

**SUPREME COURT OF SEYCHELLES**

**Reportable**

[2020] SCSC ...  
CS15/2018

In the matter between:

**BARBARA MATHILDA KAREN POIRET** **1<sup>st</sup> Plaintiff**

**SYLVIA ELIZABETH PEIRA POIRET** **2<sup>nd</sup> Plaintiff**  
*(rep. by Mr Serge Rouillon)*

and

**SEYCHELLES PENSION FUND**

**MARIE ANGE WAYE-HIVE** **Defendants**  
*(rep. by Mr Oliver Chang Leng)*

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**Neutral Citation:** *Poiret & Or v Seychelles Pension Fund & Ors* (CS 15/2018) [2020] SCSC  
( 30 January 2020).

**Before:** Govinden J

**Summary:** Action in delict; damages claimed for unlawful award of pension; rights to pension of spouse and children; pension properly awarded to concubine; Seychelles Pension Fund Act (Cap 220)

**Heard:** 8 March 2019

**Delivered:** 30 January 2020

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**JUDGMENT**

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**GOVINDEN J**

**[1] The pleadings**

[2] The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs has filed a Complaint in which they averred that they are the widow and the daughter of the late Antoine Ralph Danny Poiret, respectively, also referred to hereinafter as “*the deceased*”. The 1<sup>st</sup> Defendant is a body corporate established under the provisions of the Seychelles Pension Fund Act 2005, hereinafter also referred to as “*the Act*”. Its objective being to collect and distribute voluntary pension contributions to its

members and dependants. The 2<sup>nd</sup> Defendant was the General Manager of the 1<sup>st</sup> Defendant at all material times in the Plaintiff.

[3] The deceased passed away before reaching the relevant pensionable age and was at that time a registered contributor in the fund of the 1<sup>st</sup> defendant. He was accordingly entitled to be paid pension benefit from this fund. The payment could have been paid either to his surviving spouse or children.

[4] It is averred further that the deceased had by way of a Will left his entire estate, including his contribution to the fund, to the 1<sup>st</sup> Plaintiff. On this basis and also as the Surviving Spouse, the 1<sup>st</sup> Defendant submitted a claim for the pension benefit of the deceased to the 1<sup>st</sup> Defendant. This application was dealt with by the 2<sup>nd</sup> Defendant in her capacity as General Manager. The Plaintiffs submitted applications for benefit on the standard form, accompanied by evidence to the 1<sup>st</sup> defendant, through the 2<sup>nd</sup> Defendant, in an attempt to establish the entitlement of their entitlements. They were however informed by the 2<sup>nd</sup> Defendant that their claims had not been accepted and that instead that the 1<sup>st</sup> Defendant had treated one Christine Clarisse as the surviving spouse based on the latter's Application in the light of the provisions of the Act and the *Pension Fund (Benefits) Regulations 2006*, hereinafter also referred to as "*the Regulations*".

[5] The Plaintiffs further aver that the said Christine Clarisse is not entitled to the pension benefit as she had not cohabited with and had not been maintained by the deceased but was only a family nurse who took care of him after he was diagnosed with a terminal illness. As such they aver that the 1<sup>st</sup> Defendant committed a faute by coming to this determination. As regards the 2<sup>nd</sup> Defendant, the Plaintiffs aver that she acted abusively towards them and unduly favoured Ms Clarisse's case and that as such she must be made jointly and severally liable with the 1<sup>st</sup> Defendant for their losses; damages and inconveniences.

[6] As a result the Plaintiffs pray to this court for a judgment ordering that they be paid the payment of any and all of the deceased entitlements under the Act; expenses incurred for processing of their claims; damages for material loss, distress and moral pain and suffering with interest and cost.

[7] On the other hand the Defendants jointly deny the Plaint. In their defences they raised two pleas in limine litis and defended the action on its merits. As far as the Plea in limine litis is concerned the Defendants makes the following averments;

1. Section 71 of the Act bars the Plaintiffs from claiming damages against the 2<sup>nd</sup> Defendant for acts or omissions done in good faith in the discharge of her functions as an employee of the 1<sup>st</sup> Defendant and accordingly, the Plaintiffs prayers against the 2<sup>nd</sup> Defendant ought to be struck out.
2. As the 1<sup>st</sup> Defendant is a body established by statute, the proper form for a claim against the 1<sup>st</sup> Defendant should be a petition for judicial review of the decision of the 1<sup>st</sup> Defendant and not a Plaint as currently formulated.

[8] On the merits the Defendants jointly and collectively deny the averments in the plaint. It is denied that the Plaintiffs are entitled to the funds standing in the deceased account. The 2<sup>nd</sup> Defendant denies all the averments of abusive or malicious behaviours regarding her dealings with the Plaintiffs and aver that at all material times she acted in a professional manner. As far as Christine Clarisse's claim is concerned the Defendants avers that they could not give the Plaintiffs access to her application due to the confidential nature of the information found in it. It is the Defendant's case that the benefit was paid to Ms Clarisse as she had proven to the reasonable satisfaction of the 1<sup>st</sup> Defendant that she was in a relationship of "*concubinage*" with the deceased for more than three years prior to his death and that this payment was effected in compliance with the provisions of the Act and the Regulations. Both Defendants, as such, pray that the plaint be dismissed with costs.

