

SUPREME COURT OF SEYCHELLES

Reportable/ Not Reportable /

Redact

[2019] SCSC 422
CS 09/2013

In the matter between

1.SARAH CAROLUS

Plaintiffs

2.MAEVE CAROLUS

3.ELLEN CAROLUS

4.DAVE MARENGO

5.EMILY MARENGO

(rep. by Mr. Joel Camille)

and

1.NIALL SCULLY

Defendants

2.NATIONAL DRUG ENFORCEMENT AGENCY

3.THE ATTORNEY GENERAL

(rep. by Mrs. Rongmei)

Neutral Citation: *Carolus & ors v Scully & ors* (CS 09/2013) [2019] SCSC

(30 May 2019)

Before: Nunkoo J

Summary: Search under NDEA Act –unlawfulness-can only be established by proving bad faith.

Heard:

Delivered: 30 May 2019

ORDER

The plaint is dismissed. No order as to costs.

JUDGMENT

NUNKOO JUDGE

[1] The Plaintiffs are claiming the total amount of SR 1,080,000.00 as damages from the Defendants for having unlawfully entered into their house on 4 August 2012 around 22.00 hours. They have averred that

- (i) on the night of 24 August 2012 NDEA agents entered into their house forcefully, by banging on the back door.
- (ii) The Agents were wearing combat uniforms and carrying submachine guns (AK 47) and pistols and forcefully detained and held the Plaintiffs in detention at gun point in the house. The Plaintiffs have averred that
- (iii) the NDEA agents entered the house without regard to normal practice and procedures and they refused to identify themselves;
- (iv) they asked for the whereabouts of the of the 4th Plaintiff who was sleeping upstairs in his room; thereupon the NDEA agents went upstairs and they carried a search of the premises by keeping the 4th Plaintiff in his underwear and without any other clothing.
- (v) All the members of the family, that is Plaintiffs Number 1,2, 3, 5, were detained in the living room;
- (vi) The Plaintiff Number 4 was taken around the house and in front of the other Plaintiffs which included his mother in law and his daughter, a minor in his underwear.
- (vii) The Plaintiff was handcuffed and the members were detained at gun point in the living room.

[2] The Plaintiffs have averred that the NDEA agents committed a faute in that they unlawfully entered the house of the second 2nd Plaintiff by failing at the right and reasonable opportunity to identify themselves

[3] They failed to state to her, that is the 2nd Plaintiff, the reasons of their entry.

[4] They unlawfully detained the 1st, 2nd, 3rd, 5th Plaintiffs at gun point inside their house, and as regards the 4th Plaintiff they unlawfully arrested and detained him at gunpoint inside the house. It is being alleged that the Defendants unlawfully detained the 4th Plaintiff against his will without informing him of the reason of his detention; they arrested and detained the 4th Plaintiff against his will without a lawful justification; they arrested and detained the 4th Plaintiff in humiliating, insulting, undignified, cruel, inhumane, degrading and improper manner in having him handcuffed in his underwear, that is without proper clothing despite his request to the NDEA agents.

[5] It is being alleged that the Defendants unlawfully searched the bed room of 3rd, 4th and 5th Plaintiff without lawful justification.

[6] Having unlawfully searched the house without lawful justification

[7] Unlawful confiscation of property belonging to the 4th Plaintiff that is decorative dagger and a sword.

- [8] Unlawful search of the 2nd, 3rd and 4th Plaintiff's vehicle.
- [9] The Defendants have pleaded that they entered the house of the Plaintiff on 24th August 2012. They have denied that the 3rd Defendant acted during the course of employment of 1st and 2nd Defendants, forcefully held the Plaintiff in detention at gun point in the house. They also deny that the Defendant's number 1 and 2 held the Plaintiff at gunpoint in the house.
- [10] The Defendants have averred that they had information from reliable and trustworthy source that a breach of the Misuse of Drugs Act was taking place at Grand Anse, Mahe and that the owner of the land the 4th Plaintiff that is Dave Marengo was in possession of a firearm and that he had threatened to use the firearm against someone.
- [11] The Plaintiffs have particularised the loss and damages as follows:

i) Unlawful detention at gun point:

1 st Plaintiff:	Rs 50,000.00
2 ND Plaintiff:	Rs 50,000.00
3 rd Plaintiff:	Rs 50,000.00
5 th Plaintiff:	Rs 50,000.00

ii) Unlawful arrest and detention:

