

# IN THE COURT OF APPEAL OF SEYCHELLES

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## **Reportable**

[2022] SCCA 16 (29 April 2022)

SCA 56/2019

(Appeal from CS 99/2015)

**AHMED AFIF**

**Appellant**

*(rep. by Mr. Clifford André)*

and

**DAVID SAVY**

**Respondent**

*(rep. by Mr. Elvis Chetty)*

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**Neutral Citation:** *Afif v Savy* (SCA 56/2019) [2022] SCCA16 (Arising in CS 99/2015)  
(29 April 2022)

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

**Summary:** Defamation-defence of truth and fair comment

**Heard:** 14 April 2022

**Delivered:** 29 April 2022

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## **ORDER**

The appeal is dismissed. The Appellant, Ahmed Afif is ordered to pay to the Respondent, David Savy, the sum of SR 50,000, together with interests from the date of the judgment of the Supreme court and costs of the suit below and of this appeal.

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## **JUDGMENT**

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**TWOMEY JA**

### **Background**

[1] In the run up to presidential elections in September 2015, political rallies and meetings took place across Seychelles. The Respondent, Mr. David Savy, a businessman who previously had been the Chief Executive Officer of Air Seychelles, the national airline, in a suit filed in

October 2015, claimed damages for defamation of his character by the Appellant, Mr. Ahmed Afif, then the Secretary-General of a political party, Lalyans Seselwa.

[2] The defamation complained of was alleged to have taken place at a public gathering at a conference centre in Bois de Rose where Mr. Afif is alleged, inter alia, to have meant either in the words and slides he used or by innuendo that Mr. Savy -

*“had committed corruption in the manner he ran Air Seychelles Limited, that he was a corrupt and/or dishonest individual, that he sold tickets at a low price to his friend so that his friend could make a profit by selling these tickets at a higher price to the detriment of Air Seychelles Limited, [that he had] abused his position as the Chairman and Chief Executive Officer of Air Seychelles Limited and took decisions which were not in the interest of Air Seychelles Limited, [that he was ]responsible for Air Seychelles going bankrupt or facing financial difficulties; and or [that ] the Plaintiff [was] corrupt and dishonest like Sunil Shah with whom the Plaintiff [kept] company and was a close friend of.”*

[3] The meeting was recorded and published on video and at the time of the suit was available on the YouTube website.

[4] In his statement of Defence, Mr. Afif averred that the comments he made were in the public interest, not defamatory but were made on matters of purely public interest, in good faith and without malice. He further averred that the words used were not understood to bear the meanings alleged and denied that the words were false and malicious or had any defamatory meaning. Instead, he stated, the words used in their natural and ordinary meaning were true in substance and fact and were justified. Similarly, the slides used during his speech and presentation.

### **The trial**

[5] Mr. Savy testified and adduced evidence of two witnesses. Mr. Afif testified and produced documentary evidence of the financial affairs of Air Seychelles. The court *a quo* after a lengthy trial found in favour of Mr. Savy. It found that despite Mr. Afif’s denials, his choice of words, pictures and presentation impugned Mr. Savy’s integrity and that an objective view of the words and the presentation supported the view that Mr. Savy was placed at the centre of the allegations to suggest that his actions in the management of Air Seychelles with corrupt

elements had led to its demise. The court found that the state of affairs of Air Seychelles could have been said without reference to Mr. Savy. The court added that Mr. Afif's defence and testimony were that his statements were substantially true and that he made them in the public interest but in this respect he had been unable to bring evidence, as he was wont to, to show that Mr. Savy had caused the losses or was responsible for managing the company in a corrupt way and that the corruption had led to the demise of Air Seychelles. Ultimately, the court found that Mr. Afif's defences of justification and fair comment failed.

### **The appeal**

[6] Dissatisfied with this decision, Mr. Afif has appealed on two grounds:

- 1 *The learned trial judge erred in law and fact to have concluded in paragraph 189 of her judgement that 'Judged against the present case, it is clear that the statements made by M., Afif were not based on facts which are true... so implying that his presentation was not factual', when in fact everything stated was factual and evidence was tendered to that effect. Mr. Afif gave evidence in court to say that everything he said or posted in the slides were actually factual and true.*
- 2 *The learned trial judge erred in law and fact to have concluded in paragraphs 190 and 200 of her judgment that: "As regards the defence of substantial truth the Defendant did no need to show that every single characteristic of the statement made was true, merely that it was substantially true (see Alexander v North Eastern Railway Co ([1865] 6 B & S 340)" and "As mentioned, the Defendant has not shown that the comments made in relation to the Plaintiff are substantially true. He has in his own version stated that there was no intention to impugn any corruption on Mr. Savy." The fact is that the Defendant in fact (sic) showed that the statements were true and not that they were substantially true. The Judge definitely erred in law regarding this."*

[7] The grounds of appeal are infelicitously drafted and are repetitive as were the submissions of Mr. André, Counsel for Mr. Afif. All I understand him to be saying is that the learned trial judge was wrong not to have accepted the defence of justification.

## **Defamation and the defence of justification or truth**

[8] Mr. André in his written submissions has only reiterated his grounds of appeal and has reminded the court that the law of defamation of Seychelles is contained in Article 1383 of the Civil Code.

[9] He has repeated that what Mr. Afif stated was true and that this was corroborated by the documentary evidence of Air Seychelles' financial affairs. In oral submissions, he contended that Mr. Afif had not intended to defame Mr. Savy.

[10] Particular exception was taken by Mr. André to Paragraphs 189 - 191 of the court's judgment. He submits that the entire decision is based on these paragraphs and the learned trial judge's reasoning erroneous. It is his submission that as Mr. Afif had stated in his evidence that he was not accusing Mr. Savy of corruption and that the presentation was only on a matter of public interest in relation to Air Seychelles, which Mr. Savy had identified with himself, the statement was justified and was fair comment as it only related to criticism of the government. He reiterated that Mr. Afif was having "a go at the government and not Mr. Savy."

[11] In response, Mr. Chetty, Counsel for Mr. Savy submitted that the message delivered by Mr. Afif portrayed to the world at large that Air Seychelles had lost money because of corruption on the part of Mr. Savy. The whole slide presentation was done at the expense of Mr. Savy.

[12] Mr. Chetty further submitted that it is a truism that parties are bound by their pleadings and Mr. Afif relied solely on the defence of justification (truth) but that the defence was not available to him. This is because he submits, that the remarks made during the presentation were not made in good faith and in an atmosphere of a political gathering made to inflame the crowd and to bring Mr. Savy into disrepute and ridicule.

[13] Relying on the case of *Esparon v Fernandez*,<sup>1</sup> it is Mr. Chetty's submission that a man stating what he believes to be true about another is protected by the defence of truth if he makes the statement honestly and without any indirect or improper motive (emphasis added). Hence, for example, it was immaterial if Mr. Afif had not intended to impugn Mr. Savy's character, when

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<sup>1</sup> (1980) SLR 148

using the tag line “Corruption” next to his picture. As was stated in *Wyatt v Corgat*,<sup>2</sup> the meaning in which the defendant intended the words to be understood is immaterial in determining whether the words are defamatory or not; what is material is the meaning of the circumstances of the particular case that the words conveyed to the hearer. Mr. Chetty further contends that in a political setting, when feelings are running high, the use of slides with images of the Mr. Savy with accompanying snide remarks such as “Our friend who was in charge of that company which he sank” cannot reasonably indicate that Mr. Afif’s motive was proper and solely directed at air Seychelles.

[14] In Mr. Chetty’s submission, the appropriate test in defamation is whether the words tend to lower the plaintiff in the estimation of right-thinking members of society generally (*Ramkalawan v Gill*<sup>3</sup>).

[15] In conclusion, according to Mr. Chetty, there are no defences available to Mr. Afif since the falsity of the defamation is presumed until disproved by the defendant (*Barrado v Berlouis and Another*<sup>4</sup>, *Pillay v Pillay*<sup>5</sup>). The onus of proving the truth of the statements lay on Mr. Afif (*Regar Publications v Pillay*<sup>6</sup>), a burden he failed to satisfy.