[9] **Uncontested facts**

[10] From the pleadings it appears that the followings facts are not in issue in this case. It is not being contested that the deceased was a contributor to the Seychelles Pension Fund before his passing away and as such was entitled to a Surviving Spouse and or Children Pension benefit. The amount of the benefit payable is also not in issue. Moreover, the legal provisions under which the pension was to be made payable is also not being

contested, albeit that there appears to be some contest about what legal interpretation is to be attributed to such terms such as “ *the surviving spouse*” in the Act and the Regulations.

**[11] Contested facts**

[12] The Plaintiffs jointly and collectively contested the factual basis upon which Ms Christine Clarisse had been awarded the pension benefit of the deceased by the Defendants. They say that Ms Clarisse could not have been considered as a surviving spouse by the defendants as she was not in a state of “*concubinage*” with the deceased and was not being maintained by the deceased, the latter being a legal requirement when it comes to de facto or common law relationships. The Plaintiffs assert that the 1<sup>st</sup> Plaintiffs claim based on the subsisting marital relationship between the deceased and the 1<sup>st</sup> plaintiff and the last will and testament of the former. The Defendants, on the other hand, argue that the state of “*concubinage*” had been established based on the information revealed in the application of Ms Clarisse and the 1<sup>st</sup> Defendant independent investigation. The treatment of the plaintiffs by the 2<sup>nd</sup> Defendant is said by the former to have been a *faute* as it was inappropriate; discriminatory and abusive. This is being denied by both defendants.

**[13] Issues for determination**

[14] I have scrutinized the Pleadings filed in this case and the different submissions made before the court in the light of evidence led in this case and I having done so I considered that the following are issues left for this court determination.

- (1) The Pleas in *limine litis*.
- (2) Who between the 1<sup>st</sup> Plaintiff and Ms Christine Clarisse is entitled to the pension benefit of the deceased as the surviving spouse under the Act and the Regulations.
- (3) Whether the 2<sup>nd</sup> Plaintiff qualifies for children’s pension
- (4) Whether the conducts and the acts of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant vis a vis the Plaintiffs consist of a *faute* and hence makes them liable to the damages claim
- (5) The heads and amount of damages payable by the Defendants to the Plaintiffs, if any,

(6) The interest and costs payable by the Defendants, if any.

**[15] Submissions**

[16] The Defendant's Counsel, in his written submissions, first submitted on the Pleas in limine. Regarding the first plea, it is their submission that section 71 of the Act is similar to that of section 5 of the *Public Officers ( Protection ) Act ( CAP 192)*, which in giving immunity to Public Servants also states that a public officer shall not be liable in law if he or she has acted in good faith or with reasonable cause. Referring to the evidence, it is the submission of the Counsel that the 2<sup>nd</sup> Defendant, at all times, acted in good faith in discharge of her functions and was only expressing the 1<sup>st</sup> Defendant's decision and that there is no evidence showing that she intentionally and maliciously caused the Plaintiffs to suffer loss. As regards the 2<sup>nd</sup> plea, it is his submissions that as the Plaintiffs seeks a remedy for what they alleged was an illegal decision that was made by the 1<sup>st</sup> Defendant, as a statutory authority, it would have been more reasonable and appropriate for the avenue of Judicial Review, by way of a petition, to have been explored instead of a delictual action by way of a plaint.

[17] In respect of the merits, Counsel submitted that the 1st Plaintiff is not eligible to the pension. It is his submission that sections 35 to 37 of the Act makes provision for the Surviving Spouse of a deceased member to be eligible to receive a pension or a gratuity in relation to that deceased member having an account with the 1<sup>st</sup> Defendant depending on their particular circumstances. It is submitted that the Regulations issued pursuant to section 68 of the Act expands upon the various benefits that persons may be eligible for and what is required to qualify for it, including that of a Surviving Spouse. In that regards it is his submissions that section 2 of the Act defines spouse as;

*(a) 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;*

*(b) Where the member had, at the time of the member's death, been cohabitating 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.*

- [18] Submitting on the application of section 2 of the Act to the facts, Learned Counsel for the Defendants submitted that the Act and the Regulations look to and give pre-eminence to co-habitation and maintenance aspect of the spousal relationship instead to formal relationships. According to him, one cannot be eligible for a surviving Spouse Pension for the purpose of the Act, if one did not live in with the deceased person prior to his or her death. It is his submission that evidence in this case shows that the 1<sup>st</sup> Plaintiff was not living in with the deceased prior to his date and yet regulation 26 (1) of the Regulations, that imposes a residence test on an applicant spouse, provides that the Spouse should have resided in Seychelles for a continuous period of at least 5 years prior to the death of the member. According to him the 1<sup>st</sup> Plaintiff at most only spend a few weeks in Seychelles per annum. Learned Counsel submitted that though the Board of Trustees of the 1st Defendant Could have waived the strict residency requirement in favour of the 1<sup>ST</sup> Plaintiff , there was no evidence led that shows that she sought the waiver.
- [19] As regards the eligibility of the 2<sup>nd</sup> Plaintiff, it is the submission of the Defendants that she does not fit the definition of “*child*” under section 37 of the Act read with regulations 31 to 34 of the Regulations. A child beneficiary being only a child of the deceased under the age of 18 years or under 25 years in full time education.
- [20] On the other hand, the Defendant’s Counsel submitted that Ms Christine Clarisse fit the definition of spouse under the Act. It is Learned Counsel’s submission that the specific nature of the Act places common law relationship above that of the married spousal relationship and that cohabitation is the ultimate legal criteria. Hence, according to his submission, if you are married and not residing with your legally married spouse, but with someone else who you treats as your common law spouse and you have resided with and maintained that person for at least three years prior to your death, then the latter would be taken to be your spouse for the purpose of the Act. Applying this legal test to what he considered to be the evidence in the case, Learned Counsel submitted that that

