

**Pillay v Regar Publications (Pty) Ltd & Ors
(1997) SLR 125**

John RENAUD for the Plaintiff
Bernard GEORGES for the First, Second and Third Defendants
Fourth Defendant absent and unrepresented

Appeal by the defendant was dismissed on liability but damages reduced to R175,000.00 on 5 December 1997 in CA 3 of 1997

Judgment delivered on 22 January 1997 by

PERERA J: The plaintiff was a former teacher and lecturer and is presently the Minister of Education and Culture. It is not in dispute that he also held administrative posts in the same Ministry at some time, and was the Principal Secretary prior to being appointed as Minister.

The instant action for defamation is based on an article that appeared in the "Regar" newspaper, issue of 22 December 1995, in the Creole language. It is also not in dispute that the plaintiff was a Minister at the time of publication of this article, which is marked exhibit P1.

The plaintiff, however, relies only on certain excerpts from that article to aver that the statements therein in their natural and ordinary meaning or by innuendo refer to him, that they are false, and that they constitute a grave libel on him. These excerpts, as set out in the plaint, are as follows –

Dernye ka ki montre ki gouvènmàn pa pe aplik sa bann lareg fondamantal se le fe ki Msyè Patrick PILLAY, minis pou ledikasyon, in vann son lakaz dan leo Pointe Au Sel ek gouvènmàn, pour en pri R700,000.00.

An 1993, Msyè Patrick PILLAY ti aste en lakaz Fairview, La Misere, avek gouvènmàn menm, pour en pri R305,000.00. Gouvènmàn tin aste sa menm lakaz, ki lo en arpan later, detwa lannen avan pou R320,000.00. I annan tou laparans ki gouvènmàn in fer "en bon deal" pou minis PILLAY.

I pa sanble ki i ti pou sanz son lakaz Pointe Au Sel pour enn ki pli fay La Misere. Donk diferans R400,000.00 ki Msyè PILLAY in fer lo sa de tranzaksyon i sanble koman en gran lavantaz pour li. Eski i en kondisyon spesyal pour li akòz i minis, oubyen nenport dimoun i kapab ganny sa kalite deal?

Si i pe servi son pozisyon koman minis pour ganny lavantaz spesyal, sa i definitivman pa prop. Annou pa bliye ki si bann gro zofisye i enplike dan bann keksoz ki pa onnet, tou dimoun pou fer parey. Nou bezwen en sistenm kot

napa "de pwa de mezir.

The English translation as appearing in the plaint is as follows-

"Another deal for the Minister"

The latest example which illustrates that the Government is not complying with the fundamental rules laid down, is the case of Mr Patrick PILLAY, Minister for Education and Culture. He sold his house situated at Pointe Au Sel to the Government for a sum of R700,000.00.

In 1993 Mr Patrick PILLAY purchased a house at Fairview, La Misere from the Government for a sum of R305,000.00. The house which stands on 3 acres (sic) an acre of land was purchased by the Government a few years ago for the price of R320,000.00. This transaction bears all the hallmarks of a good deal for Mr PILLAY, undertaken by the Government.

It does not appear that Mr PILLAY would have exchanged his house at Pointe Au Sel for a house of less value at La Misere. The difference of R400,000.00 that Mr PILLAY benefited from the transaction appears to be a great advantage to him. Is it a special treatment for the Minister or anybody else can benefit from this kind of deal?

If he is using his position as Minister to obtain special advantage, this is definitely not right. We should bear in mind that if Senior Officers are involved in dishonest deals, everybody would follow suit. There ought to be a system where "two weights and two measures" does not exist.

The defendants in their statement of defence denied the veracity of the English translation of the excerpts of the article and hence the plaintiff called a sworn interpreter to prove the translation. I shall deal with the disputed areas of the translation as I proceed.

In paragraph 5 of the plaint, the plaintiff avers thus –

The said statements, either in their natural and ordinary meaning, or by innuendo mean and are understood to mean, that the plaintiff who is the Minister of Education and Culture-

- (i) used his position as Minister to obtain a favourable advantage for himself.
- (ii) is in the habit of doing shady deals.
- (iii) he is setting a corrupt precedent encouraged by the Government.

The Alleged Defamatory Meaning

The defendant is entitled to have read as part of the plaintiff's case the whole of the

publication from which the libel is extracted and also any other document referred to which qualifies or explains its meaning. Thus if a libel is contained in a newspaper paragraph, not only the paragraph, but also the heading must be taken into account. As Alderman B stated in the case of *Chalmers v. Payne* (1835) 2Cr.M.& R. 156, "if in one part of the publication something disreputable to the plaintiff is stated but that is removed by the conclusion, the bane and the antidote must be taken together." In doing so, words must be construed in their natural and ordinary meaning, that is, in the meaning in which reasonable men of ordinary intelligence would be likely to understand them, where nothing is alleged to give them an extended meaning or an innuendo created.

It is on these rules of interpretation that I propose to examine the entirety of the article to consider whether the meanings alleged by the plaintiff as set out in paragraph 5 of the plaint, would be the meaning which a reasonable man would attach to them.

