

# CONSTITUTIONAL COURT OF SEYCHELLES

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**Reportable**  
[2020] SCCC  
CP 05/2019

In the matter between

**VERBENE DEVELOPMENT COMPANY LIMITED**      **Petitioner**  
(rep. by Ms. A Benoiton)

And

**GOVERNMENT OF SEYCHELLES**      **1<sup>st</sup> Respondent**  
(rep. by Mr. G Thachett)

**UNITED CONCRETE PRODUCTS**      **2<sup>nd</sup> Respondent**  
**(SEYCHELLES) LTD**  
(rep. by Mr. A Derjacques)

**ATTORNEY-GENERAL**      **3<sup>rd</sup> Respondent**  
(rep. by Mr. G Thachett)

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**Neutral Citation:** *Verbene Development Company Ltd v Government of Seychelles & Ors* (CP05/2019) [2020] SCCC .... (... May 2020)

**Before:** Govinden J, Pillay J and Carolus J

**Summary:** The Constitutional petition is dismissed on the ground of failure of the Petitioner to file an application with the 1<sup>st</sup> Respondent within the prescribed time under Part III of the 7<sup>th</sup> Schedule of the Constitution, which would have obliged the latter to negotiate in good faith.

**Heard:** 12 November 2019

**Delivered:** 2<sup>nd</sup> June 2020

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## ORDER

1. No constitutional obligation upon the 1<sup>st</sup> Respondent under paragraph III of Schedule 7 of the Constitution to consider any application from the

Petitioner in respect of the land parcel PR190 and to negotiate with the Petitioner

2. The Petitioner's contention that its claim of right arises *de jure* upon the promulgation of the Constitution and remains operative until its claim is fully and finally settled is misguided and based on a wrongful interpretation of the Constitution.

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## JUDGMENT

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### **GOVINDEN J. (with Pillay J and Carolus J concurring)**

[1] On the 2<sup>nd</sup> of February 1988, parcel PR190 was compulsorily acquired by the 1<sup>st</sup> Respondent from the Petitioner pursuant to the provisions of the Land Acquisition Act 1977 and the declaration of the said acquisition was registered on the 19<sup>th</sup> of October 1988 and transcribed in Vol. 76 No. 24 at the Mortgage and Registration Office, Victoria. At the time of its acquisition parcel PR190 contained a building which was used as a dwelling house.

[2] On the 21<sup>st</sup> of June 1993 the Constitution was promulgated with an undertaking by the State in its Part III of Schedule 7, to continue to consider all applications in respect of land compulsorily acquired under the Lands Acquisitions Act 1977 and to negotiate in good faith with the previous owner of the land with a view, *inter alia*, to: 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 to the land acquired or paying full monetary compensation for the land acquired (Schedule 7, Part III, cl. 14).

[3] On the 31<sup>st</sup> December 1998, that is five years after the coming into force of the Constitution, the Republic of Seychelles acting through the Respondent, in consideration of the transfer by the 2<sup>nd</sup> Respondent of the land comprised in title S5271, transferred parcel PR190 to the 2<sup>nd</sup> Respondent. The Petitioner and/or its directors and/or its shareholders were not informed and were otherwise unaware of the said transfer.

[4] It is the contention of the Petitioner that, from the compulsory acquisition of parcel PR190 up to the coming into force of the Constitution, PR190 was registered in the name of the 1<sup>st</sup> Respondent. On the coming into force of the Constitution, the 1<sup>st</sup> Respondent had not developed parcel PR190 and had no plans to develop it. Until the transfer of parcel PR190 to the 2<sup>nd</sup> Respondent, no development had been implemented or approved in relation to parcel PR190. The Petitioner thus contends that its claim or right in respect of the compulsory acquisition of PR190 under the provisions of Part III of Schedule 7 to the Constitution was still pending at this time, having not been fully and finally settled.

[5] It is the case of the Petitioner that by effecting the said transfer of parcel PR190 to the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent acted in bad faith and/or fraudulently, and contravened its obligations under Part III of Schedule 7 of the Constitution, violating the Petitioner's constitutional right to property.

