

CONSTITUTIONAL COURT OF SEYCHELLES

Reportable

[2019] SCCC 10
CP 03/2019
(Arising in CS158/2018)

In the matter between:

MURVIN NICHOLAS GREEN
(*rep. by Manuella Parmentier*)

Plaintiff

and

SHARON PAYETTE

1st Defendant

GAMALIEL SEBASTIEN WALTER DUGASSE

2nd Defendant

NATHAN ALISTAIR WALTER DUGASSE
(*1st, 2nd, and 3rd Respondents rep. by Basil Hoareau*)

3rd Defendant

THE ATTORNEY GENERAL
(*rep. by Guilmette Bootna*)

Neutral Citation: *Green v Payette & Ors* (CP 03/2019) [2019] SCCC 10 (15 October 2019).

Before: Burhan, Govinden, Carolus JJ

Summary: Constitutionality of Article 920 of the Civil Code of Seychelles Act and the resultant statutory scheme for succession.

Heard: 16 July 2019

Delivered: 15 October 2019

ORDER

Reference by Supreme Court under Article 46 (7) of the Constitution.

Article 920 and the corresponding Articles of Chapter III of Title II of Book III of the Civil Code of Seychelles Act do not contravene Article 26 of the Constitution.

JUDGMENT

E. CAROLUS J (M. BURHAN, R. GOVINDEN JJ concurring)

Background

- [1] This judgment is made pursuant to an Order of the Chief Justice M. Twomey dated 28th January 2019, in CS 158 of 2018, referring to the Constitutional Court for its determination, the question of whether Article 920 of the Civil Code of Seychelles (hereinafter “the Civil Code”) and the resultant statutory scheme for succession contravene Article 26 of the Constitution of the Republic of Seychelles (hereinafter “the Constitution”). The reference to this Court is made pursuant to Article 46(7) of the Constitution.
- [2] In terms of the plaint in CS 158 of 2018, the plaintiff and the first defendant are the children and sole heirs of the late Walter Marston Green. The second and third defendants are the children of the first defendant. The plaintiff claims that the said Walter Marston Green transferred to the defendants land parcels PR474, PR3033, PR6106, PR3034 and C406 by gift *inter vivos* disguised as sales, and in so doing disposed gratuitously in excess of one third ($\frac{1}{3}$) of the total asset value of all his property that existed at the time of his death, which disposition is in excess of the disposable portion as provided for in Article 913 of the Civil Code. He therefore prays for the remaining two thirds ($\frac{2}{3}$) of the total asset value of all the property belonging to the late Walter Marston Green that existed at the time of his death to be brought back into the hotchpot of his estate to be distributed equally between the plaintiff and the first defendant in accordance with the rules of succession.
- [3] In their statement of defence the defendants raised the following plea in *limine litis* -

Articles 913 and 920 of the Civil Code – on which the suit is based – is unconstitutional in that they are in contravention of the right to acquire, own and peacefully enjoy and dispose of property as protected by Article 26 of the Constitution.

[4] In her Order of the 28th January 2019, referring the matter to the Constitutional Court, the Chief Justice having found that the constitutionality of Article 913 of the Civil Code was tested in the case of Achilla Durup & Ors v Josepha Brassel & Ors (2013) SLR Part 1 259 and that the Constitutional Court had decided that Article 913 is not unconstitutional on the ground that it is a limitation that is necessary in a democratic society guaranteeing the family, which is the fundamental group unit of society, legal, economic and social protection, and that no appeal had been made against that decision, held that in terms of Article 46(7) of the Constitution the question has already been the subject of a decision of the Constitutional Court and is not one that the Supreme Court can again refer to the Constitutional Court for determination.

[5] However with regards to Article 920 of the Civil Code, she found that insofar as the constitutionality of that provision is concerned, that question has not been answered, and proceeded to refer the following question to the Constitutional Court for its determination

Does Article 920 of the Civil Code of Seychelles Act (hereinafter “the Civil Code”), and the resultant statutory scheme for succession, contravene Article 26 of the Constitution of Seychelles by inhibiting a proprietor of property from freely disposing of his property and a donee from receiving and enjoying such dispositions.

[6] The Attorney General is represented in these proceedings, having been given notice of the same in accordance with Rule 10(3) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules.

[7] All the Parties filed written submissions and also submitted orally at the hearing of the matter.

Submissions of the Parties

[8] The submissions of the parties are reproduced only insofar as they are relevant to the issues considered by the Court in this case.

The Case for the Plaintiff

[9] It is the view of the plaintiff that Article 920 of the Civil Code does not contravene Article 26 of the Constitution and he prays for a determination of the Court in those terms and for the Court to dismiss the defendants' plea in limine litis in in CS 158 of 2018 with costs.

[10] Counsel for the plaintiff relied on the case of Durup v Brassel to state that the constitutionality of Article 913 of the Civil Code was tested in that case and found not be unconstitutional. In that regard she submits that Article 920 of the Civil Code results from and only applies when read together with Article 913 of the Civil Code, from which it could not exist independently. Therefore, if the latter is found to be constitutional then the former would also be constitutional as it cannot stand on its own.

[11] She further submits that if Article 920 of the Civil Code is determined to be unconstitutional, that determination would not only be inconsistent with Durup v Brassel but also deprive an aggrieved party from any redress, thus rendering Article 913 of the Civil Code ineffective and with no real weight as there would be no repercussions for its breach.

The case for the Attorney General

[12] The Attorney General holds the view that Article 920 of the Civil Code does not contravene Article 26 of the Constitution and prayed the Court to find accordingly.

