

CONSTITUTIONAL COURT OF SEYCHELLES

Reportable
[2023] SCCC 2
CP 02/2021

In the matter between:

RICHARD PHILIP ERNESTINE
(rep. by Frank Elizabeth)

Petitioner

and

THE GOVERNMENT OF SEYCHELLES

1st Respondent

THE ATTORNEY GENERAL
(rep. by Gulmette Leste)

2nd Respondent

Neutral Citation: *Richard Philip Ernestine (in his capacity as Executor to the Estate of the late Leon Augustine Ernestine) V The Government of Seychelles & Anor*
(CP 02/2021) [2023] SCCC 2 (14 March 2023).

Before: Burhan J, Dodin J, Pillay J

Summary: Compulsory Acquisition of Land, Constitution, Compensation already paid.
Part III of Schedule 7 paragraph 14(1) (a) of the Constitution.

Heard: 11 October 2022

Delivered: 14 March 2023

ORDER

The preliminary objections are upheld and the petition stands dismissed. No order is made in respect of costs.

RULING

BURHAN J (DODIN J, L. PILLAY concurring)

- [1] The Petitioner herein mentioned, filed this petition under Article 130(1) of the Constitution of the Republic of Seychelles (hereafter “the Constitution”) on 25th May 2021. The Petitioner is the son of the late Leon Auguste Ernestine and Gabrielle Suzette Ernestine (hereafter jointly referred to as “the Deceased”).
- [2] The Petitioner was duly appointed executor to their estates on the 22nd September 2009. The 1st Respondent is the Government of Seychelles that establishes and administers policies and laws. 2nd Respondent is the Attorney General and is added as a party in accordance with Rule 3(3) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules 1994 (hereafter “the Constitutional Court Rules”).
- [3] The background facts related to the petition are that the Petitioner’s parents owned, *inter alia*, Parcel S1140 (hereafter “S1140”), measuring 879 square meters, situated at Cascade, Mahe, Seychelles. It is common ground that S1140 was compulsorily acquired by the 1st Respondent on the 4th December 1987 pursuant to Section 4 of the Lands Acquisition Act, 1977 (Act no 10 of 1977) (hereafter “the Land Acquisition Act”). On 16th March 1990 the 1st Respondent transferred S1140 to the Seychelles Industrial Development Corporation (SIDC). On 27th November 1991, S1140 was again transferred to Anthony Bradburn and Micheline De Sylva for SCR215, 000.00. The said facts are accepted by all parties.
- [4] On the 21st June 1993, the new Constitution of the Republic of Seychelles came into effect. Part III of Schedule 7 thereof undertakes, that the State will continue to consider all applications in respect of land compulsorily acquired under the Land Acquisition Act and to negotiate in good faith with the previous owner of the land, with a view to, *inter alia*: transferring the land back to the previous owner where the land had not been developed, or where there was no Government plan to develop it, or where the previous owner was prepared to implement a plan similar to Government’s; or compensating the

previous owner by transferring another parcel of land of corresponding value for the land acquired.

- [5] On the 10th April 1997, Mr. Bradburn and Ms. De Sylva transferred the Property to the Seychelles Housing Development Corporation (SHDC) for the sum of SCR200, 000.00. On the same day, the SHDC transferred S1140 to Mr. Charles De Commardmond for SR200,000.00. It would be pertinent to mention at this stage that Counsel for Petitioner Mr. Elizabeth in his submissions conceded that a monetary compensation of SCR350, 000.00 was paid to Mr. Leon Ernestine in December 1995 for S1140 after the Constitution of 1993 came into force.
- [6] On the 19th August 2008, Mr. Leon Ernestine died bequeathing all his property to his wife. Mrs Ernestine too passed away on the following August 2009, leaving her property to her three children. The Petitioner in his capacity as executor in the Deceased's estate pursues this claim.
- [7] The Petitioner prays that Parcel S1140 be returned on the grounds that the 1st Respondent had not developed same and had no plans to develop S1140 on the coming into force of the Constitution. Alternatively, that the Petitioner be compensated by transferring to the Petitioner a corresponding parcel of land with similar size and value to S1140; or that the Petitioner be compensated with full monetary compensation for S1140 based on the value at the date of the judgment.
- [8] The Respondents raised two preliminary objections under Rule 9 of the Constitutional Court Rules. The first being that the Petitioner lacked the *locus standi* to maintain the petition. The 2nd Respondent cited Paragraph 14(1)(a) of Schedule 7 of the Constitution arguing that it can only be made by a specific class of persons. The 2nd Respondent further referred to the cases of ***Poole v Government of Seychelles CSA 42 of 2013*** and ***Deloitte and Touche AG v Johnson and Others (Cayman Islands) [1999] UKPC 25*** in support of this contention.
- [9] Secondly, the 2nd Respondent averred that the Petitioner's petition does not disclose a reasonable cause of action. To substantiate this position, the 2nd Respondent referred to