4 th Plaintiff:	Rs 100,000.00
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iii) Unlawful entry in house of 2nd Plaintiff:

2 nd Plaintiff:	Rs 50,000.00
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iv) Unlawful searches in bedroom of 3rd and 4th Plaintiff:

3 rd Plaintiff and 4 th Plaintiff jointly:	Rs 50,000.00
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v) Anxiety, distress and inconvenience: As a result of the matters stated above, the 1st, 2nd, 3rd, 4th and 5th Plaintiff has suffered shock, distress, emotional pain and trauma. The 2nd, 3rd and 5th Plaintiff had to undergo treatment and counselling for emotional and psychological trauma;

1 st Plaintiff:	Rs 100,000.00
2 nd Plaintiff:	Rs 100,000.00
3 rd Plaintiff:	Rs 100,000.00
4 th Plaintiff:	Rs 100,000.00
5 th Plaintiff:	Rs 100,000.00
vi) Breach of 4 th Plaintiff right's to dignity and for cruel, inhuman and degrading treatment as stated in Paragraphs 4 and 7 above:	Rs 150,000.00.
vii) Unlawful searches in vehicle belonging to 2 nd , 3 rd and 4 th Plaintiff:	
2 nd Plaintiff:	Rs 10,000.00
3 rd and 4 th Plaintiff jointly:	Rs 20,000.00

Total claims by each Plaintiff:

1 st Plaintiff:	Rs 150,000.00
2 nd Plaintiff	Rs 210,000.00
3 rd Plaintiff:	Rs 185,000.00
4 th Plaintiff:	Rs 385,000.00
5 th Plaintiff:	Rs 150,000.00
Total claims:	1,080,000.00

[12] Plaintiffs aver that despite a written request to the 1st and 2nd Defendants and despite various assurances of the 2nd Defendant that the above referred incident will be investigated and redress to be undertake in favour of Plaintiff, to this date, 1st and 2nd Defendants has failed or refused to settle Plaintiffs 'claim, or at all.

[13] Wherefore, the Plaintiffs prays to this Honourable Court to be pleased to enter judgment in the total sum of Rs 1,080,000.00 in their favour, against the Defendants, jointly and

severally, all with costs and interests as from the date of judgment as per the following awards:

For the 1st Plaintiff, in the sum of Rs 150,000.00

(i) For the 2nd Plaintiff, in the sum of Rs 210,000.00

(ii) For the 3rd Plaintiff, in the sum of Rs 185,000.00

(iii) For the 4th Plaintiff, in the sum of Rs 385,000.00

(iv) For the 5th Plaintiff, in the sum of Rs 150,000.00

[14] Evidence in Chief of Third Plaintiff.

The Plaintiff number 3, Ellen Carolus, deponed first. She stated that on the night of the 24th August, a Friday, she and the other members of her family, that is the other Plaintiffs were in the living room watching television. It was at the end of the film when they heard banging on the back door and voices saying "open the door, Police."

[15] Her mother Plaintiff No. 1, Sarah Carolus, opened the door and they saw men coming in. All of them carried big guns. The Witness stated having asked the Defendants who they were but they did not reply and went straight upstairs where the Plaintiff No 4, Dave Marengo, was sleeping. As for the other members of the family, they were taken to the living room at gun point and they felt terrified as one of them was clicking the gun. She stated how the 4th Plaintiff, Dave Marengo was brought down in his underwear at gun point; he was made to sit at the dining table in the kitchen. This scared their little daughter who thought the NDEA agents were going to kill her father. The witness stated that she asked them to allow their daughter to go closer to the 4th Plaintiff and when she walked towards her father one of the agents followed her with a gun. The witness deponed to say that the agents after searching in the house went to search their cars. They carried the search until 1 am. They did not wear uniform. They carried guns. When asked who they were they said they would know later, and in creole "taler ou a konne" in a threatening tone, according to the witness. Plaintiff No 3 also stated that the officer standing near her husband was Mr Marcel Naiken, who was talking arrogantly, bullying him and saying all sorts of things, humiliating him and insulting him.

[16] The witness stated that the Defendants did not act in good faith, that there was no need to enter their house through the window and that they did open the door. She also testified that her daughter Emily got an emotional shock and had to get the help of a psychologist, one Mr Gerard Lim Sam. The latter saw her and some coping techniques.

