

**IN THE COURT OF APPEAL OF SEYCHELLES**

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**Reportable**

[2022] SCCA 38 (19 August 2022)  
SCA 12/2020  
(Appeal from CS 15/2018)

**BARBARA POIRET**

**SYLVIA POIRET**

**Appellants**

*(rep. by Mr. Serge Rouillon)*

and

**1. SEYCHELLES PENSION FUND**

**2. MARIE ANGE WAYE HIVE**

*(rep. by Mr. Olivier Chang Leng)*

**Respondents**

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**Neutral Citation:** *Poiret & Anor v Seychelles Pension Fund & Anor* (SCA 12/2020) [2022] SCCA 38 (Arising in CS 15/2018) (19 August 2022)

**Before:** Fernando, President, Twomey-Woods, Andre, JJA

**Summary:** Seychelles Pension Fund Act, Seychelles Pension (Benefit) Regulations, pre-retirement death benefits – competing claims of married spouse and common law spouse – remedies under judicial review and delictual action

**Heard:** 5 August 2022

**Delivered:** 19 August 2022

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**ORDER**

The appeal is dismissed. However, the decision to grant Ms. Marie Christine Clarisse pension benefits was unlawful. We make no order as to costs, given the issues raised in this case. We order that a copy of this decision be served on the Minister of Finance, responsible for the Seychelles Pension Act, to address the legal anomalies raised in this decision.

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**JUDGMENT**

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## DR. TWOMEY-WOODS, JA

### Background

- [1] The present appeal concerns the interpretation of the Seychelles Pension Fund Act 2005 (the Act), namely a provision therein to the effect that notwithstanding that a marriage subsists at the time of one's death, a common-law partner, as opposed to the married spouse, may be deemed the beneficiary of the deceased's pension benefits.
- [2] The facts of the case are bitterly disputed, but it was conceded at the appeal hearing that the deceased in this case, Danny Poiret, had during his lifetime had two relationships on the go simultaneously, one with his wife Barbara Poiret (the First Appellant) and one with a work companion Christine Clarisse.
- [3] What is disputed is whether the marriage with his wife subsisted at the time of his death and whether his alleged common-law partner had a meaningful and stable relationship sufficient to meet the eligibility provisions for a pension from the Seychelles Pension Fund (SPF) under the Act.
- [4] The deceased was 57 at the time of his death, and his beneficiaries under the Act would be entitled to a pre-retirement death gratuity and other benefits.

### The Applicable Law

- [5] The principal provisions of the Act that have caused challenges in the present case are the following:

*“Section 2...  
spouse”, in relation to a deceased member, means —  
where the member was married and was at the time of the member's death living with and maintaining his married partner, that married partner; or where the member had, at the time of the member's death, been cohabiting with a person as the common law wife or husband of the member, even if the member had not been divorced, for a period of at least three years before the member's death and had maintained that person during that period;*

...

33.(1)A person is entitled to a retirement pension or an incapacity pension only if the person has a minimum of 10 years of continuous contribution to the Social Security Fund or a minimum of 10 years continuous mandatory contribution to the Seychelles Pension Scheme after the Seychelles Pension Scheme came into operation on 1st January 1991 or the Seychelles Pension Fund, immediately prior to retirement or an aggregate period of 20 years of contribution to either the Social Security Fund or the Seychelles Pension Fund prior to retirement.

(2)In respect of a surviving spouse's pension and children's pension, the deceased spouse and parent must have had a minimum period of 10 years of continuous contributions to the Social Security Fund or a minimum of 10 years of continuous mandatory contribution to the Seychelles Pension Scheme since the Seychelles Pension Scheme came into operation on 1st January 1991 or to the Seychelles Pension Fund immediately prior to the death of the deceased spouse or an aggregate of 20 years contributions to the Social Security Fund or the Seychelles Pension Fund prior to the death of the deceased spouse.

#### *Pre-retirement death gratuity*

34. (1) Where a member dies before reaching retirement age leaving no surviving spouse or children or his spouse is not living with him at the time of his death, his dependant or, if he has nominated in the prescribed manner any dependant or other person, that dependant or other person shall be entitled to receive as a benefit a pre-retirement death gratuity equivalent to the sum, if any, standing to his credit in the Fund at the time of his death.

(2) Where a member dies before reaching retirement age and is not qualified for a pension under section 33, his spouse or if he has no spouse, his nominated beneficiary or if he had not made any nomination the dependant or in the absence of any dependant his heirs shall be entitled to receive as a benefit a pre-retirement death gratuity equivalent to the sum, if any, standing to his credit in the Fund at the time of his death." (Emphasis added)

[6] The following provisions of the Seychelles Pension Fund (Benefits) Regulations 2005 (the Regulations) are also relevant:

"2. maintenance or maintaining" means contributing to the household expenses and/or daily needs of an applicant, financially or otherwise, as one of the main contributors to the aforesaid expenses and needs and contribution in this definition includes being the main person, doing the laundering, cooking or

*cleaning for a member or caring for his child, without being paid any salary for the aforesaid services;*

*Part IV – Pre and Post Retirement Death Gratuities*

*14. (1) Where a member dies prior to retirement and does not qualify for a retirement pension under section 33 of the Act and at the time of his death he has a surviving spouse, his spouse and in the absence of a surviving spouse, his children if any shall subject to regulation 7 be entitled to a pre-retirement death gratuity equivalent to the sum of the member’s mandatory and voluntary contributions standing to the member’s credit in the Fund at the time of his death together with any interest thereon.*

*(2) Where a member dies prior to retirement whether or not he qualifies for a retirement pension under section 33 of the Act and at the time of his death he has no spouse, or children, his nominated beneficiary, or if he has not made any nomination, his dependant if any who he has been maintaining for at least 3 years prior to his death and in the absence of any of the aforementioned, his heirs shall subject to regulation 7 be entitled to a pre-retirement death gratuity equivalent to the sum of the member’s mandatory and voluntary contributions standing to the member’s credit in the Fund at the time of his death together with any interest thereon..:*

*Part VII – Surviving Spouse’s Pension*

*26. (1) Subject to regulation 31, a surviving spouse, of a deceased member who dies prior to retirement and at the time of death notwithstanding his age qualifies for a retirement pension under section 33 of the Act, shall be entitled to a surviving spouse’s monthly pension for life.”*

*Provided that the surviving spouse has resided in Seychelles for a continuous period of at least 5 years immediately prior to the death of the deceased member unless such requirement is waived by the Board.*

*...*

*(3) Where immediately prior to his death the deceased member was maintaining his legally married spouse and at the same time maintaining another spouse, the legally married spouse shall be the one entitled to the surviving spouse’s pension. (Emphasis added).*

[7] The SPF does not contest that Mr. Poirer’s beneficiaries were eligible under the Act and Regulations for the statutory benefits (which were not negligible) as he had worked in the

Ministry of Health. He had contributed to the SPF for over forty years, well above the necessary qualifying period.