- [13] She submitted that the principle set out in Article 913 which gives rise to the reserved and disposable portion of a succession, was tested and found to be constitutional in the case of *Durup v Brassel* in that it was found to be a permitted limitation to the right to property which was endorsed by the Court of Appeal in the case of *Desaubin & Ors v Sedgwick SCA 12 of 2012 (14 August 2014)*. She argued that since Article 920 provides a remedy where there is failure to abide to Article 913, if Article 913 is a permitted limitation to the right to property, Article 920 must also by extension be held to be a permitted limitation. Further in light of the finding of constitutionality of Article 913 in *Durup v Brassel*, a finding of unconstitutionality in respect of Article 920 would leave a breach of Article 913 without redress.
- [14] Counsel also submits that Article 913 does not prevent a person from acquiring, owning and peacefully enjoying and disposing of his property but gives that person a perimeter within which he or she ought to exercise that right for the sake of preservation of family. A *de cuius* can therefore sell or make a gift to an heir so long as that sale or gift does not diminish his or her estate to the extent that the rights of the reserved heirs are affected. She cited the case of *Reddy & Anor v Ramkalawan (CS 97/2013) [2016] SCSC 31 (26 January 2016)* in support of that view. Similarly, she argues that the purport of Article 920 is not to nullify any dispositions made by the deceased and thereby abrogate his right to dispose of his property freely, but merely to bring back to the reserved portion the excess of the disposable portion that has been disposed of in breach of Article 913, to be distributed to the reserved heirs. The remainder of the disposable portion remains for the beneficiary of the disposition made by the deceased. To that extent the limitation placed on the *de cuius* to dispose of his property falls within Article 47 of the Constitution as to the scope of limitations to a protected right in that the limitation does not have a wider effect than is strictly necessary.
- [15] In reply counsel for the defendants stated that the case of *Desaubin v Sedwick* (*supra*), not only concerned a will but the statement by the Court of Appeal that it agreed with the case of *Durup v Brassel* was made obiter, and further that the issue before the Court in that case is not the same as is now before the Court.

The case for the defendants

- [16] It is the contention of the defendants that Articles 920 and 913 as well as all other Articles of Book III Title II Chapter III of the Civil Code contravene Article 26(1) of the Constitution and are as such void, and they pray for a declaration to that effect.
- [17] Counsel for the defendants first addressed the issue raised by the plaintiff and the Attorney General that the constitutionality of Article 913 has already been determined by the Court in *Durup v Brassel*, and that Articles 913 and 920 are so intertwined that a declaration of constitutionality of the first necessarily implies the constitutionality of the second.
- [18] Counsel for the defendant concedes that Articles 913 and 920 are interlinked because whereas Article 913 prescribes the reserved and the disposable portion, Article 920 provides for the reduction of dispositions in excess of the disposable portion.
- [19] However he submitted that the question referred to the Constitutional Court in *Durup v Brassel* and the question referred to this Court in the present case are different in that although the reference in *Durup v Brassel* was in respect of Article 913, it concerned a testamentary disposition by a testator to a legatee whereas the referral before the Court in the present case has to do with a gift *intervivos* from a proprietor to a donee. He submitted that the reference in each case was different in terms of the circumstances, and therefore the finding of constitutionality of Article 913 in the case of *Durup v Brassel* could not be extended to Article 920.
- [20] He further submitted that the finding of constitutionality in *Durup v Brassel* was made specifically in respect of Article 913 and not in respect of corresponding Articles or “the resultant statutory scheme for succession with regard to testate succession”.

[21] Counsel for the defendants also contends that the point now being raised should have been dealt with by the Court of Appeal and that it was not proper for Counsel for the plaintiff to raise it at the hearing stage of the present proceedings. He submitted that the plaintiff ought to have appealed against the decision of the Chief Justice to refer the matter to the Constitutional Court on the ground that the question referred to the Constitutional Court for its determination has already been the subject of a decision of that Court and that therefore the conditions for reference under Article 46(7) of the Constitution had not been satisfied, instead of raising this issue during the present proceedings.

[22] Counsel for the defendants further submits that because Articles 920 and 913 of the Civil Code are intertwined, in determining whether Article 920 of the Civil Code and the resultant statutory scheme for succession contravene Article 26 of the Constitution, the Court would also inevitably have to consider and revisit the constitutionality of the Article 913 of the Civil Code. In that respect he submitted that this Court is not bound by its decision in *Durup v Brassel*, a case in which he was involved and in which he took the stance that Article 913 was constitutional, a view which he now submits was wrong, as was his stance taken in the case of *Reddy & Anor v Ramkalawan* (CS 97/2013) [2016] SCSC 31 (26 January 2016). He submits that should this Court find that it has to depart from *Durup v Brassel*, it is free to do so and indeed should do so.

[23] Counsel for the defendants then went on to address the Court on the reasons why he was now of the view that the case of *Durup v Brassel* had been wrongly decided. Insofar as these are relevant to the matters considered in the present proceedings, these are briefly as follows:

- [24] Under Article 26(2) of the Constitution, the right to property may be subject to such limitations as may be prescribed by law and necessary in a democratic society, based on a number of factors as set out in Article 26(2) (a) to (i). The defendants do not dispute that the restrictions imposed by Articles 913 and 920 of the Civil Code are prescribed by law in that they satisfy the requirements set out in the case of Silver and Others v The United Kingdom A. 61 1983, but contends that these provisions as they currently stand, are not necessary in a democratic society, and further that such limitations and restrictions are not in the public interest for the following reasons.
- [25] It was submitted that the historical reasons for the law of forced heirship which is the protection of the family and to ensure equality between descendants no longer justify the limitations imposed by Articles 913 and 920 which therefore cannot be considered as necessary in a democratic society.
- [26] Counsel relied on the case of Silver and Others v The United Kingdom (supra) to state that to be necessary in a democratic society a law must not only correspond to a “pressing social need” but also be “proportionate to the legitimate aim pursued”. In that respect, he submits that while there may be a “pressing social need” for the limitations imposed by the impugned provisions in certain circumstances, such as for children who are in need or unable to fend for themselves (for example minors or children who have attained the age of majority but are disabled or still pursuing their education), the limitations have gone beyond what is “proportionate to the legitimate aim pursued” by imposing a duty on parents to give their children the means to continue their existence and secure their future, even after they have attained adulthood and can provide for themselves. This he submits, renders the law of reserved heirship unconstitutional. To be proportionate to the legitimate aim being pursued the limitation contained in Article 920 and by extension Article 913 should be restricted solely to children who are dependent on the *de cujus*.