[17] The witness also deponed to the effect that that they met the NDEA and invited them to visit their house. Indeed Mr Burke and another gentleman did go to the place of the Plaintiff. According to the Plaintiff these two officers from the NDEA later went on the television and stated that everything was done according to law and that correct procedures were followed.

[18] **Cross Examination of Witness No. 3**

The witness stated that at the time when the NDEA raided her house she was a practising attorney and had been into the legal practice for 17 years. She maintained that they were not allowed to move in the house and were kept at gunpoint. She also testified that that it was only by the end of the search that is when they were about to leave that the officers identified themselves as police officers. The witness was asked if banging on the door would amount to forceful entry and she said it amounted to forceful entry.

[19] **Evidence in chief of Plaintiff No. 4 Dave Marengo**

He testified that on that night he was in bed when all of a sudden he found three police officers in his room; two of them pointing guns on both his side and there was another one standing nearby; they carried AK 47 guns and according to him they were army men. They handcuffed him and brought him downstairs. They made him sit at the table; they did not identify themselves. They told him that they were going to search his car. They searched until 1 am; they removed the handcuffs and told the witness that they were going to his farm. He followed in his car but they did not go to the farm. He testified that it was humiliating to be brought down before his mother in law in his underwear and without a shirt.

[20] In cross examination he stated that he was suspected of planting marijuana on his farm. He testified that he had seen some writing about that.

[21] **Evidence of Plaintiff No. One-Sarah Carolus.**

This witness stated that she was a teacher and was 82 years old. She testified that she heard banging on the door and she went to the window and the defendants stated that they were police and asked to open the door. The Witness stated that she went to look for the key but by then the Defendants had already rushed in the house and they carried guns. She also testified that at the beginning they did not identify but when Plaintiff No 3 questioned them one of them showed an identity card and they started talking. One of the officers upon seeing the witness told her that he had been one of his pupils.

[22] In her cross examination she state she testified that she had brought this case because she was traumatised and shocked by the presence of the police and their behaviour. The witness was also referred to her letter written to the NDEA chie wherein she had stated that whatever they were doing did not require a warrant and that they just asked for Dave Marengo; that no one apart from Dave Marengo was searched.

[23] **Evidence of Mr Gerard Lim Sam, Counsellor.**

Mr Gerard Lim Sam who works for the National Council of Children deponed and stated that he had studied Business Studies and Accounting; later he studied Philosophy and Theology. He started his career as accounting technician but when the post of counsellor was advertised he applied and was selected. Later he studied Psychology up to A level and he is presently doing his diploma in Counseling and that he had received on the job training in counselling. He gave evidence regarding the condition of Emily Marengo, daughter of Plaintiff No. # who was allegedly traumatised by the happenings at her place on the night of the search. He testified that the child complained that she could not sleep and was having nightmares; she refused to watch television. That she did not want to go to school.

[24] In cross examination he stated that he had seen the child twice over a period of 6 months and that he was not a clinical psychologist.

[25] **Evidence of Marcel Naiken, NDEA officer.**

He deponed that on that night they went to search the farm of Plaintiff No 4 at Grand Anse as they suspected him to be cultivating cannabis there. They found nothing during their search and then they moved to the residence of the Plaintiffs. There they knocked at the door; no one was opening and he then enterec the house through a window that was open. He opened the door and let his colleague come in. He testified that he informed the Plaintiffs that they had gone there to search for a firearm; they handcuffed the Plaintiff no.4 and asked him to be with them during the search.They did not find any firearm; but they found a bayonet which is used in the army. They took it saying that it was government property.

[26] He maintained that the search they carried that night was based on credible information.

[27] In cross he maintained that they wearing uniforms. He denied having detained the members of the family thought they were brought in a single room and this was done according to the rule they follow specially for their safety. He maintained that everything was done according to defined procedures and the law.

[28] **Evidence of Michel Nourice NDEA agent**

He testified that he was part of the search team. He stayed downstairs during the search in the house of the Plaintiffs. He sat down that is downstairs where all three ladies and two children were gathered. He talked to Sarah Carolus her ex-teacher. According to him everything was calm. No one was under pressure. He testified that it was Officer Naiken's job to introduce them. He did so and went upstairs. He also stated that he had a pistol and not an AK47.