[8] It is necessary at this juncture to summarise the competing claims of the married spouse (Mrs. Poiret) and the common law partner (Christine Clarisse). We also need to address the claim of Sylvia Poiret (the deceased's adult daughter).

### **Mrs. Poiret's claim**

[9] Mrs. Poiret claimed benefits under her husband's contributions to the SPF because she was legally married to him since 1984. Hence her claims (although she was not permitted to make a formal application for the benefits as she was told she did not meet the residency requirement for the same) would have been made under sections 34(1) or 34 (2) of the Act for a pre-retirement death gratuity and Regulation 26 for a pension for life. She admitted that from 2008 when she moved to the U.K., up to the period leading to her husband's death, they both continued contributing to the maintenance of the family. She produced evidence of their joint account (P 15). Indeed, the court *a quo* found that despite this separation, they operated as a family unit and that:

*“[t]he long-distance relationship even appears not to have dampened the love and affection between the deceased and [Mrs. Poiret] as shown by the contents of the different cards and text messages.”*

[10] She testified that she had moved to the UK in 2008 primarily to be with her daughter, who was studying there, and because she was often alone in Seychelles as her husband frequently travelled with his work with the Football Association. They maintained their relationship as husband and wife. Over the years, Mr. Poiret visited her often in the U.K, and they would travel on family holidays together, and she would come annually to Seychelles for periods of up to six weeks. He lived in the matrimonial home in St Louis while in Seychelles, and the only time he moved to Hermitage was when he became ill in 2015. The utility bills for their home were paid by both of them (Exhibits P 8, 9 and 13 – electricity, water bills and home insurance payments, respectively). They texted or phoned daily (Exhibit P 10 - phone logs). He paid their daughter's college fees and helped with other bills.

[11] She testified that when he was first taken ill in 2013, she had arranged with their mutual friend Ms. Clarisse to have him travel to Mauritius for treatment. She sent money for the hospital bills. When his condition worsened in 2015, and he had his operation and chemotherapy treatment in Seychelles, she flew down to be at his bedside. Ms. Clarisse, a family friend and nurse, assisted her with his care. On his discharge, he came to the matrimonial home in St. Louis with her. When she left for the U.K to care for her heavily pregnant daughter, she made arrangements for her cousin and Ms. Clarisse to call on him daily.

[12] However, after her departure, he moved into Ms. Clarisse's home on the basis that it was easier to be cared for there. Before her departure, he had admitted to her that he had had an affair with Ms. Clarisse but that it had ended long ago. When confronted, Ms. Clarisse denied the affair and said she would no longer help them.

[13] On his last visit to the U.K. to her in 2016, he fell ill and was admitted to a hospital, where he spent seven weeks. On his temporary discharge from the hospital, he indicated he wanted to spend time with his sister. After two days, she did not hear from him again. She understands that he subsequently travelled to Seychelles, but they never spoke before his death shortly after.

[14] Numerous witnesses, including her daughter, corroborated her testimony that she had had a subsisting relationship with the deceased until his death. As I have stated, this fact is, in the main, not contested. However, a draft application for a divorce petition was tendered either by Ms. Clarisse or the deceased to support Ms. Clarisse's application for Mr. Poiret's pension benefits to the SPF.

[15] Mrs. Poiret also produced her husband's Will made in the UK on 17 October 2016, which was proved and registered in Seychelles. She was subsequently appointed as the Executrix of her husband's Estate by the Supreme Court of Seychelles. In that Will, Mr. Poiret declares in respect of the definition of his Estate in relevant part to the present case:

*"In our Will where the context so admits, "our estate:" shall mean the following:  
(A) 1. Bank Accounts...*

9. Seychelles Pension Fund Private...

...

*Beneficiaries*

*I give our properties in the United Kingdom, Seychelles and anywhere else, absolutely and free of tax and free of any money charges. Our beneficiaries are:*

- 1. Barbara Mathilda Poiret*
- 2. Sylvia Elizabeth Piera Poiret.”*

*I give to Barbara Mathilda Poiret all my estate. Should Barbara Mathilda Poiret predecease me...I appoint our daughter Sylvia Elizabeth Piera Poiret to be our beneficiary...*

**Ms. Clarisse’s claim**

[16] Ms. Clarisse applied to the Pension Fund for a surviving spouse’s pension as the deceased’s common-law spouse on the grounds that she had cohabited with the deceased for ten years preceding his death (See Exhibit D1- Application for a surviving spouse’s pension). She testified that their relationship had developed since she started work with him in the Occupational Health Department of the Ministry of Health. She had known him since 1997 in their capacity as colleagues, and they would often take lunch together.

[17] They started an intimate relationship soon after but kept it secret. She was married then but stopped living with her husband in 2000 and divorced him in 2009. It was at that time that Mr. Poiret started staying over at her home in Hermitage, although he would return to his house in St Louis each day to do chores. This arrangement continued for an extended period. Together they took in a young girl to live with them, and she adopted the child. Mr. Poiret would contribute to the maintenance of that family unit as well as renovate the kitchen in Hermitage.

[18] When Mrs. Poiret and Sylvia Poiret visited, they all spent time together both at Hermitage and St. Louis, although during those occasions, Mr. Poiret would sleep at St. Louis with his wife. She testified that Sylvia Poiret knew of their intimate relationship.

[19] She travelled with him as his partner to several countries, including Malaysia and South Africa. When he started getting sick in 2013, she travelled with him for treatment in

Mauritius. In June 2015, he was diagnosed with stomach cancer, and she travelled to India with him for his treatment there. She was adamant that she travelled with him not as his nurse but as his partner, contrary to what Mrs. Poiret had testified. On their return from India in October 2015, he did not return to his home in St. Louis as he was too weak to care for himself.

[20] He travelled to the U.K. on his own for his granddaughter's baptism. Ms. Clarisse joined him there eventually in September 2016 at his sister's house. She travelled back with him to Seychelles in November 2016, and he was again admitted to the hospital. He was discharged into her care at Hermitage and passed away two weeks later.

[21] Her testimony is also corroborated and several witnesses and by cards from Mr. Poiret.

### **Sylvia Poiret's claim**

[22] Sylvia claimed that as the deceased's daughter, she was entitled to his pension as a dependant under sections 34(1) and 34(2) of the Act or as his heir under Regulation 14.

[23] Sylvia corroborated her mother's narrative of events and denied knowledge of an intimate relationship between her father and Ms. Clarisse. She believed that her father had been forcibly removed from the UK in his last days while suffering from terminal cancer to be brought to Seychelles by Ms Clarisse to control him and ensure she benefitted from his finances on his death.

### **The Plaintiff in the court *a quo*.**

[24] When Ms. Clarisse applied for benefits from the SPF as the deceased's common-law partner, the SPF enquired whether she qualified. After interviewing three witnesses and considering the competing applications, she decided to award Ms. Clarisse the pension benefits under the Act.