[6] Negotiations took place between the Petitioner and the 1<sup>st</sup> Respondent, in which the latter offered to the Petitioner monetary compensation. The Petitioner refused the offer as according to it the sum did not reflect the market value of Parcel PR190 as at 21<sup>st</sup> of June 1993 or the current market value of the parcel.

[7] Accordingly, the Petitioner prays that the said transfer should be cancelled and the 1<sup>st</sup> Respondent and/or the 2<sup>nd</sup> Respondent should transfer parcel PR190 to the Petitioner. Secondly, in the alternative, if the return of the parcel is impossible the Petitioner demands compensation by the transfer of a corresponding parcel of substantially similar value. Thirdly, in the alternative, the Petitioner avers that, given the failure of the 1<sup>st</sup> Respondent to act in good faith and the fraud committed in respect of the Petitioner's right, that the 1<sup>st</sup> Respondent pay the Petitioner the market value of PR190 at the time of the judgment, or the value as identified by at least three (3) independent appraisers of repute.

[8] On the other hand, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents deny the Petition. The fact that parcel PR190 was acquired by the Republic is not denied. The Government and the Attorney General, however deny that the Petitioner was in existence at the time of the acquisition. They further aver that there was no constitutional obligation to inform or notify the Petitioner of the transfer of the parcel PR190 as there was no ongoing negotiation between the Petitioner and the 1<sup>st</sup> Respondent at the time of the transfer; and further that no claim or application was made by the Petitioner upon the coming into force of the Constitution in relation to the property.

[9] At any rate, it is the contention of the Respondents that they made an offer of RS 700,000 to the Petitioner in 2011. They further aver that the Petitioner cannot be allocated an alternative plot to PR190 as, despite their best efforts, no similar plot of corresponding value was found. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent aver that it is currently willing to pay the Petitioner the market value of PR190 as compensation, which they had assessed as SR5,400,000 in 2018, which sum had been offered to and rejected by the Petitioner. It is their position that monetary compensation is the only feasible option as the Constitution permits that – where the land cannot be transferred back – the only option is full monetary compensation.

[10] The 2<sup>nd</sup> Respondent admits that parcel PR190 was acquired from the Petitioner by the 1<sup>st</sup> Respondent on behalf of the Republic of Seychelles. It also admits that the same parcel was transferred to it by the 1<sup>st</sup> Respondent at the time mentioned in the Petition. However, it is the contention of the 2<sup>nd</sup> Respondent that it was requested and compelled to transfer parcel S5271 to the 1<sup>st</sup> Respondent, and accept in return land parcel PR190, in compensation. Therefore, to the extent that the 2<sup>nd</sup> Respondent may be implicated or referred to with reference to fraud or bad faith it avers that it felt compelled and obligated to accept parcel PR190, which was made under duress and in breach of its constitutional rights. Accordingly, the 2<sup>nd</sup> Respondent avers that, should it be deprived of land parcel PR190 by the order of this Court, it should be adequately compensated by the 1<sup>st</sup> Respondent in the sum of SR40,660.000, being the current market value of the parcel S5271, which was transferred to the 1<sup>st</sup> Respondent.

[11] Given the above position of the parties the following issues arise for this Court's determination in this case:

- a. Whether there is a constitutional obligation upon the 1<sup>st</sup> Respondent under Part III, Schedule 7 of the Constitution to consider an application in respect of lands compulsorily acquired under the Lands Acquisition Act 1977 and to negotiate with a previous owner, in the absence of an application made by the owner within one year from the promulgation of the Constitution, as prescribed by the said Schedule. If this issue is determined in the affirmative;
- b. Whether the transfer of parcel PR190 to the 2<sup>nd</sup> Respondent was done in bad faith and or fraudulently in denial of the Constitutional right of ownership and Part III of the 7<sup>th</sup> Schedule of the Constitution.
- c. Whether the 2<sup>nd</sup> Respondent was acting under duress and without consent when it transferred parcel S5271 to the 1<sup>st</sup> Respondent in consideration for parcel PR190, a situation that would render the said exchange null and void.