Rules 2(2) and 5 of the Constitutional Court, and the authority of *Letang v Cooper* [1965] 1 QB232 at page 242 to establish that there was nothing in the present case that demonstrates the existence of a factual situation that can meet the claim under the aforementioned Paragraph 14(1)(a) of the Constitution. Further the cases of *Monthy v Seychelles Licensing Authority* [2018] SCCA 44 and *Adonis v Celeste* [2019] SCCA 32 were cited to illustrate that the word “material” means necessary for the purpose of formulating a complete cause of action, and if any “material” statement is omitted, the petition is bad in law.

[10] This Court will first determine the preliminary issues and if these issues are determined in favour of the Respondents, and against the Petitioner, there would arise no necessity for this Court to go into the merits of the case.

[11] It would be pertinent at this stage to set out the relevant provision of the Constitution on which the Petitioner bases his case which is paragraph 14(1)(a) of Schedule 7 of the Constitution which reads as follows:

“(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 sub subparagraph (a) or sub 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. “[Emphasis added]”*

[12] In the case of ***Verbene Development Company Ltd v Government of Seychelles & Ors.*** (CP 5 of 2019) [2020] SCCC 557 (02 June 2020), the Court concluded that the provisions of Part III of the 7th Schedule of the Constitution of 1993 were meant to apply for a transitional period which is further confirmed by the wording of its provisions by stating at paragraph 17 that:

“The undertaking on the part of the State to continue to consider all applications by owners of land which had been compulsorily acquired under the previous Constitution is in respect of all applications made during the period of twelve months from the date of the coming into force of the Constitution.” [Emphasis added]

[13] The Constitution came into operation on the 21st June 1993. The 12 months within which the State would be constitutionally obligated to consider all applications of owners of land whose property had been acquired would start from 21 June 1993 and would end on the 20th June 1994.

[14] At the expiration of this period, the State would have no constitutional obligation to consider and negotiate with an owner who presents their application outside the prescriptive period set out in this provision. The Court in ***Verbene*** [paragraph 18] stated that this could be diverted from only on moral grounds.

[15] In **Poole**, Domah, JA at paragraph 24, stated that the questions that the Constitutional Court should ask when determining whether an action was properly brought under the Schedule are the following:

“i) Was the application made within 12 months?

ii) Is the State negotiating in good faith?

iii) Has the eligible applicant obtained one of the remedies prescribed in the Constitution?”

[16] In the **Verbene** case the court held the application was made years after the expiry of the period of twelve months and dismissed the application. In this instant case too, the application has been filed by the Petitioner in 2021, 27 years later well after the expiry period.

[17] In this instant case S1140 was acquired from the Petitioner in December 1987. Upon the acquisition, the land became vested in the State, free from all encumbrances, and the interest of Deceased were converted into a right to compensation under the Land Acquisition Act. On the 21st June 1993, the new Constitution came into effect. In 1995, Petitioner was compensated for the same property at SCR350, 000.00. It is to be noted that while in his petition the Petitioner meticulously narrates every transaction respecting to S1140 since 1987, the Petitioner conveniently omits the aspect of Mr Ernestine receiving compensation in respect of the same property in question in 1995. This fact was elicited from Petitioner’s Counsel when the Court asked counsel directly if Mr Ernestine was compensated. At which point Mr. Elizabeth states as follows:

“Well, on the 20th June 2020, I wrote a letter to Mr. Patrick Lablache regarding this case and claiming compensation from government and he replied on the 6th August 2020 and he said, ‘I refer to your letter 20th June 2020 [sic] according to our records parcel V394, V3296 and V5720 were transferred back to Mr. Ernestine in December 1995. As compensation for the compulsory acquisition of these properties under Schedule 7 part 3 of the Constitution. With regards to parcel S1140 monetary compensation amounting to SR350,000/- was paid to Mr. Ernestine in December 1995.” [Emphasis added]

[18] It is trite that parties have a duty to disclose material facts to court. Underscoring the importance of disclosure of material facts, in the UK case of ***Tweed v Parades Commission for Northern Ireland*** [2006] UKHL 53, the House of Lords held:

“The disclosure of documents in civil litigation has been recognised throughout the common law world as a valuable means of eliciting the truth and thus of enabling courts to base their decisions on a sure foundation of fact.” [Emphasis added]

[19] It is clear to this Court that the Deceased have been compensated for the property which in the view of this Court is a very material fact as far back as 1995 after the coming into force of the 1993 Constitution.