In paragraph 3 of the statement of defence, the defendants admit that "on 22nd December 1995, in an article entitled "Ankor En Deal Pour Minis", the defendants wrote and published an article of and concerning the plaintiff. The words "Pour Minis" evoked divergent interpretations. Counsel for the defendants maintained that it referred to "Ministers" in plural form. The plaintiff, in his testimony, disagreed and stated that it was in singular form and that if the plural was intended, it should have been "Pour Bann Minis". Angel Judith Sanders (PW2), the Court Interpreter called by the plaintiff stated that although it could be in the plural, "taking the article as a whole", she took it to be a personal reference to the Minister referred to in the article. Anne Elizabeth (PW3), another interpreter of this Court, testified that in the context of the whole article it referred to the single Minister, Mr. Patrick Pillay and that the word "Ankor" meant that there were previous deals by this Minister. Hence the natural and ordinary meaning contained in the heading of the article is that the plaintiff had engaged in deals of similar nature before. But the second defendant, who assumed the responsibility for writing the article, insisted that he meant "Ministers" in general and that the plaintiff's deal was one such instance.

The defendants produced six articles that appeared in the "Regar" newspaper preceding the article in dispute, wherein land transactions involving the Government and certain public officers and two Ministers were published. On a question raised by the Court as to whether an average reader who had not read any of these previous articles would have understood the heading in the way the defendants aver, the second defendant replied that there was the possibility.

It is a truism that words are almost found embedded in specific contexts. But sometimes to an average reader, a word would mean what it says or signifies. Stephen Ullman, in his book on "Semantics" puts it with delightful asperity, thus – "When I use a word", said Humpty Dumpty, "it means just what I choose it to mean - neither more nor less." Some in their eagerness to underline the importance of context and to demolish the belief that there is a "proper" meaning inherent in a word, go almost as far as Humpty Dumpty in their dogmatic utterances. The second defendant's insistence is reminiscent of such an

attempt, unless it is accepted as an inept usage of the Creole language.

The by-line however is less contentious and as translated by PW2, reads, "Mr. Pillay buys a house and sells the other one - is everything in order?" Counsel for the defendants relies on a "Genera and Species" argument, not only to explain the relationship between the headline and the by-line, but to establish that the plaintiff was not "targeted" for singular attack, and that the publication was made for the public benefit in a general sense.

As I stated earlier in the judgment, the plaintiff has relied on certain excerpts from the article appearing in exhibit P1. The English translation has been challenged and in fact, there is an erroneous reference to "3 acres", where it should be "an acre". This Court has therefore the advantage of reading the translation in the plaint with the translation provided by the sworn interpreter in the course of the proceedings.

The first paragraph of the article (which is not reproduced either in Creole or English in the plaint) as translated in Court by PW2 is as follows –

The SPPF Government refuses to accept that Government transactions ought to be made in the open and that big officers should not have any special favours while buying or selling property from the Government. However it is necessary that these conditions are observed if the Government wants to put into practice the policies of honesty and transparency in public affairs. The last case that shows that the Government is not applying those fundamental rules is the fact that Mr Patrick Pillay the Minister of Education has sold his house at upper Pointe Au Sel to the Government for a sum of Rs. 700,000.

The natural and ordinary meaning a reasonable person would attach to this introductory portion of the article would be that the Government was not following fundamental rules of honesty and transparency, especially when buying and selling property from or to high ranking public officials, and the latest case was the transaction with Mr Pillay. The reasonable inference that would be drawn from such an assertion would be that this transaction was a dishonest or "shady" one, that is, in contra-distinction to the policies of "honesty and transparency" advocated in the article.

Mr Georges, counsel for the defendants, sought to compound such an interpretation by submitting that the publication in question was a build-up over a period of time, whereby the "Regar" newspaper published similar articles concerning public officials and two Ministers regarding land transactions which the newspaper thought were irregular. He further submitted that, had this been an isolated article without such a build-up, there might have been a case for defamation ex facie the article. He therefore urged the Court to consider the purport of the article in the context of a series of articles published previously to expose lack of honesty and transparency on the part of the Government in land transactions, especially when dealing with public officials. But, that would depend on whether the readers of the "Regar" issue of 22 December 1995 read the earlier

articles commencing from 22 October 1993, or even if they had read, had forgotten the contents. Otherwise, there would have been publication at least to a section of the readers for the first time. The article exhibit P1 does not refer to previous articles of that nature. The reference to "the last case" or the "latest case" being that of Mr Pillay highlights his transaction as an example of a dishonest and shady one.

The article then proceeds to question the purpose of the Government in buying the plaintiff's house at Pointe Au Sel. Then a statement of fact is made, that it is not situated in a place where it can be used for any public purpose. By a process of deduction, it states that the question arises as to whether that house standing on a land 3/4 acre in extent is worth that price. In a previous case, *Barrado v Berlouis and Another*(1993) SLR 12, an enterprising politician of the day asked similar questions in a defamatory political broadcast. As the trial Judge in that case, I held that the defendant was making defamatory statements under the guise of asking questions. The Seychelles Court of Appeal affirmed that finding. In the instant case too, the defendants, by the same method, were conveying to the public that the Government had purchased a property which could not be used for any public purpose and paid a sum of R700,000 which was above the real value. That would be the natural and ordinary meaning of that paragraph.

These questions formed the background to the main subject of the article upon which the plaintiff has based the instant action for defamation. I shall set out the balance portion of this article as translated by the sworn interpreter in Court, as neither party raised any objections as to its accuracy-

In 1993, Mr Pillay had bought a house at Fairview, La Misere, from the same Government for a price, that is, Rs. 305,000. The Government bought the same house that is on an acre of land several years before for Rs.320,000. It is obvious that the Government has made a good deal for Minister Pillay. It does seem that he would have changed his house at Pointe Au Sel for one of lesser value at La Misere, so the difference of Rs.400,000 that Mr. Pillay has made on that transaction seems to be a big advantage for him. Is it a special condition for him because he is a Minister or can anyone benefit from that sort of deal?