[16] It is important to read the cited paragraphs of the court’s judgment in context and so I reproduce the preceding paragraphs as well as those paragraphs in contention:

*[“187] In the present case, the burden was on [Mr. Afif] to show that the statements against the Plaintiff were true. Alternatively, that this was a fair comment.*

*[188] As regards fair comment, Lord Denning in London Artists Ltd v Littler [1969] 2 QB 375, [1968] 1 WLR 607, [1968] EWCA Civ 3, [1969] 2 All ER 193 held that:*

*‘Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or others; then it is a matter of public interest on which everyone is entitled to make a fair comment.’*

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<sup>2</sup> (1964) SLR 72

<sup>3</sup> (2015) SLR 405

<sup>4</sup> (1993) SLR 12

<sup>5</sup> (2013) SCSC 68

<sup>6</sup> (1998-1999) SCAR 131.

*The case further held that the comment must be based on facts which are true or protected by privilege. It was cautioned that the defence of fair comment on matters of public interest is not to be defined too closely. (See also: Kemsley v Foot [1952] A.C. 345 which highlighted that for an opinion to be fair comment it must be based upon facts. There, the Court also highlighted the difficulties in distinguishing an allegation of fact from an expression of an opinion.)*

*[189] Judged against the present case, it is clear that the statements made by Mr. Afif were not based on facts which are true. His own version was that he was not accusing Mr. Savy of corruption or corrupt activity. So implying this in his presentation was not factual.”*

*[190] As regards the defence of substantial truth, the First Defendant did not need to show that every single characteristic of the statement made was true, merely that it is substantially true. (See: Alexander v North Eastern Railway Co [1865] 6 B & S 340).*

*[191] As mentioned, the First Defendant has not shown that the comments made in relation to the Plaintiff are substantially true. He has on his own version stated that there was no intention to impugn any corruption on Mr. Savy.*

*[192] In the circumstances, the First Defendant has failed in his defences.”*

[17] I have reread and given anxious thought to Paragraphs 189 -191 of the court’s judgment. I understand the learned trial judge to be saying that in the light of the jurisprudence cited in the previous paragraphs, for Mr. Afif’s comments to be justified or to be fair comment, they must be based on fact. Despite Mr. Afif’s testimony that he was not accusing Mr. Savy of corruption, the implication of corruption by Mr. Savy in his presentation was not based on fact. His defences therefore failed.

[18] Similarly, with regard to his defence of substantial truth, as some of his comments were not true - namely the imputation of corruption to Mr. Savy, that defence also failed.

[19] I am in agreement with Mr. Chetty that the learned trial judge was correct in this reasoning. A summary of the salient aspects of Mr. Afif’s slide presentation bears this out. The first slide entitled “Corruption” with Mr. Savy’s photograph underneath and the tagline- “How did Air Seychelles lose €5.4m in 2009; the fourth slide entitled “Selling tickets to friends”, again with Mr. Savy’s photograph underneath and the accompanying tag line “France Seychelles for €289

or SR 4,200 with friends including business class, friends then resell for €800 or SR 12,000'; the sixth slide entitled, "The Good Life – SR1 a year" again with Mr. Savy's photograph in a swimming pool with Mr. Sunil Shah. The words and photographs speak for themselves and need no further comment.

[20] Mr. Afif, as he presented the slides, also stated inter alia: "Take their time because Lalyans knows that they have taken the money. Continue to look. Corruption does not stop there. You remember we had a nice company which we called Air Seychelles, which was ours? It is no longer ours. We asked them a small question, how come in 2009, how come they lost 5.4 million euros in 2009? I will not talk a lot about that. I will give you another example as to why the company went down... They were selling tickets to their friends... Our friend who is in charge of that company which he sank, he is enjoying with his friend, birds of the same feather, who got an island that has been leased to him by the government for one (1) rupee per month."

[21] In his testimony, Mr. Afif admitted that he had been incorrect in stating the price of a return ticket that was allegedly sold to friends of Mr. Savy (P. 93). He also presented the accounts of Air Seychelles- it had made losses but there was no evidence of corruption in the accounts either by Air Seychelles itself or by Mr. Savy or at all. Not only was the statement about corruption false in regard to Air Seychelles but they were also false with regard to Mr. Savy.

[22] The authors of *Gatley on Libel and Slander*<sup>7</sup> (citations omitted) explain imputation as follows:

*"What imputation is conveyed by any particular words is to be determined on an objective test, that is, by the meaning in which the ordinary reasonable man would understand them...the imputation conveyed is not to be determined by the meaning intended by the man who published the words..."*

*The meaning in which the defendant intended the words to be understood. is immaterial in determining whether the words were defamatory or not. The question is not what the defendant intended, but what reasonable men, knowing the circumstances in which the words were published, would understand to be the meaning. Liability for [defamation] does not depend on the intention of the defamer, but on the fact of the defamation..."*

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<sup>7</sup> *Gatley on Libel and Slander* (P.S. C. Lewis, 8<sup>th</sup> edn, 1981)

*It is not the defendant's intention, or the meaning in his own mind, that makes the sense of a [defamation] but "what was the meaning an inference what would naturally be drawn by reasonable and intelligent persons reading it..."<sup>8</sup>*

*The question is, what was the effects on the bystanders of the words used, not what the defendant secretly intended in his own mind.<sup>9</sup>*

[23] Gatley cites cases where words even said in jest or as joke can be taken seriously and amount to defamation.<sup>10</sup>

[24] In the circumstances, it would be disingenuous to try and curtail the meaning of the word 'corruption' displayed on the slides as Mr. Afif tried to do in his cross-examination (P. 153 of the transcript of proceedings)- "koripsyon (corruption) means something which is not running according to the norm...it may [have a malicious intent and meaning] but it could also imply that, sorry does not imply that it is directed at a person. Something went wrong, I am not directing it at the person." Everyone in Seychelles understands the word corruption – it is a crime; it means much more than 'something went wrong;' it means being actively involved in acquiring illicit benefits or abusing power for one's personal gain. If the remark was not aimed at a person or thing, why have the photographs of both Air Seychelles and Mr. Savy? If 'something went wrong,' why just not say that instead of raising the inference of corruption?

[25] Equally, it does not matter what the intention of Mr. Afif was in making the statements and displaying the photos of Mr. Savy – it was what was understood or could be reasonably inferred by the objective listener.

[26] I am also not in any way convinced by Mr. André's submission that it was Air Seychelles or the government that was clearly inferred by Mr. Afif. The inextricable link between the photos of Mr. Savy to the tag lines and statements even to the most naïve member of society can but infer that Mr. Savy was the corrupt individual who had ruined Air Seychelles. That is the

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<sup>8</sup> Ibid, at p 45, parag 88-89

<sup>9</sup> Ibid, at page 46, parag 90

<sup>10</sup> Ibid, *Donoghue v Hayes* (1831) Hayes (Ir Ex.) R 266, *Beloff v Pressdra*, [1974] 1 All E.R.241

defamation complained of and the defence of truth and fair comment could not, in the circumstances assist Mr. Afif. The grounds of appeal therefore have no merit.

## **Malice**

[27] The issue of malice in defamation was raised during the hearing of the appeal. This issue did not form part of the grounds of appeal, nor was it a defence raised at any time in the pleadings or trial. Without wishing to engage with the settled jurisprudence regarding the fact that a court should not formulate a case for a party and cannot raise issues not raised in the trial, it is important that I say something about malice- if only to quell the vaguest doubt that it has a bearing in the present case.

[28] The issue arose in the context of the pleadings: it was pointed out that Mr. Savy had in his plaint referred to Mr. Afif “falsely and maliciously” speaking and publishing the statements slides, images and a video. In his statement of Defence, Mr. Afif denied that his comments and publications were malicious. He stated that:

*“The said words are in the natural and ordinary meaning true in substance and fact pleading justification and in the alternative, the opinions expressed which by nature cannot be true or false, were fair comments upon a matter of public interest, in good faith and without malice.”<sup>11</sup>(emphasis added)*

[29] Mr. Afif’s defence was justification and fair comment. That is all. If the words ‘malice’ and ‘malicious’ were used, they were used adjectivally to either denote or deny good faith. They were not used in the context of a defence of qualified privilege as is clear from the pleadings and the proceedings in the court *a quo*. It is therefore a non-issue before this court.

[30] In any case, a defence of qualified privilege could not have been sustained. As Mr. Chetty has contended in Further Submissions, Mr. Savy was not a public figure, merely a private citizen. Being the Chairperson or the CEO of a company does not make one a public figure. In the particular context of this case, there could be no defence of qualified privilege and, as pointed out, none was pleaded.

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<sup>11</sup> Paragraph 12 of the Defendant’s statement of Defence.

[31] The issue of proving malice, therefore, does not arise. It would only have arisen in the context of a defence of qualified privilege.