[20] The Deceased, having secured compensation in 1995, cannot now through the executor of Deceased’s estate, seek to recover compensation for the second time from the 1st Respondent in respect of the same property, to do so would be incorrect and therefore unacceptable. In whatever format the principle is stated, its aim is to ensure equity. In other words, having accepted the SCR350,000.00 in 1995, any debt outstanding to the Deceased or the estate in our view was extinguished upon acceptance of the said amount. There is no “continuing breach” in this particular situation as Petitioner’s Counsel sought to convince this Court by citing the **Chow v Michel** [2011] SLR 1 case.

[21] In the case of ***Georges Verlaque & Another v Government of Seychelles*** CC SC 5 of 1999, it was held that once “negotiations have ended successfully” and the State “grants the appropriate remedy” it is the end of the matter. The Deceased had an opportunity following the enactment of the Constitution in 1993 to assert their rights (which they apparently did), by making the argument that on the basis of the 1st Respondent not having developed or having no plans to develop same, he had a right to reclaim S1140 or entitled to another property of corresponding value. Seemingly they were granted compensation at S1140 market value in terms of paragraph 14(1)(c) and therefore cannot now resurrect or re-agitate the already settled matter, otherwise, there would be no finality and the floodgates would remain permanently open for such applications. It should also be mentioned that in this instant case there is no evidence of continued

negotiations in the nature of seeking additional compensation as provided for under subparagraphs (i), (ii) or (iii) of paragraph 14(1)(c) nor has any correspondence in support of same being adduced by the Petitioner.

- [22] It would be pertinent at this stage to refer to the case of ***Jameson and Another v Central Electricity Generating Board and Others [1998] UKHL 51***, where prior to his death, a deceased lodged a claim against his employers for a disease caused by exposure to asbestos. He was paid £80,000 plus costs, in a settlement later embodied in an order. Following his death, the executor of deceased's estate sought further damages. Lord Hope of Craighead stated as follows:

“In the typical case the plaintiff agrees to accept the sum which the defendant is willing to pay in full and final settlement of his claim. Such a settlement normally involves an element of compromise on both sides. But, whatever the nature and extent of the compromise, one thing is common to all these cases. This is that the agreement brings to an end the plaintiff's cause of action against the defendant for the payment of damages.” [Emphasis added]

- [23] The fact that there is no evidence of complaints filed subsequent to the proffered offer being made for the property leads this Court to one conclusion – that the offer of SCR350,000.00 made to the Deceased was acceptable, and no correspondence was entered into on the subject - until the present petition. This evidences that the State negotiated in good faith, since there is no evidence of any subsequent protest.

- [24] In the case of ***Gosain v. Yashpal Dhir, (1992) 4 SCC 683, pp. 687-88, para 10*** held that:

“No party can accept and reject the same instrument and that ‘a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage.” [Emphasis added]

[25] In coming to a finding that no continuous breach of the constitutional rights of the petitioner exists, we pause to consider Rule 4(1)(b) and (c) of the Constitutional Rules which prescribes a timeline within which a petition shall be filed as follows:

“(1) Where the petition under rule 3 alleges a contravention or a likely contravention of a provision of the Constitution, the petition shall be filed in the Registry of the Supreme Court –

(a) ...;

(b) in a case where the likely contravention is the result of an act or omission, within 3 months of the act or omission;

(c) in a case where the likely contravention arises in consequence of any law, within 3 months of the enactment of such law.”

[26] According to subsection (3) the only exception to filing out of time is if leave of the court is obtained, in which case the court may for “sufficient reason” extend the time for filing under Rule 3 [sub paragraph(4)]. Such leave of the court was not obtained in the present case thus rendering this petition defunct *ab initio*.

[27] Further consequent to S1140 being compulsorily acquired under the Land Acquisition Act, in 1987 and compensation paid in 1995, it has gone through a succession of transfers and the Deceased compensated for the land and by accepting such compensation it extinguishes any rights that Deceased might have had pertaining to the property. The Petitioner therefore cannot continue with this application several years and several successions later.

[28] For the aforementioned reasons the preliminary objections are upheld and the petition stands dismissed. No order is made in respect of costs.

Signed, dated and delivered at Ile du Port on 14 March 2023.

M Burhan J

G. Dodin J

L. Pillay J