The last paragraph reads thus –

Nobody questions the right of Mr Pillay to buy or sell any house except if he is using his position as Minister to gain any special advantage. This is definitely not correct. Let us not forget that if the big officers are implicated in those sort of dealings that are not honest, everyone will do the same. We need a system where there are no "two weights and two measures.

This paragraph was meant to be the antidote to the bane contained in the previous paragraphs. But taking the two together, the meaning a reasonable man would gather would be that –

- (1) The Government bought the Fairview Estate house and property some years prior to 1993 for R320,000.
- (2) In 1993, the same house and property was sold to the plaintiff for R305,000.
- (3) The Government bought the plaintiff's house and property at Pointe Au Sel for R700,000.
- (4) The plaintiff would not have sold his Pointe Au Sel House in exchange for a house of less value at Fairview Estate.

The deduction to be drawn from those facts is that, in commercial parlance, the plaintiff "bought cheap and sold dear" so that in connivance with the Government, he made a profit of R400,000. Mr Georges however submitted that the article used the "guarded" word "appears" (isable) when referring to the advantage gained by the Plaintiff. He claimed that it was not a categorical statement, but merely an opinion, and hence there was nothing defamatory.

As regards the last paragraph, Mr Georges pointed out that the plaintiff had omitted to state in the plaint, the opening sentence whereby the writer qualified the comments that followed by stating "nobody questions the right of Mr. Pillay to buy or sell any house ...", and submitted that it would have been so omitted as on a reading of the whole article, there was no hint of defamation in it.

In his submissions, Mr Georges stated that –

The fact that the first paragraph complained of is a fact, and the second paragraph complained of is a fact, the Minister is left with a legitimate complaint of whether the R400,000 was a good advantage to him or not.

As I stated at the very commencement, the case for the plaintiff is that the defendants have sought to rely on an arithmetical difference between the prices of two properties of unequal value and utilized it to defame him by stating to the public who would not know the correct valuations of the respective properties that he had connived with the Government and entered into a shady deal and appropriated a sum of R400,000 from public funds. To the plaintiff, the prices reflect the correct values of the two properties. If the defendants claim otherwise, the burden was on them to establish it and justify their allegation of an undue advantage. This, they failed to do. Hence the plaintiff has proved the defamatory meaning alleged in the plaint.

Effect On The Plaintiff

A person's enjoyment of the right to society of his kind depends on his possession of certain qualities and therefore if he is believed by others to lack those qualities, he might be deprived of the society of such persons who believe him to lack those qualities. The plaintiff is professionally a teacher and lecturer. Presently he is the Minister of Education

and Culture. In either of those categories, the society expects the post-holder to set exemplary standards in ethical and moral behaviour. Thus an imputation of dishonesty, whether it amounts to a crime or not, would be defamatory of such an individual.

The plaintiff testified how he noticed that the respect and regard he had from his subordinates had waned due to doubts about his integrity. He also stated that some persons invited for parties did not attend them and shunned him after the article in question appeared in the "Regar" newspaper. Anne Elizabeth (PW3) an interpreter of this Court, called by the plaintiff to testify regarding the impact, stated that she believed the contents of the article. Questioned about her reactions, she stated –

I was angry, because it shows that people who have powers and positions, they can do favours to themselves, which is being approved by Government, and other people like us Seychellois, we have to pay so much money to get a piece of land, which is not fair.

This evidence stood unchallenged. To succeed in an action for defamation, a person must prove three things about the statement: (a) It is defamatory; (b) It has been reasonably understood to refer to him; and (c) It has been published to a third person.

The last two aspects have been satisfied without dispute. As already stated, the plaintiff has been portrayed as a dishonest person. Although statements of fact have been disguised as questions and comments, the pith and substance of the article is discernible to any ordinary person with average intelligence. The attempt to hide the real purpose has been like an attempt made by an ostrich to bury its head to avoid predators, not realizing that the rest of its body is widely exposed. Consequently, the defamatory statements have exposed the plaintiff to hatred, ridicule and contempt and caused him to be shunned and avoided. It has also lowered him in the estimation of the right-thinking members of the society and disparaged him in his profession.

The Defences

The law of defamation, however, tries to strike a balance between an individual's right to have his reputation protected and freedom of speech, which implies the freedom to expose wrongdoing and thus to damage reputation. Hence the law provides certain defences for the person who makes a defamatory statement about another for an acceptable reason.

The case for the defendants is tersely set out in the statement of defence under the sub-heading "Particulars" as follows –

The defendants are engaged in the dissemination of information to the general public through their newspaper. The plaintiff, a Minister of Government, sold his house to the Government for a sum much greater than the one paid when he bought another house from the Government and the economic advantage of this was commented on by the defendants in an article. In the premises the defendants and the Seychellois public

had a common and corresponding interest in the subject-matter and publication of the said words.

Hence, the defendants plead the defence of "qualified privilege", which is available to newspaper publications. They also plead the defence of "fair comment" and aver that the words complained of were used in "good faith, without malice, upon a matter of public interest, namely the fairness of a Minister of Government selling his house at a much greater sum to the Government than the sum paid for one in a better area acquired by him from the Government."

