IN THE SEYCHELLES COURT OF APPEAL

[Coram: A. Fernando (J.A), G. Dodin (J.A), S. Andre (J.A)**]**

Civil Appeal SCA 07/2016

(Appeal from Supreme Court DecisionCS 97/2013)

Wavel John Charles Ramkalawan — Appellant

Versus

Lizanne Reddy

Michel Bernard Selwyn Gouffe — Respondents

Heard: 08 August 2019

Counsel: Mr. B. Georges for the Appellant

Mr. F. Elizabeth for the Respondents

Delivered: 23 August 2019

JUDGMENT

A. Fernando (J.A)

1. During the August 2018 session of the Court of Appeal, when this appeal came up for hearing, this Court made the following Order by our judgment dated 31st August 2018:

"We hereby order that the Supreme Court case CS No. 97 of 2013, which was the subject matter of appeal in Court of Appeal case SCA No. 07 of 2016 be remitted to the Supreme Court with a further Order that the Supreme Court refers the two constitutional questions raised to the Constitutional Court for their determination.**"**

Background to the appeal:

2. The Respondents (Plaintiffs before the Supreme Court), sued the Appellant (Defendant before the Supreme Court) claiming for their shares in land comprised in Parcel V12164 which the deceased, Eva Kitty Ramkalawan, during her lifetime, on 31st January, 2008, had transferred to the Appellant. The Respondents are the sister and a half-brother of the Appellant and the children of the deceased. It is the case of the Respondents, that the said transfer was in reality a disguised donation. They claimed that the deceased could only dispose gratuitously either by Gift inter vivos or by Will, only one fourth of the total asset value of all her property that existed at the time of her death. The Appellant in his statement of defence had denied that the transfer was a disguised donation as the Transfer was for the land only and maintained that the sale of the land was valid and for value. On 26th January, 2016 the Supreme Court entered judgment in favour of the Respondents. On 24th February, 2016 the Appellant entered a Notice of Appeal against the said decision, advancing two grounds of appeal. Before that appeal was caused-listed for hearing, the Defendant entered a Notice of Motion seeking leave to amend the Notice of Appeal to include two fresh grounds of appeal, which were two constitutional questions. <u>There was no objection from the Respondents to the Notice of Motion seeking leave to amend the Notice of Appeal to include the two fresh grounds of appeal.</u> Leave was granted by a single Judge of this Court.

3. The said two constitutional questions were:

"The restriction in the Civil Code on the free disposal by a person of property belonging to the person during the person's lifetime by providing a reserved portion of that property for children contravenes the right to property in Article 26 of the Constitution.

Any reversal of the right of free disposal of property through the doctrine of disguised donation contravenes the right to property in Article 26 of the Constitution and is unconstitutional insofar as it is not a restriction prescribed by law.**"**

4. This Court stated at paragraph 10 of the Judgment:

"During our deliberations, we considered the Constitutional Court case No. 05 of 2012, Achilla Durup & Ors v Josepha Brassel & or, and found that the constitutional issue that was determined by the Constitutional Court in that case was based on a disposition by a Will, whereas the instant case involves the transfer for consideration, of immovable property during the lifetime of the Transferor, years prior to the passing away of the Transferor. We have determined the issue raised by the Appellant in the two grounds of appeal set out above, ought to be remitted to the Supreme Court for referral of the Constitutional Court for determination.**"** (emphasis added)

In making this pronouncement, this Court had taken into consideration the provisions of Article 46(7) of the Constitution, which I shall refer to later in the Judgment.

5. At paragraph 14 of her Judgment dated 30th January 2019 the Learned Chief Justice had said: **"**…Whether or not I believe that there is a constitutional issue here, which may be important for determination by a Court, I am unable to make the order as granted by the Court of Appeal, and remit the matter to the Court of Appeal for determination of the appeal grounds proper**"**.

6. The reason the Learned Chief Justice gives for not complying with the order of the Court of Appeal and remitting the case back to the Court of Appeal is found at paragraph 13 of her judgment where she states:

"Without wishing to sit on appeal of a decision of the Court of Appeal, I must point out that its order directing that the matter before it be remitted to the Supreme Court with a further order that the Supreme Court refer the matter to the Constitutional Court was made *per incuriam* for the reasons I have stated above.**"**

7. To say that a decision of this Court was given per incuriam is, to say the least, unusual and could be taken, though I cannot believe it was so intended, as of a somewhat offensive character. I could have understood if the Learned Chief Justice said that the Court of Appeal was wrong but I fail to understand, how anyone could say that this Court acted per incuriam in face of the reasons given by the Learned Chief Justice.