the deceased and Ms Christine Clarisse were concubines who had cohabited with each other for more than three years at the latter's residence and that they were reciprocally maintaining one another.

[21] As regards the effect of the deceased last Will and Testament on his pension benefit, Learned Counsel submitted that it cannot take precedent over provision of the Act. In his submission the doctrine of "*lex specialis derogate legi generali*" applies in this case, namely that a law governing a specific subject overrides a law that governs general matters. He submitted that there is a clash or inconsistency between the Civil Code and the Act with regards to the right to inherit, with the Civil Code preserving the right in favour of the legally married spouse and the Act giving the right to both a legally married spouse and common law spouse, subject to any of them meeting the requirements of the Act. According to him the right to testamentary disposition as revealed by the Will and the right of the inheritance right of the legally married Surviving Spouse receives their legal validity from the Civil Code, which is the general law, whilst the Act, which is the special is favourable to the common law spouse in this case .Accordingly, applying the "*lex specialis*" principle he submitted that the latter must prevail over the former.

[22] On the other hand, in his written submissions the Learned Counsel for the Plaintiffs submitted that section 71 of the Act cannot come as a bar to the liability of the defendants. It is his submission, after referring to the evidence of the 2<sup>nd</sup> Defendant interactions and dealings with the Plaintiffs , that the 2<sup>nd</sup> Defendant does not meet the test of this section as evidence revealed the she did not exercised her powers to do her duties in good faith without bias or ill will ; she omitted to do things which needed to be done before reaching a reasoned conclusion from evidence supplied to her and she, as a result failed to make the correct determination taking into account regarding the possibilities for the Plaintiffs to qualify under the Act.

[23] In his reply to the 2<sup>nd</sup> plea in limine litis Learned Counsel submitted that a right of action in Judicial Review does not suggest that a suit brought against the defendants by way of a

plaint is illegal as the law provides for the 1<sup>st</sup> Defendant to be sued in the normal way and does not exclude the right to bring private actions in tort or faute.

[24] As regards the merits, Learned Counsel submitted that the definition of “*spouse*” for the purposes of the Act includes the act of maintenance, by the deceased member of the beneficiary spouse and that there exist no evidence that Ms Clarisse was being maintained by the deceased. Learned Counsel placed emphasis on the fact that the former had made no reference of being maintained by the deceased in her evidence. According to him any evidence from the Defendants and their witnesses stop short of establishing this fact.

[25] It is the further submission of Counsel that a concubine can qualify only in exceptional cases. According to him the general rule is found under the Right to Protection of the Family under article 32 of the constitution. In his submission the evidence in this case is not enough in order to tip this rule in favor of the exception. Learned Counsel submitted that the evidence, taken at most, shows nothing more than an alleged extra marital affair that may have gone on and off for some time .

[26] With respect to the evidence generally, Learned Counsel refers to the testimonies of the witnesses of the Defendants and dispute their veracities and ability to support the claim of Ms Clarisse. On the other hand, it is the submission of Counsel that witnesses called by the Plaintiffs and the Plaintiffs themselves testified in a cogent; consistent and credible manner and established the plaintiff’s case on a balance of probabilities.

[27] As regards the arguments of Defendant’s Counsel with respect to the “*lex specialis*” principle, Learned Counsel submitted that he agrees that the general rule is a specific Act will overrule a general Act. However, to him, this is not an absolute rule as there have been many case law decided under general law such as the Civil Code that has overridden specific laws. Submission is also made regarding the legality of the Regulations made under the Act that defines a relevant child and spouse. The objection is taken to the extent that they defined those two terms to the exclusion certain interested parties. Learned Counsel submitted that these definition is ultra vires the enabling provision in section 68 of the Act.



