

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2022] SCCA 1 (28 January 2022)

SCA 39/2019

(Appeal from CS 09/2013) SCSC 422

In the Matter between:

1. Sarah Carolus

2. Maeve Carolus

3. Ellen Carolus

4. Dave Marengo

5. Emily Marengo

Appellants

(rep. by Mr. Joel Camille)

and

1. Nial Scully

2. National Drugs Enforcement Agency

3. The Attorney General

Respondents

(rep. by Ms. Corine Rose)

Neutral Citation: *Carolus and Others v Scully and Others* (SCA 39/2019) [2022] SCCA 1 (28 January 2022) (Arising in CS 09/2013) SCSC 422

Before: Fernando President, Robinson JA, Tibatemwa-Ekirikubinza, JA.

Summary: Dr. L. Tibatemwa-Ekirikubinza. **Tort-Fault. Burden of Proof-** where in a civil dispute the court analyses evidence adduced by both sides and concludes that the probabilities are equal, the plaintiff will have failed to discharge their burden of proof.

Fernando, President and Robinson JA: Judgment and orders of the Supreme Court are quashed. No order as to costs

Heard: 1 December 2021

Delivered: 28 January 2022

ORDER

The appeal partly succeeds in that the Judgment of the Supreme Court is quashed.

JUDGMENT

DR. L. TIBATEMWA-EKIRIKUBINZA, JA

The Facts

1. The appellants lodged a suit in the Supreme Court contending that they were unlawfully searched and detained by officers of the National Drugs Enforcement Agency (NDEA). They claimed damages amounting to SR 1,080,000/= under various heads.
2. The background to the case is that on the night of 4th August 2012 around 22:00 hours officers of the National Drugs Enforcement Agency (NDEA) entered the appellants' residence at Grande Anse, Mahe.
3. The NDEA officers averred that they suspected Dave Marengo (4th appellant) to be cultivating a prohibited drug, cannabis, at his farm at Grand Anse. They also suspected him to be in unlawful possession of a firearm. The search at the farm yielded neither the prohibited drug nor a fire arm. The search team then moved to the residence of the appellants. The defendants testified that when they reached the residence they knocked on the door and identified themselves but no one opened the door. One of the officers entered the house through an open window, opened the door and let in the other officers.
4. That upon conducting the search, the 4th appellant was found with a bayonet- a weapon used in army combat. The weapon was confiscated on the premise that it was government property.
5. On the other hand, the appellants alleged that the search was unlawfully conducted because the NDEA officers did not identify themselves upon entry, had no search warrants and subjected the appellants to trauma. In its defence, the 2nd respondent argued that according to Section 20 of the NDEA Act, a Police Officer had authority to conduct a search without a warrant. Furthermore, by virtue of Section 7 of the NDEA Act, the

agents were clothed with immunity against any action done in good faith in exercise of the duties and functions of an NDEA officer.

6. Premised on the foregoing provisions, the 2nd respondent argued that there was no cause of action disclosed in the appellants' plaint and prayed that it be dismissed.
7. The trial Judge (Nunkoo J) held that although NDEA Act provides immunity for complaints against conduct during a search, the immunity is not unconditional. The immunity covers only actions done in good faith. It was however the finding of the judge that although the appellants had indeed gone through a lot of embarrassment and suffered trauma, they had failed to prove that the search was unlawful and had been conducted in bad faith and thus the actions of the respondents did not amount to fault. Consequently, the Judge dismissed the appellants' plaint. He made no order as to costs.
8. Dissatisfied with the trial Judge's decision, the appellants appealed to this Court on grounds that:
 1. **The learned trial Judge erred in law and fact by concluding that the search was lawful and that it was done in good faith, without first having an appreciation and a proper evaluation of the evidence before him.**
 2. **The learned trial Judge erred in law and on the facts in failing, sufficiently or at all to assess the evidence adduced by the appellants in its entirety which clearly showed that the Police Officers acted below the standard required by them in the particular circumstances of this case.**
 3. **The learned trial Judge erred in law and on the facts in having failed to sufficiently or at all address his mind to the evidence of Mr. Nichol Fanchette which confirmed that members of the 2nd respondent had visited the appellants at their home with a view to reach an amiable settlement of the appellants' claim and hence to address sufficiently the appellants' assertion**

that the said visit amounted to an admission of liability by the respondent for the wrong doings of the Police Officers at the material time.

- 4. The learned trial Judge erred in law for having wrongly applied the law as regards the standard of care required at the material time by the Police Officers in the present case, which standard of care, the learned Judge clearly failed to appreciate was below what is required for similar instances.**
- 5. The learned trial Judge erred in his finding that the 4th appellant was suspected of cultivating marijuana and that the agents of the 2nd respondent were under a duty to search his premises in absence of any evidence of facts and or circumstances forming the basis of reasonable suspicion or evidence that he was indeed cultivating marijuana.**

Prayers

9. The appellants prayed that this Court reverses the Judgment of the lower court and the appeal be allowed with costs.

Appellants' submissions

10. Counsel contended that the learned trial judge did not make an assessment of the evidence as would be expected from a trial judge. That the learned judge did not sufficiently evaluate the evidence to ascertain whether a fault had been committed in law, in light of the respective testimonies given by the appellants. In counsel's view, the trial Judge should have approached the case by considering the following three questions:
 - (i) Whether the Respondents committed a delict (a faute)
 - (ii) Whether the fault caused harm to the Appellants
 - (iii) Whether damages were payable to the Appellants and in what quantum.