[25] Mrs. Poiret and her daughter filed a Plaintiff in the Supreme Court alleging *faute* on behalf of the SPF and its General Manager, Mrs. Wayne Hive, and for which they had suffered damages for the loss of the payments made to Ms. Clarisse, their expenses in processing their claims and -



*“c. financial loss, distress and moral damages... substantial disappointment, loss, inconvenience R1,000,000.”*  
*Total loss and damages R2,000,000 and*  
*d. For the whole with interest from the date of the filing of the Plaint and costs ...”*

[26] It is noted at this stage that the Plaint was challenged on two points in *limine*, namely that:

- 1 *Section 71 of the Act barred the Plaintiffs from claiming damages against Mrs. Waye Hive for acts or omissions done in good faith in the discharge of her functions*
- 2 *As the SPF was a statutory body the proper form for a claim against it should have a petition for the judicial review of its decision*

### **The court a quo’s decision**

[27] The court allowed the first point in *limine*, finding that the burden of proving that Mrs. Waye Hive had acted in bad faith in discharging her functions had not been discharged by the Poirets. In the circumstances, the court found that she benefited from immunity under section 71 of the Act and the claim against her was therefore dismissed in its entirety.

[28] Disposing of the second point in *limine*, the learned trial judge had this to say:

*“As far as the 2nd Plea in limine is concerned, I am of the view that an action by way of a Plaint under the Civil Code for damages, such as this one, and an action for Judicial Review under Article 125 (1) (c) of the Constitution are mutually exclusive and can be pursued simultaneously and independently of one another. This is so as they are substantially and procedurally different from one another. The former is one which calls for reparation for damages caused by a decision or action of a person, be it in a quasi-judicial capacity (as it is in this case) and the latter calls for the questioning of the decision making process or action of the same person and a prayer to the court to correct such decision-making process. Moreover, in this case no prejudice or injustice would be caused to the parties or a third party by the institution of the two actions. Therefore, I am of the view that the Plaintiffs could have chosen the avenue of Judicial Review or that of a delictual action or both.”*

[29] The court went on to dismiss the Plaint finding that Mrs. Poiret had not resided and cohabited with Mr. Poiret in Seychelles for the qualifying period of 5 years prior to his death. The court also stated that although the Pension Board could have waived the

residency condition, no application for the same had been made by Mrs. Poiret. Ultimately the court found that Mrs. Poiret “was not the spouse of the deceased for the purpose of the Act”. Instead, it found that Ms. Clarisse had satisfactorily established her cohabitation with Mr. Poiret for the qualifying period under the Act. The court went further to state that although it was the function of the Pension Board to statutorily assess whether the deceased had maintained Ms. Clarisse during his cohabitation, the court was sufficiently empowered to do the same. After examining the evidence on this issue, the court decided that Ms. Clarisse had adequately proved that she had been maintained by the deceased in terms of section 2 of the Act. In that regard, no fault could be attributed to the Pension Fund for the payment of benefits to Ms. Clarisse and the claim against the Pension Fund was dismissed with costs.

[30] The court also found that the deceased’s daughter, Sylvia Poiret, aged 34 years, did not satisfy the conditions under the Act to benefit as a child from her father’s contributions to the Pension Fund, namely that she did not meet the definition of “child’ under section 37 of the Act. Since the court had found in favour of Ms. Clarisse, the issue of Sylvia Poiret being an heir entitled to benefit from her father’s contributions to the Pension Fund `did not arise for deliberation.

### **The appeal**

[31] From this decision, Mrs. Poiret and her daughter have appealed on seven grounds, namely:

- 1 *The learned judge erred in law and fact in failing to properly address his mind to the evidence, facts and law before him.*
- 2 *The learned judge erred in law in his failure to refer important matters raised in the trial to the Constitutional Court under Article 46 of the Constitution including the constitutionality of the Seychelles Pension Fund Act*
- 3 *The learned judge showed extreme bias and erred in law by focusing on and misapplying the *lex specialis* concept by finding the superiority of the Seychelles Pension Fund Act over the Seychelles Civil Code and the Constitution.*
- 4 *The learned judge erred in law and fact by his bias and failure to take into consideration the competing claims in his judgment having raised serious questions about the claims’ investigation; and the veracity of the evidence produced by the parties.*

- 5 *The learned judge has erred and the judgment undermines the proper constitutional principle of the protection of the family unit, the balanced and expeditious administration of justice; our procedural and substantive laws and fairness to litigants.*
- 6 *The judgment is unsafe and unsatisfactory through a combination of biased assessments of the facts of the case, misapplication and distortion of the law.*
- 7 *The learned judge erred on the facts and the law in failing to make a finding that both Respondents are liable to compensate the Appellants.*

[32] We have grouped the grounds of appeal around the issues they raise and will deal with them in turn. At the outset, we categorically state that any reference to bias on the learned trial judge's part is unsustainable given the fact that no evidence of bias was made and that a reading of the judgment shows that consideration was equally given to both parties' case by the learned trial judge. Allegations of bias by a judicial officer are a serious charge and should not be lightly made without supporting evidence, as in this case. The evaluation of impartiality is done objectively and not subjectively. In the present case, there is nothing to evaluate as the allegations are not supported by any evidence. And in this regard, as pointed out by Lord Brown in *Michel v The Queen* [2009] UKPC 41, whether a trial has been conducted fairly is not to be judged merely by the correctness of the result.

**The failure by the court to refer the matter to the Constitutional Court (Grounds 2 and 5)**

[33] In the judgment of the court *a quo*, the trial judge states as follows:

*“79...As far as the alleged unconstitutionality of the provision of the definition of spouse is concerned, I am of the view that the point has only been timidly argued and has been any challenge with enough force that would merit the question to be referred to the Constitutional Court (sic).”*

[34] Hence the learned trial judge found no need to refer the matter.

[35] A referral to the Constitutional Court by the Supreme Court is provided for in Article 46(7) of the Constitution as follows:

*“Where in the course of proceedings in any court, other than the Constitutional Court or the Court of Appeal, a question arises with regard to where 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.”*

[36] In the present case, the issue of the constitutionality of the provisions of the Act was neither averred in the Plea nor raised during the proceedings. Counsel for the Appellants, Mr. Rouillon submits that the issue of constitutionality was referred to nine times at the stage of his closing submissions. We have scrutinised these submissions and observe that the contention of Mr. Rouillon however inaptly drafted, referred to two issues: first, the provisions of the Act in terms of placing a married spouse on the same footing as a common law spouse in competing claims for a deceased’s spouse pension benefits undermined the constitutional right to the protection of the family as contained in Article 32 of the Constitution; and secondly that the way the decision of the Pension Fund was formed and implemented resulted in a breach of their rights to dignity and fair treatment.