8. **'***Per incuriam***'**, refers to a Judgment of a court which has been decided without reference to a statutory provision or earlier Judgment which would have been relevant. The Learned Chief Justice had not elaborated on how the Judgment of the Court of Appeal is *per incuriam* by not considering a statutory provision or an earlier Judgment.

9. I have considered **Article 5 of the Civil Code of Seychelles Act** which states: **"***Judicial decisions shall not be absolutely binding upon a Court but shall enjoy a high persuasive authority from which a Court shall only depart for good reasons.***"**(emphasis added) It is my view that the Judgment of this Court referred to at paragraph 1 above, was not per se a 'judicial decision' to which article 5 would apply, as it was not a legal opinion in the course of resolving a legal

dispute, providing the decision reached to resolve the dispute, and indicating the facts which led to the dispute and an analysis of the law used to arrive at the decision. Even if it was to be argued that it was a judicial decision the Learned Chief Justice has not shown any 'good reason' in accordance with Article 5 of the Civil Code of Seychelles Act, as to why she decided to depart from the order made by this Court referred to at paragraph 1 above.

10. In the often cited case of **Young v Bristol Aeroplane Company Limited, [1944] 1 KB 718, Court of Appeal; 1944 2 AER 293** it was stated: **"***the court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam, e.g., where a statute or a rule having statutory effect which would have affected the decision was not brought to the attention of the earlier court*.**"** (emphasis added) The Court of Appeal in **Morelle Ltd v Wakeling [1955] 2 QB 379** stated: **"***that as a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong*.**"** In **R v Northumberland Compensation Appeal Tribunal ex parte Shaw [1951] 1 All ER 268**, a divisional court of the King's Bench division declined to follow a Court of Appeal decision on the ground that the decision had been reached per incuriam for failure to cite a relevant House of Lords decision.

11. According to **Black's Law Dictionary, Ninth Edition,(2009)**: **"***Per incuriam of a judicial decision means one that is wrongly decided, usually because the judge or judges were ill-informed about the applicable law*.**"** **Louis-Philippe Pigeon** in **Drafting and Interpreting Legislation 60 (1988)** states: **"***There is at least one exception to the rule of stare decisis. I refer to the judgments rendered per*

*incuriam. A judgment per incuriam is one which has been rendered inadvertently. Two examples come to mind: First, where the judge has forgotten to take account of a previous decision to which the doctrine of stare decisis applies. For all the care with which attorneys and judges may comb the case law, errare humanum est, and sometimes a judgment which clarifies a point to be settled is somehow not indexed, and is forgotten. It is in cases such as this that a judgment rendered in contradiction to a previous judgment that should have been considered binding, and in ignorance of that judgment, with no mention of it, must be deemed rendered per incuriam; thus, it has no authority... The same applies to judgments rendered in ignorance of legislation of which they should have taken account. For a judgment to be deemed per incuriam, that judgment must show that the legislation was not invokved.***" Rupert Cross and J. W. Harris**, in **Precedent in English Law 149 (4th Edition 1991)** states: **"***As a general rule the only cases in which decision should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some features of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam, must in our judgment, consistently with the stare decisis rule which is an essential part of our law, be of the rarest occurrence.***"**

12. I am also of the view that the Learned Chief Justice had not only sat on appeal of a decision of the Court of Appeal by stating that the order made by the Court of Appeal was made **'***per incuriam***'**, but has remitted the case back to the Court of Appeal with an order that the Court of Appeal determine the appeal grounds proper. There is no mention of the two constitutional grounds.

13. The reasons the Learned Chief Justice has given to state that the Judgment dated 31st August 2018 of this Court was made 'per incuriam' are to be found in paragraphs 5 -12 of her judgment, namely:

"[5] The Court of appeal has power under **rule 31(5) of the Court of Appeal Rules 2013** (sic 2005) to **"***confirm, reverse or vary the decision of the trial court with or without an order as to costs, or may order a re-trial or may remit the matter with the opinion of the Court thereon to the trial court, or may make such other order in the matter as it may seem just*.**"**(emphasis added).