11. In respect of the above submission, counsel particularly pointed out that the learned trial judge failed to evaluate the evidence of Mr. Nichol Fanchette which confirmed that members of the 2nd Respondent had visited the Appellants at their home with a view of reaching an amiable settlement of the claim. That had the Judge properly evaluated the said evidence, he would find that the visit amounted to an admission of liability by the Respondent for the wrongdoings of the Police Officers during the search.
12. To buttress the foregoing argument, counsel relied on Justice Andre Sauzier's book- *Introduction to the Law of Evidence in Seychelles* wherein he stated that a *declaration whereby a party admits having caused an accident and agrees to compensate the victim amounts to an acknowledgment of liability based on legal principles and does not amount to a binding admission of fact.*
13. Counsel concluded on this point by submitting that the offer made by the Respondents amounted to an acknowledgement of liability on their part.
14. It was also the counsel's contention that the learned trial Judge wrongly applied the law in regard to the standard of care required by the Police Officers during the search. That the proper standard of care is that which has been articulated in the cases of **Labonte & Ors vs GOS**¹ and **AG vs. Labonte**². In **Labonte & Ors vs GOS**, the Court held that, *security personnel are under an obligation to provide their services to the required standard using their special skill and competence ... any professional service for that matter requires and involves the use of special skill, knowledge and competence ... The member of the police force and other disciplinary forces are trained only to acquire that special skill and competence.*
15. And in the case of **AG vs. Labonte**, the Court held that, *where Police Officers exercising their duties is characterized by abuse of power or gross negligence or imprudence, they could not be said to be acting in good faith.*

¹ CS No. 46/2005.

² SCAR 2006-2007.

16. Counsel further contended that the officers did not act in good faith while carrying out their duties. That the respondents' evidence shows that the Officers extended the scope of their search instructions. Counsel referred to the testimonies of Naiken and Nichol Fanchette which were all to the effect that they were instructed to search for firearms and drugs at Dave Marengo's farm, and not the house. That in fact the house did not belong to the 4th Appellant. Counsel therefore submitted that the search at the appellants' house was done in bad faith since it was outside the scope of the search instructions.
17. Counsel also submitted that the Officers failed to first ascertain ownership of the house before carrying out the search. Furthermore, they failed to identify themselves and state the purpose of their visit. That all this was evidence that the search was carried out in bad faith.
18. On the basis of the above, counsel submitted that the search, arrest and detention of the appellants was unlawful and unjustified which amounted to a fault prescribed in Article 1382(2) of the Civil Code.
19. On the issue of damages, counsel submitted that it is settled law that damages are awarded for prejudice suffered by each of the appellants resulting from the actions of the respondents. Counsel argued that the respondents were vicariously liable for the Officers who were their agents. Counsel argued that the appellants' claim for Rs. 50,000 each as damages was supported by evidence of being herded to one side of the house and held in detention at gunpoint for close to two hours.
20. In conclusion, the appellants' counsel prayed for an order reversing the dismissal of the Complaint in CS 09/2013 and judgment to be entered in favour of the appellants. He also prayed that this Court awards costs of this appeal and those in the court below to the appellants.

Respondents' reply

Ground 1

21. Counsel submitted that the trial Judge assessed the evidence of the Plaintiffs and that of the Defendants as well as the relevant legal provision before coming to the conclusion that the defendants acted in good faith and that the search was not unlawful.
22. Furthermore, counsel argued that the NDEA officers acted and conducted the search upon receiving credible information that Dave Marengo (the 4th appellant) was involved in cultivating a controlled drug and was in possession of a fire arm. On the basis of the said information, counsel submitted that according to Section 20 of the NDEA Act, the officers in execution of their statutory duties were permitted to enter, search any person or premises at any time, arrest, detain persons and seize any article liable for seizure.

Grounds 2 and 4:

23. Counsel submitted that the burden to prove fault lies on the one who raised it. Mere conjectures and presumptions were not sufficient.
24. Counsel emphasized that the officers entered and conducted the search of the house in accordance with Section 20 (1) and (2) of the **NDEA Act** which is to the effect that, a police officer may at any time, with or without a warrant stop and search any person whom he reasonably suspects of having in possession a controlled drug or an article liable to seizure.
25. In light of the above provision of law, counsel argued that the record bears the consistent and uncontroverted evidence of the respondents' witnesses especially that of the senior officer-Nichol Fanchette that they mounted an operation on credible information that Dave Marengo was cultivating controlled drugs and that he had a firearm with him. Furthermore, that officer Nichol Fanchette stated in his testimony that necessary steps and precaution for protection were taken such as arming themselves with pistols considering that it was suspected that the 4th appellant had a gun with him.

26. Further, that the officers duly identified themselves as NDEA officers, were dressed in blue uniform with "NDEA" written on their t-shirts, and presented their badges with photographs to the appellants and told them the purpose of their visit.
27. Premised on the above evidence, Counsel argued that the officers conducted the operation with due care and the embarrassment or inconvenience caused cannot be termed as Fault or that the officers acted below the standard required. In support of this argument, counsel relied on the authorities of **Antoine Emmanuelle Madeleine vs. NDEA**³ and **Roger Pothin vs. Mana Both & Anor**⁴.

Ground 3:

28. Counsel submitted that it was not in dispute that the appellants were received and met at the office of the NDEA. Furthermore, that it was also not in dispute that Officers Brandan Burke and Nichol Fanchette visited the appellants' house and an exchange of communication via email ensued thereafter.
29. Regarding the allegation of an offer for "compensation" made by the NDEA officers to the appellants, counsel referred to Officer Nichol Fanchette's testimony during cross-examination where he denied making an offer to the appellants or admission of liability for the alleged fault. Counsel argued that in absence of a statement admitting liability from the NDEA Officers, then such liability could not be inferred.
30. With specific reference to the testimony of Officer Nichol Fanchette, counsel explained that the events leading up to the purported visit to the appellants' home was in response to the complaint made by the Appellants and to offer an explanation to them. That such honourable action taken by the officers could not be taken as admission of liability. Counsel further argued that if such complaint went unattended, the police risked criticism.

³ CS 25 of 2016.

⁴ CS 40/2015.

Ground 4:

31. Under this ground, Counsel argued that the search was conducted on the basis of information received that Dave Marengo was cultivating a controlled drug and possessed a gun. Counsel made reference to **Section 20 of the NDEA Act** which empowered Police Officers with or without warrant to search any person or place reasonably suspected to have a controlled drug or article liable to seizure.
32. Furthermore, Counsel argued that the respondents by virtue of **Section 7 of the NDEA Act** were granted immunity against any action done in good faith in exercise or discharge of any powers, duties or functions.
33. Counsel also relied on the case of **Jill Norris v. GOS & Anor**⁵ where an arrest and detention was made and consequent damage allegedly was suffered by the plaintiff. In holding that the defendants did not commit any error of conduct, the Supreme Court at paragraph 11 found that neither the police nor the Government committed any error of conduct *which would not have been committed by a prudent person in the circumstances. That the dominant purpose of the arrest and detention by the police was not intended to cause any harm to the plaintiff nor done out of malice.*
34. On the premise of the above case, counsel submitted that in view of the circumstances of the present case, especially the fact that the 4th appellant was suspected to possess a firearm, the respondents did not commit any error of conduct which would not have been committed by a prudent person. Therefore, the respondents' action of carrying out a search did not constitute fault in law.
35. In conclusion, counsel submitted that since there was no fault, the appellants' plaint disclosed no cause of action and should therefore be dismissed. Counsel thus prayed that the appeal is disallowed and the judgment of the trial Court be upheld.