[37] In countering these submissions, Mr. Chang Leng, Counsel for the Respondents, stated that he was unsure of the constitutionality complaint. He referred the court to the case of *Chow v Bossy* (SCA 11/2014) [2016] SCCA 20 (12 August 2016), in which Domah J stated that:

*“The referral court does not play the role of an automatic transmission gear but one of judicious judicial screening. It should be satisfied that the application is one worth sending for a decision to the Constitutional Court.”*

[38] We agree with Domah’s sentiments on this question. Constitutional issues may be alive in any given case, but this does not automatically set in train a referral to the Constitutional Court. The judge seized with the matter has to decide on the threshold issues of whether the tests for referral as set out in Article 46(7) have been met. True, the learned trial judge in the present case does not give sufficient reason for not referring the matter, but a quick recourse to the provisions of the Act provides the answer as to why there is no need to have the issue of unconstitutionality addressed.

[39] The Act, it can be argued, deals with the mores of Seychellois society when it provides for pension benefits to be paid to common law spouses. We take judicial notice of the fact that

the notion of family in Seychelles denotes units founded on the relationships between both married and unmarried persons. Common law relationships are more prevalent in our society than those between married persons. Article 32 of the Constitution protects the family, not a family arising from marriage only. The Act, in its objects and ensuing provisions, provide for this reality to ensure that when a spouse passes away, the surviving spouse's family, married or not, continues to be maintained.

[40] With regard to the protection of married spouses and duties of spouses in life and death under the Civil Code, it must be noted that Regulation 26 (3) (above in paragraph 6), in complementarity to the codal provisions, provides that when there are competing claims by a married spouse and a common-law spouse:

*“the legally married spouse shall be the one entitled to the surviving spouse’s pension.”*

[41] Given the meaning of *family* and this proviso, there is no tension between the Act in this sense and the Constitution meriting a referral.

[42] With regard to the second limb, although we can venture to say that the matter could have been handled with more *delicatesse* and a more thorough investigation, there is simply not enough evidence adduced to support a finding that the SPF's decision could have amounted in a breach of the Poiret's rights to dignity and fair treatment.

[43] These grounds of appeal have no validity and are dismissed.

### **The application of the *lex specialis* principle (Ground 3)**

[44] In addressing the issues raised in grounds 2 and 5 above, we have indicated that the Act's provisions do not in any way offend the principles relating to the family that the Constitution and the Civil Code protect. In that context, we are not of the view that the *lex specialis* principle need have been applied. We, therefore, need not say more about it.

**The tension in the Seychelles Pension Act and the Seychelles Pension Fund (Benefits) Regulations and the misapplication of the provisions (Grounds 1, 4 and 6)**

[45] Mr. Rouillon has submitted that the evidence in this case scrutinised against the provisions of the Act and Regulations did not permit a proper decision to be taken either by the SPF or the learned trial judge. He specifically refers to the qualifications in the provisions relating to *maintenance, residency and cohabitation*.

[46] Mr. Chang Leng submits that the contentions of the Poirets are emotive and largely irrelevant given the purport of the Act and the Regulations.

[47] While we agree that much emotion was stirred up in this case especially given the peculiar evidence, there is an aspect of these grounds which merits attention. It arises from the piecemeal fashion in which the Act was amended and subsequent regulations made pursuant to it. Regulations to the Act are made under section 68 of the Act, which provides:

*“68. The Minister may, on the recommendation of the Board, make regulations for carrying into effect the purposes and provisions of this Act and without prejudice to the generality of the foregoing —*

*(a) for the calculation of the amounts and the manner of payment of benefits under this Act;*

*(b) for specifying the rates of contributions to be paid by employers and workers and the collection of contributions;*

*(c) for granting loans to members against voluntary contributions standing to their credit in the Fund and the conditions applicable*

*(d) for specifying ratios for investments under section 50(1). (Emphasis added)*

[48] In this respect, the Seychelles Pension Fund (Benefits) Regulations contain specific provisions that may be *ultra vires* the parent legislation. It is trite that subordinate and delegated legislation cannot be inconsistent with the parent legislation, nor should there be conflict between the subordinate legislation and the enabling legislation.

[49] In our view, the addition of Regulations relating to conditions that allow beneficiaries to qualify for benefits, not themselves circumscribed by the Act, might be problematic. Section 68(a) delegates to the Minister the power to regulate how benefits are paid under the Act. Yet the Regulations provide for gratuities not provided for by the Act and set conditions for

“maintenance” and “residency”, among other matters. It is clear that the Act is not “umbrella legislation” and that the Minister is not delegated power to fill in the gaps. It may also be contended that the Regulations exclude a large class of persons (spouses living abroad) through the addition of qualifying conditions for “maintenance” and “residency”. It must be repeated that the objects of the Act are to maintain the surviving family of the contributor – not rule out beneficiaries who are not resident in Seychelles.

[50] In deciding whether subordinate legislation is *ultra vires* the parent legislation, it was held in *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 4 All ER 903 that:

*“In determining the extent of the power conferred on the Lord Chancellor by [an] Act, the court must consider not only the text of that provision, but also the constitutional principles which underlie the text, and the principles of statutory interpretation which give effect to those principles”.*

[51] However, this issue is not squarely before this court. Neither is a declaration that the delegated legislation is *ultra vires* a remedy that can be granted by this court given that we are simply sitting on an appeal of a decision in a delictual action. Until an administrative action in this respect is properly brought, a declaration cannot issue. In the absence of such a declaration, the Regulations must therefore be presumed to be valid.

[52] Applying these provisions as they are, the decision of the Respondents to grant Ms. Clarisse the pension benefits is therefore plainly wrong. This is because, as we have pointed out before, an explicit provision of the Regulations has been overlooked, namely Regulation 26 (3). It bears repeating:

*“Where immediately prior to his death the deceased member was maintaining his legally married spouse and at the same time maintaining another spouse, the legally married spouse shall be the one entitled to the surviving spouse’s pension.”*

[53] The court found that Mr. and Mrs. Poiret operated as a family unit during his lifetime, maintaining each other. Even though Mrs. Poiret did not satisfy the residency requirement and could not obtain the benefits, she remains the deceased’s legally married spouse for the

purposes of section 26(3). On that fact alone, Ms. Clarisse could not qualify for the benefits. In the light of this finding and in terms of the provisions of Regulation 26(3), the learned trial judge erred in finding that the Respondents acted legally to grant Ms. Clarisse the pension benefits. Insofar as the trial judge also ventured to say that he was as well placed as the SPF to decide on this issue, that finding was erroneous. This was not a judicial review action in which he could review the decision of the Pension Fund. It was an action for damages under delict.

[54] These grounds have validity and are allowed. However, given, as we already said, that the present appeal concerns an action in delict, a declaratory order in respect of the SPF's decision being unlawful cannot issue.

[55] We do not find that the provisions in respect of Sylvia Poiret were wrongly applied by the learned trial judge or the Respondents – she did not meet the definition of child under the Act. Her consideration as a qualifying heir might have succeeded in the absence of her mother's and Ms. Clarisse's claims not being successful. However, her claim is not sufficient pleaded to allow a finding by the court in this respect. The grounds of appeal as they relate to her claims are dismissed.