[27] Counsel also submits that the limitations imposed by the impugned Articles do not fulfil the condition of Article 47(a) of the Constitution that an exception to a right guaranteed under the Constitution is to be narrowly interpreted, in light of the definition of the term “democratic society” in Article 49 of the Constitution, in that it is not strictly necessary in a democratic society to require a parent to leave part of his estate that he has donated by way of gift or testament, to his children.

[28] In conclusion he submitted that “forced heirship” can only be considered necessary in a democratic society in the public interest solely to the extent that it is limited to children who are unable to fend for themselves. He was further of the view that the State’s undertaking to promote the legal, economic and social protection of the family which it recognises as being the natural and fundamental group unit of society under Article 32(1) of the Constitution would be sufficiently discharged by a law imposing forced heirship only in respect of such children.

- [29] We note that counsel for the defendant had by way of alternative argument, also raised the point in his written submissions that a person should have greater freedom to dispose of his property in his lifetime than by way of testamentary disposition and that there is far more justification for forced heirship in respect of dispositions by testament than in respect of dispositions made during the lifetime of the donor. This argument is premised on a distinction between *Durup v Brassel* and the present case on the basis that the former dealt with a donation by testamentary disposition whereas the latter concerns a donation by way of gift *inter vivos*.
- [30] In reply to the defendants argument that the decision in *Durup v Brassel* should be departed from because it was wrongly decided, counsel for the Attorney General submitted that in terms of Article 46(7) of the Constitution which prohibits reference to the Constitutional Court of a question which has already been the subject of a decision of that Court, the constitutionality of Article 913 could not again be canvassed before the Constitutional Court.
- [31] Further, while she agreed that this Court is not bound by the decision in *Durup v Brassel*, she drew attention to Article 5 of the Civil Code which provides that while judicial decisions are not absolutely binding upon a Court, they shall enjoy a high persuasive authority from which a Court shall only depart for good reason.

[32] She also stated that the fact that *Durup v Brassel* concerned a testamentary disposition whereas the present case concerns a disposition by gift inter vivos does not constitute “good reason” for departing from the finding of constitutionality of Article 913 in that case because Article 913 and 920 cover both types of dispositions. She stated that the finding of constitutionality of Article 913 in *Durup v Brassel* would still be applicable whether a disposition in breach of that law is made by way of a will or by gift inter vivos. Further to depart from the authority in *Durup v Brassel* in the present case on the grounds that it concerns disposition by gift inter vivos, would go against the spirit of Articles 913 and 920 which enshrines the principle of reserved heirship in cases of both gifts inter vivos and by will, with the result that an heir can easily lose his or her inheritance by disposition to another person by way of gift inter vivos, which would defeat the purpose of these Articles which is to protect heirs from total and unjust disinheritance.

Analysis

[33] The question referred to this Court for its determination is the following:

Does Article 920 of the Civil Code of Seychelles Act and the resultant statutory scheme for succession, contravene Article 26 of the Constitution of Seychelles by inhibiting a proprietor of property from freely disposing of his property and a donee from receiving and enjoying such dispositions.

[34] The Court therefore has to determine the constitutionality of “Article 920 of the Civil Code and the resultant statutory scheme for succession” in light of the provisions of Article 26 and other relevant provisions of the Constitution. In particular this Court has to determine whether Article 920 and corresponding Articles of the Civil Code breach the right of a proprietor of property from freely disposing of his property and a donee from receiving and enjoying such dispositions.

[35] The relevant provisions of Article 26 of the Constitution provide:

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.*

(2) *The exercise of the right under clause (1) may be subject to such limitations as may be prescribed by law and necessary in a democratic society-*

(a) *in the public interest;*

[36] In light of the arguments presented in this case and the issues arising therefrom, it is essential to set out not only the provisions of Article 920 of the Civil Code but also Article 913 thereof both of which are found in Chapter III of Title II of Book III of that Code.

Article 913

Gift inter vivos or by will shall not exceed one half of the property of the donor, if he leaves at death one child; one third, if he leaves two children; one fourth, if he leaves three or more children; there shall be no distinction between legitimate and natural children except as provided by article 915 - 1.

Nothing in this Article shall be construed as preventing a person from making a gift inter vivos or by will in the terms of article 1048 of this Code.

Article 920

Dispositions either inter vivos or by will which exceed the disposable portion shall be liable to be reduced to the size of that portion at the opening of the succession.

[37] A reading of Article 26 of the Constitution shows that this provision not only guarantees the right to property in its clause (1) but also sets out limitations to such right in its clause (2). The right to property is therefore not an absolute right but may be subject to limitations which are prescribed by law and necessary in a democratic society on any of the grounds enumerated in sub-clauses (2)(a) to (i) of that Article.