Court's analysis

⁵ CS 38/2012.

36. The essence of the grounds of the appeal is that the trial Judge failed to evaluate the evidence adduced by the parties and as a result erred in his findings that:
1. the search was lawful
 2. the search was conducted in good faith
 3. the officers exercised a proper standard of care during the search.
37. Therefore, the consideration of this appeal will rotate on whether on the evidence available the plaintiffs/appellants proved on a balance of probability that the search was unlawful, that it was carried out in bad faith and the officers' conduct fell below the standard of care expected of them.
38. But before delving into a discussion of the concepts on lawfulness of the search and standard of care, I will first address the contention that the trial Judge failed in his duty of evaluating the evidence.
39. A reading of the impugned judgment shows that the learned trial judge meticulously set out what the relevant law is. He covered the legal powers given to the NDEA and the ensuing immunity; what constitutes fault in law and the law which provides that good faith is presumed and it is the party pleading bad faith who must adduce evidence to rebut the presumption. The judge also set out the law as regards the standard of care expected of a law enforcement officer in carrying out a search, a standard of care rooted in the duty of care.
40. It is after setting out the law that the judge said:

The court appreciates that the plaintiffs ... had experienced the search ... negatively. This is understandable. It is a traumatic experience, and the type of harm experienced may sustain a claim of damages. However, because the search was conducted in terms of the law, the immunity clause outlined above is triggered.

For a successful claim, the plaintiffs have to demonstrate that the conduct of the defendants was unlawful and was not conducted in good faith.

In light of the above, the plaintiffs have failed to demonstrate that the search was unlawful, and that the conduct of the police in the circumstances was not carried out in good faith

... For the plaintiff to succeed, bad faith on the part of the NDEA agents ought to have been established. There is no such evidence on record.

41. I have painstakingly gone through the record of proceedings in the lower court and given meticulous thought to the entire evidence adduced. On each and every disputed fact relevant for the determination of the matter before court, the witnesses on each side were on the face of the record, firm in their side of the story. In many ways, it was the “word” of the appellants against the “word” of the respondents. Despite this, the judge did not in his judgment juxtapose the testimonies from each side. He did not juxtapose the law which he had so clearly cited, with evidence adduced and thus apply the law, to the circumstances of the case. He did not explain why he believed the defendants and disbelieved the plaintiffs. He did not explain why in his view, the evidence adduced by the plaintiffs, failed to demonstrate that the search was unlawful and/or was tainted with bad faith.
42. It is expected that a judgment evidences on the face of it, the “thought process” of the author. A judgment is not written for the benefit of the judge, the most important audience are the litigants. They are entitled to have a candid explanation of the reasons for the decision.
43. The judge in a trial court, is the fact finder who will make findings of fact. The trial court makes findings as to what happened - based on the evidence submitted by the parties. Based on these findings and the relevant law, the fact finder will determine which party should have judgment awarded in their favor.
44. In the case before us, the judge was duty bound to evaluate the evidence in its entirety and based on his appreciation of the evidence determine whether the search was lawful, was done in good faith and whether the standards expected of the law enforcement officers had been complied with. Evidence that he had done so had to be on record.

45. In this appeal, inherent in each ground of appeal is an issue of the judge's failure to properly evaluate the evidence adduced before arriving at findings which the appellants challenge in this Court.
46. I find that as contended by the appellants, there is no evidence that the trial judge evaluated the evidence in its entirety before dismissing the plaintiffs' case.
47. An appellate court generally does not decide issues of fact. The primary distinction between trial and appellate courts is that whereas trial courts resolve both factual and legal disputes, appellate courts will normally only review claims that a trial judge made a legal mistake. The legal mistake may be in form of procedure taken by the trial judge in resolving the dispute. *Appellate courts review the procedures and the decisions in the trial court to make sure that the proceedings were fair and that the proper law was applied correctly. It is this that I have done in the appeal before court: reviewed the procedure adopted by the trial Judge and I have found it wanting.*
48. I also note that the trial Judge made no remark on the demeanour of the witnesses. Demeanor evidence has since time immemorial been recognized in law as an important basis for determining the credibility of witnesses in fact finding. Demeanor evidence refers to the non-verbal cues given by a witness while testifying, including voice tone, facial expressions, body language, and other cues such as the manner of testifying, and the attitude of a witness while testifying.⁶ Indeed it is a generally accepted principle in court hearings that the demeanour of a witness is of value in shedding light on the credibility of a witness. The opportunity to observe the demeanor of a witness while testifying is often exclusive to the trial court, the court where evidence and testimony are first introduced, received, and considered. As already stated, the trial Judge did not explain the basis for his finding that the appellants had not proved their case to the legal standard required. He did not explain why he believed the respondents' testimonies and rejected those of the appellants.

⁶ Gregory L. Ogden, The Role of Demeanor Evidence in Determining Credibility of Witnesses in Fact Finding: The Views of ALJs, 20 J. Nat'l Ass'n Admin. L. Judges. (2000)

49. In light of the errors pointed out above, the Court will proceed under **Rule 31 of the Court of Appeal Rules** which provides as follows:

Power of the Court on appeal

(1) Appeals to the Court shall be by way of re-hearing and the Court shall have all the powers of the Supreme Court together with full discretionary power to receive further evidence by oral examination in Court, by affidavit or by deposition taken before an examiner or commissioner. (My emphasis)

(2) -----

(3) The Court may draw inferences of fact, and give any judgment, and make any order which the Supreme Court ought to have given or made, and make such further or other orders as the case requires. (My emphasis)

(4) -----

(5) **In its judgment, the Court may confirm, reverse or vary the decision of the trial court with or without an order as to costs, or may order a re-trial or may remit the matter with the opinion of the Court thereon to the trial court, or may make such other order in the matter as to it may seem just, and may by such order exercise any power which the trial court might have exercised.** (Emphasis of Court)

50. In exercising the power under the above provisions of law, this Court is mindful that it did not have the opportunity to view the witnesses. Nevertheless, the Court will be guided by the testimonies on record to assess whether or not the appellants discharged their duty of proving the case on a balance of probabilities.

