

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS36/2012

[2014] SCSC 381

**MICHEL ANDRE ESTICO
OF CARANA, GLACIS, MAHÉ**

Plaintiff

versus

**NICHOL FANCHETTE
OF NDEA Headquarters, New Port Road, Victoria, Mahe**

1st Defendant

**NATIONAL DRUG ENFORCEMENT AGENCY
Represented by Nial Scully, its Director of New Port Road, Victoria, Mahe**

2nd Defendant

**THE COMMISSIONER OF POLICE
Police Headquarters, Victoria, Mahe**

3rd Defendant

**THE GOVERNMENT OF SEYCHELLES
Herein represented by the Attorney-General of National House**

4th Defendant

Heard: 18 January 2013

1 July 2013

Counsel: Mr. F. Allyfor plaintiff
Mr. V. Benjaminfor defendants

Delivered: 22 October2014

JUDGMENT

D. Karunakaran, Acting Chief Justice

- [1] The plaintiff in this action claims the sum SR 1,000,000/- from the defendants jointly and severally for loss and damage, which the plaintiff suffered as a result of an unlawful act, the officers of the National Drug Enforcement Agency (hereinafter called the NDEA)allegedly committed with malice to the detriment of the plaintiff. This delictual claim is based on an alleged unlawful search and harassment by the said officers who were acting in their capacity as préposés of the 3rd and the 4th Defendants.
- [2] It is not in dispute that the Plaintiff is a Seychellois national employed as a pilot by Air Seychelles Limited.The1stDefendant is and was at all material times, an officer of the NDEA, the2nd Defendant is a statutory body established under the National Drug Enforcement Agency Act, 2008, and its functions, inter alia, are
- (i) to co-ordinate investigations into drug offences,
 - (ii) to achieve effective deterrence and prevention of drug offences,
 - (iii) to co-ordinate the national operational response to drug offences and
 - (iv) to commence, take over, direct or take part in any investigation or operation by any law enforcement or other agency that relates wholly or partly to drug offences.
- [3] The 3rdDefendant administers and commands the Seychelles Police Force. The4th Defendant, the Government of Seychelles operates, maintains and/or administers the Seychelles Police Force. The Seychelles Police Force is commanded by the

Commissioner of Police and its functions, amongst others, are to maintain law and order and prevent and detect crimes in Seychelles.

- [4] The plaintiff avers in his plaint that on the 5th December, 2011, the 1st Defendant together with other officers of, or attached to, the 2nd Defendant and/or the Seychelles Police Force, whose names are unknown to Plaintiff, acting together and in the course of their employment and duties with the 2nd Defendant and/or 3rd Defendant and/or 4th Defendants maliciously, without any reasonable cause and justification and acting out of bad faith unlawfully and unconstitutionally threatened the Plaintiff and entered onto the Plaintiff's land and searched the Plaintiff's dwelling house at Carana, Glacis, Mahé.
- [5] The Plaintiff further avers that the said entry, search and breach of privacy was done out of malice without reasonable cause, and in bad faith to intimidate and harass the Plaintiff. The said acts of the defendants were unjustified, unlawful, an abuse of power and unconstitutional as the Plaintiff had ordered the officers of the Second Defendant that they should not search the aircraft on its arrival from South Africa during the morning of the 5th December, 2011, until all the passengers have disembarked from the aircraft. According to the plaintiff, those unlawful acts of the defendants amount to a *fault* in law rendering the 2nd Defendant and/or the 3rd Defendant and/or the 4th Defendant vicariously liable to the Plaintiff in damages for the said acts of the 1st Defendant and the other said officers of the 2nd Defendant and/or the 3rd Defendants. It is the case of the plaintiff that by reason of matters aforesaid he suffered loss and damages as follows, which the Defendants are, jointly and severally, liable to make good to the Plaintiff.

Particulars of Loss and Damage

(a) Unlawful entry and search	SR 200,000/-
(b) Breach of privacy	SR 200,000/-
(c) Moral Damage	SR 600,000/-