[29] **Evidence of Nichol Fanchette. NDEA agent**

He testified that on that day he received information about Dave Marengo that he was cultivating cannabis and that he also had a firearm. So he called Marcel Naiken and asked him to take charge of the search. He also contacted a patrol car to be carried there. He testified that once they reached there they surrounded the house and knocked at the door and shouted "Police, Police" No one opened the door. This is when Marcel entered the house through the window. He confirmed that it was Marcel Naiken who went upstairs and handcuffed Plaintiff No. 4. In a gist he stated they did everything according to procedure. In cross examination that they did not have to break the door and that they did not need a warrant.

[30] **The case of the Plaintiffs.**

The case of Plaintiff No 4 must be considered separately from those of the other Plaintiffs. The NDEA agents were interested to search the 4th Plaintiff and the place where he was farming and also the place where he was living.

Dave Marengo's main complaint is that the police handcuffed him when he was sleeping and took him around the house in his underwear during the search and he was also detained in the kitchen

[31] The Plaintiffs are complaining that the police entered the house unlawfully in that they banged violently on the doors, and entered through the window and they did not disclose their identity.

[32] The Plaintiffs are complaining that the members of the family were detained in the living room at gun point.

[33] The Plaintiff no.3 as guardian of the child Emily is claiming damages for the trauma and anxiety suffered by the child.

[34] SUBMISSIONS OF THE DEFENDANTS

Learned Counsel for the Defendants on law are as follows:

Section 20

Section 20 of the NDEA Act:

- (1) A police officer may at any, without a warrant-
 - a) stop and search any person whom he reasonably suspects of having in possession a controlled drug or an article liable to seizure;
 - b) enter and search any place or premises in which he reasonably suspects that there is to be found controlled drug or an article liable for seizure;
 - c) search a person found in the place or premises referred to in paragraph (a);
 - d) seize and detain a controlled drug or an article liable to seizure found on the person referred to in paragraph (a),(b) or (c) or in the place or premises referred to in paragraph (b).
- (2) For the purpose of exercising his functions under subsection (1) the police officer may, with such assistance as he deems necessary in the circumstances, use such force as is reasonably necessary in the circumstances.

b) The powers of the agency's agents which are contained in Section 9 and 13 of the Act. Section 13 (4) (a) of the Act provides in relevant form:

{4) Where in an instrument of appointment the President vests in an NDEA agent the power, functions duties, protections and authorities that vest in a person by virtue of him being —

(a) a police officer;

c) an officer of Customs...

such appointment shall be deemed to be an appointment of the NDEA agent under the relevant Acts and shall operate to vest in the NDEA agent all the powers, functions, duties, protections and authorities of a duly appointed and fully authorised police officer, officer of the Revenue Commission, officer of Customs, and/or an immigration officer, and/or as may be otherwise specified in the instrument of appointment, and so that any subsequent amendment of any such Act shall be deemed to apply to the NDEA agent as if the amended Act was in force at the time of his

appointment.

c) Article 1382 of the Civil Code which provides its definition 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 the result of a positive act or an 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.

d) Defendants by virtue of the Section 7 of the NDEA Act is granted immunity against any action done in good faith in exercise or discharge of any powers, duties or functions under the NDEA Act.

Immunity

Section 7 of the NDEA Act:

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.

e) **Article 2268 of the Civil Code which provides that:**

Good faith shall always be presumed. The person who makes an allegation of bad faith shall be required to prove it.

[35] Hence, the Plaintiff is statutorily prohibited pursuant to Section 7 of the NDEA Act against the Defendants.

[36] The Plaintiff in those circumstances does not disclose any *faute* or any illegality on the part of the Defendant because of the presumption of good faith. The NDEA have powers to investigate and ought to conduct such investigations thoroughly and in the manner that best seem fit according to the law and codes of conduct (**Antoine Emmanuelle Madeleine vs NDEA – CS 25 of 2016, copy enclosed**)

[37] I have very carefully analysed the evidence. I am convinced that the Plaintiffs did go through a lot of embarrassment and suffered from fear and trauma. But such reactions in themselves do not amount to *faute* on the part of the Defendants. The rule regarding

powers of search and entry into private premises is well established: the police must always obtain a warrant before doing so, from the court. Searching or entering premises without a warrant is an extreme and exceptional measure. It is given to the police for very specific purposes and one such purpose is the elimination of drug related activities and bringing the perpetrators of such activities before a court of law for them to be neutralised. The 4th Plaintiff was suspected of cultivating marijuana. The NDEA agents were under a duty to search his premises and also his farm. They had the necessary powers and protection of the law to do. The search was lawful. Whatever happened on that night might not have been nice for the Plaintiffs; it would not be nice for anybody to be disturbed at night by the police and be subjected to a search.