51. The balance of probabilities is the requisite standard of proof by which a trier of fact must determine the existence of contested facts. Saying something is proven on a balance of

probabilities means that it is more likely than not to have occurred. It means that the probability that some event happens is more than 50%.

52. What is the difference between succeeding on the balance of probabilities and failing on the balance of probabilities? In one case **Miller vs. Minister of Pensions**⁷ Denning J said:

"If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not." (Emphasis of Court)

53. Expressing that in percentage terms, if a judge concludes that it is 50% likely that the claimant's case is right, then the claimant will lose. By contrast, if the judge concludes that it is 51% likely that the claimant's case is right then the claimant will win. One may well ask how the Judge is expected to measure the probabilities of a case to 1%!

54. In a family case **RE B**⁸, Lord Hoffman answered that question using a mathematical analogy:

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

55. Following the above discourse, the appellants are duty bound to show by evidence that those who entered their premises were not acting with diligence, which an honest man of ordinary prudence is accustomed to exercise and were acting unreasonably and

⁷ [1947] 2 All ER 372.

⁸ [2008] UKHL 35.

arbitrarily. Furthermore, the appellants are also duty bound to prove the allegations of bad faith. **Article 2268** of the **Civil Code** provides that:

“... The person who makes an allegation of bad faith shall be required to prove it.”

56. The appellants made several allegations of unlawful acts by the respondents' agents which amounted to bad faith. In support of their case, the appellants called 5 witnesses. The testimony of each witness given in examination in chief as well as in cross examination was as follows:

Allegation of forceful entry

57. The 1st appellant-Sarah Carlous - testified that upon hearing a bang on the door, she together with the third appellant - Ellen Carlous - went to the window.
58. The 3rd appellant-Ellen Carlous (wife to Dave Marengo) testified that the officers banged the door telling the occupants 'open Police'. She further testified that she saw one of the officers entering through the window into the living room and opening the door for the rest of his colleagues about the same time that her mother (1st appellant) was opening the door for the officers to enter. She also stated that the officers banged the door to the extent that she thought they would break it.
59. The 2nd appellant-Maeve Carolus - testified that when they were checking whether all the windows and doors were locked as per their normal routine, they heard a loud banging on the door and someone saying 'open the door'.
60. On the other hand, the officers (who were witnesses called by the respondents) testified that the appellants delayed to open the door which in their view was an act of obstructing justice. That it is for this reason that officer Naiken accessed the house through an open window. Officer Naiken specifically stated that when the appellants took long to open the door, he entered through the window and opened for the rest of his colleagues.

61. In evaluating these testimonies, one has to be cognisant of the fact that the entry through the window is not in dispute. The issue in contention is whether the entry by Officer Marcel Naiken through the window was forceful, unlawful and unreasonable in the circumstances.
62. On the one hand, one has to bear in mind that the appellants were weary of break-ins and cautious of people knocking at that time of the night. It was therefore reasonable for them to be reluctant to open.
63. On the other hand, the respondents had a mandate to search the premises for a fire arm allegedly held illegally by an occupant of the premises. In their view, any delays could compromise their search. I opine that it would be expected of a prudent NDEA official in such circumstances to act swiftly and access the premises through any available means. I note that at the time the officers showed up at the appellants' house, the window was open and there was therefore no physical break in. It should also be noted that the entry through the window was not the first option taken by the officers.
64. I find that the officer's action of entering through the window was not unreasonable in the circumstances.

Failure by the Officers to identify themselves upon entry

65. It was common cause that before entry into the house, the NDEA agents at the very least identified themselves as "police". They banged the door and said "open police".
66. What is in contention is whether upon entry they identified themselves as NDEA agents and whether they informed the occupants that they were NDEA officers what the cause of entry was.
67. The 3rd appellant testified that NDEA officials did not identify themselves upon entry. That she asked- "how do we know you are the Police. Can you identify yourselves?" but there was no response to the question. The witness further stated that the officers did not state the purpose of their visit nor introduce the leader of the team. That however, just

before their departure, the officers told her that they came to search for a gun that her husband (the 4th appellant) was suspected of being in possession of because he had used it to threaten somebody.

68. On the other hand, the 4th appellant - Dave Marengo - testified that the officers did not identify themselves before handcuffing him. He however said that when the officers woke him up, the first thing they asked him was where the fire arm was. The officers then searched his room, the wardrobe, and bins and under the pillow but nothing was found. That thereafter, he was taken downstairs by the officers who informed him that they were going to search the car but nothing was retrieved from the vehicle.
69. The 1st appellant testified that the officers did not identify themselves and the occupants did not know who they were or where they came from. She further stated that the officers did not approach her to ascertain if she was the owner of the house. That however, just before they left the house the officers identified themselves by flashing their badge.
70. Upon cross-examination, when questioned whether she knew that the NDEA were in her house for an operation, Sarah answered “yes”. However, she stated that she did not know what operation they were sent to carry out.
71. Maeve Carolus testified that the agents never identified themselves. That they never mentioned they were from the NDEA.
72. On the other hand, Officer Marcel Naiken testified that on that night he informed the occupants of the house that were going to carry out a search. That when they located Dave Marengo they informed him that they were doing a search for drugs and a firearm. On cross-examination, Mr. Naiken stated that they identified themselves as NDEA agents before they went upstairs to where Dave Marengo was.
73. Officer Michel Nourrice testified that it was Naiken’s job to introduce them and he told the occupants that they were NDEA officers and the purpose of their visit was to carry

out a search for drugs. He insisted that Naiken introduced himself although he could not remember exactly what he said.