[38] There is no doubt in our minds that legal provisions that provide the mechanism for effecting the reduction of dispositions *inter vivos* or by will made by a *de cujus* constitute

a limitation to the right to property enshrined in Article 26(1) in that it inhibits “a proprietor of property from freely disposing of his property and a donee from receiving and enjoying such dispositions”. The question to which we must then address our minds is whether Article 920 and the corresponding Articles of the Civil Code are permitted limitations to the right to property in terms of Article 26(2) of the Constitution and are therefore constitutional.

[39] The test for determining the constitutionality of a legal provision was set out in the Court of Appeal case of Sullivan v The Attorney General and Anor SCA 25 of 2012 (14 August 2014) reported in SLR (2014). This test is threefold and as follows: Firstly the legal provision must be prescribed by law, secondly it must be necessary in a democratic society, and thirdly there must be proportionality between the legal provision in terms of the restrictions it imposes on a fundamental right and the objective of that legal provision.

[40] We observe that this is much the same test as was applied by the Constitutional Court in the case of *Durup v Brassel* in determining the constitutionality of Article 913 in which the Court found that this provision is prescribed by law, is necessary in a democratic society in that it meets a pressing social need and is proportionate to the legitimate aim pursued by such provision, and is in the public interest.

[41] We therefore proceed with the determination of the question before this Court by applying the Sullivan test.

Prescribed by law

[42] In the Sullivan case, the Court stated at paragraph 23 thereof that:

(23) *The accepted requirements of a prescribed by law are that it be certain, clear and precise and framed so that its legal implications are foreseeable.*

[43] In the *Durup v Brassel* case, in considering whether Article 930 was “prescribed by law”, the Court stated the following at paragraphs 31 to 34 thereof:

(31) *In Mancienne v Government of Seychelles (No 2) SCA10/2004, LC 262 the President of the Court of Appeal Ramodibedi with Bwana JA concurring,*

interpreted the term "as prescribed by law" with respect to a restriction that may be imposed by law under art 22(2) of the Constitution. I reproduce paragraph 35 of the judgment in part:

[35] In my opinion, the words "as may be prescribed by a law" ... are clearly designed to serve a purpose which is this, namely, to include any law either statutory ... or the common law that may be necessary in a democratic society for the protection of the values set out in sub-clauses (2) (a)(b)(c)(d)(e) and(f) of Article 22. ... In this regard it is important to note that the word "law" is defined in section (1) of the principles on Interpretation in Schedule 2 of the Constitution to include "any instrument that has the force of law and any unwritten rule of law.

(32) Furthermore, I observe that the law must contain certain qualitative characteristics and afford appropriate procedural safeguards so as to ensure protection against arbitrary action. In the case of *James v United Kingdom* the Chamber of the European Court of Human Rights reiterated that:

... the term "law" or "lawful" in the Convention ...also [relate] to the quality of the law, requiring it to be compatible with the rule of law.

(33) Accordingly the Chamber of the European Court of Human Rights in the case of *Silver v United Kingdom* interpreted the term "prescribed by law" with respect to a restriction that may be imposed by a law in terms of the European Convention on Human Rights as follows:

A second principle is that "the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances, of the legal rules applicable to a given case"

A third principle is that "a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail".

(34) It follows from the above interpretations that the limitation contained in art 913 of the Civil Code and the resultant provisions of Book III, Title II: *Gifts Inter Vivos* and *Wills of the Civil Code* is a limitation prescribed by law, which is

adequately accessible to the citizen of this country and attains the level of certainty that is reasonable in the circumstances.

[44] In light of the above, we find that Article 920 and the corresponding Articles of the Civil Code are limitations prescribed by law, in that they meet the requirements of “prescribed by law” as set out in both the Sullivan and the Durup v Brassel cases.

Necessary in a democratic society

[45] In determining whether Article 920 of the Civil Code and corresponding Articles of the Civil Code are limitations that are necessary in a democratic society, this Court has to address the arguments of counsels for the plaintiff and the Attorney General that Articles 913 and 920 are so intrinsically linked, that the Court having found in Durup v Brassel that Article 913 was not unconstitutional in that it is “a limitation that is necessary in a democratic society guaranteeing the family which is the fundamental group unit of society legal, economic and social protection”, this finding of constitutionality should extend to Article 920.

[46] Counsel for the defendant, on the other hand while he concedes that Articles 913 and 920 are intertwined, distinguished between the Durup v Brassel case and the present one on the basis of two points. Firstly that the Durup v Brassel case concerned a testamentary disposition whereas the present case concerns a gift *inter vivos*. Secondly that in the Durup v Brassel case the finding of constitutionality was made specifically in respect of Article 913 and not in respect of corresponding Articles or “the resultant statutory scheme for succession with regard to testate succession” whereas in the present case the reference is made in respect of Article 920. Finally he contended that the point raised that the finding of constitutionality of Article 913 in Durup v Brassel should extend to Article 920 because these two articles are intertwined and that consequently Article 920 should be found to be constitutional, should not have been raised at the hearing stage of this matter, but that the plaintiff should have appealed against the decision of the Chief Justice to refer the matter to the Constitutional Court on the ground that the question referred to that Court for its determination has already been the subject of a decision of that Court and that therefore the conditions for reference under Article 46(7) of the

Constitution had not been satisfied. Consequently, he submits that the case of Durup v Brassel should not be relied upon to make a finding of constitutionality in respect of Article 920.

[47] Counsel for the defendant further argues that because Articles 920 and 913 are so intertwined, in determining whether Article 920 of the Civil Code and the resultant statutory scheme for succession contravene Article 26 of the Constitution, the Court would have to consider and revisit the constitutionality of Article 913 of the Civil Code which was determined in Durup v Brassel. In that respect he submits that the Court is not bound by the decision in Durup v Brassel but can and ought to depart from it. He argues that this case was wrongly decided. For convenience we proceed by dealing with this last point first.

