failure of the First Respondent to self-help by not resorting to effect restrictions or cautions on the land while negotiating for its return and thirdly, on Article 26 of the Constitution .
- [24] These submissions were also made in *Berlouis* and *Atkinson* and dismissed. These authorities remain good law. In both those cases, the Court was categorical, and rightly so, in our view, that the constitutional right to redress for land acquisitions override any legal right, in this case rights under the Land Registration Act.
- [25] The Court also made the point most forcefully in *Atkinson* that Article 26 of the Constitution cannot be used to defeat the Scheme. It would be perverse for the Court to rely on the limitations to the right to property so as to override the Government’s undertaking to return land to claimants under a Scheme specifically devised to remedy past injustices.
- [26] Much has been made of the Court’s reference to and definition of “resumption” as contained in section 25(c) of the Land Registration Act in the *Berlouis* case and the fact that it had no application to that case nor to the circumstances of the present case. Counsel for the Fourth Respondent submitted that the legal dictionary meaning of the word resumption refers to the taking back of something such as property given up or lost.
- [27] Section 25 (c) provides in in relevant part:

“Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same without their being noted on the register:-

...

(c) rights of compulsory acquisition, resumption, entry, search and user conferred by any written law;...”

- [28] Although in the context of this case this exercise is purely academic, we would like to observe that the Fourth Respondent’s definition of a resumption right is indeed correct. A resumption right is indeed an overriding interest distinguishable from the right of the State to compulsorily acquire land from a proprietor. The right of resumption in section 25 strictly speaking refers to cases in which the Government, not the land occupants, has the ownership of the land. The occupant may have a leasehold interest which the Government through the acquisition process acquires the occupant’s rights and gets back the land it originally owned.
- [29] In any case all the rights provided for in the Land Registration Act are subject to the supreme law of the Constitution (see Article 5 of the Constitution).
- [30] In effect, with regard to Parcel T3094, the facts and decision of *Berlouis* cannot be distinguished from the present appeal. The First Respondent cannot be faulted for not registering a caution or restriction against Parcel T3094. The Fourth Respondent is deemed to have had notice of the Scheme and the First Respondent’s claim. The Fourth Respondent’s claim should be against the First Appellant, the Government of Seychelles, who sold the land whilst it was negotiating its return to the First Respondent. The Court cannot connive and condone the conduct of the First Appellant.
- [31] For these reasons, we find that Parcel T3094 should be returned to the First Respondent.

Parcel T3095

- [32] In their grounds of appeal, the Appellants have stated:
- “that there is in place developmental plans for ...Parcel T3095 and the First Appellant had adduced evidence to the effect that [the parcel] is still used by the public as a beach park for many years (emphasis ours).*
- [33] In the Appellants’ skeleton heads of argument, however, it is submitted by their learned Counsel Mr. Chinnasamy that the Constitutional Court failed to note that:
- “Title T3095 has been developed into a Bazar O Van and for community festive gatherings and as a beach park with toilets and open kiosks” (emphasis ours).*

- [34] He also submitted that the Constitutional Court's finding that the holding of leisure activities occasionally is not sufficient to amount to development is not tenable since there is no definition of development which bars leisure activities as part of a development.
- [35] Mr. Boullé, first of all takes umbrage with the conflicting statements contained in the grounds of appeal and the skeleton heads. Whilst one set of statements avers that there are development plans for the parcel, the other states that there are developments on the parcel.
- [36] Counsel for the First Respondent has relied on the affidavits of the two assessors appointed by the Court to evaluate the acquired land who aver that during their visit to the *locus* they did not observe toilets or kiosks on Parcel T3095.
- [37] Subsequently, Mr. Chinnasamy, who did not file any affidavits in reply, relied on the fact that the area is used for communal activities, which in his submission, in any case amounts to a development.
- [38] At the hearing of the appeal it became obvious to the Court that there are and there were no developments whatsoever on Parcel T3095 during the decades of its acquisition from the First Appellant. The Court did take judicial notice of the fact that occasional communal activities are advertised on the national media and held on the site. We were unable to ascertain however whether these activities extended to the whole parcel in issue or on some confined space on the land.
- [39] Mr. Boullé for the First Respondent did acknowledge and concede that there is motorable right of way across the land to the beach and that in the event of the land being returned to the First Respondent this right of way would be maintained.
- [40] We were singularly unimpressed by the Appellants' reluctance to provide any concrete evidence of what public use Parcel T3095 has been put to and what would militate against its return to the First Respondent.