74. The analysis of this evidence shows that the appellants on the one hand and the respondents on the other hand were each firm and consistent in their testimonies. The appellants testified that the NDEA officers did not introduce themselves. On the other hand, the respondents testified that they introduced themselves and stated the reason for their visit.
75. Nevertheless, both sides testified that on arrival at the premise, the officers called out 'police'. The testimonies show that it was the appellants' word against the respondents. In line with the persuasive authority of **Miller vs Minister of Pensions (Supra)**,

If the evidence is such that the court can say, "we think it more probable than not" the burden is discharged, but if the probabilities are equal it is not.

76. It cannot therefore be said that the appellants discharged their duty of proving the allegation on a balance of probabilities.

Failure by the officers to wear uniform

77. The 1st appellant testified that the NDEA officers were in combat uniform. During cross-examination, the witness stated that the Officers were wearing the same "kind" of uniform.
78. The 2nd appellant testified that the men were in uniform but he thought that they had stolen them.
79. The 3rd appellant testified that when her mother opened the door, men who were uniformed and wearing some kind of headgear entered the house.
80. One can infer that the officers wore apparel belonging to a certain institution although the three witnesses (the first, second and third appellant) were not familiar with it.

81. On the other hand the 4th appellant testified that he was able to identify the men as Officers of the NDEA by their uniform.
82. The respondents on the other hand called 3 witnesses who all stated that they were in uniform.
83. Officer Marcel Naiken testified that the agents were in uniform, and had a cap written NDEA on it. He stated that:

“We are agents, we are in the uniform we are just covering with the bullet vest, because the information earlier, he had a pistol that is why we have the vest on us and we have the cap written NDEA on it”
84. During cross-examination, Marcel Naiken maintained that they were wearing NDEA labelled uniform and even showed their badges.
85. Michel Nourrice testified that they were in uniform on that night and the uniform had the NDEA badge on it, for easy identification.
86. The 3rd witness- Nichol Franchette testified that on that night they were wearing blue uniform with an NDEA imprint on it and they even showed their badges and informed the house occupants that they were going to do a search for drugs.
87. From the evaluation of the testimonies given by the appellants and the respondents, it is clear that the respondents were consistent in their testimonies that they were wearing NDEA uniform and had badges with them. All the appellants conceded that the agents were in some kind of uniform. Even more important is the fact that the 4th appellant testified that he was able to identify the men as Officers of the NDEA by their uniform, thus corroborating the averments of the respondents. Accordingly, it is safe to infer that the officers were clothed in NDEA uniform.
88. The lack of knowledge by some of the appellants as to how the NDEA uniform looked like does not invalidate the fact that the officers were in NDEA uniform and neither does it in and of itself show evidence of bad faith on the officers’ part.

Unlawful detention

Another allegation is that the officers detained the appellants in a manner which was unlawful.

89. The 3rd appellant testified that the family members were herded into the seating room where they had been watching television, at gun point and not allowed to move. During cross-examination, the respondents' counsel referred to the appellants' complaint letter which was on record and asked the witness the following questions to which she replied:

Q: *But you said yourself and also in your letter of complaint that you said you were allowed to go and comfort your daughter. Your mother was allowed to go and give a tissue to your daughter-*

A: *We were seated in the seating room. We were not allowed to move around. It was like one step.*

Q: *So I put it to you that since you allowed to do whatever actions you have done during that time that you were not put at gunpoint or you are not in the fear as you have deponed in this Court?*

A: *As I have previously stated during the whole incident from the time that these armed men poured into our house without giving any explanation as to who they were and why they were here and we were put at gunpoint in our living room. Well I myself, I was terrified because I did not know who those people were. I do not know what they wanted and we were just put there, we were not allowed to do anything. I was terrified. I feared for my life, for the life of my family and I did not know what would happen next because these people did not strike me as professionals. They did not strike me as people who knew what they were doing. They were just taking things as they went along because I they had been professionals, if they knew what they were doing the minute they had come into the house they would have identified themselves. They would have said, why they were there.*

90. When asked whether anyone else was detained apart from Dave Marengo who was handcuffed, the witness responded that, *'when you force us to sit somewhere and point a*

gun at us, and we are not allowed to move, I do not find any other word other than detention for that.

91. The 1st appellant also testified that the officers herded them in the sitting room and were not allowed to move. However, during cross-examination, Sarah Carolus stated that they were allowed to move around when they asked for permission to do so. She gave an example of the 3rd appellant- Ellen Carolus who was allowed to move and take her child to sleep.
92. Officer Naiken on the other hand disputed the appellants' allegation that the occupants' movements were restricted. He testified that they allowed the child (Emily Marengo) to go to the toilet with her mother. Furthermore, officer Naiken explained that putting everyone in one place did not amount to detention or arrest. He explained that the procedure they adopted during the search was appropriate because a fire arm was involved.
93. An analysis of the above testimonies reveals that the appellants were allowed to move although under permission. This was in line with Officer Naiken's testimony who also testified that as when it was necessary for the appellants to move, they allowed them to do so.
94. It would be unreasonable to expect the officers to allow the appellants to move at free will yet they were operating under the belief that the 4th appellant unlawfully possessed a gun. The officers' conduct should be evaluated based on what they reasonably believed to be the circumstances under which they were operating.
95. An analogy can be drawn from principles accepted in evaluating the defence of self-defence. Lord Morris in **Palmer vs. R**⁹ said:

⁹ [1971] AC 814.

“If there has been an attack so that self defence is reasonably necessary, it will be recognized that a person defending himself cannot weigh to a nicety the exact measure of his defensive action.”

96. It is also a renowned principle governing the defence of self-defence that the test court should apply should be an objective one. A judge should not evaluate the events like an armchair critic, but rather should place oneself in the shoes of the attacked person at the critical moment and bear in mind that at such point in time the attacked person only has a few seconds in which to make a decision. The court should then ask whether a reasonable person would have acted in the same way in those circumstances. A person who suffers a sudden attack cannot always be expected to weigh up all the advantages and disadvantages of his/her defensive act and to act calmly.
97. The above principles make it appropriate and legitimate for the officers to have carried along ammunition as a precautionary means having received credible information that the 4th appellant was in possession of a fire arm.

Clicking of guns

The 1st appellant testified that the officers were playing with the gun trigger while they were sitting in the living room, and she did not know whether they were thieves.