#### **The issue of compensation – Ground 7**

[56] Compensation or damages would arise only if a *faute* were committed by the Respondents. We have already found that they essentially acted within the confines and constraints of the provisions of the Act and Regulations. Their only *faute* was to overlook the application of Regulation 26(3) and a consideration of the Poirets as qualifying heirs of the deceased.

[57] In this regard, we agree that Mrs. Waye Hive acted in good faith when discharging her functions. We also agree that the Appellants did not satisfactorily discharge their burden of proving such bad faith. The trial judge cannot be faulted for finding that Mrs. Waye Hive benefited from immunity under section 71 of the Act.

[58] With regard to the SPF, the claim for the pension benefits cannot arise, given our finding that the provisions of the Regulations specifying a residency condition would exclude the payment of benefits to Mrs. Poiret. As we have stated, neither Mrs. Poiret nor Ms. Clarisse



can obtain the benefits for the reasons given. The pleadings do not sufficiently plead a case for Sylvia Poiret, and her claim is also dismissed.

[59] We have already expressed our views on the procedural legal avenue, which would have yielded better remedies for the Appellants. The Appellants have taken their chances and grounded their action in delict – but they have committed another grave error. The plaint states in paragraph 19:

*“As a result of the actions, abusive and insulting behaviour of the 2nd Defendant and faute of the Defendants jointly and severally the Plaintiffs have suffered loss, damage and inconvenience”*. (Emphasis added)

[60] We have on numerous occasions addressed the issue of such claims in delict. As drafted, there is an obfuscation as to whom the fault is attributed in the plaint. If one claims vicarious liability, the conditions under Article 1384 must be shown; that is, *a lien de preposition* (link of subordination) must be established. If one claims under Article 1382, direct liability is averred, and then a different regime is applicable.

[61] In *Public Utilities Company v Chelle Medical Limited* (SCA 42 of 2019) [2021] SCCA 78 (17 December 2021), we addressed this exact issue finding that it was not clear from the pleadings whether it was the company that was personally liable to the plaintiff or vicariously liable through the acts of its employees. To prove a case of vicarious liability, the plaintiff would have to establish that the employee did not act outside her functions, that is, that she was not on a frolic of his own but was acting on the instructions of her employer (see *William & Anor v Abel & Anor* [ CS 112/2017] [2021] SCSC 83 (26 March 2021)).

[62] In the case of *Civil Construction Company Limited v Leon & Ors* (SCA 36/2016) [2018] SCCA 33 (14 December 2018), we again dealt with this issue and referred to the case of *Confait v Mathurin* (1995) SCAR 203 in which the court stated that parties are bound by their pleadings, the purpose of which is to give notice of its case to the other party. The Court went on to state that:

*“Where a party claims damages against another for damage caused him by an act, he must state in his pleading where the damage is caused by the act of the other person himself or by the act of a person for whom he is responsible. By Article 1384 of the Civil Code, a person is responsible for the damage which is caused by his own act or by the act of persons for whom he is responsible. The cases in which one person must answer for the acts of another are specified... where a party avers that the liability is based on the act of the other party himself, he should not set up a case at the trial based on liability for the act of a person for whom he is responsible. Where the case of the plaintiff is that the defendant is sued for the act of a person for whom the defendant is responsible, the plaintiff must aver by his pleadings and prove the relationship which gives rise to such liability unless such is admitted.”*

[63] Similarly, in *Hermitte v Attorney General & Anor* (SCA 48 of 2017) [2020] SCCA 19 (21 August 2020), the court held that although it is a well-settled principle that the law does not have to be pleaded, it is nonetheless essential for the plaintiff to aver in what capacity the parties are being sued. Our words fall on deaf ears, but our orders follow the above-stated principles. For this reason, this ground must be dismissed.

[64] Finally, we make the following observation. A man contributed to the Pension Fund, as did his employer for over forty years. As the provisions of the Act and Regulations stand, none of the potential beneficiaries under the Act can benefit from his contributions because the Regulations may be *ultra vires* the Act. The Minister of Finance needs to address this issue urgently.

### **Decision and Order**

[65] The appeal is dismissed. However, the decision to grant Ms. Clarisse pension benefits was unlawful. We make no order as to costs, given the issues raised in this case. We order that a copy of this decision be served on the Minister of Finance, responsible for the Seychelles Pension Act, to address the legal anomalies raised in this decision.

Signed, dated and delivered at Ile du Port on 19 August 2022.

**ANDRE, JA**

- [1] I have read the Judgment of my learned sister Twomey-Woods JA, with which I agree substantively. However, I do not agree that the learned Judge in the court a quo erred in his findings that the Seychelles Pension Fund took the proper decision both in facts and the law when it decided to pay the pension to the concubine.
- [2] I am in concurrence with my learned sister's view that an action on deciding the legality of the Regulations is not before us and therefore cannot be decided by this Court. Rather, this Court is to be guided by the Regulations as they are, and this means the regulations in their entirety. This includes the residency requirement as set out in Regulation 26 (1) which provides:

*Part VII – Surviving Spouse's Pension*

*26. (1) Subject to regulation 31, a surviving spouse, of a deceased member who dies prior to retirement and at the time of death notwithstanding his age qualifies for a retirement pension under section 33 of the Act, shall be entitled to a surviving spouse's monthly pension for life."*

*Provided that the surviving spouse has resided in Seychelles for a continuous period of at least 5 years immediately prior to the death of the deceased member unless such requirement is waived by the Board.*

- [3] I disagree that we should only look at Regulation 26 (3) without considering equally Regulation 26 (1) above. The residency requirement is still an important facet of

qualifying for pension. In my view, Regulation 26 (3) applies where there is a clash or competing claims between two spouses who both qualify as set out in the law. This qualification includes that pertaining to residency as set out in Regulation 26 (1). In any regard, and as rightfully pointed out by the learned Judge in the court, and on the reliance of the law itself, Mrs Poiret had the elbowroom to ask the Board to waive the residency condition. She did not, and she cannot be cushioned against her own failure, to the detriment of a fully qualifying spouse.

[4] To read Regulation 26 (3) to the total disregard of Regulation 26 (1), means the Court is electing which Regulation to consider and disregard. In doing so, the Court is ignoring its own logic, as set out in paragraph 52 by my learned sister Twomey-Woods JA when she says:

[52] ***Applying these provisions as they are**, the decision of the Respondents to grant Ms. Clarisse the pension benefits is therefore plainly wrong. This is because, as we have pointed out before, **there is a clear provision of the Regulations that has been overlooked**, namely Regulation 26 (3). It bears repeating:*

*“Where immediately prior to his death the deceased member was maintaining his legally married spouse and at the same time maintaining another spouse, the legally married spouse shall be the one entitled to the surviving spouse’s pension.”(Emphasis added)*

[5] In not reading Regulation 26 (1), the Court also overlooks a clear provision. Rather, the Court must consider all the provisions set out in the law, because that is the law. It cannot choose which provisions to have regard for and which ones to disregard.