The defendants also plead the defence of "truth" in substance and in fact. In English law, this defence is termed "justification".

Statements made on an occasion of qualified privilege are protected "for the common convenience and welfare of society." According to Lord Atkinson in the case of *Adam v Ward* [1917] AC 309 –

A privileged occasion is an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

Lord Donaldson in the "*Spycatcher case*" [1990] 1 AC 109, commenting on the crucial position of the press, stated –

It is not because of any special wisdom, interest, or status enjoyed by the proprietors, editors, or journalists. It is because the media are the eyes and ears of the general public. Indeed it is that of the general public for whom they are trustees.

In England, unlike in the United States of America, the law does not recognise any special privileges attaching to the profession of the press as distinguished from the members of the public. The reason has been explained by the Privy Council in the case of *Arnold v King - Emperor*. AIR 1914 PC 116 as follows –

The freedom of the journalist is an ordinary part of the freedom of the subject and to whatever length the subject in general may go, so also may the journalist; but apart from statute law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do make him more careful, but the range of his assertions, his criticism, his comments, is as wide and no wider than that of any other subject.

In the instant matter, I concede that there was a reciprocal interest in the newspaper and the public regarding land transactions between the Government and the public and

especially public officers. But in disseminating information about the transactions of the plaintiff, did the defendants cross the Rubicon? The defence of qualified privilege is available to a newspaper so long as the report is (a) fair and accurate and (b) published without malice.

As regards accuracy of the report, the plaintiff does not deny that he purchased the Fairview Estate property in 1993 for R305,000 and in 1995 sold his Pointe Au Sel property for R700,000. But he testified and adduced other evidence to establish that he gained no undue financial advantage and that there was no shady deal as was being made out in the article.

The plaintiff testified that due to an unfortunate incident that occurred in the family in August or September 1991 it became necessary to leave the Pointe Au Sel house. This fact has not been contested by the defendants. He was Principal Secretary of the Ministry of Education at that time. Through the assistance of the then Minister, he was able to obtain the house at Fairview Estate initially on rent. He further testified that that house which had been rented to expatriate officers was in a dilapidated condition. However, he and his two children liked the area and the seclusion and decided to stay on.

In 1993, he applied to purchase that house. As he did not have sufficient funds at that time, he obtained a loan from the Seychelles Housing Development Corporation to finance the purchase price of R305,000 partly. He sold his Pointe Au Sel property only in 1995, for R700,000. Thereafter he demolished the Fairview Estate house and rebuilt it with the proceeds of the sale and also paid off the SHDC loan. Philip Belle (PW4), a stone mason, testified that the Fairview Estate house was demolished by him at the request of the plaintiff. He further justified that "it was a house that had been built for a long time, and it was in a bad state of repair." He also stated that some parts of the walls had large cracks separating them and that the roof made of asbestos was leaking. On the basis of this evidence, it could be reasonably inferred that the condition of the house in August 1991, when it was purchased, would not have been very much different. The plaintiff stated that he paid the price of R305,000 quoted by the Government, although he thought it was on the high side. He was aware that this property had been purchased by the Government a few years before, for a sum of R320,000, from a private individual. The defendants allege that the plaintiff sold his house "at a much greater sum to the Government than the sum paid for one in a better area". The burden of proving that the Fairview Estate property, which the defendants considered was in "a better area", was worth much more, and how much more, lay on they who asserted it. So it has to be proved that the Pointe Au Sel property was not worth R.700,000. No such evidence was adduced by the defendants.

Learned Counsel for the defendants, in submitting a list of facts which he considered to be established, stated inter alia that –

The plaintiff has not produced a valuation, has chosen deliberately not to produce a valuation of the La Misere house, to rebut the suggestion that

he had not obtained an advantage, which obligation was squarely on him to do. He was the one complaining, he who alleges, must prove. He alleged that he had not obtained an advantage. In my humble submission, his evidence fell short of proving that he had not.

Here, counsel was mistakenly fitting the boot to the wrong foot. In an action for defamation, the burden is always on the defendant to prove the allegation in the alleged defamatory publication.

When this matter was canvassed by counsel for the plaintiff in the course of his submissions, counsel for the defendants clarified his position and stated –

The burden of proving the truth of the allegation rested on my clients and my clients alone at all times. What I did say however was that it was up to the plaintiff to prove that the house at Fairview was not worth R305,000 and that he did not make R400,000 as a difference between the two sales and purchases. That was our *allegation, and it was up to him to dispute, because until he did, I submit that it was open to my client to assume and to presume that when one sells a house at R700,000 and buys another one for R300,000, there is a difference of R400,000 which appeared as an advantage.*

With respect, having stated the burden of proof correctly, counsel for the defendants fell into the same error. Any primary school child would know that the arithmetical difference between R700, 000 and R300, 000 is R400,000. If that was the only news that the "Regar" newspaper considered it had a duty to publish for the benefit of the public, then every time a person sold his car and bought a motor cycle, would also be an occasion for publication, as evidently such a person gains a pecuniary advantage from the difference in prices. No reasonable man would expect such news. The article was using those transactions of the plaintiff as the latest example of the failure on the part of the Government to practice the policies of honesty and transparency. There lies the innuendo.