[48] In dealing with this point, we bear in mind that the question referred to this Court for its determination concerns the constitutionality of “Article 920 of the Civil Code and the resultant statutory scheme for succession”.

[49] The plea in *limine litis* raised by the defendants giving rise to the reference to the Constitutional Court questions the constitutionality of both Articles 913 and 920 of the Civil Code. It reads as follows:

Articles 913 and 920 of the Civil Code – on which the suit is based – is unconstitutional in that they are in contravention of the right to acquire, own and peacefully enjoy and dispose of property as protected by Article 26 of the Constitution.

Underlining is ours.

[50] However, the question referred to the Court for its determination as stated in the Chief Justice’s Order of the 28th January 2019, concerns the constitutionality of “Article 920 of the Civil Code and the resultant statutory scheme for succession” only. It makes no mention of Article 913. The reasons therefor can be found in the said Order at paragraphs 35 to 38 thereof, as follows:

(35) The constitutionality of Article 913 had been tested in the case of Durup & Ors v Brassel & Anor (2013) SLR Part 1 259, and the Constitutional Court decided that it was not unconstitutional in that;

“Article 913 of the Civil Code is a limitation that is necessary in a democratic society guaranteeing the family, which is the fundamental group unit of society, legal, economic and social protection” (per Robinson J parag 48 p.277)

(36) *There was no appeal of this decision. Therefore in terms of Article 46(7) of the Constitution “the question ... has already been the subject of a decision of the Constitutional Court” and is not one that the Supreme Court can again refer to the Constitutional Court for determination.*

(37) However, insofar as the constitutionality of Article 920 of the Civil Code is concerned, that question has not been answered.

(38) *Although the provisions of Article 920 of the Civil Code relate to the same subject matter as Article 913 in that it concerns the portion of disposable property in the law of succession, out of an abundance of caution, and being satisfied that the question raised is not frivolous or vexatious, and has not specifically been a decision of the Constitutional Court or the Court of Appeal, I adjourn the proceedings in the Supreme Court and refer the following question for determination by the Constitutional Court*

....

Underlining is ours.

[51] A reading of the above shows that the Chief Justice referred only “Article 920 of the Civil Code and the resultant statutory scheme for succession” to the Constitutional Court for its determination as to its constitutionality. She did not refer Article 913 of the Civil Code, because she was satisfied that the question of the constitutionality of that article in relation to Article 26 of the Constitution had already been the subject of a decision of the Constitutional Court in *Durup v Brassel* which had not been appealed against, and she was therefore precluded from referring the same question to the Constitutional Court again in terms of Article 46(7) of the Constitution. However as to Article 920 of the Civil Code, she was satisfied that the question of the constitutionality of that provision was not frivolous or vexatious, and that it had not specifically been a decision of the Constitutional Court or the Court of Appeal, hence the reference to the Constitutional Court.

[52] Article 46(7) of the Constitution reads as follows:

Where in the course of any proceedings in any court, other than the Constitutional Court or the Court of Appeal, a question arises with regard to whether there has been or is likely to be a contravention of the Charter, the court shall, if it is satisfied that the question is not frivolous or vexatious or has already been the subject of a decision of the Constitutional Court or the Court of Appeal, immediately adjourn the proceedings and refer the question for determination by the Constitutional Court.
Underlining is ours.

[53] It is clear that the Chief Justice could not in the light of the clear prohibition in Article 46(7) refer to the Constitutional Court a question which has already been the subject of a decision of that Court. In our view she therefore rightly confined the reference to the Constitutional Court to “Article 920 of the Civil Code and the resultant statutory scheme for succession.”

[54] For this reason this Court cannot in the words of counsel for the defendants, “revisit the constitutionality of Article 913 of the Civil Code” in determining the question before it. For the same reason we consider that this Court is bound by the terms of the reference of the Chief Justice in her Order of the 28th January 2019. Furthermore to revisit the constitutionality of Article 913, in the present case would amount to the Constitutional Court in essence sitting on appeal of one of its own decisions.

[55] This Court is also urged to depart from the decision in *Durup v Brassel* on the basis that it was wrongly decided. This Court cannot depart from that decision without good reason. In terms of Article 5 of the Civil Code, “Judicial decisions are not absolutely binding upon a Court but shall enjoy a high persuasive authority from which a court shall only depart for good reason.” In essence counsel for the defendant is disputing that the limitation imposed by Article 913 on the right to property is necessary in a democratic society in the public interest in that the law of forced heirship does not correspond to a pressing social need and goes beyond the legitimate aim pursued. As stated above, the Court cannot revisit its decision in *Durup v Brassel* which made the following findings on these very same points at paragraphs 46 and 47 of its judgment which are reproduced below.–

(46) *In light of the above arguments, I have no difficulty to further hold that there is also a "pressing social need" to protect the reserved heirs from total and unjust disinheritance from a succession, in which they are entitled, to the benefit of third parties.*

(47) *Therefore, I have no difficulty to find that the law of reserved heirs contained in art 913 of the Civil Code is proportionate to the legitimate aim pursued*

- [56] On that basis therefore, this Court cannot depart from the decision in *Durup v Brassel*. We further note that the case of *Durup v Brassel* was not appealed against. If as contended by counsel for the defendant, it was wrongly decided, the decision ought to have been appealed against. As it is, the decision in *Durup v Brassel* stands.
- [57] We will now consider the argument of the plaintiff and the Attorney General that Articles 913 and 920 of the Civil Code are so intrinsically linked that the finding of constitutionality in respect of Article 913 of the Civil Code in the case of *Durup v Brassel* must by implication extend to Article 920 of the Civil Code resulting in the constitutionality of that provision.
- [58] In order to determine the issue at hand it is necessary to examine not only Article 913 and 920 of the Civil Code but to also consider them in the context of other corresponding provisions of that Code namely those contained in Chapter III of Title II of Book III thereof. Book III of the Civil Code is entitled “Various Ways of Acquisition of Ownership”. Title II of this Book deals with “Gifts Inter Vivos and Wills”. Chapter III of Title II entitled “Disposable Portion and Reduction” is dedicated to the subject of forced heirship.