[28] **The law**

[29] The court finds that the following are some relevant provisions of the Act and Regulations applicable in this case;

[30] With regards to the Act;

[31] S 2 “ Spouse”, in relation to a deceased member, means –

(a) *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*

(b) *(b) 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;*

[32] S 4 *The objectives of the Fund shall be-*

(c) *To provide for the financial security of the surviving spouse and children of members who die before retirement by the payment of monthly surviving spouse’s pension or children’s pension.*

[33] S 36. *Where a person who is receiving a retirement pension dies, his surviving spouse or dependent shall be entitled to receive a post- retirement death gratuity as provided by regulations if the surviving spouse or dependent does not qualify for benefit under section 37.*

[34] S 37.(1) *Subject to subsection (2) , where a member dies after retirement his spouse or children living with him at the time of his death may be granted a pension.*

[35] (2) *Subsection (1) shall come into force after provision is made by regulations for the post retirement spouse’s pension or children’s pension and such regulations may require*

*an additional contribution to the fund to have been made by a member who wishes his spouse or children to receive such pension.*

[36] *S 38 (1) Where a member dies before reaching the retirement age and has no surviving spouse, his children shall be entitled to receive a children's pension and the voluntary contribution if any standing standing to his credit in the fund with interest as prescribed by regulations.*

[37] *(2) For the purpose of this section "children" includes children from a previous marriage or relationship that the member was maintaining before his death.*

[38] *(3) When more than one person is entitled to a benefit under subsection (1), the sum due as benefits shall be divided among those persons.*

[39] *With regards to the Regulations;*

[40] *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."*

[41] *PART VII – SURVIVING SPOUSE'S PENSION*

[42] *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.*

[43] *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.*

[44] (2) Sub regulation (1) shall apply notwithstanding the fact that the surviving spouse may, under these Regulations, be drawing or become entitled to a retirement or incapacity pension or drawing another surviving spouses pension from a previous relationship.

[45] (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 entitle to the surviving spouse's pension."

[46] Regulation 29(1) deals with the form and content of an Application for a spouse's pension. Amongst other documents in support the Application must contain an Affidavit, which must state the relationship of the applicant to the deceased member; period of cohabitation and whether the applicant was being maintained by the deceased member.

[47] 30 (1) A surviving spouse's pension shall not be granted or shall cease in the following circumstances-

(a) If the deceased member's death occurs before three years of cohabitation in the case of the surviving spouse not being married to the deceased;

[48] PART VIII- CHILDREN'S PENSION FUND

[49] 31 (1) Subject to regulation 26, a child, of a deceased member who dies prior to retirement and at the time of death notwithstanding his age qualified for a retirement pension under section33 of the Act, shall be entitled to a children's pension until 18 years old or up to 25 years old if the child is still in full time education or up to15 years old if the child is in full time employment and earns a salary of not less than R1,900 a month.

[50] The Act was amended by the *Seychelles Pension Fund (Amendment) Act 2018*. This amendment came into operation on the 19<sup>th</sup> of December 2018, accordingly I am of the view that the amendments to the law would not be relevant to and should not operate to affect this case as the facts of the case occurred prior to the amendment.

[51] **Analysis and determination**

[52] Before proceeding to make a determination on the facts in issue in this case the court would have to decide on some points of law relevant to the outcome of the case. The first one is that of “*lex specialis derogate legi generali*”. The Learned Counsel for the Defendants, submitted that when one applies this principle to the facts of this case, the provisions of the Act must take precedent over that of the Civil Code when it comes to pension allocation. A finding that should lead the court to make a determination rejecting all application of the provisions of the Civil Code of Seychelles , when they are seen to be inconsistent with that of the Act.

[53] “*Lex specialis*”, in legal theory and practice, is a doctrine relating to the interpretation of laws and can apply to both domestic and international law context. The doctrine provides that if two laws govern the same factual situation, a law governing a specific subject matter (*lex specialis*) overrides a law governing only general matters (*lex generalis*).

[54] In the Indian Supreme Court case of *Maya Mathew vs State of Kerala and ors, Appeal Civil 1833/2005*, the Appellant and others had filed a case before the High Court seeking a direction to the State Government to report to the Public Services Commission vacancies to be filled through appointment by transfer. The number of recruits depended on the applicability of two sets of Rules, one special and the other general. The court held as follows;

*(ii) 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.*

*(ii) If the repugnancy or inconsistency subsist in spite of an effort to read them harmoniously, the prior special law is not presumed to be repealed by the later general law. But where a clear intention to make a rule of universal application by superseding the earlier special law is evident from the later general law, then the later general law, will prevail over the prior special law...*

*(iv) Where a later special law is repugnant or is inconsistent with an earlier general law, the later special law will prevail over the earlier general law.*

[55] 12. Having regards to the fact that several special rules had been tailor made to suit and meet the special requirements of different specified services, the General Rules recognized the need for the special Rules to prevail over the General Rules. Rule 2 of the General Rules providing for is extracted below;

[56] 2. Relation to the Special Rules- If any provisions in the General Rules contained in the part is repugnant to a provision in the Special Rules applicable to any particular service contained in Part iii, the later shall in respect of that service , prevail over the provisions in the General Rules in this part”