### **Quantum**

[32] The issue of quantum although raised in Mr. Savy's skeleton heads of argument did not form part of a cross-appeal and were not pursued at the hearing of the appeal. I therefore need not say more about it.

### **Decision**

[33] In the circumstances, the grounds of appeal are without merit and the appeal fails in its entirety. The orders of the court a quo stand. I repeat them for clarity.

### **Order**

[34] The Appellant, Ahmed Afif, is ordered to pay to the Respondent, David Savy, the sum of SR 50,000, together with interests from the date of the judgment of the Supreme Court and costs of the suit below and of this appeal.



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Dr. M. Twomey-Woods, JA.

**ROBINSON JA**

- [1] I agree with the conclusion of Twomey-Woods, JA that the appeal should be dismissed in its entirety.
- [2] I uphold the order of the learned Judge that the appellant shall pay to the respondent the sum of SCR50,000 in damages.
- [3] I make no order as to costs.

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Fiona Robinson, JA

Signed, dated and delivered at Ile du Port on 29 April 2022.

## FERNANDO, PRESIDENT

1. The Appellant (Defendant, at the trial before the Supreme Court, and hereinafter referred to as the Appellant) has appealed against the judgment of the Supreme Court directing him to pay the Respondent (Plaintiff at the trial before the Supreme Court, and hereinafter referred to as the Respondent) a sum of Rs 50,000.00 in damages for statements made by the Appellant affecting the Respondent's reputation significantly and the ridicule, hurt and embarrassment the Respondent suffered in his profession.
2. The Appellant, at the time the cause of action arose and as averred in the Plaint filed by the Respondent before the Supreme Court had been the Secretary General of Lalyans Seselwa, a political party registered in the Seychelles. He had also earlier been a member of the Board of Directors of Air Seychelles. The Respondent was at all material times the Chairman and Chief Executive Officer of Air Seychelles, a publicly funded company from public funds owned and accountable to the public.
3. It is averred in the Plaint that on the 6<sup>th</sup> of September 2015, the Appellant, at a public meeting organized by Lalyans Seselwa, at the ICCS Conference Centre, falsely and maliciously spoke and published in the creole language defamatory words about the Respondent, as stated in the sub-paragraphs referred to herein:

“3.1 Pran zot letan parske lalyans i konnen pou dir zot inn pran sa larzan. Kontiyen rode.

3.2 Koripson pa fini la. Zot rapel nou ti annan nou en zoli lakonpanyen ki apel Air Seychelles, ki ti pou nou? I nepli pou nou. Nou demann zot enn ti

kestyon, ki manyer en 2009, ki manyer zot ti perdi 5.4 milyon Ero an 2009? Nou demann zot sa keston? Be ler nou demann sa keston, parske nou fyer nou pei e nou rapel ki zot ti vinn kot governman e zot dir ek gouvernman pret zot 255 milyon rounpi.

3.3 Wi mon bann zanmi, zot ti demann pret zot 255 milyon Rounpi akoz zot in defons en trou dan zot bidze. Ler i demann prete ek gouvernmen savedir inn demann ek zot parske zot ki pey larzan ki donn governman tou le mwan. Si ou kalkile desan senkann senk (255) milyon rounpi i annan 46,000 travayer Sesel, sakenn de zot travayer inn donn Air Seychelles senk mil senksan (5500) rounpi. Sakenn zot inn donner, mon dir donner pa prete akoz la i pa pe rann. I pa pe rann. Savedir en mwan zot saler zot in pran zot in vid dan en trou. E ler nou demande, be msye ou'n pran en mwan nou saler be eksplik nou akoz ou'n pran en mwan nou saler? Ler nou demande zot dir pa bezwen rode kot nal mal. Sey aranz bato anfen avyon me selman pa demande kot nal mal. Be nou dan lalyans Seselwa nou anvi zot konnen kot nal mal. Mon kwat i enportan zot konnen kot nal mal.

3.4 Mon montre zot sa portre pou vwar pou dir dan sa lepok nou ti annan nou senk avyon, tou le senk i la. Zot nepli la. Akoz ti annan senk avyon? Akoz zot ti pe lwe sa senk avyon. Me toultan ti annan zis de avyon ki ti pe fer Lerop, trazyenm avyon ti al Moris, Sengapour ek Sid Afrik e de avyon ti reste park lo sa koltar Pointe Larue. Sa de avyon ki ti reste park ti pe kout sa pei 10 mil dolar par zour par avyon. 20 mil dollar par avyon ki pe assize lo sa koltar pa pe ganny en sou akoz i pa anvole. Eski i difisil pou nou konpran si ou annan de masin pe asiz ater Ven mil (20,000) dolar par zour preski De san senkant (250) milyon rounpi par zour, ki dan en semenn ou'n depans ou 1.8 milyon rounpi, ou pa pou anfonse vitman ou pou ariv De san Senkann

Senk (255), e ler ou pe fer tousala lekel ki pe ganny larzan? Ou pe perdi ou. Be sa boug ki lwe ou avyon ki per fer larzan parske li zis i asize i park son avyon lo ou koltar in anmas Ven mil (20,000) dolar par zour. Se sa enn bann rezon ki sa lakonpanyen ti fayit.

- 3.5 Mon pa pou koz bokou lo la. Mon pou donn zot en lot kekzanp akoz sa lakonpanyen ti desann. Pa sa. Zot ti pe vann tiket ek zot dalon. Eski zot ti konnen pou dir ler i ti pe perdi larzan Air Seychelles ti pe vann en tiket ek son dalon Kat Mil Desan (4200) roupi sorti lafrans pou vin Mae Kat mil Desan (4200) roupi. Sa dalon i en reseler, i vann sa tiket 12,000 Roupi ek kliyan, kliyan i pey 12,000 roupi. Air Seychelles i anmas 4,200 Roupi en boug i pran 8,000 roupi i met dan son pos. Avyon i antre plen, plen debarke sorti Lafrans, deborde, lakonpanyen i fayit malgre avyon i plen. Se sa ki Air Seychelles ti pe pas ladan. Mwan mon pe dir ek zot, lekel ki responsab pou tousala? Lekel kinn fer benefis dan tousala? Sa boug kinn lwe ou avyon parske sa boug ki lwe ou avyon, ki ganny li zis ek nou 20 mil dollar par zour ozordi sa lakonpanyen ki li i ti travay avek in kite i form son prop lakonpanyen e ozordi i vo 3.7 milya dolar. Pa zis pou nou petet in fer dil lezot landrwa.
- 3.6 Nou zanmi ki li i ti ansarz sa lakonpanyen kin fer koule li i pe enjoy ek son dalon, zwazo menm nik, kinn ganny en zil ki in lwe ek li par gouvman en roupi (SR1) par mwan. Zot lo sa zil ki zot pe gete la. Si zot pa oule kwar la son lis kot inn pey en roupi (SR1) par mwan.
- 3.7 Kinn arive finalman zot in vann nou byen. Nou nepli annan nou laprid, nou ki pe pey det parske sa bann zans kantmenm zot inn dir zot pe donn nou en goudmen nou ki pe pey sa bann det, zot pa pe peye. Nou nou'n perdi kontrol,

nou'n perdi nou dignite. Lo nou moto zot a war toultan nou dir i enportan pou nou annan nou dignite, me dan sa ka nou'n perdi nou dignite. Ozordi sa lakonpanyen i ankor pe perdi larzan. Se pa mwan ki pe dir. Monn met sit website ki zot kapab al lo la. Zot a war ekzakteman ki lemonn i panse lo Air Seychelles. I pe perdi larzan ziska ozordi. Sa rapor ki monn mete i 2015 siporte par fron moniter enternasyonal.” (verbatim)

4. The following is a true and accurate translation in English, of those words as stated in the paragraph referred to above and as stated in the Complaint:

“4.1 Take their time because Lalyans knows that they have taken that money. Continue to look.

4.2 Corruption does not stop here. You remember we had a nice company which was called Air Seychelles, which was ours? It is no longer ours. We asked them a small question, how come in 2009, how come they lost 5.4 million Euros in 2009? We asked them that question? When we asked them that question, because we are proud of our country and we recall they come to the Government and said to the Government, lend them 255 million rupees.