[6] I agree with my learned sister when she interprets the law holistically as one which seeks to maintain the family of the deceased (paragraph [49]). I also agree with her when she is categorically states that family as protected by the Constitution is not one which arises out of marriage alone (paragraph [39]). These important contours of our law must be taken into account as one cogitates on this matter before us. The law as it stands under

Regulation 26 (1) puts a residency requirement which the Court cannot wiggle out of. The residence requirement ought to be taken heed of as we interpret the law holistically because that is the law.

[7] For the above-stated reasons, the Appeal should be dismissed.

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Andre, JA

Signed, dated and delivered at Ile du Port on 19 August 2022.

**FERNANDO, PRESIDENT (Dissenting)**

1. I have had the benefit of reading my sister Justice Twomey’s judgment forwarded to me, and I commence with the statement of my sister Justice Twomey at paragraph 64 of the judgment “A man (Mr. Poiret) contributed to the Pension Fund as did his employer for over forty years” and I add on to that statement, “while his legally married wife of 32 years, the 1<sup>st</sup> Appellant, had lived in the expectation that in the event of her husband predeceasing her, she will have the security of his pension.” This appeal is about the denial of the pension to the 1<sup>st</sup> Appellant to that of her husband, which she was in expectation.
2. I agree with Justice Twomey’s decision that to grant Ms. Marie Christine Clarisse pension benefits was unlawful. I also agree with Justice Twomey that the 2<sup>nd</sup> Appellant, the daughter of Mr. Poiret is not entitled to his pension under the SPF Act.
3. I intend at the outset to examine the definition of ‘spouse’ at section 2 of the Seychelles Pension Fund Act to ascertain whether the denial can be justified.

Section 2 of the SPF Act reads as follows:

“spouse”, in relation to a deceased member, means —

“Where the member was married and was at the time of the member’s death **living with and maintaining** his married partner, that married partner; or

where the member had, at the time of the member’s death, been **cohabiting with a person** as the common law wife or husband of the member, even if the member had not been divorced, **for a period of at least three years before the member’s death and had maintained** that person during that period;”

4. The words “living with and maintaining his married partner at the time of the member’s death” in defining ‘spouse’ at section 2 to of the Seychelles Pension Fund Act, in my view does not necessarily mean that the married partner should have been physically living with the member in the same household. Living with one’s ‘married partner’ means a formal union between two individuals that unites their lives legally, socially, culturally, economically, sexually and emotionally and where sacrifices have to be made for the sake of the marriage. It ties a couple in the eyes of the law and ties their assets and liabilities. The union of assets often extends to bank accounts, property, savings, pensions and debts. Married couples have an obligation to support each other and the children of the marriage both during marriage and even after the relationship ends. When a marriage ends, it must be ended by a formal, legal divorce or annulment process. Divorcing spouses also have the obligation to divide their property by legally prescribed methods. In this case there was no divorce, legal separation or annulment nor was there an iota of evidence that the marriage between the Appellant and her husband had broken down. It was clear that for all intents and purposes the marriage between the 1<sup>st</sup> Appellant and her husband, Mr. Poiret was subsisting. It becomes often necessary for one spouse to live away from the other spouse for the sake of children, grandchildren, aged parents and purposes of employment and business etc.
  
5. In a cohabitation relationship the couple needs to live together physically in the same household and have a sexual relationship to be accepted as the common law wife or husband of the member. That is why the Seychelles Pension Fund Act states that they should be living together for a period of at least three years before the member’s death.

This in my view is the underlying difference between married and cohabiting couples that is made out in the definition of ‘spouse’ in section 2 of the SPF Act. A cohabitation relationship may be ended simply and informally upon the agreement of the parties. Dissimilar to marriage, when a relationship concludes, the parties may divide the property however they choose. Furthermore, in contrast to divorce, cohabiting couples usually do not incur the obligation to support each other after the relationship ends. The father of a child born to unmarried cohabitants is not entitled to a legal presumption of paternity and may have to establish his paternity through blood tests and a legal action and paternity must be established in order to compel child support payments.

6. Paragraphs 9 to 15 of the judgment of my sister Justice Twomey Woods clearly brings out in my view the case of the 1<sup>st</sup> Appellant within the definition of ‘spouse’ in section 2 of the SPF Act. In summary:

- ❖ The Appellant had moved to the UK in 2008 primarily to be with her daughter who was studying there.
- ❖ The Appellant maintained their relationship as husband and wife. Over the years Mr. Poiret visited her often in the U.K and they would travel on family holidays together and she would come annually to Seychelles for periods of up to six weeks. He lived in the matrimonial home in St Louis while he was in Seychelles and the only time, he moved to Hermitage was when he became ill in 2015.
- ❖ Evidence was lead to show that from 2008 when the 1<sup>st</sup> Appellant moved to the U.K. up to the period leading to her husband’s death, they both continued contributing to the maintenance of the family.
- ❖ The utility bills for their home were paid by both of them (Exhibits P 8, 9 and 13 – electricity, water bills and home insurance payments respectively).
- ❖ They texted or phoned daily (Exhibit P 10 - phone logs). Mr. Poiret paid for their daughter’s college fees and he helped with other bills.
- ❖ The 1<sup>st</sup> Appellant testified that when her husband was first taken ill in 2013 she had arranged with their mutual friend Ms. Clarisse to have him travel to Mauritius

for treatment. She sent money for the hospital bills. When his condition worsened in 2015 and he had his operation and chemotherapy treatment in Seychelles, she flew down to be at his bedside. Ms. Clarisse who was a family friend and a nurse assisted her with his care. On his discharge, he came to the matrimonial home in St. Louis with the 1<sup>st</sup> Appellant.

- ❖ When she subsequently left for the U.K to care for her heavily pregnant daughter, she made arrangements for her cousin and Ms. Clarisse to call on him every day.
- ❖ Mr. Poiret had admitted to her before her departure that he had had an affair with Ms. Clarisse but that it had ended a long time ago. When confronted, Ms. Clarisse denied the affair.
- ❖ Numerous witnesses, including her daughter the 2<sup>nd</sup> Appellant, corroborated the testimony of the 1st Appellant that she had had a subsisting relationship with Mr. Poiret until his death. This fact has not been contested.
- ❖ Mrs. Poiret also produced her husband's Will made in the UK on 17 October 2016 which was proved and registered in Seychelles. Respondents had no objection to it. She was subsequently appointed as the Executrix of her husband's Estate by the Supreme Court of Seychelles. In that Will, Mr. Poiret declares in respect of the definition of his Estate in relevant part to the present case:

“In our Will where the context so admits, “our estate:” shall mean the following:

(A) 1. Bank Accounts...