[57] I have addressed and applied my mind to the underlying conditions applicable and involved in this principle of statutory interpretation. Having done so, I find that the rules of the Civil Code regarding succession and the capacity to inherit was made in the 19<sup>th</sup> century to deal with the rights of the legally married surviving spouse, descendants, ascendants and collaterals to inherit the whole or part of the estate of a deceased person . The Common Law Spouse or Concubine being excluded. This law is of a general application and will operate in the absence of a later specific civil law dealing with private rights or liabilities prescribing otherwise than the Code. When it comes to right to inherit, the Civil Code provisions would have been applicable to all benefits in the forms of pension prior to the enactment of pension laws as they would have been part of the “*patrimoine*” of the deceased. The Seychelles Pension Fund Act was, however, enacted in 2005 with the aim of standardising the Pension law of Seychelles and in so doing it introduced a different regime of distribution of pension for reasons that the legislature has deemed fit. In this law the Surviving Spouse, though a concubine, can benefit in a pension, contrary to his or her exclusion to this right in the Civil Code. In the same breath it also limit the capacity of a legally married spouse to benefit from a pension in certain instances in favour of the concubine. It further takes away the freedom of testamentary disposition from the deceased when it comes to his or her liberty to make beneficiary allocations and instead creates statutory right to pension in law in favour of certain specific individuals. It further introduced conditions of both substance and forms as prerequisites to inherit a pension, that are different from that of the general law, in order for children and married spouses of the deceased to inherit the right to pension. 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.

**[58] Burden of proof**

[59] The burden of proof in a civil matter, which is apparently straight forward concept, would have particular significance in this case, given the nature of the case and the different statutory burdens that the law places on the parties in this suit. For an authoritative statement of what consist of burden of proof in this case I will refer to a dictum of the Court of Appeal in the case of *Gopal and Anor v Barclays Bank (Seychelles)* ( SCA no 51 of 2011) which had the following to say on burden of proof in civil cases.

[60] “16. Section 12 of the Evidence Act gives room for the application of English law of evidence in Seychelles except where it is otherwise provided by special laws. In *Suleman v Joubert*, SCA 27/10 at 6 this court quoted with approval *Re B ( Children)* [2008] UKHL 35, Whereby Lord Hoffman using mathematical analogy in explaining the burden of proof held as follows;

*If a legal rule requires a fact to be proved (a fact in issue) a Judge or Jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or did not. If the tribunal is left in doubt the doubt is resolved by a rule that one party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having*

*happened. If he does discharge it, a value of 1 is returned and the fact is treated having happened”*

[61] The court further quoted *Halbsbury Laws of England, ( 4ed )*, at page 18 paragraph 19, which had the following to say on the subject.

[62] 19 “ *To succeed on any issue the party bearing the legal burden of proof must satisfy (1) satisfy a Judge or Jury of the likelihood of the truth of his case by adducing a greater weight of evidence than his opponent and (2) adduce evidence sufficient to satisfy them to the required standard of proof.*”

[63] Each of the parties in this case have taken a firm and entrenched position as to who is entitled to the pension of the deceased. Each of their claims are based on statutory rights under the provisions of the Act. They would therefore need to prove to the satisfaction of the court that evidence adduced supports the legal statutory requirements needed to bring their rights into operation.

[64] **Plea in limine litis**

[65] In their pleas the Defendants has pleaded to this court to strike out the case against the 2<sup>nd</sup> Defendant under section 71 of the Act and secondly that the action has been wrongly brought by way a Plaint and should have been by way of a Judicial Petition.

[66] These pleas are made under S 90 and 92of the Seychelles Code of Civil Procedure. Under these provisions any party is entitled to raise by his or her pleadings any point of law, which can be disposed of either before or during hearing and if the point is proven by the said party, the court may order the pleading to be struck out for disclosing no cause of action or for being frivolous or vexatious or it can stay or dismiss the action or give judgments on such terms as may be just.

[67] S 71 of the Act provides as follows,“ *A member of the Board or an employee of the Fund shall not be liable for damages for anything done or omitted to be done in good faith in the discharge or purported discharge of his functions*”.

[68] Good or bad faith is something that has to be shown to exist if a party is to be successful in a plea under this section. This is state of fact that can only be proven by way of evidence, unless it is admitted by a party. Furthermore, such evidence is subject to rebuttal by the opposing party. In this case bad faith is disputed by the Defendants. In my view, therefore, this court could not have made a Ruling on the application of S 71 without hearing evidence. Accordingly, this plea would have to be decided together with the merits of the case and not as a Preliminary Objection per se. Hence, it would be considered together with the totality of the pleadings when the court makes a determination on the whole of the evidence.

[69] As far as the 2<sup>nd</sup> Plea in limine is concerned , I am of the view that an action by way of a Plea 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 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. They chose to come to court in delict and to that extent there decision cannot be faulted.

**(1) Who between the 1<sup>st</sup> Plaintiff and Ms Christine Clarisse is entitled to be paid the pension benefit of the deceased as the surviving spouse under the Act and Regulations.**

[70] The 1<sup>st</sup> Plaintiff is admittedly and this is not denied by the Defendants, the legally married spouse of the deceased, she makes her claim on that basis. The standard pension application form tendered in evidence confirms this. Accordingly, she would be entitled



to the pension if she meets the requirements of the Act. The burden of proof of showing that she meets those legal requirements resting on her.