- [59] Section 1 of Chapter III of Title II of Book III deals with “The Portion of Disposable Property” in Articles 913 to 919. Article 913 establishes the principle of forced heirship in respect of descendants by providing for the reserved and disposable portions of a succession and prohibiting dispositions by gift *inter vivos* or by will in excess of the disposable portion. The other Articles of that section (other than Article 915-2 cl.1 which provides for forced heirship in respect of ascendants) contain rules regulating the application of the principle of forced heirship contained in Article 913. It goes without saying that these Articles rely on Article 913 for their application.
- [60] Section II of the same Chapter entitled “The Reduction of Gifts and Legacies” comprises Articles 920 to 930. Article 920 states the rule for the reduction of dispositions by gift *inter vivos* or by will where such dispositions exceed the disposable portion while Article 921 provides for who may demand such reduction. Article 922 provides rules for calculating the disposable portion for the purpose of effecting the reduction. Articles 923 to 930 contain provisions essentially governing how the reduction is to be effected.
- [61] We find it significant that the provisions setting out the principle of forced heirship and regulating the application thereof appear in the same Chapter as provisions for reduction of dispositions in excess of the disposable portion in breach of that principle, thus reinforcing the idea that they are intrinsically linked. The relationship between Articles 913 to 919 and Article 920 of the Code Civil is however better explained in Commentaire Théorique & Pratique du Code Civil par Théophile Luc, Tome Sixième at page 212 as follows:

*La quotité de la portion disponible ne peut être déterminée qu’à la mort du disposant. La question de savoir quel sera le droit des héritiers réservataires dans le cas où la quotité disponible ayant été dépassée, leur réserve se trouve entamée, est réglée par les articles suivants **qui servent de sanction aux art. 913 à 919.***
Emphasis is ours.

[62] The “Articles suivant” referred to in that passage are Articles 920 and 921. The above shows that Articles 920 and 921 of the Civil Code are ancillary to Article 913 of the Civil Code in that the former articles provides a remedy for a breach of the latter one, and that without Article 913, Article 920 would serve no purpose. As also rightly stated by counsels for the plaintiff and the Attorney General, if Article 920 was to be declared unconstitutional, it would leave any person aggrieved by a breach of Article 913 without any redress. Similarly Articles 922 to 930 of the Civil Code only provide rules for calculating the reduction prescribed by Article 920 and to regulate how the reduction is done with the result that they are also dependent on not only Article 920 but also on Article 913.

We will now address the points raised by counsel for the defendants in support of his argument that the pronouncement of constitutionality of Article 913 in *Durup v Brassel* should not extend and apply to Article 920 and the other Articles of Chapter III of Title II of Book III. These points in essence distinguish the case of *Durup v Brassel* from the present one.

[63] The first point is that the case of *Durup v Brassel* concerned a testamentary disposition whereas the matter before the Court concerns a gift *inter vivos*. An examination of Articles 913 to 919 contained in Section I of Chapter III of Title II of Book III entitled “The Portion of Disposable Property” shows that these provisions draw a parallel between and apply without distinction to both gifts *inter vivos* and testamentary dispositions. In Section II of Chapter III of Title II of Book III which deals with “The Reduction of Gifts and Legacies”, Article 920 also makes no distinction between the two types of dispositions. Neither does Article 922 which provides rules for calculating the disposable portion for the purpose of effecting the reduction. We however observe that subsequent provisions in particular Articles 923 to 926 which govern how the reduction is effected, treat dispositions by gift *inter vivos* and by will somewhat differently as explained in Dalloz Encyclopédie Juridique 2^e Édition, Quotité Disponible, notes 439, 440 and 441 at page 36:

439. *La réserve est prise d'abord sur les biens dont le défunt n'a pas disposé, ensuite sur ceux dont il a disposé par testament, enfin sur les donations entre vifs. Celles-ci ne sont sujettes à réduction qu'autant que les biens laissés libres par le défunt et ceux dont il a disposé par acte de volonté ne suffisent pas à remplir les héritiers réservataires de leurs droits. Spécialement, les donations entre vifs, sauf l'exception prévue par l'article 917 du code civil, ne peuvent être réduites qu'après qu'ait été épuisée la valeur des biens compris dans les dispositions testamentaires ...*
440. *Le principe de la propriété des legs au point de vue de la réduction est la conséquence de l'irrévocabilité des donations entre vifs. Le défunt n'a pu exposer à la réduction les donations antérieurement faites en laissant par testament des biens à d'autres personnes. Ce serait un moyen indirect de revenir sur ses donations; le legs, dispositions de dernière volonté, est toujours la dernière en date des libéralités quoique sa rédaction puisse être antérieure aux donations faites par le défunt. La réduction des legs avant les donations est d'ordre public (C. civ., art. 923 ...).*
441. *1° Lorsque la quotité disponible est entièrement absorbée par les donations, les dispositions testamentaires ne sont pas seulement réductibles, elles sont caduques (C. civ., art. 925), c'est-à-dire non avenues.*

[64] And the following in Commentaire Théorique & Pratique du Code Civil par Théophile Luc, Tome Sixième at pages 225 and 226:

174. *Lorsque la somme totale des dispositions imputables sur la quotité disponible dépasse cette quotité, il est prouvé qu'une atteinte a été portée à la réserve. C'est alors pour les héritiers réservataires le cas de demander la réduction des libéralités.*

Mais ces libéralités peuvent résulter des dispositions testamentaires, soit des donations entre-vifs. Or le droit des légataires est nécessairement postérieur à celui des donataires; d'un autre côté, les donations entre-vifs sont irrévocables;

Donc:

ART. 923 Il n'y aura jamais lieu à réduire les donations entre-vifs, qu'après avoir épuisé la valeur de tous les biens compris dans les dispositions testamentaires; et lorsqu'il y aura lieu à cette réduction, elle

se fera en commençant par la dernière donation, et ainsi de suite en remontant des dernières aux plus anciennes.