In citing rule 31(5) the learned Chief Justice had omitted to make reference to the last line therein, namely**"**...*and may by such order exercise any power which the trial court might have exercised:...***"**

[6] When a matter is remitted to the Supreme Court it is required to continue the trial in light of the opinion of the Court of Appeal or to reconsider a matter which had arisen in the Supreme Court and was the subject of the appeal. However, when a matter is remitted to the Supreme Court, the Supreme Court has to determine the matter by exercising its powers in terms of the Courts Act and the Constitution. (emphasis added)

[7]...The Court of Appeal did not refer the matter to the Constitutional Court itself, because it is proscribed from doing so by the wording of **Article 46(7) of the Constitution**: **"**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.**"** [emphasis added]

14. At paragraphs 8 and 9 of her Judgment the Learned Chief Justice citing the Court of Appeal Judgment in Chow V Bossy (SCA 11/2014) [2016] SCCA 20 (12 August 2016) states:**"**With respect, article 46(7) clearly prescribes an additional element that the Supreme Court must determine. This additional element is *whether* a constitutional issue has arisen *in the course of the proceedings*. A referral is thus not a mere rubber-stamping exercise.**"** (emphasis added by me) I am of the view that the decision of this Court in Chow V Bossy has no relevance to this case as it did not pronounce on a remittance by the Court of Appeal to the Supreme Court to have a matter referred to the Constitutional Court. What this Court did in Chow V Bossy was to emphasise on what the **'**Supreme Court**'** must consider when making a referral to the Constitutional Court in accordance with article 46(7) of the Constitution.

15. At paragraph 10 of her Judgment, the Learned Chief Justice had stated: **"**The question of constitutionality of a legal provision could arise at any stage in the case: the pleadings, the evidence or the submissions. Whilst this would ordinarily be a very perfunctory question to determine, it finds relevance in this case.**"** (emphasis added). The statement of the Learned Chief Justice at paragraph 10 of her Judgment as underlined above, answers the additional element that needs to be determined and referred to in the underlined part of the Chief Justice's statement at paragraph 9 of her Judgment, as referred to at paragraph 13 above, i.e. **"***whether* a constitutional issue has arisen *in the course of the proceedings"*. In this case the question of constitutionality of a legal provision arose 'at the appeal stage' in the case, which is still **"***in the course of the proceedings***"**. The Court of Appeal in remitting the case back to the Supreme Court made the remission, a part of the proceedings of the Supreme Court, by determining in its opinion, in accordance with rule 31(5) of the Seychelles Court of Appeal Rules 2005, that there is a constitutional question involved. This comes within the powers of the Court of Appeal as stated at rule 31(5) of the Seychelles Court of Appeal Rules 2005,

namely, **"***...and may by such order exercise any power which the trial court might have exercised:...***"** as referred to earlier at paragraph 13[5] above. This made it unnecessary for the Supreme Court to make a further determination on the question of referral.

16. At paragraph 11 of her Judgment, the Learned Chief Justice had stated: "The two constitutional issues which have been raised were not raised in this court in the pleadings, evidence or submissions despite a protracted trial that lasted from 2013. They arose for the first time on appeal, drafted not as grounds of appeal, but rather as discreet grounds, which should have been used to ground a constitutional petition." (emphasis added)

17. Finally at paragraphs 12 and 13 of her Judgment, the Learned Chief Justice had gone on to state, citing the Judgment of the Supreme Court in Verlaque V Seychelles International Mercantile Banking Corporation: **"**In such circumstances, the court is constrained not to intervene in a matter, which is clearly an afterthought and an attempt to explore a new ground, which did not arise and was never an issue at trial**."** The case of Verlaque also has no relevance to this case as it did not pronounce on a remittance by the Court of Appeal to the Supreme Court to have a matter referred to the Constitutional Court.