4.3 Yes my friends, they asked to borrow 255 million Rupees because they had created a hole in their budget. When it asked to borrow from the Government it means it had asked to borrow from you because you pay money to the Government every month. If you calculate 255 million rupees there are 46,000 workers in Seychelles, each one of you worker has given to Air Seychelles 5500 Rupees. Each one of you has given. I say given not lend because it is not paying back. It is not paying back. This means one month of your salary you have taken you have thrown it down a hole. And when we asked, but Mister, you've taken one month of our salaries but explain to

us why you have taken one month of our salaries? When we asked they say there is no need to enquire where it went wrong. Try to fix the boat, well the plane but do not ask where it went wrong. But we in Lalyans Seselwa we want to know where it went wrong. I believe it is important that you know where it went wrong.

4.4 I show you this photograph to show that during that time we had five aeroplanes, all five are here. They are no longer here. Why were there five aeroplanes? Because they were leasing five aeroplanes. But at all times there were only two aeroplanes which went to Europe, a third aeroplane went to Mauritius, Singapore and South Africa and two aeroplanes remained parked on the tarmac at Pointe Larue. The two aeroplanes which remained parked was costing the country ten (10) thousand dollars per day per plane. Twenty (20) thousand dollars per (sic) aeroplane which remained on the tarmac not earning a cent as it was not flying. Is it difficult for us to understand that if you have two engines which remain on the ground, twenty (20) thousand dollars per day, nearly two hundred and fifty (250) million Rupees per day, that in one week you've spent 1.8 million Rupees, would you not sink quickly for you to reach 255, and when you are doing all of this, who is losing money? You are the one losing. But the guy who is leasing you the aeroplane is making money because he sits down he parks his aeroplanes on your tarmac and he collects twenty thousand (20,000) dollars per day. This is one of the reasons that this company went bankrupt.

4.5 I will not talk a lot about that. I will give you another example as to why the Company went down. Not that. They were selling tickets to their friend. Did you know that when it was losing money Air Seychelles was selling a ticket to its friend Four Thousand Two Hundred (4200) rupees to travel from

France to Mahe. Four Thousand Two Hundred (4200) rupees. That friend is a re-seller, he sells tickets twelve thousand (12,000) rupees to the client, the clients pay twelve thousand (12,000) rupees, Air Seychelles collects four thousand two hundred (4200) rupees a guy pockets eight thousand (8000) rupees. The aeroplane comes in full, full from France, the company goes bankrupt despite the aeroplane being full. This is what Air Seychelles was going through. I am asking, who is responsible for all of that? Who benefited from all of this? The guy who leased you the aeroplanes because the guy who leased you the aeroplanes is the one who receives only from us twenty thousand (20,000) dollars per day. Today he has left the company that he worked for and created his own company and today he is worth 3.7 million dollars. Not only from us maybe he did other deals elsewhere.

- 4.6 Our friend who was in charge of that Company which he sank, he is enjoying with his friend, birds of the same feathers, who has got an island that has been leased to him by the government one (1) rupee per month. They are on the island that you are looking at. If you do not believe it there is his lease whereby he has paid one (1) rupee per month.
- 4.7 What has happened finally, they sold our property. We no longer have our laprid, we are the ones paying the debt, those people despite saying they are giving us a helping hand, we are the ones paying all these debts, they are not paying. We have lost control; we have lost our dignity. In our moto you always see we always say it is important for us to maintain our dignity, but in this case we have lost our dignity. Today this company is still losing money. It is not me who is saying this. I have shown the website which you may access. You will see exactly what the world thinks on Air Seychelles.

It is losing money until today. The report I have shown is 2015 supported by the International Monetary Fund.” (verbatim)

5. It is averred at paragraph 5 of the Complaint that the Appellant had falsely and maliciously published, displayed and exhibited several slide images as stated herein:

“(i) slide image containing the creole word “koripsyon” written in black at the top (of the slide image), along with a photograph of the Plaintiff and Dr. Rajiv Bissessur. The slide image was published simultaneously with the publication of the words mentioned in subparagraph 3.2 of the Complaint (hereinafter slide one);

(ii) a slide image containing the creole words “Ankor Koripsyon” written at the top (of the slide image) followed by the words:

- Government ti fer li kado SR255m sibvansyon
- Ekivalan Sr5,500 dan pos sak travayer Seselwa
- Ti dir pa bizwen rode kot nal mal!

The slide image which also contained a photograph of an Air Seychelles aeroplane was published simultaneously with the publication of the words mentioned in subparagraph 3.3 of the Complaint (hereinafter slide Two).

(iii) a slide image containing the creole words “Ankor Koripsyon” followed by the words;

- Lwe 5 avyon ek ILFC

- 2 ti asiz permanan lo koltar
- ILFC ti anmas \$10,000 par zour lo sak avyon

The slide image also contained a photograph of five Air Seychelles aeroplanes on the tarmac at the Seychelles International Airport at Pointe Larue. The slide image was published simultaneously with the publication of the words mentioned in sub paragraph 3.4 of the Plaint (hereinafter slide Three).

- a slide image containing the creole words “Vann tiket ek Dalon” written at the top, followed by the words:
  - Lafrans sesel pour € 280 oubyen SR4200 ek Dalon enkli klas biznes
  - Dalon I revann pur €800 oubyen SR12,000

The said slide image was published simultaneously with the publication of the words mentioned in sub paragraph 3.5 of the Plaint (hereinafter slide Four).

- (iv) a slide image containing the words “The Good Life SR 1 paran” written at the top (of the slide image). The slide image also contained a photograph of the Plaintiff and one Sunil Shah in a swimming Pool taken on Round Island. The slide image further contained the first part of the lease agreement between Trinity Estate (Pty) and the Government of Seychelles in respect of the leasing of Round Island by Trinity Estate (Pty) Ltd from the Government of Seychelles and the following words in the lease were encircled in black “an annual rent of Seychelles Rupees One only”. The slide image was

published simultaneously with the publication of the words mentioned in sub paragraph 3.6 of the Plaint (hereinafter slide five).” (verbatim)

6. The following is a true and accurate translation in English of the written creole words set out in the above-referred slide images as stated in the Plaint:

“(i) in slide One the word “Koripsyon” is translated as “Corruption”;

(ii) in slide Two the words “Ankor Koripsyon” are translated as “more corruption” and the rest of the words as:

- the Government gifted SR255 m as subvention
- equivalent to SR5,500 from the pocket of each Seychellois worker
- it was said there was no need to enquire where it went wrong!

(iii) In slide Three the words “Ankor Koripsyon” are translated as “more corruption” and the rest of the words as:

- Leased 5 Aeroplanes from ILPC
- 2 sat permanently on the tarmac
- ILFC collected \$10,000 per day on each aeroplane.

(iv) the translation of the creole words in slide four is as follows:

(a) the words “Vann tiket ek Dalon” is translated as “selling tickets to friends”, and

(b) the rest of the words of the slide are translated as:

- France to Seychelles €280 or SR4200 to a friend including business class
- friend resells for €800 or SR12,000.” (verbatim)

7. It is averred at paragraph 8 of the Plaintiff that on or around the 10<sup>th</sup> of September 2015 the Appellant maliciously published and or caused to be published a video, publishing the defamatory words referred to at paragraph 3 above on the YouTube website.

8. The Respondent had averred in the Plaintiff that the words complained of and referred to at paragraph 3 above, referred and were understood to refer to him as particularized in the Plaintiff as follows:

- “(i) the Plaintiff was from February 1997 to February 2011 occupying the post of Chairman and Chief Executive Officer in the Air Seychelles Limited and the occupation of the said posts by the Plaintiff was public knowledge in the Seychelles;
- (ii) the Plaintiff was referred to by reference to two photographs respectively referred to in sub paragraph 5 (i) and 5 (iv) of the Plaintiff;
- (iii) the Plaintiff was specifically referred to by virtue of the publication of the words mentioned in sub paragraph 3.6 of the Plaintiff which were published simultaneously with the publication of the photograph mentioned in sub paragraph 5 (iv) of the Plaintiff; and/or
- (iv) a large but unqualified numbers of persons who heard the words complained of would reasonably have understood them to be referring to the Plaintiff.” (verbatim)

9. The Respondent had averred in the Complaint that the words complained of were defamatory of him in their natural and ordinary meaning, or by innuendo including the meaning that he the Respondent:

- “(i) has committed corruption in the manner he managed the Air Seychelles Ltd;
- (ii) is a corrupt and/or dishonest individual;
- (iii) sold tickets at a low price to his friend so that his friend could make a profit by selling these tickets at a higher price to the detriment of Air Seychelles Limited;
- (iv) abused his position as the Chairman and Chief Executive Officer of Air Seychelles Limited and took decisions which were not into the interest of Air Seychelles Limited;
- (v) is responsible for Air Seychelles going bankrupt or facing serious financial difficulties; and/or
- (vi) the Plaintiff is corrupt and dishonest like Sunil Shah with whom the Plaintiff keeps company and is a close friend of.” (verbatim)

10. The Respondent had averred in the Complaint that by reason of the publication of the words complained of his reputation has been seriously damaged and that he has suffered hurt, distress and embarrassment in the way of his profession and office and that he has been brought into public scandal, odium and contempt as a result of which the Appellant is liable to pay damages to him in the sum of SR 1,000,000.00.