Les dispositions testamentaires sont donc toujours réductibles avant les donations entre-vifs, sauf la précision faite par l'art. 917(1);

[65] As can be seen from the above, the different treatment of dispositions by gift *inter vivos* and by will in those provisions is due to the application of the rule of irrevocability of gifts *inter vivos* and because “le droit des légataires est nécessairement postérieur à celui des donataires” . This Court is of the view that this by no means distinguishes the case of *Durup v Brassel* from the present one to the extent that the pronouncement of constitutionality of Article 913 in *Durup v Brassel* cannot be extended to Article 920.

[66] We are confirmed in our view by the following in Commentaire Théorique & Pratique du Code Civil par Théophile Luc, Tome Sixième at pages 5 and 6 on the “Fondement du droit de disposer à titre gratuit”:

La notion exacte du droit de propriété individuelle implique nécessairement, pour celui qui en est investi, la faculté de disposer librement de sa chose, à titre gratuit, soit pendant la durée de sa vie, soit au moment de sa mort.

Ce point est indéniable en ce qui touche les dispositions entre-vifs. Il ne l'est pas moins à l'égard des dispositions qui ne doivent produire leur effet qu'au décès du propriétaire ...

Il n'y a pas de distinction à établir entre le testament et la donation: ces deux modes de disposition appartiennent à l'homme au même titre et sont la manifestation ou l'affirmation d'un même droit. Sans doute on peut concevoir l'intervention du législateur en vue d'assurer le libre exercice de ce droit dans sa sphère légitime d'action, mais on ne saurait admettre que le législateur veuille rendre cet exercice plus ou moins difficile, sous prétexte qu'il voit les donations ou les testaments avec plus ou moins de faveur.

- [67] This also disposes of the defendants' argument at paragraph 29 hereof that a person should have greater freedom to dispose of his property in his lifetime than by way of testamentary disposition, and that there is far more justification for forced heirship in respect of testamentary dispositions than in respect of dispositions by gift *inter vivos*.
- [68] We also consider it appropriate to consider the defendants' argument based on the distinction between gifts *inter vivos* and testamentary dispositions in light of the judgment in *Durup v Brassel* itself. We observe that nowhere in the judgment is any such distinction made. In fact in many instances the court in that judgment refers to "the law of reserved heirs" (Vide paragraph 23 lines 2 and 4, paragraph 25 line 2, paragraph 30 line 1, paragraph 41 line 1, paragraph 47 line 1 and paragraph 48 line 1) and "reserved heirs" (Vide paragraph 46 line 2) without making any distinction between dispositions by gift *inter vivos* and by will. We also observe that in paragraphs 30 and 34 mention is made of both "gift *inter vivos* and wills". We find it significant that in paragraph 48, in which the Court makes the finding of constitutionality of Article 913, no distinction is made between gifts *inter vivos* and testamentary dispositions.
- [69] In our view therefore, the reasoning behind, and consequently the finding of the Court as to the constitutionality of Article 913 of the Civil Code applies to both dispositions by gift *inter vivos* and by will. Consequently we find that the argument of counsel for the defendant that the finding of constitutionality in respect of Article 913 cannot be extended to Article 920 on the basis of the distinction between these two types of dispositions is misconceived.

[70] The second point made by counsel for the defendants in support of his argument that the pronouncement of constitutionality of Article 913 in *Durup v Brassel* should not be extended and apply to Article 920 and the other Articles of Chapter III of Title II of Book III is that the finding of constitutionality in *Durup v Brassel* was made specifically in respect of Article 913 and not in respect of corresponding Articles or “the resultant statutory scheme for succession with regard to testate succession”, whereas in the present case, the reference to the Constitutional Court is made in respect of Article 920. In that respect, reference was made to paragraph [48] of the judgment in *Durup v Brassel* reproduced below:

[48] *In the result, I find that the law of reserved heirs contained in art 913 of the civil code is a limitation that is necessary in a democratic society guaranteeing the family, which is the fundamental group unit of society legal, economic and social protection.*

- [71] We note that the reference to the Constitutional Court in *Durup v Brassel* was in respect of “Article 913 and the resultant statutory scheme for testate succession”. The Court’s finding of constitutionality at paragraph 48 of its judgment referred to by counsel for the defendant concerned “the law of reserved heirs contained in art 913 of the civil code”.
- [72] In our view, paragraph 48 of the judgment in *Durup v Brassel* must be read in the light of the whole judgment bearing in mind the applicability of the reasoning behind the Court’s finding of constitutionality of Article 913 to other Articles in Chapter III of Title II including Article 920. After a thorough perusal of the judgment in *Durup v Brassel*, we are unable to find any reason why such findings should not apply to Article 920 as well as the corresponding Articles of Chapter III of Title II.
- [73] It is our view that “the law of reserved heirs” referred to in paragraph 48 of the judgment in *Durup v Brassel* is contained in the whole of Chapter III of Title II of Book III and is not confined to only Article 913 of the Civil Code. This is because as we have explained before all the Articles of that Chapter III are interlinked and dependent on Article 913. Without Article 913 and the other provisions of Section I of Chapter III, the provisions of Section I of Chapter III including Article 920 would serve no purpose. Similarly without Article 920 and other provisions of Section I of Chapter III, Article 913 would be left without any remedy for its breach. We conclude that the Court in *Durup v Brassel* confined its findings to Article 913 because the question referred to the Court for its determination principally concerned the constitutionality of that article which provides for the principle of forced heirship and without which the other provisions of Chapter III of Title II of Book III would be rendered otiose.
- [74] We therefore find that the argument that the finding of constitutionality of Article 913 in the case of *Durup v Brassel* should not apply to Article 920 and other corresponding provisions because the finding in that case was made in respect of only Article 913 has no merit.