In the case of *Barrado* (supra), counsel for the first defendant also wrongly submitted that the plaintiff was "unable to show that the statements made by the defendant were not justified." Ayoola JA had this to say on the aspect of burden of proof -

The nub of the allegation complained of was that she acquired businesses and properties with dishonest means and not that she acquired them in breach of any regulation. As to the latter, truth of the allegation or imputation is a matter of defence, since the falsity of defamation is presumed until disproved by the defendant.

Although it was not his burden, the plaintiff adduced evidence to establish the dilapidated condition of the Fairview Estate house. Hence although the Government purchased that property for R320 000 sometime earlier, the depreciation in value of the

house due to a deterioration of its structural condition would have reduced the overall value. The defendants emphasized the aspect of the location. Counsel for the defendants sought to suggest that the Fairview Estate was an exclusive high class area where the property values were equally high. The fact that wealthy people and important Government officials reside there alone does not make the area a high class one. Some Government officials occupy Government owned or leased properties for lack of a choice. In the case of the plaintiff, he purchased the property only to demolish the house shortly thereafter, as it was not fit for occupation, and not for aesthetic reasons. When the defendants were communicating to the readers that the Fairview Estate house was worth much more than R305,000, they were suppressing the depreciation in value of the house. It was their burden to substantiate their assertions.

As regards the Pointe Au Sel property, Mr Hubert Alton, quantity surveyor (PW1), testified that he valued the property which consisted of two parcels of land, one with a house thereon at R750,000 in 1994. He stated that the property was worth approximately R400,000 and the house R350,000. This valuation was done at the request of one Alexis Monthy, who was then occupying the house. However, the plaintiff, on 18th August 1994, agreed to sell Mr Monthy one of the parcels (parcel No.C.3063 - in extent 2897 sq. metres) and the house for R650,000. (Exhibit D7) Mr. Monthy paid a sum of R100,000 as a deposit and agreed to pay the balance by 15th September 1994. As he failed to comply with this condition, the plaintiff instituted proceedings in this Court (Case No.232/94) and obtained a discharge of this agreement and retained the deposit.

One Miranda Esparon (DW2), the concubine of Alexis Monthy and one of the parties to the said promise to sell, called by the defendants to rebut the evidence of the plaintiff that the agreed price was R750,000, failed to achieve the purpose for which she was called when she admitted under cross examination that at the time of signing the agreement, she was not living with Monthy and that she was therefore not present when the plaintiff and Monthy had initial discussions regarding the proposed sale. Hence Mr Hubert Alton's evidence that he valued the property at R750,000 and Miranda Esparon's evidence that such valuation was done for the purpose of obtaining a loan from the Development Bank, lend support to the plaintiff's evidence that the property was to be sold for R750,000. In any event, nothing flowed from this discrepancy, if at all, as the plaintiff subsequently advertised the whole property for R750,000 on the basis of the valuation.

The plaintiff stated that although a foreigner showed interest in purchasing, he failed to come with the purchase price. The plaintiff then sold the smaller portion of the land for less than R50,000 and offered parcel C.3063 and the house to the Government for R700,000. Faced with those explanations from the plaintiff, counsel for the defendants then sought to question the propriety of a Minister buying and selling with the Government. The plaintiff agreed that people not knowing the actual facts, would criticize such transactions, but stated that such criticism was not justified in his case, as the defendants failed to inform the readers that the two properties were not of equal value. On the contrary, the article made out that he had paid less for a more valuable

property and sold a less valuable property for a higher price.

As Hoexter JA stated in the case of *Neethling v. The Weekly Mail* (1994) 1 SA 708 (cited with approval by Adam JA in the case of *Roger Mancienne v Claude Vidot* (unreported) CA 36/94 -

In deciding whether a defamatory publication affects qualified privilege, the status of the matter communicated (i.e. its source and intrinsic quality) is of critical importance. In this connection obvious questions which suggest themselves (the examples given are not exhaustive) are: Does the matter emanate from the official and identifiable source or does it spring from a source which is informal and anonymous? Does the matter involve a formal finding based on reasoned conclusions, after weighing and sifting of evidence, or is it no more than an ex parte statement or mere hearsay?

The defendants had every opportunity to investigate the aspect of valuation of the respective properties, as the fact that a Minister transacted with the Government alone was not sufficient to allege dishonesty and shady dealing if the valuations correctly reflected the market values. Therefore, when the defendants cited the plaintiff's transaction as the latest example of non-compliance by the Government of the policies of honesty and transparency in public affairs they were, by innuendo, making a defamatory statement of and concerning the plaintiff. As they failed to investigate the factual situation, the defendants had no duty or right to publish their "ex parte statement" to the public. The second defendant categorically admitted that the article contained his own subjective opinions. The defence of qualified privilege therefore fails.

As to the defence of truth, or justification, if the libel contained defamatory statements both of fact and of opinion, the defendant must prove that the statements of fact are true and the statements of opinion are correct. However, according to an exception under section 5 of the Defamation Act 1952 (UK), which is the law applicable in Seychelles, it is now not essential to prove the truth of every word of the libel. "If the defendant proves that the main charge or gist of the libel is true, he need not justify statements or comments which do not add to the sting of the charge or introduce any matter by itself actionable." (*Gatley* - paragraph 1390).

According to McNae's *Essential Law for Journalists* - (12th Edition) at page 135 –

The defence of justification is not only difficult; it is dangerous. If it fails, the court will take a critical view of the newspaper's persistence in sticking to a story which it decides is not true, and the jury may award greater damages accordingly.