Total SR 1,000,000/-

- [6] Therefore, the plaintiff prays this Court for a judgment ordering and condemning the Defendants, jointly and severally, to pay the former the sum of Seychelles Rupees One Million (SR 1,000,000/-) in damages with interests and costs.
- [7] On points of law, defendants contend that they are granted immunity by virtue of Section 7 of the NDEA Act against any action for anything done in good faith in exercise or discharge of any powers, duties or functions under the NDEA Act and the Misuse of Drugs Act. Hence, the defendants claim they cannot be sued in the instant legal proceedings because of the statutory immunity. It is also the averment of the defendants that the Plaintiff does not disclose a reasonable cause of action against the Defendants. Besides, there is no specific allegation or cause of action pleaded against Defendant No.3 in the plaint; he is a misjoinder and the Court should strike out him as a party to the instant action.
- [8] On the merits, it is also the case of the defendants that based on confidential information received by the Chief Officer of the 2nd Defendant certain employees of Air Seychelles were engaged in illegal activities under the Misuse of Drugs Act and using the facilities of Air Seychelles including aircraft to import illegal drugs into Seychelles. In pursuance of the said information, on 25th November 2011, a specific set of measures were agreed with the major stakeholders at the Seychelles International Airport, which was aimed at enhancing the surveillance, prevention and detection of drugs, and were in addition to the existing processes that were and are being operated by SCAA, Police, Customs and NDEA at the airport.
- [9] The defendants further aver that on 5th December 2011 it was scheduled to enter Air Seychelles plane after its arrival to search the aircraft for controlled drugs and other paraphernalia that might be on the plane for the purpose of the investigation into the allegations of illegal drug related activity. That the efforts of the 1st, 2nd, and 4th Defendants were frustrated by the actions of the Plaintiff, who obstructed their agent

and prevented from carrying out his lawful duties and responsibilities by standing at the door of the aircraft and preventing his entry to search the plane. In so preventing the NDEA agent from carrying out his lawful duties, the plaintiff committed an offence under Section 16(6) of the Misuse of Drugs Act 1991. The Plaintiff's actions thus gave credence to the information about the illegal activities. According to the defendants, in a further effort to frustrate the efforts of the NDEA to carry out their lawful functions, the Plaintiff on arrival at the customs check point refused to allow the NDEA agent present, to search him or his luggage.

- [10] Having regard to the very reliable information, coupled with the refusals of the Plaintiff either to allow a search of the plane, later his luggage or him gave reasonable grounds for believing that the Plaintiff was engaged in illegal drug related activity. Hence, the agents pursued their investigations by carrying out a search of the Plaintiff's premises at Carana, Glacis later in the afternoon of the 5th December 2011. Over and above the Plaintiff during the attempted search of the aircraft and during the subsequent search at the Plaintiff's premises on the 5th December 2011 was extremely uncooperative and abusive towards the Agents. Certain items were seized, examined and returned in good condition to the Plaintiff. Hence, the defendants contend that the operation was *bonafide* and done in good faith, and were done in the exercise and discharge of their powers, duties and functions under the NDEA Act and Misuse of Drugs Act.
- [11] It is further averred that the Defendants have not abused any of its powers but acted well within the ambit of law and further have not breached the Plaintiff's Constitutional right and have not committed any *fault* in law and are not liable for any damages. The search was conducted in accordance with the powers conferred under Section 21 of the Misuse of Drugs Act.
- [12] It is further averred that the Defendants have not committed any *fault* in law and are not liable for any damages. According to the defendants, the claim for moral damage, unlawful entry and search and breach of privacy are not true and correct. In any event, defendants aver that the plaintiff's claim is manifestly excessive and exorbitant in all

the circumstances of the case. Therefore, the Defendants pray this Honourable Court to dismiss the Plaintiff with costs.

[13] The facts that transpire from the evidence on record are these:

[14] The plaintiff, aged 46 is a Citizen of Seychelles. He is a well-trained professional Airline Pilot. He is married. His wife is also working as Director with the Ministry of Agriculture. They have two children. The first one is a daughter. She is pursuing her University-Studies abroad. The second one is a son. He is 18 and doing his A level-studies locally in Seychelles. According to the plaintiff, he is a well-respected person in his profession and society. He is a hardworking person and a proud father of two children. He has worked hard to provide a good education to his children and brought them up as good citizens. The plaintiff is living with his family in their own house at Carana, Mahé. He has 11 dogs at home. Some of them are big and ferocious.

[15] Be that as it may, the plaintiff started his career as a pilot with Defence Forces, in the Air Wing of the SPDF. He served the Air Wing for about three years; and then joined the National Airlines - Air Seychelles - as a pilot. In 2011, he had completed 22 years of service with Air Seychelles. With his long flight experience, he was serving as Captain. According to the plaintiff, he commands a lot of respect in his job with Air Seychelles. In his own words the plaintiff stated that if one asks his employer to give a reference for him, they would always commend him to be a "*loyal and honest*" person.