11. The Respondent by way of relief had sought an order against the Appellant to pay him the sum of SR 1,000,000.00 with interests and costs.
12. It is to be noted that in paragraphs 4.1 – 4.5 and 4.7 referred to above there is no mention at all, specifically by name or by innuendo to the Respondent. There is nothing stated therein about the personal life of the Respondent, nothing to the effect that he stole or benefitted or intentionally allowed others to steal or benefit from Air Seychelles or anything indicative of such. There is nothing stated or indicated therein that the Respondent has committed corruption in the manner he managed the Air Seychelles Ltd, is a corrupt and/or dishonest individual, abused his position as the Chairman and Chief Executive Officer of Air Seychelles Limited and took decisions which were not in the interest of Air Seychelles Limited. There is no allegation that the Respondent was guilty of dishonest practices, as bribery, or lacking in integrity or acted crookedly. The references are always to the losses suffered by Air Seychelles, by use of the words ‘they’, ‘them’, ‘their’, ‘it’, ‘its’ ‘company’, and ‘Air Seychelles’. There is no mention anywhere of the words ‘he’, or ‘him’. The only reference to the Plaintiff is at paragraph 4.6 where it is stated: “Our friend who was in charge of that Company which he sank, he is enjoying with his friend, birds of the same feathers, who has got an island that has been leased to him by the government one (1) rupee per month...” The other person depicted in the slide is Mr. Sunil Shah, a well-known businessman against whom there is no allegation of corruption whatsoever, in the slide or elsewhere. It is the Respondent by use of the words ‘dishonest like Sunil Shah’ at paragraph 12 (vi) in his plaint, that has defamed Mr. Sunil Shah. Leasing of lands by the government for one (1) rupee per month has been a common occurrence and Mr. Shah is not the only one who has had such a benefit. The word ‘which he sank’ does not give the impression that the Plaintiff stole from the company or was corrupt and the words “birds of the same feather” does not necessarily mean dishonest or corrupt persons but persons

with similar interests. I am of the view in relation to the way persons in charge of public institutions have managed their institutions, use of words such as ‘sank’, ‘ruined’, and ‘messed up’ etc. without any allegation of a specific corrupt act on the part of the person concerned, should not be actionable on the basis of defamation.

13. The Appellant in his Statement of Defence filed before the Court had stated that “the comments made were in the public interest, not malicious or defamatory on matters of purely public interests, in good faith without malice. It is information and matters to which the public has a right to know.” In relation to paragraph 3, 6 and 8 referred to above, the Appellant in his Statement of Defence while denying “that the said words bore or were understood to bear or capable of bearing the meanings alleged or were false and malicious or any defamatory meaning” had stated that the words contained therein “are in the natural and ordinary meaning true in substance and fact pleading justification and in the alternative the opinions expressed... were fair comments upon a matter of public interest in good faith and without malice, namely the conduct of the affairs of Air Seychelles as a public company whereby the Plaintiff was Chairman and Chief Executive for over 15 years.” The Appellant had denied that the words complained of by the Respondent referred and were understood to refer to the Respondent and were defamatory of him in their natural and ordinary meaning. The Appellant had denied that by reason of the publication of the words complained of the Respondent’s reputation has been seriously damaged and that he has suffered hurt, distress and embarrassment in the way of his profession and office and that he has been brought into public scandal, odium and contempt as a result of which the Appellant is liable to pay damages to the Respondent in the sum of SR 1,000,000.00.

14. The Appellant in his Notice of Appeal has raised the following grounds of appeal:

- “1. The Learned Judge erred in law and fact to have concluded in paragraph 189 of her judgment stating that: *“Judged against the present case, it is clear that the statements made by Mr. Afif were not based on facts which are true” ... so implying that his presentation was not factual.* When in fact everything stated was factual and evidence was tendered to that effect. Mr. Afif even gave evidence in court to say that everything is said or posted in the slide were actually factual and true.
2. The Learned Judge erred in law and fact to have concluded in paragraph 190 and 200 of her judgment stating that: *“As regards the defence of substantial truth, the first defendant did not need to show that every single characteristic of the statement made was true, merely that it was substantially true (see Alexander v North Eastern Railway Co [1865] 6 B & S 340)”*. 200.. *“As mentioned, the First Defendant has not shown that the comments made in relation to the Plaintiff are substantially true. He has on his own version stated that there was no intention to impugn any corruption on Mr. Savy”*. The fact is that the First Defendant in fact showed that the statements were true and not that they were substantially true. The Judge definitely erred in law regarding this.” (verbatim)
15. The basis on which the learned Trial Judge had arrived at a decision after a detailed examination of the pleadings, the evidence led by both parties to the action and the law pertaining to defamation is stated at paragraphs 189-200 of the judgment. I therefore set out herein paragraphs 189-200 of the judgment verbatim on which the grounds of appeal have also been based.
- “[189] Judged against the present case, it is clear that the statements made by Mr. Afif were not based on facts which are true. His own version was that he

was not accusing Mr. Savy of corruption or corrupted activity. So implying this in his presentation was not factual.

[190] As regards the defence of substantial truth the First Defendant did not need to show that every single characteristic of the statement made was true, merely that it is substantially true. (See: **Alexander v North Eastern Railway Co [1865] 6 B & S 340**).

[200] As mentioned, the First Defendant has not shown that the comments made in relation to the Plaintiff are substantially true. He has on his own version stated that there was no intention to impugn any corruption on Mr. Savy.”

16. In relation to paragraph 189 of the judgment, I do not agree with the learned Trial Judge’s finding that the Appellant by saying that he was not accusing the Respondent of corruption or corrupt activity, had implied, that the statements he made in his presentation were not factual, namely not based on facts which are true.

17. Also, in relation to paragraph 200 of the judgment, I am of the view that the Appellant’s position that he had no intention to impugn any corruption on the Respondent, does not go to establish that the Appellant failed to show that the comments made in relation to the Respondent are substantially true as stated by the Trial Judge.

18. The learned Trial Judge had at paragraphs 160, 161 and 162 of the judgment accepted Mr. Afif’s statements as to the truth of the state of Air Seychelles when she said: “Particularly, since the objective facts are that Air Seychelles did suffer losses, that it get a bail out from Government of SCR 225 million, that it did lease aircrafts at an average amounts above USD 10,000 per day, that at least two aircrafts

did not fly frequently, that as a result of significant losses...,” At paragraphs 161 & 162 of the judgment, she accepts Mr. Afif’s statements as to “the truth of the state of Air Seychelles”. At paragraph 162 of the judgment the learned Trial Judge had stated: “In the circumstances of this case, Mr. Afif’s defence to the claim was that the statements were substantially true, and that he shared this in the public interest. That was what he led in evidence.” At paragraph 146 of the judgment the learned Trial Judge had said that it was accepted that SCR 255 million was paid to Air Seychelles by Government and this may be taken as an objective fact. Again, at paragraph 152 the learned Trial Judge had said: “It was established during the evidence that Air Seychelles did suffer a loss of Euro 5.4 million. So his statement of this to the crowd was, objectively, one of fact”. At paragraphs 142 & 144 of the judgment the learned Trial Judge had said: “It seems factual and it seems on Mr. Savy’s own version, that the amounts for the leases exceeded USD 10,000 per day... The evidence, of both the Plaintiff and Mr Afif, revealed that Air Seychelles expended more than USD 10,000 on leased aeroplanes”. At paragraph 135 of the judgment the learned Trial Judge had said: “It was not contentious, during the proceedings that the tickets were sold to Air France at SCR 4200 for a single trip whereas Air France resold the tickets at a much higher rate of Euro 800”. The said statements by the learned Trial Judge are totally contradictory of what she had stated at paragraphs 189 and 200 of the judgment as referred to at paragraph 15 above, and thus the very basis of her entire decision is erroneous and faulty and cannot stand. The statements by the learned Trial Judge shows that she had accepted as truthful the comments made at paragraphs 3.2/4.2; 3.3/4.3; 3.4/4.4 and 3.5/4.5 of the Plaintiff.