In the instant case, it is true that the plaintiff purchased the Fairview Estate for R305,000 and sold his property at Pointe Au Sel for R700,000 also to the Government. However, the truth of the gist or sting of the libel that these transactions were examples

of dishonest and shady transactions of the Government with public officials remains unproved. Accordingly this defence as well fails.

Although a defendant may not be able to show that he was actuated by circumstances described as "qualified privilege" or "justification" (or truth), he may escape liability for publishing a defamatory statement by establishing that his statement was a "fair comment on a matter of public interest." This defence does not extend to allegations of fact. The defence of fair comment is distinct from the defence of justification. In "fair comment", the state of mind of the defendant when he published the defamatory words is most material. Proof of actual malice defeats the defence. But in "justification" the state of mind of the defendant is immaterial. Another distinction is that in the plea of fair comment, the right exercised by the defendant is shared by every member of the public, while in "qualified privilege" the right is not shared, but is limited to an individual who stands in such relation to the circumstances that he is entitled to say or write what would be libelous or slanderous on the part of anyone else. A comment is a statement of opinion on facts.

In paragraph 10 of the statement of defence the defendants rely on the following particulars as the basis for their comment—

[The] words complained of by the plaintiff were fair comment made in good faith and without malice upon a matter of public interest, namely the fairness in the plaintiff, a Minister of Government, selling his house at a much greater sum to the Government than the sum paid for one in a better area acquired by him from the Government.

Subject to section 6 of the Defamation Act 1952, a defendant under a plea of fair comment must prove (1) that each and every statement of fact in the words complained of is true; and (2) that the comment on the facts so proved was bona fide and fair comment on a matter of public interest.

Although the defendants aver that they commented on the "fairness" of the transaction, the article, in its opening paragraph, makes a statement of fact which they could not prove. The transactions of the plaintiff with the Government were neither dishonest nor shady. Had the defendants investigated their facts, no such allegation could have been made bona fide. As was stated in the case of *Davies v. Shepstone* (1886) 11 App. Cas. at page 190 –

It is one thing to comment upon or criticize, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct.

Accordingly, the defendants cannot rely on the defence of fair comment. On the whole, therefore, the defendants have failed to defend themselves in respect of the article that appeared in the "Regar" newspaper issue of 22 December 1995, under the heading "Ankor En Deal Pour Minis", which contained statements of unverified facts concerning the plaintiff, which were defamatory of him, and caused him prejudice by exposing him

to hatred, ridicule and contempt and injuring him both personally and professionally. Consequently, the case against the fourth defendant having been withdrawn, the first, second and third defendants will be liable in damages.

Assessment of Damages

In awarding damages, the basic principles have to be followed. Ayoola JA in the *Barrado* case (supra) stated -

In my judgment, in an action for damages for libel or slander, English law applies in determining the nature and quantum of damages to be awarded. Where the circumstances justify it, exemplary damages could be awarded.

The principle of awarding damages where the plaintiff elects to sue more than one defendant in the same action in respect of the same publication is laid down in *Gatley on Libel and Slander* (8th edition, paragraph 1463) as follows –

In an action against two or more persons as co-defendants in respect of a joint libel, the jury may not discriminate between them in finding separate damages against the different defendant, but there must be one verdict and one judgment against all for the total damages awarded.

As regards the nature of damages awarded in defamation cases, Windeyer J summed up the position in the case of *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 150 as follows –

It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways - vindication of the plaintiff to the public, and as a consolation to him for wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.

The principles followed in the assessment, are basically –

- (1) Consideration of the injury suffered. Here, the good standing and repute, the nature of his profession and the gravity of the imputation are relevant.
- (2) Regard must be had to the conduct of the defendant and the circumstances of the publication.
- (3) Punitive damages may be awarded against the defendant by way of a deterrent.

In *Barrado*(1993) SLR 12, I, as the trial Judge, considered the official status of the

plaintiff in assessing damages. Ayoola JA approving this, stated -

The learned Judge could not have discussed the circumstances of the libel without adverting to the office held by the respondent and the motive of the scurrilous attack on her. Also, it was perfectly legitimate for the Judge to have taken into consideration the status of the respondent (plaintiff) in the assessment of damages. The higher the plaintiff's position the heavier the damages (see for instance *Youssouf v Metro-Goldwyn-Meyers Pictures Ltd (1934) 50 TLR 581*; *Dingle v Associated Newspapers Ltd (1961) 2 QB 162*; *Lewis v Daily Telegraph Ltd [1962] 3 WLR 50*)

The plaintiff in the instant case is the Minister of Education and Culture, an important Ministry in the Government. Imputations of dishonesty on the part of such an official who is expected to set the trend to promote the educational and cultural values in this country is to be considered seriously. In the *Barrado* case (supra) the plaintiff was the Personal Assistant of the President of the Republic. She was not merely a typist or clerk, but one who held a position of trust and confidentiality. Although the Court of Appeal reduced the award from R550,000 to R100,000, it is still the highest award made in a defamation case in Seychelles. As Lord Radcliffe stated in *Dingle* (supra) "The damages awarded have to be the demonstrative mark of vindication."

Unlike in the case of the plaintiff in *Barrado*, who was awarded damages as a solatium for the wrong done to her personal reputation, in the instant case, the plaintiff Minister has to be compensated not only on the basis of a solatium but also to vindicate himself before the public who alone determine the future of a politician.