[41] We have in any case sought a definition for the word development used in the Scheme. None is provided in the Constitution. As the term development is used with land we have sought assistance from the definition laid down in section 7 of the Town and Country Planning Act 1972 as amended which provides in relevant part:

(2) ...the expression "development" means the carrying out of building, engineering, mining or other operations in, on, over or under any land, and the making of any material change in the use of any buildings or other land including any subdivision of land which is or is intended to be used for residential, commercial or industrial purposes, except that the following operations or uses of land shall be deemed for the purposes of this Act not to involve development of the land, that is to say -

(a) the carrying out of works for the maintenance, improvement or other alteration of any building, if the works affect only the interior of the building or do not materially affect the external appearance of the building;

(b) the carrying out by a highway authority of any works required for the maintenance or improvement of a road, if the works are carried out on land within the boundaries of the road;

(c) the carrying out by any statutory undertakers of any works for the purpose of inspecting, repairing or renewing any sewers, mains, pipes, cables or other apparatus, including the breaking open of any street or other land for that purpose;

(d) the use of any buildings or other land within the curtilage of a dwelling-house for any purpose incidental to the enjoyment of the dwelling-house as such;

(e) the use of any land (not involving building operations) for the purposes of agriculture or forestry (including afforestation);

(f) any other operation or use of land which may be prescribed;

(g) subdivision of land solely for the partition of title between heirs or co-owners..."

[42] There has been no evidence produced by the Second and Third Respondents or the Appellant to lead us to conclude that there has been any development to Parcel T767 in the context of the definition above. Counsel for the Appellants has attempted to import into the definition of development the public use purpose. The only evidence of such “development” is that of Mrs. Sabrina Zoé, the Senior Land Valuation Officer at the then Ministry of Land Use and Housing who in her evidence before the Constitutional Court stated that:

“The parcels with beachfront particularly T3094, 93 95 is very popular venue (sic) for the general public as it is being used as a beach park, garden fair, Bazar Ovan and as a public access to the beach”

[43] We have taken judicial notice of the fact that the media does advertise Bazar O Van at Anse Gaulette beachfront but the precise location of such a gathering has not been identified for us nor has frequency of such an event. As we have said, the Court has not been helped by the paucity of evidence on this issue.

[44] Land acquisitions under the Land Acquisitions Act of 1977 and the Acquisition of Land in the Public Interest Act 1996 were very different. Under section 3(1) of the 1977 Act any land could be acquired at the instance of the Minister if in his opinion it was in the national interest. No definition of national interest was provided by the legislation. In contrast, acquisitions under the 1996 Act have to be for a public interest and that public interest is defined in section 2 of the Act as:

“...the acquisition or taking possession of land for its development or utilisation to promote the public welfare or benefit or for public defence, safety, order, morality or health or for town and country planning;”

[45] That is well and good in terms of acquisitions under that Act. A public interest would have to be demonstrated, which might include a utilisation of acquired land for public welfare and in those terms embrace leisure activities for the public. However, this has absolutely no bearing in terms of the return of land already acquired under the 1977 Act under the Scheme. In considering the return of land under the Scheme, the Court cannot

take into account new plans for the land that was acquired decades before. Nor can it take into consideration use which was put to the vacant land by the community in the absence of any plan or development by the government. We therefore conclude that there is no development on the land and no plans for the same.

[46] As we have said, Mr. Boullé has conceded that there exists a motorable right of way on Parcel T3095 from the main public road to the beach on the southern side of the land and that it will be continued to be respected even if the land was returned to the First Respondent.

[47] Save for that qualification we find that Parcel T3095 should be returned to the First Respondent.

[48] In the circumstances we make the following orders:

1. Parcel T767 is to be transferred to the Second and Third Respondents forthwith with full compensation at market value to be paid to the First Respondent.
2. Parcel T3094 is to be returned to the First Respondent forthwith.
3. Parcel T3095 is to be returned to the First Respondent forthwith, with the easement (the public right of way) registered as an overriding interest on it.
4. With costs to the Respondents.

M. Twomey (J.A)

I concur:

S. Domah (J.A)

Signed, dated and delivered at Ile du Port on 21 April 2017