Seychelles Pension Fund Private...

...

Beneficiaries

I give our properties in the United Kingdom, Seychelles and anywhere else, absolutely and free of tax and free of any money charges. Our beneficiaries are:

1. Barbara Mathilda Poiret



2. Sylvia Elizabeth Piera Poiret.”

I give to Barbara Mathilda Poiret all my estate. Should Barbara Mathilda Poiret predecease me...I appoint our daughter Sylvia Elizabeth Piera Poiret to be our beneficiary...

In addition to what is set out in the judgment of Justice Twomey, the 1<sup>st</sup> Appellant had a Joint Account with the Mr. Poiret at National West Bank (exhibit P 15).

7. Also of importance is the pronouncement made by the learned Trial Judge which found that despite this separation they operated as a family unit and that: *“the long-distance relationship even appears not to have dampened the love and affection between the deceased and [Mrs. Poiret] as shown by the contents of the different cards and text messages.”*
8. It is my view where a married spouse satisfies the first part of the definition of section 2 of the SPF Act, there is no place for the alleged concubine Ms. Clarisse, in view of the disjunctive ‘or’. Further although Ms. Clarisse had testified as to an ‘intimate relationship’ there was no evidence to show that it was also a sexual relationship. An intimate relationship is an interpersonal relationship that involves physical or emotional intimacy. Although an intimate relationship is commonly a sexual relationship, it may also be a non-sexual relationship involving family, friends, or acquaintances. As stated earlier in a cohabitation relationship the couple needs to live together physically in the same household and have a sexual relationship to be accepted as the common law wife or husband. Both Appellants had denied knowledge of an intimate relationship between Mr. Poiret and Ms. Clarisse.
9. I am also of the view that the learned Trial Judge erred in unnecessarily treating this case as one in which the principle of *“lex specialis derogat legi generali”* applied, citing the **Indian Supreme Court** case of *Maya Mathew vs State of Kerala and ors,*

**Appeal Civil 1833/2005.** He had been of the view that the SPF Act which is the latter special law was repugnant or was inconsistent with the Civil Code which is the earlier general law on succession, and thus the SPF Act which is the latter special law should prevail over the Civil Code, which was the earlier general law. The learned Trial Judge had said: *“These are but a few clear indications in the special law that the intent of the legislators was to introduce a totally new revolutionary regime of law when it comes to pension. This court is hence of the view that there is a conflict between the provisions of the Civil Code and the Act in these respects. I am also further of the view that the Civil Code is the general law and the Act is the special law when it comes to law of pension and that the Act is the latter law. I reconcile this difference in the law by applying the “lex specialis” Rule. The provisions of the Act shall accordingly prevail in all respect to the fact of this case. To this extent the wish of the deceased member as shown in his last will and testament is subject to and becomes subsumed by the Act and not vice versa and further that the terms “spouse “and “children” or “child” shall bear the meaning attributed to it in the Act and not that of the Code.”* (emphasis added) To start with as stated in paragraph 7 above where a married spouse satisfies the first part of the definition of section 2 of the SPF Act, there is no place for the alleged concubine Ms. Clarisse in view of the disjunctive ‘or’. Thus, there is no inconsistency between the Civil Code and the SPF Act in regard to this matter, especially in view of the definition of ‘spouse’ in the SPF Act. Had the learned Trial Judge not erred in this regard his conclusion may have been different. If at all the inconsistency is not with the SPF Act but with the Seychelles Pension Fund (Benefits) Regulations, which I find to be ultra vires the SPF Act. Even if one were to interpret it as there been an inconsistency, the learned Trial Judge had failed to take into consideration the pronouncement in **Maya Mathew vs State of Kerala and ors**, which held: *“When two provisions of law – one being a general law and the other being specific law governs a matter, the court should endeavour to apply a harmonious construction to the said provisions. But where the intention of the rule making authority is made clear either expressly or impliedly, as to which law should prevail, the same shall be given effect”*. The SPF Act nor the Regulations made under it, do not expressly or impliedly state that in the case of a married spouse, as in the circumstances of the case, would lose her right to her

husband's pension to that of the concubine. I do not see anything in the SPF Act which states, that where there is any inconsistency between any provision of the SPF Act and any provision in an enactment in force immediately prior to the enactment of the SPF Act, the provisions of the SPF Act shall prevail. As stated earlier even if one were to interpret it as there been an inconsistency, it is necessary to apply a harmonious construction between the Civil Code and the SPF Act as postulated in ***Maya Mathew vs State of Kerala and ors.*** I am also of the view that the Fund should have been cautious in ignoring the wishes of a deceased member expressed in his Will, as it amounts to a violation of his right to dispose of his property, that has been enshrined in the Constitution.

10. I agree with Justice Twomey that the Seychelles Pension Fund (Benefits) Regulations pertaining to the 'residence in Seychelles' at regulation 26 (1) is ultra vires the SPF Act, since it does not fall under the regulation making powers under section 68 of the SPF Act and the learned Trial Judge was in error to have relied on it to deny the pension to the 1<sup>st</sup> Appellant. It is trite that subordinate and delegated legislation cannot be inconsistent with the parent legislation nor should there be a conflict between the subordinate legislation and the enabling legislation. I am of the view that the 1<sup>st</sup> Appellant was entitled to her husband's pension under section 2 of the SPF Act and there was no need to look into the applicability of Seychelles Pension Fund (Benefits) Regulations to make that determination.

11. I agree with the statement of Justice Twomey that: "With regard to the protection of married spouses and duties of spouses in life and death under the Civil Code, it must be noted that regulation 26 (3) (above in paragraph 6) in complementarity to the codal provisions provides that when there are competing claims by a married spouse and a common-law spouse:

"the legally married spouse shall be the one entitled to the surviving spouse's pension."

12. I also agree with Justice Twomey that there is a clear provision of the Regulations that has been overlooked, namely **Regulation 26 (3)**. It bears repeating:

*“Where immediately prior to his death the deceased member was maintaining his legally married spouse and at the same time maintaining another spouse, the legally married spouse shall be the one entitled to the surviving spouse’s pension.”*

I agree with the statement made by Justice Twomey that the 1<sup>st</sup> Appellant remains the deceased’s legally married spouse for the purposes of section 26(3). On that fact alone, Ms. Clarisse could not qualify for the benefits. In the light of this finding and in terms of the provisions of Regulation 26(3) the learned trial judge erred in finding that the Respondents acted legally to grant Ms. Clarisse the pension benefits.