19. The Appellant in his evidence had said that what he had stated at paragraph 4.2 (4.3) of the Plaintiff, referred to at paragraph 4 above, are based on the 2010 and 2009 Financial Statement of Accounts of Air Seychelles which had been signed by the board of directors and produced at the Trial as P4 and also D1. The Appellant

testifying had stated “Air Seychelles lost 5.4 million Euro in 2009, I stand by it, that is from their accounts...Government gave Air Seychelles a subvention of 255 million rupees...that is equivalent to 5500 from every worker in Seychelles, that it is a fact.” The Respondent had while testifying said “Yes, the question Air Seychelles had lost 5.4 million Euros in 2009 is correct” and “the 2009 audited account showed a loss of 5,4 million euro and it was shown in the audited accounts”, but complained that the Appellant had failed to mention the profits Air Seychelles had made during his tenure as CEO and the probable causes for the loss of 5.4 million, namely rise in oil prices, inability to hedge the fuel prices, damage to one of Air Seychelles aircraft in Paris, and increased competition from other Airlines like Emirates, Qatar and Ethihad following adoption of the open sky policy. The bailout from the Government according to the Respondent was partly for the deposit of the 787 aircraft and the twin otters Air Seychelles purchased. Requesting money from Government as capital injection according to the Respondent was something normal.

20. As regards statements at paragraph 4.4 of the Complaint, referred to at paragraph 4 above, the Appellant had stated, that too was based on the Financial Statement of Accounts of Air Seychelles, produced as D1 and the lease agreement between Air Seychelles and ILFC, produced as D2. In this regard the Appellant had said: “I rest my case that the statement I put is very conservative and objective and factual and based on the audited accounts”. The Appellant had detailed out the basis he arrived at the figure USD 10,000 per day, per aircraft, which ILFC collected. He had not however stated that this was the average he was presenting for the five aero-planes that were leased. The Respondent had admitted that the lease of the five aircrafts had come to USD 9300 per day. He had said that two aircrafts were used to substitute any of those that required maintenance for two or four weeks, but disagreed that due to the schedule of flights, it was not possible to have two aero

planes permanently grounded. Save his oral testimony, the Respondent did not however produce any documentary evidence, like schedules, to show that these two aero planes were operated.

21. As regards statements at paragraph 4.5 of the Plaint, referred to at paragraph 4 above, the Appellant had stated, that was based on the “Code Share Agreement between Air Seychelles and Air France which gave details of what the agreed rates will be per sector by Seychelles”, which was produced as D3 and the document prepared by him and produced as D5, after research he had done on several websites regarding the comparative airfare rates, that tickets from Charles de Gaulle to Seychelles were sold at the market. This document produced as D5 had taken into consideration the rates of Air Seychelles, Emirates and Qatar. According to the Appellant the statements were factual and the reference to friends was to Air France the partner of Air Seychelles. By the Respondent himself stating to Court that: “The statement that said that I was selling tickets to my friends...is a... reference...to Air France” shows that the Appellant had not referred to any personal friends of the Respondent as Counsel for the Respondent had insinuated, and which could have been seen as a serious allegation against the Respondent as stated at paragraph 9(iii) above. The Respondent had however contested the amounts stated by the Appellant as fares at paragraph 4.5 of the Plaint. He had said Euro 280 was for a one-way ticket and a two-way ticket was Euro 560. But this is exactly what is stated at paragraph 4.5 of the plaint: “...Air Seychelles was selling a ticket to its friend Four Thousand Two Hundred (4200) rupees to travel from France to Mahe.” The Appellant had not said SR 4200 was for a two-way ticket and thus tried to mislead the public. The Respondent had however admitted that when Air Seychelles blocked seats to Air France it had not differentiated between business class and economy and sold both type of seats at Euro 280 for a one-way ticket. He had also admitted that when Air France sold the seats they would not have differentiated between

economy and business class and would have sold business class tickets for a higher price. According to the Respondent when Air France resold the tickets, they were in certain circumstances inclusive of accommodation and transfer fares which tour operators were providing.

22. As regards statements at paragraph 4.6 of the Complaint, referred to at paragraph 4 above, the Appellant had stated, the picture shows the Plaintiff with Mr. Shah and a part of a Lease Agreement, which is a government document publicly available showing the lease that was paid by the company to the Government, namely an annual rent of R1. According to the Appellant this was factual and can be verified and there was nothing malicious about it. No allegation of dishonesty had been made against Mr. Shah and thus there was nothing to indicate that the Respondent was in cahoots with a dishonest person as stated by him, so as to dirty the Respondent's name. According to the Appellant "Birds of the same feather is a manner of speech of saying that they were friends". According to the Appellant the slide spotlighted while Air Seychelles was running at a loss "there are those who live well, that is why I said the good life". According to the Respondent the contents of paragraph 4 inferred "that whilst Air Seychelles was going through great pain that I was partying with Mr Shah who has got land for next to nothing". This is an allegation that does not cast any aspersions of dishonesty against the Respondent but shows, in the Respondent's own words, indifference to the plight of Air Seychelles. This is similar to the well-known adage 'Nero playing the flute while Rome was burning.' The Respondent had said that he had no leases from the Government.

23. In view of the learned Trial Judges findings referred to at paragraph 18 above and the evidence of the Appellant and Respondent referred to at paragraphs 19-22 above it was totally incorrect for the Counsel for the Respondent at paragraph 14 in his 'Supplementary Heads of Argument of Respondent' dated 18 April 2022 to have

stated: "...slides combined with statements made by the Appellant were both reckless and false. He [*reference is to the Appellant*] had sufficient knowledge that his statements were false." This amounts to misleading this Court.

24. The Respondent's main complaint is that in three of the slides his picture was placed and one contained the word 'corruption' at the top of the slide with his picture on it. This according to the Respondent damaged his reputation severely. According to the learned Trial Judge "Despite Mr. Afif's denials, that his choice of words, selection of pictures, and presentation impugned Mr. Savy's integrity, an objective view of the words and the presentation thereof support the view that he did place Mr. Savy at the centre, and suggest that his actions in the management of Air Seychelles, which according to him had corrupt elements, led to the demise of Air Seychelles." Having made that statement, the learned Trial Judge poses the question at paragraphs 160 & 161 of the judgment: "The question arising is whether attributing these losses and bad decisions on Mr. Savy, amounted to defamation of his character? In other words, does the truth of the state of Air Seychelles excuse Mr Afif's statements or attribution of these on Mr Savy?" The learned Trial Judge then goes on to answer the question by stating: "that it does not" because "The truth of the state of affairs at Air Seychelles could have been said without reference to Mr. Savy." By stating that 'the truth of the state of affairs at Air Seychelles could have been stated...', the Learned Trial Judge accepts, that statements made by the Appellant in relation to the state of affairs at Air Seychelles were true. Undoubtedly, the truth of the state of affairs at Air Seychelles could have been said without reference to Mr. Savy, but the issue before the Court is whether the reference to the Respondent by placing his picture in three of the slides and in one of them with the word 'corruption' at the top of the slide, amounts to defamation of the Respondent in the perception of the two witnesses who testified on behalf of the Respondent. In my view this is the main issue to be determined in this appeal, in view of the learned

Trial Judge's question at paragraph 166: "But does what he said in relation to Mr Savy amount to defamation?"

25. What is important is not what the Respondent or the Trial Judge or those who had not testified in the case feel, about the slides and comments, but the evidence from witnesses who testified in the case about their perception on seeing the slides and hearing the comments, and the Trial Judge's belief in their evidence in coming to the conclusion that the Respondent had in fact been defamed. The question that arises for consideration is, had the Respondent proved what he had set out to prove at paragraph 10 (iv) of the Plea, referred to at paragraph 8 above, namely "a large but unqualified number of persons who heard the words complained of would reasonably have understood them to be referring to the Plaintiff". The Respondent had, in support of his case called Mr. Richard Young and Mr. Emile Belmont. Mr. Richard Young was a close friend and colleague of the Respondent, who had known him for 35 years and who was also a pilot who worked with him at Air Seychelles, when the Respondent was Chairman. Mr. Emile Belmont was a mechanic who had known the Respondent for 38 years through his stepfather Mr. Rene. According to Belmont, the Respondent was a respectable person and not somebody he knows as a 'fouter dezord' (one who screws up). He had said that he "could not even believe that the video I was seeing was real..." and that he is still confused that "if those things really happened". I am of the view that the evidence of both these witnesses should be taken into consideration with a certain amount of circumspection as they cannot be treated as truly independent witnesses. A doubt also arises in the mind whether their perception of the Respondent whom both knew for over 35 years as an honourable person could have simply changed on seeing a slide which had the Respondent's photo on it with the word 'corruption' written on top of it. A doubt that strikes a person on seeing or hearing something about a close friend does not change the opinion of that close friend. The learned Trial Judge had not analyzed

the evidence of Young and Belmont and made a determination that she believed that in the perception of Young and Belmont the Respondent had been defamed in arriving at the decision.