[16] Normally, whenever he took charge of any aircraft and piloted a flight as Captain, he used to have a team of 7 cabin crew and 2 flight deck-crew members under his command. As usual on the 5th December 2011, he flew with his crew piloting Air Seychelles flight from Johannesburg bound for Seychelles with aircraft full of passengers onboard. It was a night flight. Being the Captain, he was in charge and control of the plane and accountable *inter alia*, to the safety and security of his passengers until they all securely without any harm, and comfortably disembark from the airplane. He arrived in Seychelles early morning at around 6 a.m. He landed his aircraft at the Seychelles International Airport. He parked the airplane and did the normal routines such as giving permission to the health and customs officials to enter

the aircraft and do the procedures. Then the aircraft door was closed. After a while he again gave further instruction for the crew to reopen and deplane the aircraft so that the passengers could get off safely from the aircraft. As he was the one responsible for the safety of the aircraft and the security of his passengers onboard, he was supervising the safe and comfortable disembarkation of all his passengers. As passengers were rushing to the door, an unpleasant incident happened to his shock and panic. It is pertinent to revisit the testimony of the plaintiff *in extenso* on the crucial aspect of the incident to place the alleged incident in proper perspective. This runs in verbatim thus:

[17] *“I gave instructions to deplane the aircraft and the passengers were disembarking. I was sitting in my seat in the cockpit, looking on the left through the window. I could see the steps and I saw personnel in uniform with a dog walking up the steps. I told the 1st officer (next in command of his crew), that this is not something right, not supposed to happen. I left my seat and stood at the door and Itold the gentleman ... that he was not supposed to be boarding the aircraft with a dog whilst personnel are still on board and the passengers are deplaning. He stood there before me. He told me he was coming to search the plane. I told him he could do his search but only after all the passengers have left the plane but not at this stage (when they are disembarking from the aircraft.*

[18] *I found it a bit strange because then I checked the protocol, a book called standing order. Normally if the management did not get time to send you email before a flight they would put a note in the standing order. So we checked- me and the 1st officer. We checked the standing order but there was no note. So there was no change or no protocol to that effect. So I went down the steps and asked the supervisor of Air Seychelles if she knew of any protocol that allowed officers with dogs on the plane for search whilst passengers were still on board. She told me that she has not been advised, she was not aware and no one had spoken to her about it. ... Then I did not see that officer again after that... Then I went back to my seat to complete my post flight duties. ... After completing those duties, I debriefed all the crew and then I left the aircraft and went to immigration and custom... then I went to Immigration to have my passport stamped. The officer with the dog... looked at me, turned back, walked down the steps and left. He did not challenge me; he did not ask me anything; he just turned round with the dog.*

[19] *Normally immigration ...doesn't stamp the passport but there is something called a general declaration whereby they check your name and tick against your ID and then you are through. They don't stamp our passport as crew because of the size of the passport if it is stamped every trip every week the third week you need another passport. So we carry a Seychelles Identity Card which is recognized internationally. When I leave Seychelles I have a general declaration. And we don't go through the passenger channel to stamp... ... the company maintains the record of it staff movement, crew members leaving and arriving.*

[20] *After immigration ... I went through customs. It was December and we are usually given something called concession booklet (in exhibit P1) we are allowed to have the same allowance as a passenger three times a year. On that day I used that privilege and bought some duty free items. I went through the red channel of the customs and declared my product to the officer and handed my booklet and she did her search, I only had a cabin size trolley bag; she checked all my items and ... and then she took my booklet and verified and stamped it, she went inside with the booklet to do the stamp and signature; so I had to wait (there for) a while. Whilst I was standing waiting, there was a gentleman with an ID card in civil cloth (an NDEA officer) he came to me and asked me if there was any incident in the aircraft and I said no, not to my knowledge. Because, for me, incident in aviation means something reported to the authority. I said no. He asked me for my passport, I handed my passport... he turned away to walk away from me. So I said "gentleman, how can you leave with my passport, you checked it give it back to me. He gave it back to me. Then I got my document (exhibit P1) signed and I left the Airport and drove home"*