13. I am also of the view that the manner the SPF had behaved through its General Manager, the 2<sup>nd</sup> Respondent, in dealing with this case, although I do not attribute malice or bad faith, is unlawful, arbitrary, highhanded and preposterous. The deceased member Antoine Ralph Danny Poiret died on 12 December 2016. The Appellants submitted their claim to SPF on 14 December 2016. The 1<sup>st</sup> Appellant was not permitted to make a formal application for the benefits as she was told that she did not meet the ‘residency’ requirement for the same. The Appellants did not receive any response from SPF until 12 January 2017. The additional documents called for by the SPF and submitted to SPF by the Appellants were ignored and SPF had maintained its decision. It is clear from the evidence that the SPF had come to a decision, only by listening to the version of the concubine Ms. Clarisse and not taking into consideration the case put forward by the Appellants. The Appellants had not been even interviewed, before the SPF took its decision.

14. At paragraph 19 of the Complaint filed before the Supreme Court the Appellants had averred *“As a result of the actions, abusive and insulting behaviour of the 2nd Defendant and faute of the Defendants jointly and severally the Plaintiffs have suffered*

*loss, damage and inconvenience*". In the Pleint the Appellants had averred how the 2<sup>nd</sup> Respondent had acted when the Appellants met her, namely that no documents had been shown to the Appellants as to why a decision had been made to pay the pension benefit to Ms. Christine Clarisse in exclusion to the Appellants. The 2<sup>nd</sup> Respondent had denied that Ms. Clarisse had submitted an application for the proceeds of the Fund when questioned; but had taken the stand that there existed a situation of concubinage between the deceased member and Ms. Clarisse and "that was the end of the matter". The 2<sup>nd</sup> Respondent had failed to give a proper answer as to whether any investigation had been made on the side of the wife and legal beneficiary of the deceased. The Appellants had also alleged that the 2<sup>nd</sup> Respondent had been very rude and negative towards them. The Respondents at paragraph 8 of their Defence, filed before the Supreme Court had substantiated the Appellants assertion, of the Respondents' refusal to show them any documents to the Appellants, as to why a decision had been made to pay the pension benefit to Ms. Christine Clarisse in exclusion to the Appellant. At paragraph 8 of the Defence it is averred: "*The 2<sup>nd</sup> Defendant avers that she informed the Plaintiffs that under the Act, they were not entitled to the Deceased's funds standing with the 1<sup>st</sup> Defendant and that any documents submitted to the 1<sup>st</sup> Defendant by any person, in relation to the same, are confidential and for the use of the 1<sup>st</sup> Defendant only*". I am simply shocked by this statement that has been boldly and without any qualms put in to a Defence filed before the Supreme Court of this country by the Counsel for the Respondents. The statement is a clear violation of **article 28 of the Constitution which states:** "*The State recognizes the right of access of every person to information relating to that person and held by a public authority which is performing a governmental function and the right to have the information rectified or otherwise amended, if inaccurate.*" This right that is enshrined and entrenched in the Constitution is not subject to any of the derogations provided for in section 28(2) of the SPF Act. The Constitution further provides at **article 28(4):** "*The State recognizes the right of access by the public to information held by a public authority performing a governmental function subject to limitations contained in clause (2) and any law necessary in a democratic society.*"

15. The manner the Appellant's case was handled as set out in paragraphs 13 & 14 above clearly show that the actions of the Respondents was indeed a 'fault' committed by the Respondents as defined in article 1382 (2) of the Civil Code. Undoubtedly, the 1<sup>st</sup> Appellant has suffered loss as a result of this fault and it is the obligation of the Respondents to repair it. **Article 1382 (2)** states: "*Fault is an error of conduct which would not have been committed by a prudent person in the special circumstances in which the damage was caused. It may be the result of a positive act or an omission.*"
16. The instant action in my view is one under articles 1384 (1) & (3) of the Civil Code and a lien de preposition (link of subordination) has clearly been established. At paragraph 19 of the Complaint filed before the Supreme Court the Appellants had averred "*As a result of the actions, abusive and insulting behaviour of the 2nd Defendant and faute of the Defendants jointly and severally the Plaintiffs have suffered loss, damage and inconvenience*". This was a case where the 1<sup>st</sup> Respondent, SPF being a legal person, namely a corporate body, had to necessarily carry out its functions through its employees, as averred at paragraph 2 of the Complaint and admitted at paragraph 4 of the Defence filed on behalf of both Respondents. The Appellant's pleadings in the Complaint bring their case squarely under **article 1384 (1) of the Civil Code** which states: "*A person is liable for the damage that he has caused by his own act but also for the damage caused by the act of persons for whom he is responsible or by things in his custody.*" and **article 1384 (3)** which states: "*Masters and employers shall be liable on their part for damage caused by their servants and employees acting within the scope of their employment. A deliberate act of a servant or employee contrary to the express instructions of the master or employer and which is not incidental to the service or employment of the servant or employee shall not render the master or employer liable.*" This provision clearly provides for joint and several liability. The pleadings and the evidence in this case show that the 2<sup>nd</sup> Respondent did not act outside her functions and instructions of the SPF and that she was not on a frolick of her own. In my view there is no obfuscation as to whom fault is being attributed to in the complaint. Undoubtedly it is to both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. According to the Defence filed on behalf of both Respondents and the evidence led at the trial, SPF had not denied responsibility for the

actions of its employees. In fact, it has been averred blatantly at paragraph 8 of the the Defence filed on behalf of both Respondents, that the 2<sup>nd</sup> Respondent had informed the Appellants “that any documents submitted to the First Defendant (1<sup>st</sup> Respondent herein) by any person, in relation to the Deceased’s funds standing with the 1<sup>st</sup> Defendant, are confidential and for the use of the 1<sup>st</sup> Defendant only”, in clear violation of the constitutional rights of the Appellants as set out in paragraph 13 above.

17. There is no requirement under **section 71 of the Seychelles Code of Civil Procedure**, which sets out the particulars that has to be contained in a Plaintiff, to plead the law. All What is required is “*a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action*” and “*a demand of the relief which the plaintiff claims*”. There is nothing in any Statute law which states that when suing in delict one must specify whether the action is based on article 1382 or 1384 of the Civil Code. It would be more than sufficient if there is a plain and concise statement of the circumstances constituting the action and of the material facts which are necessary to sustain the action, and which I clearly find averred in the plaintiff in this case. On a reading of paragraph 19 of the plaintiff referred to earlier it would have been clear to anyone that this was an action based on articles 1384 (1) & (3) of the Civil Code. The Respondents in their Defence, nor before us complained that they were misled by the Appellants pleadings as not to know whether the instant action was under article 1382 or 1384.
18. I therefore quash the judgment of the Supreme Court dismissing the Plaintiff filed by the Appellants before the Supreme Court. I grant the relief as prayed for against both Respondents at paragraph (a) of the Plaintiff, with interest calculated on the monthly pension that would have been payable from the date of filing the plaintiff. I award a total sum of SR 100,000.00 under paragraph (b), as the sums claimed thereunder have not been substantiated. In view of the fact that I do not attribute malice or bad faith to the actions of the 2<sup>nd</sup> Respondent relief prayed for under paragraph (c) is refused.

A. Fernando

President

Signed, dated and delivered at Ile du Port on 19 August 2022.