26. I have at paragraph 5 above stated, that save for placing the Respondent's picture on three of the slides and in one of the slides the word 'corruption' at the top of the slide, there is no mention at all specifically by name or by innuendo to the Respondent in the publications. There is nothing stated therein which amounts to corruption by the Respondent. The only other reference to the Respondent is at paragraph 4.6 of the Plaintiff, in respect of which I have made my comments. Even if the photograph of the Respondent had not been on the slides everyone in Seychelles knew that that the Respondent was the face of Air Seychelles as stated by the Appellant and admitted by the Respondent himself. Therefore, the very basis for the learned Trial Judge's decision, namely: "The truth of the state of affairs at Air Seychelles could have been said without reference to Mr. Savy.", loses its significance.

27. I am of the view that the learned Trial Judge had failed to appreciate what the Appellant at the trial had tried to expose was the true state of affairs at Air Seychelles, and placing a photograph of the Respondent in three of the exhibits marked and produced at the trial as P4 was not with the intention of impugning any corruption on the Respondent but merely to relate Air Seychelles with the Respondent, as the Respondent was seen as the face of Air Seychelles and was often on TV representing Air Seychelles. In this regard the learned Trial Judge appears not to have taken into consideration the Respondent's own evidence "I am Air Seychelles, I was the CEO and Chairman of Air Seychelles" when asked in cross examination "But you are not Air Seychelles Mr. Savy?". The Respondent had also said, the Appellant "was obviously having a go at the Government because he is an

inspiring Politician at the time and he dragged my name and myself with corruption...” In view of the Respondent’s evidence, it would not have made a difference if as the learned Trial Judge had stated: “The truth of the state of affairs at Air Seychelles could have been said without reference to Mr. Savy”, because as stated earlier the Respondent was always seen as the face of Air Seychelles. In fact, the Respondent himself had in his Complaint pleaded, as referred to at paragraph 9 (i) above that he “was from February 1997 to February 2011 occupying the post of Chairman and Chief Executive Officer in the Air Seychelles Limited and the occupation of the said posts by the Plaintiff was public knowledge in the Seychelles”. Thus, I take the view that there was no need for the Appellant to bring evidence to the fore that the Respondent had caused losses and was responsible for managing the company in a corrupt manner, and that this corruption led to the demise of Air Seychelles, as stated by the learned Trial Judge, since the Appellant throughout his evidence had stated that it was not his intention to defame the Respondent but merely to expose what happened at Air Seychelles. Placing the photograph of the Respondent on three of the exhibits in my view was merely to identify Air Seychelles with its Chairman and CEO, just like placing photographs of Air Seychelles aircraft in three of the other exhibits. In one of the exhibits the Respondent is seen seated with the then CEO of Air Seychelles, Dr. Rajiv Bissessur.

28. I am of the view that the sole reason for the Respondent’s suit against the Appellant was his misconception that whatever was said about the affairs of Air Seychelles, which is a public company, was said about him as he considered himself as Air Seychelles. That is why he had stated that even in relation to those slides where his photograph did not appear but the word ‘corruption’ was written, was a reference to him. When Counsel for the Appellant had challenged him in cross-examination: “I put it to you that you yourself Mr. Savy takes Air Seychelles as your own company when it is not as it is a Government owned company” the Respondent’s answer had

been: “We have a difference of opinion Mr. Andre.” When Counsel for the Appellant told the Respondent that the Appellant had not dragged the name of the Respondent nor mentioned his name in any of the comments or slides, the Respondent’s response had been “Yes he did, he took my picture, there is only one David Ralph Savy in Seychelles”. But there was no mention of the words David Ralph Savy in the slides or comments.

29. The Appellant had said in relation to the Complaint filed against him “I have never been malicious in the statements that I made, I have given facts based on evidence which I have produced and which can be verified. At no point have I made any attack on any individual in my statement...I did show images of the executives who were responsible for the company but my objective was to show that the company was running at a loss, was to show that there were decisions that have been made which in my view were decisions which were not right, did not reflect market reality and therefore I have never intended anything malicious against Mr Savy or any individual. My object was simply to show matters were wrong, the numbers did not add up.”

30. I am also of the view that in the circumstances of this case and in the context of what has been pleaded by the Respondent in his complaint at paragraphs 3.1 to 3.7 with its English translation at paragraphs 4.1 to 4.7; the word ‘corruption’ that appears in three of the slides does not convey the meaning that, the Respondent was ‘corrupt’. The Appellant had stated “I used the word corrupt in the sense deviating or not following the norm or altering from the original, and not bribery”, and that too in relation to Air Seychelles and not the Respondent. When confronted by Counsel for the Respondent with the definition of ‘corruption’ in the **Oxford Dictionary** the Appellant had stated he had placed reliance on one of the meanings attributed to corruption in the said dictionary namely “to alter from the original” (page 169 of

the Court of Appeal brief). Appellant's use of the word 'corruption', although different from the traditional meaning attributed to it, thus comes within the definition of the word 'corruption', in the Oxford Dictionary. It also comes within the definition in **The Chambers Dictionary**, namely to 'spoil', in the **Meriam Webster Dictionary**, namely to change from good to bad and in the **Britannica Dictionary**, namely to change (something) so that it is less valuable. There is in my view, a slight distinction in the use of the word 'corruption' and 'corrupt' in common parlance, especially when used in relation to an institution and an individual. In the circumstances I am of the view that the learned Trial Judge should have made a determination as to whether she disbelieved or believed the Appellant's evidence as to what he meant to convey by the use of the word 'corruption'. This is because according to the cases of **Esparon V Fernez and anor (1980)**, **John Talma and Robert Ernesta and three others SCA 37 of 2017** and **Pillay V Pillay (CS 15/10) [2013] SCSC 68** referred to later in the judgment, the intention of the speaker also has a bearing in cases of defamation. Had the Appellant, used the word 'corrupt' against the name of the Respondent; that may have given rise to a claim that the Respondent had been defamed, provided the contents of what had been pleaded at paragraphs 3.1 to 3.7 made reference to corrupt or dishonest acts by the Respondent. It is my view one has to see whether the contents of the statements made and slides referred to in the plaint goes to show that the Respondent was a 'corrupt' person.

31. It is my view that placing the word 'Corruption' on top of one of the slides where the photograph of the Respondent was placed cannot be viewed in isolation of the contents in the slides or the comments made. If the comments do not show that the Respondent was corrupt but merely there had been losses suffered by Air Seychelles due to wrong decisions by Air Seychelles, the Respondent cannot succeed in a case of defamation. For example, if in relation to a parastatal like that of Air Seychelles the words 'dishonesty or deception or fraud' was written on top of a slide where the

photograph of its chairman or managing director, who is known as the face of the parastatal had been placed, with allegations of bad planning, over staffing, overspending, neglect of equipment and wastage of material, and without any direct allegations against such person of corruption, there can be no complaint of defamation by the chairman or managing director.

32. The learned Trial Judge had set out the law applicable to defamation at paragraphs 167 to 188 of the judgment. In doing so she has referred to the right to dignity (article 16) and privacy (article 20), the right to freedom of expression (article 22) and the right to freedom of peaceful assembly which includes political freedom (article 23) enshrined and entrenched in the Constitution. The learned Trial Judge had referred to article 9(1) of the Civil Code which makes reference to a person's right to privacy and confidential information. The learned Trial Judge had referred to the Seychelles cases of *Esparon V Fernez and anor* (1980) SLR 148, *Pillay V Pillay* (CS 15/10) [2013] SCSC 68 (16 October 2013), *Regar Publications V Pillay* SCA 3/1997, *Talma V Henriette* (1999) SLR 108, *Latour V Maillard* (CS 120/2011) [2016] SCSC 54 (02<sup>nd</sup> February 2016) para 17, *Bastienne V Ernesta & Another* (CS 108/2016) [2018] SCSC 663 (11 July 2018) para 29 & 34). She had cited the case of *Hector V Attorney-General of Antigua and Barbuda* [1990] 2 AC 312 where Lord Bridge had said: *"In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind..."* Citing the case of *London Artists Ltd V Littler* [1969] 2 QB 375 the learned Trial Judge had referred to what Lord Denning said in that case: *"Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or others; then it is a matter of public interest on which everyone is entitled to make a fair comment"*.