- [38] It is the State's responsibility to maintain law and order, peace and security within its territory.
- [39] As representatives of the State, law enforcement officials are expected to fulfil a variety of obligations when carrying out their responsibilities, including but not limited to the maintenance of public order, the prevention and detection of crime, and the provision of aid and assistance in all kinds of emergencies.
- [40] They are given specific powers to enable them to carry out their tasks: the power to use force and firearms, to arrest and detain, and to carry out searches or seizure.
- [41] Despite clear legal standards, law enforcement work is, however, not a mathematical science that leads to clear-cut answers. Because law enforcement officials have to deal with a wide range of situations with many conflicting interests, they are accorded a degree of discretion, which places considerable responsibility on them to make appropriate choices. The fact that law enforcement officials frequently find themselves in stressful or dangerous situations and have to deal on a regular basis with people who have broken the law or are suspected of having done so means that high moral and ethical standards have to be met to ensure that law enforcement officials act in accordance with the law at all times.
- [42] The leadership of law enforcement agencies therefore needs to be aware of the need to ensure searches are conducted in a manner to ensure the protection of and respect of rights.
- [43] The impact on the personal situation of the individual affected by a search or a seizure should never be underestimated and it is therefore crucial for search or seizure activities to comply with the governing principles of legality, necessity, proportionality and accountability as well as the relevant laws applicable to search and seizure.

[44] Under Seychelles law, search and seizure powers are conferred on law enforcement officers in terms of the Criminal Procedure Code, and in terms of the Misuse of Drugs Act. The two Acts differ in that the Criminal Procedure Act requires a search warrant, whereas the Misuse of Drugs Act allows for a warrantless search where:

1. A police officer may **at any time, without a warrant-**
 - a) stop and search any person whom he reasonably suspects of having in possession a controlled drug or an article liable to seizure;
 - b) **enter and search any place or premises in which he reasonably suspects that there is to be found controlled drug or an article liable for seizure;**
 - c) **search a person found in the place or premises referred to in paragraph (a);**
 - d) seize and detain a controlled drug or an article liable to seizure found on the person referred to in paragraph (a),(b) or (c) or in the place or premises referred to in paragraph (b).

2. For the purpose of exercising his functions under subsection (1) the police officer may, with such assistance as he deems necessary in the circumstances, use such force as is reasonably necessary in the circumstances.

[45] Searches are in their nature intrusive, and will inevitably make any person feel uncomfortable. However, the law recognizes that in order to investigate serious crimes, warrantless searches may be necessary.

[46] However, simply because the law permits warrantless searches, does not mean that the police have unbridled powers to enter the homes of any citizen. A warrantless search should only be conducted in exceptional circumstances.

[47] Furthermore, the legal authority to conduct a warrantless search does not immunize police officers from ensuring that their conduct and the manner in which they treat individuals and carry out the search must respect the dignity and fundamental rights of the individuals subject to a search. Therefore searches should not be more intrusive than absolutely necessary to achieve their purpose and should not be disproportionate in scope.

[48] Although the NDEA does provide immunity for complaints against conduct during a search, this immunity is not unconditional. The NDEA requires police powers to be

exercised in good faith and this extends to warrantless searches and the manner in which law enforcement officers carry out these searches.

[49] Therefore in order for a search and seizure, in terms of the Misuse of Drugs Act, to be lawful the following elements must be present:

- a. Reasonable suspicion of an offence;
- b. All elements of the search, including the conduct of the officers, must be done in good faith.

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

[51] For a successful claim therefore, the plaintiffs have to demonstrate that the conduct of the defendants was unlawful (i.e. without reasonable suspicion) and was not conducted in good faith.

[52] 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. The conduct complained of is covered by the immunity provision contained in the NDEA.

[53] I am satisfied that the police were within their powers and nothing amounting to fault was done. 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. The Search was carried out in good faith.

[54] I therefore dismiss the plaintiff.

[55] I make no order as to costs..

Signed, dated and delivered at Ile du Port on 30 May 2019



Nunkoo Judge