[21] After this Airport episode, the plaintiff reached home. It was just past 8 am. As it was a night flight he was tired and relaxing in bed. That time he received a call from one of his colleagues, the director of operations, who asked him if the NDEA tried to get onto the plane, while he was on duty that morning. The plaintiff explained to him about the incident. Then, the director told him that the NDEA was asking for details to come and search his house. The plaintiff did not take it seriously. It was around 2.30 pm. The plaintiff was at home with his son. His wife was away as had been to work in Town. He

suddenly heard his dogs barking. The plaintiff got up from the bed and looked outside. He saw two cars and a group of armed personnel in uniform at his electronic gate. He saw the 1st defendant leading the team standing near the gate. He had a dog with him and said they were going to search his house. The plaintiff asked him if it was because he stopped him that morning from boarding the aircraft that he was then coming to harass him at his house and also asked him if he had a search warrant. As the plaintiff was having conversation with the 1st defendant, some of the officers were trying to climb over the gate but they could not get inside because of the plaintiff's dogs were at large inside his residential campus. The officers got angry and said that they were going to shoot the plaintiff's dogs, demolish the gate and get into the house. The plaintiff told them that he had no objection for them to conduct any search at his house though he did not like the way they were trying to harass him in retaliation for not allowing them to board the plane with dog. The plaintiff secured and restrained all his dogs before they entered the house as they were ferocious and would eat the sniffer-dog of the NDEA. It was a chaotic and shocking scene of threat and violence created by the armed officers of the NDEA. There was a huge commotion drawing the attention of people from the neighborhood. The plaintiff and his young son, the school-going boy was traumatized and frightened. One of the plaintiff's neighbors Mr. Mohamed, an ex-police officer, who lives just a meter away from the plaintiff's house, was looking at the plaintiff through a sliding door. The plaintiff, having been driven by fear due to the group of the armed personnel around, told Mr. Mohammed that it was a good thing that the latter was watching the happenings as the former didn't know what those armed people would do to him and to his son. These officers were well-known for beating up people. The plaintiff being a pilot, his license to work depends upon his physical and medical condition. Hence, he begged Mr. Mohamed saying "Please, stay in and watch, in case you have to call for help, if they do some harm to me". Mr. Mohamed was standing there watching the scene of uproar. With the plaintiff's cooperation the officers divided in groups and conducted a thorough search at every nook and corner of the plaintiff's house. The search resulted in nothing. The people in the neighborhood were watching all the happenings at the plaintiff's house, including Mr. Mohamed. The 1st defendant took control of the mobile phones and checked all communication equipment of the

plaintiff. While the search was on, the 1st defendant received a phone call on his phone. Immediately, he answered that it all finished we have to leave now. They stopped the search abruptly after that phone call but took his passport and other statement of bank accounts with them. The next day the plaintiff called NDEA office and asked them to return his passport and other documents. They did. From the residential search, the defendants found no objects or material leading to any suspicion or incriminating the plaintiff with any offence. Since the impugned search was conducted at the residence of the plaintiff, there has been no other investigation nor has the plaintiff been charged with any offence whatsoever for any of his acts or objects or materials he possessed or found in his possession.

[22] The plaintiff testified that the so called search conducted by the defendants at his residence that particular afternoon was a malicious act, intended to humiliate, retaliate and threaten for what happened in the morning, while he was in charge of the aircraft with passengers onboard. According to the plaintiff, the NDEA had no apparent reason to suspect him for any illegal transaction or things in his possession. He as a senior captain in the airlines being in charge of the aircraft and the passengers at the material time, with a genuine intension of protecting the safety and security of the passengers, did not allow the defendant-officer to enter the aircraft especially with a dog while the passengers were disembarking from the plane. The plaintiff testified that he is a senior pilot with vast experience of having flown many flights into other parts of the world -in Africa South Africa, Nairobi etc., in Asia, Bombay, Chennai etc., in Europe, Italy, France, Germany, London etc. (to name a few). This incident of intrusion by an officer with a dog onto an aircraft under his responsibility, that too when his passengers on the aircraft were disembarking, has never happened in his career as a pilot. The plaintiff testified in cross-examination that he had never received any direction from the Civil Aviation or from Civil Aviation Security Authority that he should allow any NDEA personnel with dogs inside the aircraft, when passengers are embarking. Further, the plaintiff testified that he had to observe the International Aviation Standard Regulations as long as he was in charge the aircraft, since had been entrusted with the lives of about three hundreds of people onboard. In his position as captain wherever he lands in the world, he has the sole authority to give or refuse permission to anyone to enter the

aircraft. On that particular morning, the officer without his knowledge and permission attempted to enter the aircraft with his dog. He therefore, asked the officer not to enter considering the safety and security of his passengers, who were disembarking. During cross-examination counsel for the defendants suggested to the plaintiff that the arrogance and bad behaviour, which the latter exhibited while refusing the NDEA officer to enter the aircraft with his dog, raised a suspicion in the minds of the NDEA officers that the plaintiff could probably have drugs in his possession. Hence, they had to carry out the search at his house in Carana that afternoon. The evidence as to such suggestion runs in verbatim thus:

Q So he (the officer) did say he was coming for a search?