33. The learned Trial Judge at page 177 of the judgment makes reference to the case of **Esparon V Fernez and anor (1980)** where **Sauzier J** summarizes the law of defamation of Seychelles as follows:

“Under article 1383 of the Civil Code of Seychelles, defamation is governed by the principles of English Law. The following are the relevant principles for this case:

1. A man commits the tort of defamation when he publishes to third-person words containing an untrue imputation against the reputation of another.
2. ...
3. A man stating what he believes to be the truth about another, is protected in so doing, provided he makes the statement honestly and without any indirect or improper motive.” (verbatim from the judgment of the learned Trial Judge, save for emphasis added by me)

34. In the case of **John Talma and Robert Ernesta and three others SCA 37 of 2017** this Court citing the Supreme Court case of **Pillay V Pillay (CS 15/10) [2013] SCSC 68** stated that a plaintiff among others must prove that the accusation is done intentionally or with fault such as wanton disregard of facts or with malicious intention.

35. The principles that emerge from the said cases as regards the elements of defamation, relevant to this case are as follows:

- a) Publication to third persons must be intentional and unlawful
- b) It should have damaged the reputation of the plaintiff by lowering him in the estimation of right-thinking members of the public
- c) What has been published should be false and
- d) It should have been done maliciously

The defences to an action for defamation as in the instant case are:

- a) Publication was true and was in the public interest
- b) Publication was a fair comment and a bona fide and honest expression of the commentator's opinion.
- c) Qualified privilege – namely that freedom of expression outweighs the protection of reputation.

36. The burden of proving the truth, public benefit and fair comment rests on the defendant. A defamatory statement is presumed to be false unless the defendant can prove its truth. It is for the plaintiff to prove malice if he is to negate the defence of fair comment and this is more so where the plaintiff, is a public figure. In **John Talma and Robert Ernesta and three others SCA 37 of 2017** this Court citing *Kim Koon V Wirtz (1976) SLR 101* held “*that the law of defamation applicable in Seychelles is the law in force in the United Kingdom on 31 October 1975.*” Similarly, in **Biscornet V Honore (1982) Sauzier J** stated “*In cases of defamation therefore it is the English law in force when the Civil Code of Seychelles 1975 was enacted which applies...*” In this respect it is in the 4<sup>th</sup> edition that we will find the English law of Defamation applicable to Seychelles. It is stated at **Halsbury's Laws of England, 4<sup>th</sup> edition paragraph 145 Note 9** that the principles that apply to malice in relation to the defence of qualified privilege as stated by **Lord Diplock in the case of Horrocks V Lowe [1975] AC 135, 1 All ER 662**, also apply to the defence of fair comment. It is stated at **Halsbury's Laws of England, 4<sup>th</sup> edition paragraph 146**: “*The plaintiff must give particulars of the facts and matters from*

*which malice is to be inferred. He must satisfy the jury on the balance of probabilities that the defendant acted maliciously...*” This is the position in the US in accordance with the decisions in **New York Times Co. V Sullivan [1964] 376 US 254**, **Curtis Publishing Co. V Butts [1967] 388 US 130** and **Associated Press V Walker [1967] 389 US 28**. In the case of **New York Times Co. V Sullivan [1964]** Justice Brennan of the Supreme Court stated: “The constitutional guarantees require. ...a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct *unless he proves that the statement was made with ‘actual malice’ - that is, with knowledge that it was false or with reckless disregard of whether it was false or not.*” It is to be noted that the US and English law of defamation was very much similar during 1975.

37. The Plaintiff had also to prove that publication damaged his reputation. The Respondent by alleging specifically at paragraphs 3, 5 and 8 of the Plea, that the Appellant had made the defamatory statements about him maliciously, had taken upon himself to prove the said matter. See paragraphs 3, 6 & 8 above. This is more so as the Appellant on the other hand throughout his Statement of Defence denied that the statements were made maliciously and maintained the position that they were made without any malice but merely to expose the conduct of the affairs of Air Seychelles as a public company whereby the Respondent was Chairman and Chief Executive for over 15 years. It is trite law that he who asserts must prove.

38. At **Halsbury’s Laws of England, 4<sup>th</sup> edition paragraph 145** in defining ‘What is malice’ it is stated: “*Express or actual malice is ill will or spite towards the plaintiff or any indirect or improper motive in the defendant’s mind at the time of the publication which is his sole or dominant motive for publishing the words complained of. The defences of both fair comment and qualified privilege are defeated by proof that the defendant published the word complained of maliciously.*”

39. I have perused the Respondent's evidence carefully but do not find anything to the effect that the statements and publications made by the Appellant were borne out of malice towards him, despite his averments in the plaint it was so. Quite contrarily, the Appellant had throughout his evidence maintained (on about 17 occasions in the course of his evidence) that the comments made were in the public interest, not malicious or defamatory on matters of purely public interests, in good faith and without malice.

40. The learned Trial Judge had as stated at paragraph 18 above, accepted that the publication was true and was a fair comment. Undoubtedly such publication was in the public interest. The learned Trial judge had failed to consider the judgments of **Esparon V Fernez and anor (1980)** and **John Talma and Robert Ernesta and three others SCA 37 of 2017** referred to at paragraphs 33 and 34 above. The learned Trial Judge has failed to make a determination that the publication was done maliciously, an element the Respondent had to establish in order to succeed in his action. In fact, she had not even adverted to it in her judgment. There is no doubt that the Respondent was a public figure who was responsible for the proper functioning of Air Seychelles and the public had a right to know about the affairs of Air Seychelles which is a public company. I wish to repeat the words of **Lord Bridge in the case of Hector V Attorney-General of Antigua and Barbuda [1990] 2 AC 312**, referred to by the learned Trial Judge in her judgment: *“In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind.”*

41. The right to dignity (article 16) and the right to freedom of expression (article 22) had to be balanced for the public benefit and the learned Trial Judge, having referred to the right to freedom of expression, had failed to advert to it in her judgment. **Article 22 (1) of the Constitution of Seychelles** states: “*Every person has a right to freedom of expression and for the purpose of this article this right includes the freedom to hold opinions and to seek, receive and impart ideas and information without interference.*” Article 22 (2) states: “*The right under clause (1) may be subject to such restrictions as may be prescribed by a law and necessary in a democratic society - ... (b) for protecting the reputation, rights and freedoms or private lives of persons;*” There is presently no law in Seychelles on Defamation and the right to freedom of expression is an unqualified right. This does not however mean that one can utter any falsehood about another and get away without any liability. Freedom of expression would be an empty platitude restricted to the pages of the Constitution if not correctly balanced against the right to dignity of a single individual who had responsibility for a public institution. It is to be noted that defamation law is a reconciliation of mutually incompatible interests, namely freedom of speech and protection of reputation.

42. The Respondent had filed this action on the basis that he had been defamed. It is clear from the averments in the pleadings and the evidence, what the Appellant had done was to expose the conduct of the affairs of Air Seychelles as a public company whereby the Respondent was Chairman and Chief Executive for over 15 years and not make any untrue imputations against the Respondent. The learned Trial Judge had accepted, as stated earlier, that the statements made by the Appellant about Air Seychelles as claimed by the Respondent were based on facts which are true, although erroneously stating otherwise, at paragraphs 189 and 200 of her judgment. Thus, an important element to succeed in an action for defamation has not been established, namely the falsity of the statements. The Respondent who had averred

in his *Plaint* and thus undertaken to prove malice has failed to do so and the learned Trial Judge had failed to make a determination on this, despite the averments in the *Statement of Defence* and the insistence of the Appellant throughout his evidence that the statements made were on matters of purely public interests, in good faith and without malice. In view of the erroneous findings of the Trial Judge at paragraphs 189 and 200, she had failed to examine whether the statements made were in the public interest on matters to which the public has a right to know and in good faith. She had also failed to examine the defences of fair comment and justification raised by the Appellant. The learned Trial Judge had failed to balance the right to freedom of expression (article 22) vis-a vis, the right to dignity (article 16).

43. In view of what has been stated above I allow the appeal, quash the decision of the learned Trial Judge and dismiss the *plaint*. I make no order as to costs.

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Fernando President

Signed, dated and delivered at Ile du Port on 29 April 2022.