98. The 3rd appellant testified that the NDEA officials were holding and pointing their guns at them while clicking them which was an intimidating, scary and terrifying experience.
99. The 4th appellant testified that the NDEA officials had pistols and guns of AK 47 type. He was subsequently handcuffed and taken downstairs where he saw one of the officers removing magazines from the pistol he was holding and putting them back.
100. On the other hand, Officer Naiken testified that no firearm was pointed at any of the occupants they found in the house.

101. Officer Michel Nourrice testified that he had a pistol which he kept on his waist and that none of the NDEA Agents had guns in their hands.
102. The appellants and the respondents' agents were all consistent and firm in their testimonies. It was the appellants' word against that of the respondents. It cannot therefore be said that the appellants proved this allegation to the required standard of proof.

Humiliation

103. The 3rd appellant testified that her husband - the 4th appellant - was made to move downstairs in an underwear. According to her, this was humiliating particularly because the 4th appellant was embarrassed before her young daughter.
104. However, during cross-examination the respondents' lawyer pointed out to the witness that in the complaint letter addressed to the NDEA, she stated that her husband was allowed to put on a T-shirt as he was only wearing a pair of shorts. The lawyer put it to the witness that her oral testimony to the effect that the husband was wearing underwear only was contradictory to what was in the complaint letter. In response, the appellant stated that, "*my husband had shorts that very brief short supposed to be sports shorts which he has never been comfortable wearing as shorts so he slept in them and I consider that as underwear.*"
105. The 4th appellant himself stated that he was putting on shorts that runners usually wear.
106. For the respondents, officer Naiken admitted that he brought Marengo downstairs without a shirt but he did not find it wrong since this was in the confines of the house and that is how they found him dressed.

107. An analysis of the testimonies above reveals that the 4th appellant was wearing shorts. It can therefore be concluded that knowledge or description of the shorts being “nightwear” was personal knowledge of the 3rd appellant, the wife. The officers were not expected to know that the 4th appellant used the shorts as his night wear. Therefore, bad faith on the part of the officers was not proved.

Unlawful search of the house and vehicle

108. The appellants stated in their submissions that the search of the house and the vehicle was illegal because the officers went outside the scope of the search instructions. That the search was only to be carried out at the farm and not extended to another place.

109. Officer Naiken on the other hand stated that upon reaching Dave Marengo’s farm, they were informed that he had just left and the officers proceeded to the house. He further testified during cross-examination that the search of the house and the vehicle was not illegal because as NDEA officers they were not obliged to first obtain a search warrant before proceeding with the search of the house and the vehicle.

110. It is my considered view that the search process was a continuum. The officers having been informed that Marengo had left the farm, had the discretion to follow him at the place where he was residing and carry out a search of the premises.

111. The law is also clear on this aspect. **Section 20** of the **NDEA Act** gives power to a Police Officer with or without a warrant to enter and search any person or place in which it is reasonably suspected that there is a controlled drug or an article liable to seizure. On the premise of the foregoing provision, the appellants’ allegation does not stand.

112. I therefore come to the conclusion that the respondents’ search of the appellants’ house was justified on reasonable suspicion that the 4th appellant (who was residing in the same house) engaged in a prohibited activity and illegally possessed a fire arm.

Confiscation of property

113. The appellants stated that during the search, the officers unlawfully confiscated Dave Marengo's bayonet which was a decorative ornament. Furthermore, that confiscation of the 4th appellant's bayonet was illegal because it was personal property.
114. The officers on the other hand testified that the weapon was used in army combat and was property of the government.
115. I find that the 4th appellant did not adduce evidence of a license or receipt showing that he had lawfully acquired the weapon. On that premise, it cannot be ascertained that the officers' confiscation of the said weapon was unlawful. It should be recalled that the search instructions given to the officers included search for illegal possession of a firearm by Dave Marengo.

Admission of liability by the officers

116. It was alleged by the appellants that the officers made an 'offer' of compensation to them which amounted to an admission of liability for their unlawful actions during the search.
117. The 3rd appellant in particular testified that the week following the incident, the 1st appellant on behalf of the appellants wrote a complaint to the NDEA who agreed to investigate the matters raised in that letter. The letter also extended an invitation to the NDEA to visit the appellants' home so that they have a reconstruction of events that transpired on the night of the search. That it is in response to the said invitation that officers Burke and Franchette went to the appellants' home.
118. Similarly, the 2nd appellant testified that four days after the search, NDEA officers went back to the house to have a reconstruction of the events that occurred on the night of the search.

119. Officer Franchette who was part of the NDEA team that went back to the appellants' house testified during examination in chief that the purpose of his visit together with officer Burke was for purposes of explaining to the appellants the procedures that were adopted during the search. He further testified that during the search, Officer Burke offered the appellants something but he did not know if it was compensation. The court then asked the witness: "you mentioned the word compensation, what exactly?" He replied "I am not sure what he offered, but we went there to talk to them."
120. Can it then be said that the officers admitted liability?
121. During cross-examination, officer Franchette maintained that the visit was for the purpose of a reconstruction of the events that transpired on the night of the search.
122. The record also shows that during cross-examination of officer Franchette, the appellants' lawyer suggested to him that the reason why the officers visited the appellants' residence was so that they could talk about compensation. This was objected to by the respondents' lawyer who stated that the suggestion was misleading because it was not anywhere on the record that the visit was for the purpose of offering compensation. The court too agreed with the respondents' lawyer that it was not on record that the witness had said that the visit was for purpose of offering compensation to the appellants.
123. An analysis of the above evidence shows that it was an undisputed fact that the officers' visit to the residence of the appellants was at the "invitation" of the appellants. It is also clear that Officer Burke who is said to have mentioned 'something' to the appellants was never called as a witness. Officer Franchette was not in position to state in precise words what Officer Burke said to the appellants.
124. It follows therefore that the appellants' allegation that the officers offered to compensate them and thus admitted liability for their actions was not proved.