[75] The defendants also question the plaintiff's decision to raise the issue that the finding of constitutionality of Article 913 of the Civil Code in *Durup v Brassel* should extend to Article 920 and corresponding provisions of the Civil Code on the basis that Articles 913 and 920 are interlinked, at the hearing stage of the present proceedings. They are of the view that the plaintiff ought to have appealed against the decision of the Chief Justice to refer the matter to the Constitutional Court on the ground that the question referred to the Constitutional Court for its determination has already been the subject of a decision of that Court and that therefore the conditions for reference under Article 46(7) of the Constitution had not been satisfied.

[76] The question referred to this Court for its determination concerns the constitutionality of Article 920 of the Civil Code in relation to Article 26 of the Constitution. In their submissions the plaintiff and the Attorney General contend that Article 913 having been determined not to infringe Article 26 in *Durup v Brassel*, and that Article being closely intertwined with Article 920, the finding of constitutionality of Article 913 should extend to and apply to Article 920.

[77] In our view, it was perfectly in order for the plaintiff and the Attorney General to raise this issue in their written submissions. We find no merit in the defendants' argument that they should have done so by appealing against the order of the Chief Justice to refer the matter to the Constitutional Court on the grounds stated.

[78] The Constitutional Court in the case of Durup v Brassel found that “the law of reserved heirs contained in art 913 of the civil code is a limitation that is necessary in a democratic society” and this Court has made a finding that the case of Durup v Brassel cannot be revisited or departed from in the circumstances of the present case. This Court has also made a finding that Articles 913 and 920 and the corresponding provisions of Chapter III of Title II of Book III cannot stand independently of, but depend on, each other for their effective application. In the light of all the above we cannot find otherwise than that the finding in Durup v Brassel in relation to Article 913 must extend to Article 920 and the corresponding provisions of Chapter III of Title II of Book III, with the result that Article 920 and the corresponding provisions of Chapter III of Title II of Book III are also necessary in a democratic society.

Proportionality

[79] The third test in the Sullivan case is the test of proportionality which the Court of Appeal explained as follows in the context of the constitutionality of the offence of criminal defamation in relation to the right to freedom of expression.

(29) ...Zimbabwe's former Chief Justice Gubbay established the test for determining whether a limitation on freedom of expression is arbitrary, excessive or not permissible as the following:

“whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.” (Nyambirai v National Social Security Authority [1996] 1LRC 64, 75).

The ECHR seems to put extra emphasis on the third limb of Gubbay's test. It considers in each particular case whether the restrictions are proportionate to the legitimate aim pursued by the legislation. In this context it considers the impact of the restriction itself.

[80] In *Durup v Brassel* the Court found that for a limitation to a constitutional right to be “necessary in a democratic society” it has to “correspond to a pressing social need” and be “proportionate to the legitimate aim pursued”. The Court found that there was a pressing social need for the law of reserved heirs based on the “special link that exists between parent and child” regardless of the age and sex of the child which is itself based on the principle of equality among heirs. It also found that the law of reserved heirs was also bound on the notion of support. It further found that the limitation contained in art 913 of the Civil Code affords the widest possible legal, economic and social protection to the family which the state recognises as the natural and fundamental group unit of society and whose legal, economic and social protection it has undertaken to promote which makes that limitation “in the public interest”. Consequently the Court held that there is a pressing social need to protect the reserved heirs from total and unjust disinheritance from a succession in which they are entitled to the benefit of third parties. In respect of the issue of proportionality of the limitation imposed by the law of reserved heirs on the right to property it held at paragraph [47] that:

(47) Therefore, I ... find that the law of reserved heirs contained in Article 913 of the Civil Code is proportionate to the legitimate aim pursued in that:

- (i) the Civil Code provides for only two types of reserved heirs (parents and children including descendants of all degrees – doctrine of representation) in the absence of which, gifts inter vivos or by will may exhaust the entire property (arts 913 – 916 of the Civil Code);
- (ii) article 727 of the Civil Code provides for circumstances where a person shall not succeed to a succession as unworthy to do so;
- (iii) it does not prohibit or limit the right of an owner of property from disposing of his or her entire property for consideration, subject to article 918 of the Civil Code ...

[81] In light of our findings at paragraph 78 above, I find that similarly to Article 913, the limitations imposed by Article 920 and the corresponding provisions of Chapter III of Title II of Book III of the Civil Code on the right to property, is proportionate to the legitimate aim pursued by those provisions.

Decision

[82] Article 920 and the corresponding provisions of Chapter III of Title II of Book III of the Civil Code having passed all three tests set out in the Sullivan case, this Court finds that these provisions read with Article 913 of the Civil Code are permitted limitations in terms of clause (2) of Article 26 of the Constitution, to the right to property enshrined in clause (1) of the same Article, in that they are prescribed by law and necessary in a democratic society in the public interest.

Signed, dated and delivered at Ile du Port on 15 October 2019.

Burhan J

Govinden J

Carolus J