[12] If the first issue is determined in favour of the 1<sup>st</sup> Respondent and against the Petitioner there would arise no necessity for this Court to make any pronouncement on the 2<sup>nd</sup> point listed for our determination as the 1<sup>st</sup> Respondent would not have been in breach of a constitutional obligation when it transferred parcel PR190 to the 2<sup>nd</sup> Respondent. As regards the 2<sup>nd</sup> Respondent, defects of consent in the transfer of parcel S5271 to the Republic of Seychelles is raised as an alternative defence to a denial of the Petition, as such there would be no necessity to address the 3<sup>rd</sup> point if the 1<sup>st</sup> and 2<sup>nd</sup> issue are determined against the Petitioner. On the other hand, if the first issue listed for our determination is determined in favour of the 1<sup>st</sup> Respondent, this Court would then have to proceed to consider the 2<sup>nd</sup> and

3rd issues as answers to these questions are needed in order for this Court to fully and finally resolve the issues between the parties.

**Whether there was a constitutional obligation on the part of the 1<sup>st</sup> Respondent to negotiate with the Petitioner.**

[13] This question invites the Court to scrutinize the wordings of the provisions of Part III of the 7<sup>th</sup> Schedule of the Constitution in the light of the facts of this case. Part III of the 7<sup>th</sup> Schedule of the Constitution reads as follows:

*“PART III*

*COMPENSATION FOR PAST LAND ACQUISITIONS*

*14(1) The State undertakes to continue to consider all applications made during the period of twelve months from the date of 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...”*

[14] This provision is a transitional provision of our Constitution. It falls within Chapter XVI, entitled “Transitional”. A transitional provision is a provision that *“regulates the coming into operation of [an] enactment and (where necessary) modifies its effect during the period of transition”*: see Halsbury’s Laws of England (LexisNexis 5th ed, 2012), vol 96 at [694] 5.

[15] In a similar vein, Thornton states that the function of a transitional provision is *“to make special provision for the application of legislation to circumstances which exist at the time when the legislation comes into force”*: see H. Xanthaki, Thornton’s Legislative Drafting (Bloomsbury Professional, 5th ed, 2013) at [17.1], previous editions of which have been

cited with approval by the House of Lords in *Regina v Secretary of State for Social Security, Ex parte Britnell* [1991] 1 WLR 198 at 202; [1991] 2 All ER 726 at 730 and the Queensland Court of Appeal in *R v Sayers* [1997] QCA 274. 6. A provision may sometimes have both a savings aspect and a transitional aspect, but with one aspect being its focus. As stated in Thornton's *Legislative Drafting* (Bloomsbury Professional, 5th ed, 2013) at [17.1]:

*“Both terms are loosely used with overlapping meanings; there is little or no advantage in seeking to pursue a watertight distinction between them. But the distinguishing criterion is the focus of the intent of the drafter: if time is the focus, then the drafter must title and express the provision as transitional; if the focus is on exception, then the drafter must title and express the provision as a savings. At the end of the day, the drafter’s pen [sic] will identify the nature of the provision, and there is great benefit in doing so clearly and accurately.”*

[16] In this respect Part III of the 7<sup>th</sup> Schedule falls within such other transitional provisions. For example, Part I deals with “Existing officers and offices” and the transitioning of offices from the previous Constitution to the current Constitution. Part II relates to the first elections and first sitting of the National Assembly. The other non-transitory provisions relating to the sitting of the National Assembly and its election are found in the substantive provisions of the Constitution, specifically Part I of Chapter VI of the Constitution. Accordingly, the non-permanent nature of this constitutional right of action and the consequential reciprocal constitutional obligation on the part of the Government, is shown by the fact that the makers of the Constitution chose to place it in the transitional part of the Constitution as



compared with the substantive provisions of the Constitution which are of a permanent nature.

[17] The fact that the provisions of Part III of the 7<sup>th</sup> Schedule were meant to apply for a transitional period is further confirmed by the wording of its provisions. 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. The Constitution came into operation on the 23<sup>rd</sup> of June 1993. The 12 months within which the State would be constitutionally obligated to consider all applications of owners of land whose lands had been acquired would start from June 1993 and would end on the 23<sup>rd</sup> of June 1994.