A Yes

Q He must have introduced himself.

A No. no names nothing. I said to him yes you may do your search but only after all the passengers have left the aircraft.

Q You did not object?

A No

Q Did you not refuse and behave badly with him?

A No.

Q Did you threaten him?

A No.

Q Did you behave arrogantly with him?

A No I behaved as a captain, a gentleman, and normal. But the thing is that this guy never talked back to me he just turned back and walked away. He never challenged me. He could have just told me he had all the powers he had and go ahead and search.

Q Yes you should have told him to step aside and let the passengers go and after that you invite him inside which you did not. You behaved badly and arrogantly and he left and that triggered an element of suspicion.

A No, no, no. I repeat again what happened, the guy came to the aircraft with a dog, he told me he had come to do a search, I said to him yes wait until all the passengers have left the aircraft and myself and other crew have left the aircraft then the aircraft is yours you can do whatever you want. Is that bad behavior?

Q I put it to you that you never said there were passengers in the aircraft to the agent who had come to the door step of your aircraft on that day.

A No I told him. Who knows if there are passengers on board, the guy who is down waiting to come up or me the operator in the aircraft who can see inside the aircraft.

Q So, when you came down you passed through the immigration and at the customs you were stopped by NDEA agent?

A No.....

Q I put it to you, you refused to cooperate with the officers at the customs to open your baggage for checking at the customs?

A No

Q And at the customs you behaved arrogantly and also badly with the officers who wanted to do your checking

A No. When you say officers or luggage, I only had one cabin size trolley bag, officers, I had concession book it is customs procedure I went voluntarily to the red channel to give the customs officer my book and my luggage to check”

[23] Furthermore, the plaintiff testified that he never received any prior notice or instruction either from Mr. Khan, the Head of Security of Air Seychelles or from the Seychelles Civil Aviation Authority (SCAA) that he should allow NDEA officers to conduct

search with their dogs inside the aircraft soon after the landing and that too, when passengers are disembarking. Following the said NDEA's search at the residence of the plaintiff, one of the weekly newspapers "*Le Seychellois Hebdo*", in its issue dated Friday 9th December 2011- in exhibit P2 - published a story - news item - titled "NDEA goes Big Game Fishing", in which it referred to the said two incidents involving the plaintiff, the first one that occurred at the airport and the second one that occurred at the residence of the plaintiff. The story inter alia reads thus:

[24] *"In a separate story concerning the NDEA, a situation escalated at the Pointe Larue international airport after the NDEA officers insisted on board an Air Seychelles flight after it landed with dogs whilst the passengers were still onboard.*

[25] *The pilot refused and his home was surprisingly searched by the NDEA a few hours later.*

[26] *Le Seychellois Hebdo has received a copy of an aviation security memo being circulated, that confirms that the NDEA is intensifying searches on all arrival flights into Seychelles. The memo warns that anyone who obstructs an agent from the due execution of his duties will be arrested"*

[27] The plaintiff testified that as a result of this story in the newspaper, many people called him and asked him about the NDEA's search at his residence. This caused embarrassment, stress and emotional disturbance to him and his family.

[28] In view of all the above, the plaintiff contended that the acts of the defendants in the name of search conducted at his residence that particular afternoon was done out of malice without reasonable cause, and in bad faith. The said search was an abuse of power by NDEA in that it was intended to intimidate and harass the Plaintiff because he did not allow the NDEA officer with his dog to get onto the aircraft soon after its arrival from South Africa during the morning of the 5th December, 2011, as and when the passengers were disembarking from the aircraft. The said unlawful acts of search by the defendants amount to a *fault* in law, which render all defendants liable to make good for the said loss and damage the Plaintiff suffered as a consequence thereof. In

the circumstances, the plaintiff urged the Court to enter judgment in the sum of SR1, 000,000/- in his favour and against the defendants jointly severally with interest and costs.