[71] The 1<sup>st</sup> Plaintiff testified that she is the wife of the deceased and that she is presently living and working in the United Kingdom. She said that she has been living there since the year 2008. The 2<sup>nd</sup> Defendant having been living there since the year 2003. It is the evidence of the Plaintiffs that there existed a family arrangement in which the 1<sup>st</sup> Plaintiff would work in the United Kingdom, whilst the deceased would work and live in Seychelles, whilst at the same time maintaining the family unit. On evidence, though there was this arrangement, it appears that certain amount of love; care and affection existed between the 1<sup>st</sup> Plaintiff and 2<sup>nd</sup> Plaintiff and the deceased even up to the time of the passing away of the latter. I am satisfied that enough evidence have been led by the Plaintiffs to convince me that this family, notwithstanding the physical separation, occasionally met together and when they would do so they would associate and function as a family. The long distance relationship even appear not to have dampened the love and affection between the deceased and the 1<sup>st</sup> Plaintiff as shown by the contents of the different cards and text messages tendered in evidence.

[72] However, treating each other as a family member or as husband and wife is one thing and meeting the strict requirements of the Act is another. As reflected in the definition of “*spouse*”(supra), the Act and its accompanied Regulations places emphasis on physical proximity; co- habitation and “*maintenance*” as the cornerstone for a deceased pension entitlement. As per the definition of spouse when it comes to a married spouse, the member should be legally married at the time of his or her death and “*living with*” and “*maintaining*” the married spouse. The living with and maintaining conditions being additional to the existence of a valid marriage. Evidence shows that the 1<sup>st</sup> Plaintiff admitted in cross examination that she would spend 4 to 6 weeks in Seychelles per year, the rest would be spent in the United Kingdom ( page 4 to 5 of the proceedings of the 11th of October 2018 in the afternoon, refers). Learned Counsel for the Defendants argued that this would not suffice for fulfilling the requirement of living with the deceased. In his further submission the already strict residency test in the Act has been the subject matter of a firmer definition in Regulation 26(1). According to this provision

the spouse should have resided in Seychelles for a continuous period of at least 5 years prior to the deceased member's death. This would impose a further condition on the Claimant spouse who not only has to show that he or she was physically living together with the deceased member at the time of his death but also that their residence were in Seychelles for a continuous period of 5 years. According to the Learned Counsel this is further proof that the 1<sup>st</sup> Plaintiff was not living with the deceased.

[73] I have scrutinised the evidence led by the Plaintiffs regarding this essential legal requirement. Having done so I would agree with the Defendant's Counsel that it has not been shown through evidence led before this court that the 1<sup>st</sup> Defendant was living with the deceased at the time of his death and neither has it been shown that she was residing in Seychelles for a period of 5 years prior to his death. To my mind it would not be sufficient for the 1<sup>st</sup> Plaintiff to establish that she was living with the deceased in the sense of being husband and wife, she further needed to show that she was at the material time physically cohabiting with the deceased and had been residing in Seychelles continuously for 5 years. Continuity of presence is key here. The evidence shows that the 1<sup>st</sup> plaintiff was not continuously residing in Seychelles after she went to work in the United Kingdom, put aside living with the deceased at the time of his death.

[74] When it comes to Regulation 26 (1) it appears that the Board of Trustees of the 1<sup>st</sup> Defendant could have waived the 5 years residency requirement upon application of the claimant. However, the 1<sup>st</sup> Plaintiff has not submitted any evidence to show that she did apply to the Board to waive this requirement and that the Board did so in her regards. At any rate this court is of the view that even if the 1<sup>st</sup> plaintiff had met the test of residency under the Regulations, she would still have, on the evidence adduced, failed to show that she was living with the deceased member at the time of his death. I therefore find that the 1<sup>st</sup> Plaintiff not to be the spouse of the deceased for the purpose of the Act.

[75] On the other hand, Ms Christine Clarisse is not a party to this case. She is however the main witness of the Defendants and the beneficiary of the deceased member's pension in this case. Following two competitive applications for the same pension being lodged with

the 1<sup>st</sup> Defendant, the latter found in favour of the Ms Clarisse and against the two Plaintiffs. In this suit it has supported her case, both on the law and facts.

[76] Ms Clarisse made an application for a surviving spouse pension in relation to the late Antoine Danny Poiret on the 4<sup>th</sup> of January 2017. Her claim was made on the basis that the deceased and herself had been living in ‘*concubinage*’ for at least 10 years prior to his demise.

[77] Whilst the 1<sup>st</sup> Plaintiff made her claim based on the 1st limb of the definition of spouse in S2 of the Act, Ms Clarisse made hers claim on the 2<sup>nd</sup> limb of the same definition. Namely under the scenario of where at the time of a married member’s death, he or she was cohabiting with a claimant as the common law husband or wife for at least 3 years prior to the member’s death and had the member had maintained the claimant during that period. The 1<sup>st</sup> Defendant having pleaded its case in favour of Ms Clarisse’s application, it bears the burden of proving to this court that the latter’s claim is established on a balance of probabilities.

[78] In order to establish its case the 1<sup>st</sup> Defendant has to prove that Ms Clarisse and the deceased member were cohabiting with each other for a period of 3 years prior to the member’s death and that the deceased member was maintaining Ms Clarisse.

[79] It is pertinent to note that the fact that the deceased member was legally married at the time of the cohabitation is immaterial for the operation of the entitlement by a common law wife or a concubine under the second limb of the definition of “*spouse*” in the Act. This provision is very unique as it places physical proximity between the spouses and maintenance above all other factors. Love and affection can be present but it is not a criteria that must exist. Moreover, it appear that an existing marriage can subsist but it will give precedence to coexisting common law relationship if the latter consist of a cohabitation of three years or more and there is maintenance by the deceased member. Much has been said regarding the morality behind this situation, however, we are here before a court of law and not of morality. As abhorrent and draconian as the Plaintiffs might see it, to the extent that the law says so, this court will have to implement it. The dictum “*dura lex sed lex*”, receives its full value in this case. 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.