18. I make the following observations and comments in relation to the Judgment of the Learned Chief Justice:

    a) I state that this Court by its Order dated 31st of August 2018 determined to remit the case back to the Supreme Court for referral to the Constitutional Court in accordance with Article 120(3) of the Constitution and rule 31(5) of the Seychelles Court of Appeal Rules 2005; as original jurisdiction in matters relating to the Constitution lies with the Constitutional Court in accordance with Articles 125(a) and 129 of the Constitution, to have the

opinion of the Constitutional Court, and to preserve the right of appeal to any party who is dissatisfied with the decision of the Constitutional Court to exercise his or her right of appeal under Article 120(2) of the Constitution, to the Court of Appeal. This Court could not have referred the matter directly to the Constitutional Court, as we do not have a separate Constitutional Court as such, and it is the Supreme Court that exercises its jurisdiction and powers in respect of matters relating to the application, contravention, enforcement or interpretation of the Constitution by sitting as the Constitutional Court, in accordance with article 129 of the Constitution.

b) In relation to paragraphs 5 and 6 of the Learned Chief Justice's Judgment referred to at paragraph 13 above, I state that this Court by its judgment dated 31st August 2018 remitted the matter to the Supreme Court with our opinion that the constitutional questions had to be addressed, having considered the Constitutional case of **Achilla Durup & Ors V Josepha Brassel & or**, as stated at paragraph 4 above. The Court of Appeal by its said Judgment further ordered that the Supreme Court refer the two constitutional questions raised, to the Constitutional Court for their determination. In doing so the Court of Appeal had thus determined that the questions were not frivolous or vexatious nor had already been the subject of a decision of the Constitutional Court or the Court of Appeal. Thus there was no necessity for the Supreme Court to hear the remitted matter in order to make a further determination whether the two constitutional questions has to be referred to the Constitutional Court, as stated by the Learned Chief Justice at paragraph 6 above.

c) I am surprised to find the Learned Chief Justice having herself stated at paragraph 13 of her Judgment as referred to at paragraph 12 above; that the two constitutional issues which have been raised by the Appellant should have been used to ground a constitutional petition; and at paragraph 14 of her Judgment as referred to at paragraph 5 above, that it may be important to determine whether there is a constitutional issue in this case; had decided with scant regard to the Constitution and the right to property enshrined and entrenched therein; to remit the matter back to the Court of Appeal, for determination the appeal grounds proper, without determination of the two constitutional issues raised.

d) I am unable to comprehend what the consequences would be, if this case was to be decided in favour of the Respondents on the appeal grounds sans the constitutional grounds raised; and in a subsequent case the two constitutional issues raised are to be decided in favour of a litigant who argues on the same lines of the Appellant in this case. The Court of Appeal has a role not only to decide individual cases but also to determine principles of law applicable to future cases. The danger of establishing a misleading precedent and the desire to correct an erroneous interpretation of an important principle of law sometimes become decisive factors in consideration of a new issue on review. In the case of **Christopher Gill V The Estate of Charlemagne Gandcourt and another, CS 174 of 1995** the Supreme Court of Seychelles said: ***"****...However, such finality in my view cannot and should not be given mechanically by the Court just for the sake of a technical conclusion of the case as some believe and more so act on such belief. In each adjudication, the Court ought to ensure that all disputes including the latent ones pertaining to the cause or matter under adjudication, are as far as possible completely and effectively brought to a logical conclusion once and for all, delivering the fruits in time to the*

needy. The good sense of the Court, I believe, should always foresee the long term ramifications of its determination in each case. It should adjudicate the cause in such a way that its decision prevents or controls the contingent delay that could possibly, proliferate in future, due to the multiplicity of litigations on the same cause or matter.**"**

This answers the submission of Counsel for the Respondents at the hearing before us that it would be bad in law for the Court of Appeal, to protract the appeal further on the basis of the questionable Ruling of the learned Chief Justice.

e) An error committed in a lower court persists whether or not the error is timely brought to the attention of that court. While failure to deal with a constitutional issue at the level of the lower court, prevents its consideration on appeal, such failure does not cure the error. Therefore, as long as the error is not corrected, the decision below is wrong. Since an appellate court's duty is usually to correct errors on issues which are raised, they sometimes do not see their duty as ending just because an error was not timely raised. An early case to recognize this concern was the US case of **Hormel v. Helvering, 312 U.S. 552 (1941)**. Justice Black stated in **Hormel v. Helvering: "***Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.***"** The general rule gives way to doing 'justice' when it prevents an appellate court from resolving a dispute correctly.

