IN THE SEYCHELLES COURT OF APPEAL

[Coram: A.Fernando (J.A),B. Renaud (J.A), G. Dodin (J.A)]

Civil Appeal SCA 23/2015

(Appeal from Supreme Court DecisionCS 09/2013)

Sarah Carolus	1st Appellant
Maeve Carolus	2nd Appellant
Ellen Carolus	3rd Appellant
Dave Marengo	4th Appellant
Emily Marengo	5th Appellant
Versus	
Niall Scully	1st Respondent
National Drugs Enforcement Agency	2nd Respondent
The Attorney General	3rd Respondent

Heard: 24 November 2017

Counsel: Mr. J. Camille for the Appellants

Ms. L. Rongmei for the Respondents

Delivered: 07 December 2017

JUDGMENT

A.Fernando (J.A)

1. This is an appeal against the judgment of the Supreme Court whereby the Appellants' Plaint was rejected for non-disclosure of a cause of action against the Respondents, Niall Scully, National Drugs Enforcement Agency (NDEA) and the Attorney General; based on a plea in limine litis filed by the Respondents.

2. The Appellants had filed action against the Respondents for unlawful entry into their house, unlawful detention of the Appellants, and unlawful search of their premises, at Anse Royale, belonging to the 2nd Appellant. The Appellants had averred in their plaint that the agents and/or employees of 2nd Respondent (NDEA) had forcibly entered their house on the night of the 24th of August 2012, acting during the course of their employment with the 2nd and 3rd Respondent. It is averred that the NDEA agents were wearing combat uniforms and carrying submachine guns and pistols and had forcibly held the Appellants in detention at gun point in their house. It is averred that those who entered had refused to identify themselves and refused to state the reasons for the entry into their house. Marcel Naiken, one of the NDEA agents had violently woken up the 4th Appellant who was sleeping, arrested him, handcuffed him and made him to proceed in his underwear around the house, in the presence of the other Appellants, which included his daughter. Thereafter the NDEA agents had left the house after about 2-3 hours. It has been the position of the Appellants that the acts of the NDEA agents, amounts to a faute in law for which the 2nd and the 3rd Respondents are vicariously, jointly and severally liable. They have claimed a total sum of SR 1,080,000.00 by way of damages.

3. The Defence is one of a total denial. By way of a Plea In Limine Litis the Respondents have placed reliance on section 7 of the NDEA Act and also taken up the position that there is no cause of action pleaded against the 3rd Respondent and has called for the deletion of the 3rd Defendant from the Plaint on the basis that it is a misjoinder.

4. **Section 7 of the National Drugs Enforcement Agency Act of 2008** :

> "*No action shall lie against the Chief Officer, any officer, employee or agent of the NDEA or any person acting under the director of the NDEA, for anything done in good faith in the exercise or discharge of any powers, duties or functions under this Act.*"

5. I am simply surprised by Counsel for the Honourable Attorney General who filed the Defence in this case on behalf of the Respondents and appeared at the trial below. I must however mention that he is not the one who appeared for the Respondents at the hearing of this appeal. Counsel who filed the Defence appears to have had no clue of pleadings in civil cases and especially **section 75 of the Seychelles Code of Civil Procedure** which states "*The statement of defence must contain a clear and distinct statement of the material facts on which the defendant relies to meet the claim...*", for the Defence filed is a lengthy story, never seen before in this Court. It contains all and even more than the evidence that could possibly have been led at the trial. For instance lengthy details of how they gained entry into the house and how the search was carried out and the details of the information received by the NDEA to carry out the search in the premises of the Appellants. One such being that "That information has been in the possession of the NDEA for some time to the effect that firearms were being brought into the country by

those involved in illegal drug related activities and that a number of operations had been carried out in an attempt to recover those firearms. That evidence of such importation is now in the public domain following the seizure of a lethal firearm, namely a kalashinikov (AK 47) that was seized in conjunction with the importation of a consignment of illegal drugs in an NDEA operation conducted on the 7.12.2012. Hence any person, their associates and their premises would come under the purview of the law." (verbatim from paragraph 2 of the Defence). On the face of the pleadings, the incident pertaining to the importation of a firearm and illegal drugs is totally unconnected to the search that was carried out in the premises of the Respondents. Surely importation of a firearm and illegal drugs into the country cannot be a basis to put 'any person', in Seychelles, under surveillance of the law. I am compelled to make reference to the poor quality of drafting of pleadings, for the Honourable Attorney General to take note of this and advise his counsel accordingly.