[80] Having thoroughly examine the evidence before me I find, through overwhelming evidence, that the state of cohabitation between the deceased member and Ms Clarisse as proven. I am further satisfied that the 1<sup>st</sup> Plaintiff was aware of an amorous relationship between Ms Clarisse and the deceased, at least as far back as the end of the year 2015. This is admitted by the 1<sup>st</sup>Plaintiff in her testimony, when she said that her husband confessed to her of this fact .Whilst the 2<sup>nd</sup> Plaintiff testified about knowing of its existence upon hearing it from third parties. Ms Clarisse’s evidence, beside going into intimate and personal details of the relationship, revealed that it started from the year 2015 to the date of the passing away of the deceased. The testimonies of Terry Poiret and Judy Poiret, the brother and the sister of the deceased all shows that the latter and Ms Clarisse were effectively living as husband and wife in the House of Ms Clarisse at Hermitage Mahe. The testimony of the Head of Department of Mr Poiret, that of Dr Jude Gedeon , though not coming to the level of revealing evidence of a common law relationship shows that the two persons were very close both in their common medical professions and in their personal lives.

[81] Both Plaintiffs denies any knowledge of the fact that the two had been cohabitating for over three years. They claimed that Ms Clarisse was but a family nurse appointed to take care of the deceased after he was diagnosed with cancer. I, however, find that the open and public relationship of those two persons would have been known to the two plaintiffs, if not personally, then through third parties and that their testimonies that the relationship was but of a formal nature of a patient and a nurse to be but an attempt to cover up the obvious.

[82] It is a further sine qua non condition that for somebody to successfully make a claim for pension as a common law spouse he or she has to prove that the deceased member was maintaining the Claimant before his or her death. To note it is not that it must be shown that the deceased was being maintained by the Claimant but that claimant being maintain

by the deceased. The objective behind this provision being clear, it is that the surviving spouse continues to be financially assisted even after the death of the deceased. So that the standard of living of the survivor is not unduly compromised by the demised.

[83] *“Maintenance” or “maintaining” is defined in regulation 2 of the Pension Regulations to mean; “contributing to the household expenses and/or daily needs of the 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”.*

[84] The Applicant, Christine Clarisse, did not deposed in her affidavit on the manner and the extent that she was being maintained by the deceased. Neither did she made any entry in the standard prescribed form of the 1<sup>st</sup> Defendant to this effect. Further the evidence led before this court shows that the investigation carried out by the 1st Defendant does not also contain proof of maintenance by the deceased of this claimant. On the other hand much has been said by Ms Clarisse in her testimony about the reciprocal maintenance that took place between her and the deceased whilst the latter was living in her house at Hermitage. I note that as the Court I am not the person that has the duty to carry out this statutory assessment, it is the legal duty of the 1<sup>st</sup> Defendant acting under the provisions of section. However, I am satisfied that this court is sufficiently empowered to make a finding on this issue of fact. I will accordingly examine the evidence with a view to make a determination as to whether there existed sufficient facts that could have led the 1<sup>st</sup> Defendant to come to a determination as to whether the late Antoine Danny Poiret was maintaining Christine Clarisse before his demised, in terms of the legal definition.

[85] After having considered the evidence as a whole I am satisfied that it shows that the deceased and Ms Clarisse were not only cohabiting with each other at Hermitage but that they reciprocally maintained each other. According to the testimony of the latter, the deceased would contribute towards the household expenses every month by paying for those expenses. She further testified that he assisted in the renovation of the house and that he was involved in household chores, such as cooking. On the other hand Ms

Clarisse testified that she would do the cooking; clean the house; do the laundry of Danny's clothes and iron them on a daily basis. Reciprocity in maintenance is not required in law, what needs to be proven is that the deceased was maintaining the claimant, the Common law Spouse. I find that the testimony given by Ms Clarisse to this effect to be cogent and truthful and, therefore, I find that the deceased was maintaining Ms Clarisse in terms of S 2 of the Act prior to his death.

[86] Accordingly, I find as proven on a balance of probabilities that the member of the Pension Fund, the late Antoine Danny Poirer, had been cohabitating with Christine Clarisse and maintaining her as a common law wife for a period of at least 3 years prior to his demise and as such she is entitled to be paid this member's surviving spouse pension

**[87] Whether the 2<sup>nd</sup> defendant qualifies for children's pension.**

[88] The 2<sup>nd</sup> Defendant is admittedly the legitimate child of the deceased. She makes her claim to the 1<sup>st</sup> Defendant on that basis. Her application was denied on the ground that she had not satisfied the 1<sup>st</sup> Defendant that she is entitled to children's pension benefit under regulation 31(1) of the Regulation (supra).