[18] The State would hence be under no constitutional obligation to consider and negotiate with an owner who presents their application outside the prescriptive period set out in this provision. If it does, it would be doing so not as a result of the compulsion of the supreme law but merely on moral grounds.

[19] Going back to the facts of this case. It is the contention of the Petitioner that upon the coming into force of the Constitution in 1993 its claim of right in respect of the compulsorily acquisition of parcel PR190 was activated and remained pending until it was fully and finally settled between it and the 1<sup>st</sup> Respondent through a negotiation between the parties. It is implied in the Petition that the Petitioner's case is that this right of action arises as a matter of law irrespective of whether it had lodged an application within the prescribed time under Part III of the 7<sup>th</sup> Schedule.

[20] On the other hand, the 1<sup>st</sup> Respondent contended that there was no application made by the Petitioner within one year upon the coming into force of the Constitution. As a result, there was no obligation on its part to negotiate with the Petitioner in respect of parcel PR190 as no claim of right arises in respect of the said parcel and it could lawfully transfer it to a 3<sup>rd</sup> party.

[21] From the position taken by these two parties, the Court deduces that whilst the 1<sup>st</sup> Respondent is insisting on the transitory nature of the right of the Petitioner to sue under the provisions of Part III of Schedule 7, the Petitioner's case is that unless and until the issue of the land acquisition is fully and finally settled by the parties, the claim of right to parcel PR190 acquired by virtue of the said Schedule remains a continuous obligation, which obliges the 1<sup>st</sup> Respondent to negotiate in good faith and not to transfer the parcel to someone else.

[22] We have carefully considered the pleadings and submissions of the parties regarding this issue and the relevant provisions of the Constitution. Having done so, we are of the view that the 1<sup>st</sup> Respondent is right in its argument. Part III is a transitory provision. It created a cause of action limited in its sphere of application. That is, it obliges the 1<sup>st</sup> Respondent to negotiate in good faith with the ex-owners of land who have made an application regarding land compulsorily acquired under the previous Constitution with a view to doing one of the things listed in clause 14(1) of Schedule 7 depending on the context. It further creates a right of action limited in time, that is the right for the ex-owners of land to make an application and for the 1<sup>st</sup> Respondent to consider the same within one year

from the promulgation of the Constitution. This right of action was not meant to be a perpetual right.

[23] The facts of this case show that the Petitioner only made an application to the 1<sup>st</sup> Respondent for the return of parcel PR190 in a letter dated the 11<sup>th</sup> of February 2008, (EXH VDC 12, attached to the Petition) in which the Attorney for the Petitioner refers to the fact that his client had in 1993 applied to the ministry responsible for lands in accordance with the provisions of the 1993 Constitution for the return of the parcel. No proof of such application had been produced by the Petitioner. At that time, the Petitioner was not only outside the prescription of one year provided by Schedule 7, but also by then the 1<sup>st</sup> Respondent had lawfully transferred the parcel to the 2<sup>nd</sup> Respondent. The facts, furthermore do not show any attempts on the part of the Petitioner to engage the 1<sup>st</sup> Respondent prior to the promulgation of the Constitution or at any time following the acquisition of the said parcel, which would have obliged the 1<sup>st</sup> Respondent, in the words of the 7<sup>th</sup> Schedule, “to continue to consider all applications” (though not exactly falling within the one year period). The 2<sup>nd</sup> Respondent attempted to engage the Petitioner in December of 1990, by making an offer of SR 220,000. To which apparently the Petitioner apparently failed to respond.

Given the above circumstances we are of the view that there was no constitutional obligation upon the 1<sup>st</sup> Respondent under Part III of Schedule 7 of the Constitution to consider any application from the Petitioner in respect of the parcel PR190. Nor was the 1<sup>st</sup> Respondent under an obligation to negotiate with the Petitioner as there was no application made by the Petitioner within the time prescribed by the said schedule. The Petitioner’s

contention that its claim of right arises *de jure* upon the promulgation of the Constitution and remains operative until its claim is fully and finally settled is misguided and based on an incorrect interpretation of the Constitution. To accept this argument would be giving a very strained interpretation to this provision and throwing it outside the ambit that the legislators intended to give it. The petitioner has not averred a breach of Article 26 of the Constitution hence we cannot make a determination as to whether its right to property under that said Article has been contravened.