f) In regard to paragraphs 11, 12 and 13 of the Learned Chief Justice's Judgment referred to at paragraphs 14 and 15 above, I wish to state that the two constitutional issues raised before the Court of Appeal that was remitted to the Supreme Court for referral requires no factual determination. In the US case of **Mattco Forge, Inc. v. Arthur Young & Co. (1997) 52 Cal. App.4th 820** it was said:**"***when the issue presented involves purely a legal question, on an uncontroverted record and requires no factual determinations it is appropriate to address new theorie***s"**. In the US case of **Woodward Park Homeowners Ass'n v. City of Fresno (2007) 150 Cal.App.4th 683, 714** the Appellate Court expressed the view that the appellate court and even the respondent can raise new issues, unless the appellant would be prejudiced, such as the situation where the new theory involves an issue of fact. They went on to state: **"***The parties' failure to raise the issue in their original appellate briefs does not bar our consideration of it if the parties have had a fair opportunity to present their positions***."**

g) Appellate courts should hear constitutional issues because they want disputes resolved correctly. In **County of Orange v. Ivansco (1998) 67 Cal.App.4th 328, 331, fn. 2,** it was held that an appellate court may also exercise its discretion and consider constitutional issues raised for the first time on appeal **"***especially when…the asserted error fundamentally affects the validity of the judgment… or when important issues of public policy are at issue…***"** Also the cases of **Glidden Co. v. Zdanok, 370 U.S. 530, 535-37 (1962)**, **McDonald v. Illinois, 557 F.2d 596, 601 (7th Cir.)**

h) To comply with the order of the Learned Chief Justice, who has refused to abide by the order of the Court of Appeal and given directions to this Court as to how this Court should proceed with the appeal would go against the

very hierarchy of the court structure set out in the Constitution and make a mockery of the jurisdiction of the Court of Appeal vis-a-vis the jurisdiction of the Supreme Court. It is the Court of Appeal that has been granted the jurisdiction under article 120(1) to hear and determine appeals from a judgment...or order of the Supreme Court and not the other way around. In the hierarchical system of courts as set out in the Constitution, it is necessary for the Supreme Court, to abide by the decisions of the Court of Appeal. In adopting the principle laid down in **Young V Bristol Aeroplane Co Ltd [1944] K.B. 718** referred to earlier, in the Seychelles context, where decisions of the Supreme Court manifestly conflict; it could choose between two conflicting decisions of its own, or it must refuse to follow a decision of its own which, though not expressly overruled, is inconsistent with a decision of the Court of Appeal or it is not bound to follow a decision of its own given per incuriam. This however does not entitle the Supreme Court to question considered decisions of the Court of Appeal with the same freedom. Even this Court, will review its own decisions cautiously.

i) In **Cassell V Broome [1972] AC 1027** the House of Lords, as it was then called, came down strongly on the Court of Appeal for stating that Rookes V Barnard [1964] AC 1129 was wrongly decided by the House of Lords and was not binding even on the Court of Appeal as it was arrived per incuriam. Their Lordships stated: **"***...It is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way and, if it were open to the Court of Appeal to do so, it would be highly undesirable. The course taken would have put Judges of first instance in an embarrassing position, as driving them to take sides in an unedifying dispute between the Court of Appeal or three members of it (for there is no guarantee that other Lords Justices would have followed*

them and no particular reason why they should) and the House of Lords. But much worse than this, litigants would not have known where they stood. None could have reached finality short of the House of Lords, and in the meantime, the task of their professional advisers advising them either as to their rights, or as to the probable cost of obtaining or defending them, would have been, quite literally impossible. Whatever the merits, chaos would have reigned until the dispute was settled, and in legal matters, some degree of certainty is at least as valuable a part of justice as perfection." (emphasis added)

The course taken by the Learned Chief Justice would lead to the same consequences as highlighted by their Lordships of the House of Lords in the Cassel v Brooke case.

19. For the reasons enumerated above, I order that the Supreme Court case CS No. 97 of 2013, which was the subject matter of appeal in Court of Appeal case SCA No. 07 of 2016, be remitted back to the Supreme Court with a further Order that another Judge of the Supreme Court refers the two constitutional questions raised to the Constitutional Court for the determination of the two constitutional questions.

A. Fernando (J.A)

I concur: ..... G. Dodin (J.A)

I concur: ..... S. Andre (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on23 August 2019