The second consideration is that regard must be had to the conduct of the defendant and the circumstances of the publication. The second defendant testified that in addition to being the editor of the Regar newspaper, he also did translations of documents. He further stated that although he had no formal training in journalism, he had trained himself and attended seminars and hence he knew that it was the responsibility of a journalist to be satisfied as to the truth of the facts he published. He further stated that he checked the facts regarding the sales to the plaintiff and by the plaintiff and the respective prices from the Lands Registry, which he considered was a reliable source for information. He maintained that the article contained only opinions based on those facts. As regards the values he obtained from the Land Registers, he stated that he made a subjective assessment that they did not reflect the correct values. He stated that he was not a valuer, hence he had no basis for such assessment. According to the evidence disclosed in the case, which this Court has accepted, there was nothing dishonest or shady in the transactions. Had the defendants cared to verify or inquire, and not been reckless, there would have been no justification for this publication. *Gatley* states at paragraph 778 that –

A failure to inquire as to the truth of the statement or to try to verify it may be so extreme that the defendant cannot be regarded as really believing his statement to be true. So where the defendant purposely abstained

from inquiring: into the facts or from availing himself of means of information which lay at hand when the slightest inquiry would have shown that the imputation was groundless, or where he deliberately stopped short in his inquiries in order not to ascertain the truth, a jury may rightly infer malice.

When the second defendant claimed that he made investigations, he was referring to the ascertaining of the two transfers and their respective prices from the Lands Registry. Had the article been limited to that, it would have been purely innocuous. But the defendants either purposely abstained from inquiring about the correct property values or was reckless about it and made positive allegations that the Pointe Au Sel property was situated in a place where it could not be used for any public purpose and hence was not worth the price the plaintiff received and so also that the Fairview Estate property was worth more than the amount paid by the plaintiff. Having done the damage, the defendants cannot camouflage the sting by using words as "it does seem" and questions of one form or another. The antidote was not effective to cure the bane in the article.

While still on the aspect of conduct of the defendant and the circumstances of the public, the article entitled "politicians with thin skins" appearing alongside the article that forms the subject-matter of this case is relevant. It has been published as a "contributed" article, but the editor has to take the responsibility for the setting. Any reasonable reader would understand its contents as a precursor to the article regarding the plaintiff. That article stresses the importance of a free press in a democracy. It refers to the late Robert Maxwell, the newspaper magnate of the United Kingdom as a "notorious crook" who "suppressed all remarks about him simply by threatening massive law suits against anyone who suggested he was acting improperly". The article then asks the question "Are we in the Seychelles being led down the same path?" The connection between the two articles was confirmed, when counsel for the defendants in cross examination asked the plaintiff to read it in Court. He referred to the question referred to above and asked the plaintiff "Isn't that what you are doing now?", to which the plaintiff replied in the negative.

That article was again an antidote to the bane. It proceeds to state that "politicians are showing that they are thin-skinned to a degree that makes one wonder if they have something to be scared about." Referring to the American system, it states "over there, they start with the assumption that all politicians are potential crooks and that they need to be watched carefully. For that reason, all questions raised about the character of public officials, about their actions in office are considered legitimate and can be scrutinized and questioned as part of the normal business of the press.

Then the writer exhorts the prospective litigant and the judiciary thus –

Looking at some of the recent cases or judgments, and some of those threatening cases here, I cannot help but think that a similar approach would serve us well too.

Then alongside that article appears the article entitled "Ankor En Deal Pour Minis", which is a calculated fabrication of facts against the plaintiff. The connection would be unmistakable to a reasonable reader. The point under consideration is the intentional behaviour of the defendants to focus attention on the defamatory article against the plaintiff.

In cross-examination, the second defendant stated that he did not think that the article contained "malicious accusations" against the plaintiff and hence he did not regret publishing it. Several times in the course of the cross-examination he stated that the article contained his own personal observations on the transactions, which he did not consider defamatory. He was, as the editor of a newspaper, unaware that what mattered in libel was not his subjective consideration but the objective view of a reasonable man. His conduct was therefore both reckless and irresponsible, and consequently, as stated above, deprived him of the qualified privilege granted to newspapers.

I have also considered the aspect of malice which was stressed by counsel for the plaintiff. As *Gatley* states at paragraph 762 –

The plaintiff will succeed in proving the existence of express malice if he can show that the defendant was not using the occasion honestly for the purpose for which the law gives protection, but was actuated by some indirect motive not connected with the privilege.

As McCardie J stated in *Pratt v BMA* [1919] 1 KB 244-

Malice in the actual sense may exist even though there be no spite or desire for vengeance in the ordinary meaning of the word.

Thus, any indirect motive other than a sense of duty is what the law calls malice. If the occasion is privileged, it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason.

To establish malice, the plaintiff relied on the following facts

- (1) The plaintiff and the second defendant worked together at the Ministry of Education and were friends. But when the plaintiff's political affiliations became obvious, the second defendant, who held opposing views, terminated the friendship gradually.
- (2) In February 1993, when the plaintiff was the Principal Secretary to the Ministry of Education, the second defendant's wife who was then the Directress of the polytechnic was transferred as Acting Director in the Ministry. She did not accept that position and resigned. This added to the animosity of the second defendant towards the plaintiff.