[29] On the other side, the defendants' witness Mr. Jose Benoiton (DW1), the dog handler, who had been involved in the first incident, testified that at the material time he was on duty at the airport with another NDEA agent one Etienne Esther. According to Mr. Benoiton, since he was instructed by his superiors to conduct the search inside the plane that day, he attempted to get onto the plane, with his dog. However, the plaintiff, who was then in charge of the aircraft prevented him from doing so. DW1 testified in essence, after all the passengers had disembarked from the plane he attempted to get onto the plane with his dog. He neither sought permission nor at the least did he inform the captain before he tried to get onto the plane for the search as such permission was according to him, not necessary. However, he admitted in cross examination that it was correct to say that he was about to get onto the plane whilst passengers were coming out of the plane; but, the plaintiff told him that he would not allow him to enter onto the plane since he did not receive any documents/authorization from his superiors to allow the search with the dog inside the plane. According to Mr. Benoiton, since the plaintiff made that comment in front of the SCCA staff and other ground workers and stopped him from getting onto the plane, **he took it as an insult** as he felt the plaintiff's treatment of him at the material time was unprofessional and brutal. Therefore, Mr. Benoiton inferred -in his own words he felt - that the plaintiff was preventing him from executing his duties at the material time as an NDEA officer. Acting on his own inference, Mr. Benoiton immediately reported the matter to his superiors stating that the captain of the plane prevented him from conducting the search inside the plane. Furthermore, Mr. Benoiton admitted in cross examination that although he had the power to search onboard the plane without the plaintiff's permission, that particular day he did not want to proceed with search despite he had sufficient time and opportunity to do so, as the plane was there at the airport without passengers for more than 3 hours. However, he preferred to return and report the matter to his team leader. Another NDEA agents one Mr. Mr Andy Cesar - DW2 - who was also on duty at the airport terminal near the red channel at the material time testified that he received a report from

another NDEA agent Esther stating that the plaintiff did not let DW1 go onboard the plane to carry out the search with his dog. Hence, when he saw the plaintiff near the customs red channel, he approached the plaintiff and asked him about the incident that happened earlier. The plaintiff told him that DW1 was trying to get onto the plane with his dog, while some of the passengers were onboard. Also the plaintiff told him that he called his Air Seychelles Duty Officer and they told him they were not informed of any such search in the plane. Then he asked the plaintiff to give his passport to him and he refused stating that he could not give his passport to him as he was not in uniform and he would give only to the customs official. According to DW2, the plaintiff did not allow him to search his luggage, argued with him and left the airport. However, DW2 admitted in cross examination that he did not recall if the plaintiff gave him the passport near the red channel or not. He also testified that he could not recall whether he was going away with the plaintiff's passport and the plaintiff told him to return the passport before going away from the scene. He also stated that as an NDEA officer, he has the power to search anyone whom he suspects outside the airport, but inside he normally asks for the passport as a matter of procedure. The main grievance of the NDEA against the plaintiff was that he prevented the NDEA officers from doing their duty. That was the reason for the search. If that incident had not happened according to DW2, probably they won't have searched the plaintiff's house. He also stated that the decision to search his house was solely taken by him. Further he testified that since there were other passengers coming to the terminal that time, he decided not to search the plaintiff at the airport. Furthermore, DW2 stated that although he spoke to his superior Mr. Nicol Fanchette about the incident involving the plaintiff, the decision to search the plaintiff's house was taken not by Mr. Fanchette. DW3, Mr. Savory Khan, the Head of Aviation Security for "Air Seychelles" testified that in 2011, at the request of the NDEA Chief Officer Mr. Neill Scully a meeting was organized for all stakeholders to agree on a series of measures to be taken inter alia, to enhance prevention and detection of drug trafficking particularly, through inbound Air Seychelles aircrafts. The details of those measures and procedures were agreed upon by all stakeholders as rehearsed in a letter dated 25th November 2011 written by Mr. Scully

addressed to the Minister for Home Affairs. DW3, Mr. Khan produced that letter - exhibit D1 - in evidence, which reads thus:

Reference: MHAETE Memo dated 16 November 2011 — Drug transactions on Air Seychelles

Dear Minister,

In response to the above mentioned memo I met with the Air Seychelles CEO Mr. Steller at his request also present at the meeting Mr Faure, CEO SCAA, Mr. Jean Laporte-Director Tech Ops Air Seychelles, Mr Samson, Head of Security SCAA, Mr Khan Head of security Air Seychelles, Mr Fanchette NDEA. In what was a very positive and productive meeting we discussed the content of the memo and I informed the meeting that the NDEA is investigating the matter further.

We agreed a series of measures to enhance prevention and detection of drugs these procedures are in addition to existing processes operated by SCAA, Police, Customs and NDEA.