6. Another reason attributed by the defence for the search of the premises was that the NDEA had received information "that a breach of the Misuse of Drugs Act was taking place at Grand Anse, Mahe and that the owner of the land Mr. Marengo, Plaintiff No. 4 (4th Appellant herein), was in possession of a firearm and that he had threatened to use this firearm..." It is to be noted that NDEA had carried out the search not in Grand Anse, Mahe, but in the house of the 2nd Appellant at Anse Royale. There is nothing alleged in the defence which sets out a basis for the search of the 2nd Appellant's house at Anse Royale and for suspecting the 1st, 2nd, 3rd, and 5th Appellants and their detention.

7. The learned Trial Judge in his Ruling had upheld the Plea in limine litis and rejected the plaint for non-disclosure of a cause of action against the Respondents on the basis that in view of the provisions of section 7 of the NDEA Act and the presumption that all State actions have been done in good faith it was obligatory on the Appellants to "specifically plead 'malice' to take out the actions of the State officers from the ambit of 'good faith'".

8. The Appellants' have filed the following grounds of appeal:

    1) "The Learned trial judge erred in law and on the facts to have concluded that on the basis of the plaint, there was no sufficient material averred on which the Appellants could proceed further with the matter.

    2) The learned trial judge erred in law and on the facts to have concluded that the Appellants ought to have pleaded *malice* such as to take the action of the Respondent outside the scope of the Respondents' legal ambit and to convert their actions into a *faute* in law.

3) The learned trial judge erred in law for having failed sufficiently to address the legal points raised by way of *Plea in limine* in its entirety and further erred in law to have insufficiently addressed his mind to the reply raised by the Appellants to the same points so raised by the Respondents.

4) The learned trial judge erred in law for having wrongly applied the law as regards to pleadings as presented in the plaint of the Appellants before him and moreover wrongly came to the conclusions as laid down in the same Ruling.

5) The learned trial judge erred in law for having wrongly appreciated the law as regards to the hearing on matters raised in Plea in limine litis and moreover for having come to the ruling in the absence of evidence before him, upon which same decision would have been based." (verbatim)

9. The Appellants have sought by way of relief for "an order reversing the dismissal of the Plaint and an order for the matter to be heard on the merits of the case before the Supreme Court". (verbatim)

10. A determination of grounds (2) and (5) would suffice to dispose of this appeal, namely, whether the learned trial judge erred in law for having made his ruling in the absence of evidence before him and concluding that the Appellants ought to have pleaded *malice* such as to take the action of the Respondents outside the scope of the Respondents' legal protection and to convert their actions into a *faute* in law.

11. In **N S Bindra's 'Interpretation of Statutes', 10th Edition**, it is stated: "'Malice' in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act, done intentional without just cause or excuse. Malice signifies some improper and wrongful motive."According to **Black's Law Dictionary, 9th edition**, among the various meanings that can be attributed to 'malice', is "reckless disregard of a person's legal rights". 'Good faith' according to the said book, "includes due inquiry. 'Good faith' implies not only an upright mental attitude, and clear conscience of a person, but also the doing of an act, showing that ordinary prudence has been exercised according to the standards of a reasonable person. 'Good faith' contemplates an honest effort to ascertain the facts upon which the exercise of the power must rest. It must, therefore, be summed up as 'an honest determination from ascertained facts'. 'Good faith' precludes pretence or deceit, and also negligence and recklessness. A lack of diligence, which an honest man of ordinary prudence is accustomed to exercise, is in law, a want of good faith..." According to **Black's Law Dictionary, 9th edition**, among the various meanings that can be attributed to 'good faith', depending on the context it is used; is, "A state of mind consisting in honesty in belief or purpose and faithfulness to one's duty or obligation". In my view 'Bad faith', which has its core in malice and ill will also

embraces unreasonableness and arbitrariness. Where police officers exercising their duties is characterised by abuse of power or gross negligence or imprudence, they could not be said to be acting in good faith as per the decision in **Attorney-General VS Labonte, SCAR 2006-2007, 213**.