125. On the whole, it is my considered view that the evidence adduced by the appellants was in no way sufficient to take the actions of the NDEA officers from the ambit of the operation of the presumption of good faith.
126. I also find that the evidence adduced by the appellants fell short of proving their claims that the officers' actions were illegal, unlawful and thereby committed a fault under the law.
127. Fault is defined under **Article 1382 (2) & (3)** of the **Civil Code** as follows:
- (2) Fault is an error of conduct which would not have been committed by a prudent person in the special circumstances in which the damage was caused. It may be a positive act or omission.**
- (3) Fault may also consist of an act or an omission the dominant purpose of which is to cause harm to another, even if it appears to have been done in the exercise of a legitimate interest. [See also the case of: Joubert vs. Suleman (2010) SLR 248].**
128. From the above provisions, it is clear that in order to establish liability under **Article 1382 (supra)** there must be a causal link between the impugned conduct and the injury. The appellants' main complaint about the search was that the NDEA Officers entered their house unlawfully, banged the door violently, entered through the window, kept the occupants of the house at gun point during the search and the said officers did not disclose their identity which allegations I have already discussed above and found that there were not proved on a balance of probabilities.
129. I have also found it pertinent to discuss the concept of standard of care because the appellants faulted the learned trial Judge for wrongly applying the law regarding the concept.

Standard of Care

130. The standard of care is rooted in the duty of care. Thus, the first question to be answered is whether the officers owed a duty of care to the appellants and if so whether they acted in breach of that duty.
131. In order to determine the existence of a duty of care, it is necessary to decide whether there was a *prima facie* foreseeability of harm, proximity and whether the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon one party for the benefit of the other.¹⁰
132. In the present case, the officers carried out the search of the appellants' residence on reasonable suspicion that the 4th appellant was cultivating cannabis-a prohibited drug. According to the NDEA Act and the Misuse of Drugs Act, Police Officers have a duty to curb down the use of such controlled drugs. However, the contention is whether the Police Officers in carrying out the search foresaw any likelihood of harm to the appellants so as to make them liable in damages.
133. In answering a similar question in **Robinson vs. Chief Constable of West Yorkshire Police**,¹¹ Lord Reed opined that since the law of negligence generally imposes a duty not to cause harm to other people or their property, then Police [Officers] owe a duty of care when such a duty arises under ordinary principles of law of negligence unless statute provides otherwise (paragraph 70). His Lordship further held that "*reasonable foreseeable risk of injury was sufficient to impose on the officers a duty of care.*" (Paragraph 74)
134. Nevertheless, the House of Lords underscored the importance of not imposing unrealistically "demanding" standards of care on Police Officers acting in the course of their operational duties. That it would be contrary to public policy to require Police Officers to fearlessly and efficiently discharge their vitally important public duty of investigating crime and at the same time require them to act cautiously in fear of causing personal injuries and consequently an action for damages.

¹⁰ Robinson vs. Chief Constable of West Yorkshire Police [2018] UKSC 4 (per Lord Reed).

¹¹ [2018] UKSC 4. (House of Lords)

135. I am persuaded by the foregoing ratio expressed by the House of Lords. In order to safeguard against the absurdity of imposing a “demanding” standard of care on Police Officers, **Section 7** of the **NDEA Act** provides that:

No action shall lie against any 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. (My emphasis)

136. Since the appellants failed to discharge the burden of proof regarding the various allegations as well as negligence, it is my finding that the legal presumption that the respondents’ agents acted in good faith has not been rebutted. It follows therefore that the immunity accorded to officers in Section 7 (supra) remained available to the respondents’ agents.

Conclusion

137. As indicated in the discussions above, this court has based its analysis on what is on record in the form of testimonies in-chief and in cross-examination. I stated earlier in this judgment that on each and every allegation the witnesses on each side were firm in their side of the story. It was the “word” of the appellants against the “word” of the respondents.

138. I am mindful of the fact that the court did not have the opportunity of assessing the demeanour of the witnesses and yet it is a generally accepted principle in court hearings that the demeanour of a witness is of value in shedding light on the credibility of a witness. But in arriving at the decision of whether to allow the appeal, I have been guided by the legal principle that the appellants, as plaintiffs, had the burden of proving their case on a balance of probabilities. And in the words of the persuasive House of Lords authority (**Re B (supra)**) where a fact is in dispute, and the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. Following from my finding that it was the word of the appellants’ witnesses against the word of the witnesses of the respondent, it is my finding that the probabilities are equal.

Consequently, in line with the persuasive authority of **Miller vs. Minister of Pensions (supra)** if the probabilities are equal, then the burden has not been discharged.

139. It follows that the appellants have not rebutted the presumption of good faith. They have not succeeded in proving that *the dominant purpose of the search by the agents of NDEA was intended to cause harm to the plaintiff and was tainted with bad faith.*

140. Arising from the foregoing discussion, I find that the appeal fails.

141. I make no order as to costs.



Dr. Lillian Tibatemwa-Ekirikubinza, JA.
FERNANDO, PRESIDENT

1. I have read the judgment of Justice Tibatemwa-Ekirikubinza where she has set out succinctly the facts of this case.
2. I am in complete agreement with the following pronouncements of Justice Tibatemwa-Ekirikubinza, as reproduced from her judgment, as she couldn't be more right:

"I have painstakingly gone through the record of proceedings in the lower court and given meticulous thought to the entire evidence adduced. On each and every disputed fact relevant for the determination of the matter before court, the witnesses on each side were on the face of the record, firm in their side of the story. In many ways, it was the "word" of the appellants against the "word" of the respondents. Despite this, the judge did not in his judgment juxtapose the testimonies from each side. He did not juxtapose the law which he had so clearly cited, with evidence adduced and thus apply the law, to the circumstances of the case. He did not explain why he believed the defendants and disbelieved the

plaintiffs. He did not explain why in his view, the evidence adduced by the plaintiffs, failed to demonstrate that the search was unlawful and/or was tainted with bad faith.

It is expected that a judgment evidences on the face of it, the “thought process” of the author. A judgment is not written for the benefit of the judge, the most important audience are the litigants. They are entitled to have a candid explanation of the reasons for the decision.

The judge in a trial court, is the fact finder who will make findings of fact. The trial court makes findings as to what happened - based on the evidence submitted by the parties. Based on these findings and the relevant law, the fact finder will determine which party should have judgment awarded in their favor.