- Random airline staff searches to be increased in all areas - SCAA, Police, Customs, NDEA*
- Aircraft to be boarded and searched randomly - SCAA, Police, Customs, NDEA*
- Drug and Explosives detection dogs to be used in aircraft searches - Police, NDEA*
- Random searching of engineering, catering and cleaning staff and equipment operating on or close to aircraft - SCAA, Police, Customs, NDEA*
- Random searching of duty free and catering carts - SCAA, Police, Customs, NDEA*
- Random urine sampling for drug trace for Air Seychelles staff SCAA, Air Seychelles*

NDEA has also undertaken to inform Air Seychelles of any Air Seychelles staff member who is suspected of or is known to consume controlled drugs provided it is not

operationally sensitive.

It was also raised at the meeting that there is a requirement to detect arms, ammunition and explosives using detection dogs whilst the NDEA has limited resources in this sector we will provide some assistance however having Police support in this area through the use of Police handlers and dogs would be very beneficial.

Yours faithfully,

(Sd) Niall Scully I

Chief Officer

Copy: COMPOL, Mr Faure, CEO SCAA, Mr Steller CEO Air Seychelles Mr Morin, Director ground Ops, Mr Samson Head of Security SCAA, Mr Khan Head of security Air Seychelles Mr Fanchette NDEA.

- [30] Mr. Khan also stated that in the past NDEA has searched in his presence some other aircrafts as well, not only Air Seychelles planes. According to him, NDEA had authority to board any vessel and conduct a search as long as they have reasonable grounds to do so. The plaintiff was that time the commander with the flight operations department. However, he was never informed of the measures that were agreed upon by the parties and referred to, in the above letter. He was never made aware of the fact that NDEA might conduct random search at any time onboard with sniffer dogs. On that particular instance, the plaintiff and another Captain Ralf Saminadin called Mr. Khan and brought to his attention that they were not ready to allow the NDEA to search the aircraft, when passengers and crew members were onboard since they were familiar with the aviation industry that when a captain is on the aircraft the overall responsibility for safety and security of the plane, crew members and passengers solely falls on him. Furthermore, Mr. Khan testified that the Civil Aviation Security never specifically authorized the NDEA to conduct any search when passengers are onboard the aircraft. It is very difficult to search an aircraft with passengers as there is a lot of panels and

especially, when it is full of passengers it is not easy to search each and every passenger, every single piece of luggage onboard, the seats, seat-pockets, toilets etc. Although Mr. Khan was on duty at the material time at the airport as the Chief of Civil Aviation Security, the NDEA never informed him about their intended search either prior to or at the time, or after the plaintiff refused entry to the dog handler. Even immediately after the plaintiff's alleged refusal, the NDEA did not make any complaint to him nor did they seek his permission to board the plane and search onboard.

- [31] DW4, Nicole Fanchette, a senior NDEA officer, who was in charge of the NDEA operations at the airport on that particular day testified that in the morning of 5th December 2011, he received information from DW2 (Andy Cesar) that the plaintiff prevented the officer Mr. Benoiton from going onto the plane to conduct the search. Besides, the plaintiff did not allow the NDEA officers to search his luggage at the arrival lounge. These two pieces of information led them to believe that the plaintiff was a suspect. Incidentally, it is pertinent to rehearse in verbatim, what this witness replied to a question put to him by the defence counsel in cross examination.

Q: Are you aware if Captain Estico knew that the NDEA was going to search or could randomly search the aircraft? Do you know whether he knew about it?

A: I think he knew because we had a meeting at the Airport together with all stakeholders and am sure that he must have been told that we are going to search a plane at any time, because before that we searched many plane.

- [32] Hence, Mr. Fanchette reported the matter to his boss Mr. Neill Scully. Subsequently, all those officers, who were on duty at the airport that morning had a meeting at the New Port and decided to search the house of the Plaintiff in the afternoon. According to Mr. Fanchette, they believed that the plaintiff was a suspect since he did not allow the agent Mr. Benoiton to enter and search the aircraft at the material time. This witness also stated that Mr. Benoiton told him that the plaintiff did not allow him to enter the aircraft because the dog was filthy or dirty. He was vexed by what had happened. He also admitted in cross examination that they have never searched a plane with passengers on arrival in Seychelles. During the search at home admittedly, he took away the passport,

ID card and other bank statements of the plaintiff from his bedroom. In cross examination, Mr. Fanchette stated that he took away the passport and ID of the plaintiff only for identification purposes, though he testified that he knew the plaintiff as captain with Air Seychelles and has seen him at the Airport on many occasions. In the circumstances, the defendants contended that said search conducted at the residence of the plaintiff was bona fide, done in good faith, and was done not out of malice but in the exercise of their powers and discharge, of duties under the NDEA and Misuse of Drugs Acts. They acted on a reasonable suspicion that the plaintiff might have been involved in drug trafficking. Furthermore, the Defendants claimed that they did not commit any fault in law and are not liable in damages to the plaintiff. Hence, they urged the Court to dismiss the suit.