12. Thus the words: 'anything done in good faith in the exercise or discharge of any powers, duties or functions' in the context of section 7 of the National Drugs Enforcement Act does not necessarily mean that one has to necessarily plead 'malice' in the plaint, to take away the immunity granted to NDEA officers under section 7. A lack of diligence, which an honest man of ordinary prudence is accustomed to exercise, is in law, a want of good faith as stated earlier. Thus in my view the learned Trial Judge erred in concluding that it was obligatory on the Appellants to "specifically plead 'malice' to take out the actions of the State officers from the ambit of 'good faith'". 'Malice' although not specifically pleaded, can be inferred from the pleadings in the plaint pertaining to forcible entry into the house and detention at gun point of the inmates of the house, refusal to identify themselves and refusal to give reasons for the entry into the house. Also the pleadings in the Statement of Defence in relation to the incidents pertaining to the importation of a firearm and the consignment of drugs which is totally unconnected to the search that was carried out in the premises of the Appellants show that there was no reasonable basis for the search of the 2nd Appellant's premises. The Trial Judge's rejection of the plaint for non-disclosure of a cause of action against the Respondents on the basis of not specifically pleading 'malice' was therefore faulty.

13. The relevant principle relating to circumstances in which the deficiency in, or absence of, pleadings could be ignored, was stated by a Constitutional Bench of the **Supreme Court of India in Bhagwati Prasad vs. Shri Chandramaul - AIR 1966 SC 735** :

"*If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matter relating to the title of both parties to the suit was touched, though indirectly or even obscurely in the issues, and evidence has been led about them then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence*

and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another." (emphasis added)

14. The principle was reiterated by the **Supreme Court of India in Ram sarup Gupta (dead) by LRs. vs. Bishun Narain Inter College [AIR 1987 SC 1242]**:

"*The pleadings however should receive a liberal construction, no pedantic approach should be adopted to defeat justice on hair splitting technicalities. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law, in such a case it is the duty of the court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of pleadings, instead the court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings, parties knew the case and they proceeded to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal.*" (emphasis added)

15. The above principle was reiterated again by the **Supreme Court of India in Bachhaj Nahar VS Nilima Mandal and Anr, Civil Appeal Nos 5798-5799 of 2008.**

16. The learned Trial Judge had also stated that: "In my view the averments are in no way sufficient to take out the actions of the NDEA officers from the ambit of the operation of the presumption of good faith. Therefore, I do not find sufficient material averred in the plaint on which the plaintiffs can proceed further." The learned Trial Judge had decided this case on the basis of the pleadings. The very purpose of trial is to allow a party to present evidence to overcome the disputable pleadings and the presumptions involved. Otherwise, if trial is deemed irrelevant or unnecessary, owing to the perceived indisputability of the pleadings or presumptions, the judicial exercise would be relegated to a mere ascertainment of the pleadings and what presumptions apply in a given case, nothing more. In my view for section 7 of the NDEA Act to apply there must be an assessment of evidence led before the Court and this cannot be decided simply on the basis of the pleadings before the Court. The Appellants should not be denied the opportunity to show by evidence that those who entered the premises of the Appellants were not acting with diligence, which an honest man of ordinary prudence is accustomed to exercise and were acting unreasonably and arbitrarily.

17. In the case of **Gangadoo v Cable and Wireless Seychelles Ltd, (2013) SLR 317**, this Court held that, pleas of Res Judicata, prescription and abuse of process cannot be

determined on a plea in limine litis, merely on the basis of the Statement of Defence which does not sufficiently describe the said matters or establish the necessary elements of the said pleas, without hearing evidence.

18. I therefore allow the appeal and make order reversing the dismissal of the Plaint and further order that the case be heard on the merits before the Supreme Court as prayed for in the Notice of Appeal. I do not make any order for costs.

A.Fernando (J.A)

I concur:. ..... B. Renaud (J.A)

I concur:. ..... G. Dodin (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on07 December 2017