- (3) The second defendant was generally antagonistic towards the SPPF Government. He stated that in 1979 he was detained in custody for a period of 7 weeks by a warrant issued by the President under the Emergency Regulations. He claimed that no reasons were given for such detention. Questioned by Counsel for the plaintiff as to whether he was still bitter about it, he stated "I still have questions about the validity of the detention, certainly."
- (4) Soon after the wife of the second defendant resigned from her post, the "Regar" newspaper of 26 February 1993 edited by the second defendant (exhibit P2), criticized the plaintiff for not releasing the "O" Level and "A" Level examination results in detail. The article, criticizing the plaintiff, who was then the Principal Secretary, stated "Mr Pillay has adopted the characteristic response of secrecy when the information is not convenient". There was there an imputation of dishonesty.
- (5) In the article in the issue of 13 October 1993, (exhibit P3) the defendants criticized the plaintiff for remaining in the post of Chairman in the Seychelles Broadcasting Corporation after being appointed as Minister. There was there an imputation that he disregarded the principle of impartiality.
- (6) In the issue of ^h June 1993 (exhibit P4) the defendants criticized the plaintiff, who as Chairman of the SBC was responsible for allocating time for political broadcasts at the time of the referendum, preceding the promulgation of the Constitution. The article alleged that the plaintiff was not granting adequate time for the opposition parties. There was there an imputation of political victimization, and lack of impartiality.
- (7) The defendants' newspaper in the issue of 28 May 1993 (exhibit P5) directly alleged that the plaintiff was dictating his own personal judgment as Chairman of the SBC.

The criticisms of the plaintiff in the aforesaid articles (exhibits P3, P4 and P5) may not amount to defamation in themselves. However they illustrate a consistent pattern of personal criticism of the plaintiff during the period subsequent to the transfer of the second defendant's wife from the prestigious post of Director of the Polytechnic and the obvious bitterness he developed when the plaintiff was appointed as Minister in the same Ministry. Hence the inference of malice cannot be disregarded in its entirety in assessing damages.

In the *Claude Vidot* case (supra) Adam JA disagreed with Ayoola JA as regards reference to awards in previous cases. However Ayoola JA comparing the *Barrado* case justified the award of R100,000 on the basis that "the publication itself, the circumstances of its publication and the conduct of the defence demonstrated such viciousness" which his Lordship stated was lacking in the *Claude Vidot* case. He further stated that in the latter case the consideration was the carelessness of the defendants in publishing the defamation without investigation and repeating the libel originated by

some other person. For this reason, and for other infirmities in the judgment of the trial Court, the award of R120,000 was reduced to R25,000.

In the instant case, I base the assessment on the following considerations –

- (1) The position of the plaintiff in the country. As Ayoola JA stated (supra) "The higher the plaintiff's position, the heavier the damages."
- (2) The recklessness of publishing without verification.
- (3) The allegation of dishonesty against a public figure which remained unproved.
- (4) The effect of the publication on the personal and political reputation of the plaintiff.
- (5) Evidence of the second defendant that he saw no reason to apologize.
- (6) The mitigatory fact claimed by the defendant of the publication. The defendant claimed that the "Regar" has a weekly circulation of 2600 copies. "The pen is mightier than the sword." The fact that the article has been published in the Creole language in a newspaper that carries articles in English as well indicates that it was meant to be read and understood by the majority of the readers in the community. Further, as a newspaper is read by hand to hand circulation after purchase, it would be a fair estimate that an average of five persons read one copy of the newspaper. Thus a minimum of 10,000 persons would have actually read the newspaper and an equal amount would have heard about the contents by discussion. I do not therefore consider that the actual number of copies issued for circulation could be considered as a fact mitigatory of the extent of the publication.

It is settled law that as an award in a defamation case cannot be arrived at by any purely objective consideration, it must be assessed "at large" on a consideration of both incriminatory and mitigatory factors as disclosed in the evidence in the case. Such "damages at large" are given as compensation and not as punishment. Damages for a single delict must be awarded as the amount against all the defendants. As Kenny J stated in the case of *O'Keefe v. Walsh* [1903] 2 IR 68 (CA) (cited by Adam JA in the *Claude Vidot* case) –

Where there is a single cause of action arising from a joint tort, and damages is the only relief claimed against the tortfeasors, and the action is fought out to the close on that basis, the Jury has no power to sever the damages.

Lord Denning MR reiterated this principle in the case of *Egger v. Lord Chelmsford* [1966] 3 All ER 406 at 411 when he said –

If the plaintiff sues them all three jointly, then by a settled rule of law dating to 1611, there can only be one judgment and one assessment of damages.

The plaintiff has withdrawn the case against the fourth defendant, the printer. Hence the contesting defendants were the "Regar" Publications (Pty) Ltd (first defendant), the editor (second defendant), and the publisher (third defendant). The plaintiff claims a sum of R600,000 from those defendants jointly and severally. There is a vast difference in the professional status of the plaintiff in the *Barrado* case, who was eventually awarded R100,000 and the instant plaintiff who is a senior Minister in an important Government Ministry. I have carefully considered all the above factors that need to be considered in making an assessment of damages.

I consider a sum of R450,000 as being a reasonable amount that should be awarded to the plaintiff.

Accordingly, judgment is entered in favour of the plaintiff in a sum of R450,000 payable by the first, second and third defendants jointly and severally, together with interest thereon and costs of action.

Record: Civil Side No 11 of 1996