[89] For a child to be entitled cumulatively or disjunctively with a spouse for a deceased member's pension he or she need not only be a child of the member but also a child that comes under the ambit of regulation 31 (1). In other words the Applicant must show that he or she is below 18 years of age and if he or she is above 18 years but below 25, that she is full time education or if he or she is below 15 years old and in full time employment and earning a salary of not less than RS 1900 per month.

[90] I have gone over the whole of the evidence in this case, having done so, I am not satisfied that the 2<sup>nd</sup> Defendant fulfil the requirements of the Pension Regulations in order for her to be paid a child's pension. She testified that she is 34 years of age. This puts her well above the age limit which would make her entitle to pension as a child under both the Act and the Regulation.

**[91] Whether the conducts and acts of the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant vis a vis the Plaintiffs consisted of a faute that would make them liable to the damages claimed.**

[92] The Plaintiffs cannot be paid any damages by the Defendants unless they prove some wrong doing on the part of the Defendants. When it comes to the acts and or omissions of the 2<sup>nd</sup> Defendant, who is an employee of the 1<sup>st</sup> Defendant, S 71 of the Act (supra) protects and give certain immunity to her. She would not be liable for damages if she is seen to have acted in good faith in her dealings with the Plaintiff. It is therefore up to them to show that she acted in bad faith, it is not up to her to establish good faith.

[93] As far as the delictual liability of the 1<sup>st</sup> Defendant is concerned, in this case it acted mostly through the 2<sup>nd</sup> Defendant. To the extent, therefore, that the court would find the 2<sup>nd</sup> Defendant, as prepose, not liable, the 1<sup>st</sup> Defendant would also not be vicariously liable. However, I would have to look at the decision of the 1<sup>st</sup> Defendant taken by the 1<sup>st</sup> Defendant as a whole, per se or through other agents, and see whether it is, as a person liable, vicariously or otherwise.

[94] The Plaintiffs claim that the 2<sup>nd</sup> Defendant as the employee and the former General Manger of the 1<sup>st</sup> Defendant failed to treat them fairly ; without good faith and with ill will . I have considered the evidence of the Plaintiffs and that of the 2<sup>nd</sup> Defendant together with that of Mrs Lekha Nair, the Chief Executive Officer of the 1<sup>st</sup> Defendant and Jeffrey Moses. Having done so, I do not find anything or inappropriate in the conduct of the 2<sup>nd</sup> Defendant. To my mind she was at all material time conducting herself fairly and within the ambit of the Act and the Regulations. She was simply discharging her duties and was either convening the 1<sup>st</sup> Defendant's decision or informing the Plaintiffs about the pension law and procedure.

[95] Both Mr Moses and Mrs Nair , fellow employees of the 1<sup>st</sup> Defendant have testified as to how the 2<sup>nd</sup> Defendant has a very long experience in dealing with clients and complaints and that the 2<sup>nd</sup> Defendant has had no records of misconducts in her past dealings with the

public. I further find that no evidence of collusion or of a conspiracy has been shown to exist between the 2<sup>nd</sup> Defendant and the Ms Clarisse as surmised by the Plaintiffs. As a result no faute is committed by the 1<sup>st</sup> Defendant.

[96] The 2<sup>nd</sup> Defendant being an employee of the 1<sup>st</sup> Defendant Section 71 of the Act also receive its full application in this case. This is a shield raised by the 1<sup>st</sup> Defendant. She has raised it and in so doing she says that as I was acting an employee during the course of employment bad faith needs to be proved. In this case, therefore, the Plaintiffs has the further burden of proving bad faith on the part of the 1<sup>st</sup> Defendant. I find that the Plaintiffs has not been able to discharge this burden and that to the contrary the Mrs Way Hive has been shown to have at all material time , acted in good faith.

[97] This court has already made a determination that the decision of the 1<sup>st</sup> Defendant not to award the pension to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs and to award it to Ms Clarisse was proper and legal in all circumstances of the case, both in law and on the facts. No faute can therefore be attributed to the 1<sup>st</sup> Defendant in that regards. As far as the allocation of the pension to the claimant Ms Clarisse is concerned I have found that there was a procedural error in that the issue of maintenance was not properly considered by the 1<sup>st</sup> Defendant. This procedural error is cured with the finding and determination by the court on this issue in this judgement. I find accordingly that this mistake could not have amounted to a fault that would have render the 1<sup>st</sup> Defendant liable to damages towards the Plaintiffs on this basis.

[98] Having come to the above determination there does not arise the necessity for this court to consider the different heads of damages payable by the Defendants to the Plaintiffs and the interest payable thereon.

[99] **Final determination**

[100] Whoever desires any court to give judgement as to any legal right dependent on the existence of facts, which he or she asserts, must prove that those facts exist. In the same vein whoever desire any court to give judgment as to any legal right per se must show that the right exist in his or her favour in law. In this case the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs has not



convinced me that they have managed to prove on a balance of probabilities that their claims to the pension of their late, husband and father has been wrongly considered by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. On the other hand I am satisfied that the 1<sup>st</sup> Defendant has taken the proper decision both in facts and the law when it decided to pay the pension to the concubine of the deceased for reasons given in this judgment. Accordingly, the Plaint is dismissed with cost in favour of the Defendants.

Signed, dated and delivered at Ile du Port on ...day of January 2020

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Govinden J