In the case before us, the judge was duty bound to evaluate the evidence in its entirety and based on his appreciation of the evidence determine whether the search was lawful, was done in good faith and whether the standards expected of the law enforcement officers had been complied with. Evidence that he had done so had to be on record.

In this appeal, inherent in each ground of appeal is an issue of the judge’s failure to properly evaluate the evidence adduced before arriving at findings which the appellants challenge in this Court.

I find that as contended by the appellants, there is no evidence that the trial judge evaluated the evidence in its entirety before dismissing the plaintiffs’ case.

An appellate court generally does not decide issues of fact. *The primary distinction between trial and appellate courts is that whereas trial courts resolve both factual and legal disputes, appellate courts will normally only review claims that a trial judge made a legal mistake. The legal mistake may be in form of procedure taken by the trial judge in resolving the dispute. Appellate courts review the procedures and the decisions in the trial court to make sure that the proceedings were fair and that the proper law was applied correctly. **It is this that***

I have done in the appeal before court: reviewed the procedure adopted by the trial Judge and I have found it wanting.

I also note that the trial Judge made no remark on the demeanour of the witnesses. Demeanor evidence has since time immemorial been recognized in the law as an important basis for determining the credibility of witnesses in fact finding. Demeanor evidence refers to the non-verbal cues given by a witness while testifying, including voice tone, facial expressions, body language, and other cues such as the manner of testifying, and the attitude of a witness while testifying. Indeed it is a generally accepted principle in court hearings that the demeanour of a witness is of value in shedding light on the credibility of a witness. The opportunity to observe the demeanor of a witness while testifying is often exclusive to the trial court, the court where evidence and testimony are first introduced, received, and considered. As already stated, the trial Judge did not explain the basis for his finding that the appellants had not proved their case to the legal standard required. He did not explain why he believed the respondents' testimonies and rejected those of the appellants. (verbatim but emphasis placed by me)

3. These pronouncements were made because grounds 1 and 2 of appeal were all directed at the leaned Trial Judge's failure to have an appreciation and a proper evaluation of the evidence before him of both the Appellants' and the Respondents' evidence. In fact, Justice Tibatemwa had stated in her judgment that "The essence of the grounds of the appeal is that the trial Judge failed to evaluate the evidence adduced by the parties and as a result erred in his findings".
4. I am in a difficulty therefore to agree with the following conclusion reached by Justice Tibatemwa-Ekirikubinza, since credibility of witnesses is the yard stick to determine cases of this nature and which is the role of the Trial Judge. Whether the Appellants as Plaintiffs proved their case on a balance of probabilities is dependent on the testimony

of the witnesses for the Appellants and the Respondents as analysed and determined by the Trial Judge.

“As indicated in the discussions above, this court has based its analysis on what is on record in the form of testimonies in-chief and in cross-examination. I stated earlier in this judgment that on each and every allegation the witnesses on each side were firm in their side of the story. It was the “word” of the appellants against the “word” of the respondents.

*I am mindful of the fact that the court did not have the opportunity of assessing the demeanour of the witnesses and yet it is a generally accepted principle in court hearings that the demeanour of a witness is of value in shedding light on the credibility of a witness. But in arriving at the decision of whether to allow the appeal, I have been guided by the legal principle that the appellants, as plaintiffs, had the burden of proving their case on a balance of probabilities. And in the words of the persuasive House of Lords authority (**Re B (supra)**) where a fact is in dispute, and the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. Following from my finding that it was the word of the appellants’ witnesses against the word of the witnesses of the respondent, it is my finding that the probabilities are equal. Consequently, in line with the persuasive authority of **Miller vs. Minister of Pensions (supra)** if the probabilities are equal, then the burden has not been discharged.”*

5. In a case of this nature it is my view that we cannot place reliance on rule 31 of the Seychelles Court of Appeal Rules 2005, set out fully in the judgment. The words in rule 31(1) that “Appeals to the Court shall be by way of re-hearing and the Court shall have powers of the Supreme Court...” do not mean that this Court turns out to be a full Trial Court. As stated correctly by Justice Tibatemwa “an Appellate court generally does not decide issues of fact”. This is also not a case where we are drawing inferences from established facts as set out in rule 31(3), but attempting to make a determination based entirely on the evidence of witnesses we have not seen or heard. The Trial Judge’s

failure to evaluate the evidence adduced by the parties in this case, is not merely a procedural error which can be corrected under the proviso to rule 31(5) of the Seychelles Court of Appeal Rules, but a fundamental error that vitiates the judgment of the learned Trial Judge and one we cannot correct in the circumstances of this case.

I am therefore of the view that the judgment of the Supreme Court should be quashed. The appeal partly succeeds so far as the judgment of the Supreme Court dismissing the Plaintiff in CS 09/2013 is reversed. I remit the case for a fresh hearing in the Supreme Court.

7. I make no order as to costs.

Anthony F. T. Fernando

President of the Court of Appeal

ROBINSON JA

1. I had the opportunity to read in draft the judgment of Fernando, PCA., and that of Tibatemwa-Ekirikubinza JA. I agree with the observation of Fernando, PCA., that —

"5. In a case of this nature it is my view that we cannot place reliance on rule 31 of the Seychelles Court of Appeal Rules 2005, set out fully in the judgment. The words in rule 31(1) that "Appeals to the Court shall be by way of re-hearing and the Court shall have powers of the Supreme Court..." do not mean that this Court turns out to be a full Trial Court. As stated correctly by Justice Tibatemwa "an Appellate court generally does not decide issues of fact". This is also not a case where we are drawing inferences from established facts as set out in rule 31(3), but attempting to make a determination based entirely on the evidence of witnesses we have not seen or heard. The Trial Judge's failure to evaluate the evidence adduced by the parties in this case, is not merely a procedural error which can be corrected under the proviso to rule 31(5) of the Seychelles Court of Appeal Rules, but a fundamental error that vitiates the judgment of the learned Trial Judge and one we cannot correct in the circumstances of this case."

2. Hence, I agree with Fernando, PCA., that the judgment should be quashed. I make an order quashing the judgment and orders of the learned Judge in their entirety. I remit the case for a fresh hearing in the Supreme Court.
3. I make no order as to costs.

F. Robinson JA

Signed, dated and delivered at Ile du Port on 28 January 2022.