**Whether the transfer of parcel PR190 to the 2<sup>nd</sup> Respondent was done in bad faith and or fraudulently in denial of the Constitutional right of ownership and Part III of the 7<sup>th</sup> Schedule of the Constitution.**

[24] Accordingly, the transfer of parcel PR190 to the 2<sup>nd</sup> Respondent was done in good faith and not in denial of the Constitutional right of ownership and Part III of the 7<sup>th</sup> Schedule of the Constitution. There cannot be bad faith when there was no obligation upon the 1<sup>st</sup> Respondent to negotiate with the Petitioner at the time of the transfer.

[25] The legal and constitutional nature of the Schedule was confirmed by the Court of Appeal in the case of *Poole v Government of Seychelles (SCA 42 OF 2013)*. Referring to its transitory nature, this Court had this to say:

*“Speaking only for right to property for the time being, it contained a special and dedicated Clause which imposed a continuing obligation upon the State to reconsider all cases of land acquisitions effected between June 1977 and the date of the coming into force of the new Constitution. Article 14(1)(a), Part III, Schedule 7 provides for the government of the day to receive applications for a return of the lands acquired or where they could*

*not be returned for the provision of full compensation in terms of money, property transfer of a similar value or a combination of both.*

*That special and dedicated constitutional provision is entrenched by a special time period within which applications must be made. This Redemption Regime applied to “all applications made during the period of twelve months from the date of coming into force of this Constitution.” It was meant to correct past injustices done to citizens at a time when the Constitution was ushering the Republic from a regime of state owned property to one of private ownership of land subject to public interest considerations.”*

[26] In that regard, on the facts of the case the Court found that Mr Poole did make his application within the 12 months constitutionally provided for.

[27] As to the questions that the Court should ask when determining whether an action was properly brought under the Schedule, the Court had this to say:

*“The questions which the Constitutional Court should have simply asked are as follows:*

- 1. Was the application made within the stated 12 months?*
- 2. Is the State negotiating in good faith?*
- 3. Has the eligible applicant obtained one of the remedies prescribed in the constitution?”*

[28] On the first question, the Court in *Poole* found that the application was made within 12 months from the promulgation of the Constitution. On the second question, it upheld the appeal on the ground that the State had not negotiated in good faith in that it had relied on a pre-1993 judgment to oust the Appellant’s claim. Hence, the Court of Appeal overruled the Constitutional Court finding of *res judicata* in favour of the Petitioner.

[29] The Court of Appeal concluded the case with the following paragraph: “On the matter of Article 14(1)(a), Part III, Schedule 7 of the Constitution of the Republic of Seychelles, we need to state as forcefully as possible that the sun will set on it only when the last *timely application* has been disposed of in good faith. And not before. That is destined to be the Day of Redemption of the past injustices. And no other” (emphasis added).

[30] The case of the Seychelles Court of Appeal case of *Lise Morel vs Government of Seychelles and Ors (CP 10/ 2011)* offers little assistance to us. In that case, negotiation started between the Petitioner and the Government within the prescribed time under the Schedule after the coming into force of the Constitution and continued thereafter for the return of the Petitioner’s land. And it was on that basis that the Court of Appeal held that a parcel extracted and sold to the intervenor in 2001 during the continuum of the negotiation between the parties showed bad faith on the part of government.

**Whether the 2<sup>nd</sup> Respondent was acting under duress and without consent when it transferred parcel S5271 to the 1<sup>st</sup> Respondent in consideration for parcel PR190, a situation that would render the said exchange null and void.**

[31] This question has become otiose in the light of our findings on the 1<sup>st</sup> and 2<sup>nd</sup> issues raised for our determination. The 2<sup>nd</sup> Respondent had raised this objection in the alternative to a total denial of the Petitioner’s claim and on the pre-emptive affirmative determination on those issues.

[32] In our final determination, we therefore dismiss the Petition with costs in favour of the Respondents.

Signed date and delivered on this 2<sup>nd</sup> day of June 2020, at Ile du Port, Victoria,  
Mahe.

Govinden J

Pillay J

Carolus J