[33] I carefully perused the entire evidence on record including the documentary evidence adduced by the parties in this matter. I gave diligent thought to the submissions of counsel on both sides. I also had the opportunity to observe the demeanour and deportment of the witnesses, whilst deposed in Court. First, on the question of credibility, I believe the plaintiff in every aspect of his testimony. Having observed the demeanour and deportment of the plaintiff, I conclude that he is a credible witness and was speaking the truth to Court. I believe his testimony particularly, on his version as to how, why and under what circumstances he had to stop Mr. Benoiton from getting onto the plane with his dog that morning. The reasons he gave for stopping Mr. Benoiton is plausible and his evidence in this respect is very cogent, reliable and consistent in all material particulars. Indeed, I believe him in that

- (i) whenever he was onboard any plane as captain, he was the one in-charge having overall authority and responsibility for the safety and security of all the lives onboard including passengers and his own crew-members; this overall responsibility includes inter alia, protection of all people on board from any health, psychological or emotional hazards or discomforts they may suffer due to intrusion of any animal, especially in a congested space inside the aircraft;

- (ii) Mr. Benoiton did attempt to get onto the plane at the material time, and the plaintiff did see him walking up the steps with a dog, while passengers were still onboard.
- (iii) The plaintiff having observed the scene came close to the door and told Mr. Benoiton that he was not supposed to be boarding the aircraft with a dog whilst the passengers were disembarking but he could do so only after all the passengers had disembarked the plane.
- (iv) There were no protocols, standing orders or any other special instructions from the Air Seychelles management or Civil Aviation Authority or Airport Security notifying or authorizing the plaintiff to allow such searches inside the plane, that too, while passengers were still onboard.
- (v) Although certain measures and procedures were agreed upon by all stakeholders in a meeting to allow random searches inside the aircrafts as rehearsed in exhibit D1, that important piece of information was never communicated to the plaintiff at any point in time.
- (vi) Soon after the said incident, the plaintiff did go through Immigration, cleared his luggage at the Customs Red Channel and the NDEA officers were still around watching the plaintiff , who did give the passport to one of the NDEA officers, when he requested for it.
- (vii) The NDEA had ample time and opportunity at the Airport to search the person and the baggage of the plaintiff, who had only one piece of hand luggage with him at the material time.
- (viii) Immediately after plaintiff's refusal, the NDEA did not make any complaint to Mr. Savory Khan, the Head of Aviation Security for "Air Seychelles" nor did they seek permission from them to board the plane and do the search.

- (ix) If the NDEA really had any suspicion on the plaintiff, they had sufficient time and earliest opportunity to search on the plaintiff soon after he left the airport on his way back home.
- (x) Mr. Benoiton took it as a personal insult, when the plaintiff stopped him from getting onto the plane and wrongly inferred that the plaintiff was stopping him from searching the aircraft.

[34] In view of all the above, I find on facts that the NDEA officers misinterpreted the words and the reaction of the plaintiff at the material time. Hence, they wrongly inferred that the plaintiff insulted their officer and challenged the powers and authority of NDEA and prevented them from searching the aircraft. Evidently, this wrong inference cannot constitute a valid reason to justify the subsequent search at the dwelling house of the plaintiff. In fact, the genuineness and the plausible reasoning behind the plaintiff's refusal to allow the man with the dog onboard the aircraft at the material time, were completely lost in translation - over the repeated hearsays along the communication line- starting from Mr. Benoiton until the information finally reached the Chief of NDEA, which allegedly necessitated the search at the residence of the plaintiff. Their misinterpretation and the wrong inference obviously, have prompted the NDEA officers to react the way they did in the afternoon. In my judgment, the impugned search they conducted at the residence of the plaintiff in the afternoon was a later thought, a contrived reaction by the officers of the NDEA that emanated from the wrong message the officer Mr. Benoiton conveyed to his superiors, as he felt that he was insulted by the plaintiff in the morning incident that occurred near the aircraft. In any event, even if one assumes for a moment that plaintiff had insulted one of the NDEA agent, that fact alone cannot on its own, in the absence of any other incriminating facts or circumstances, constitute a valid ground for a "reasonable suspicion" in order to justify the search at the dwelling house of the plaintiff. In passing, I should mention that most of the searches the NDEA normally carry out throughout the country are really commendable as they do so with a good intention of achieving an effective detection, deterrence and prevention of drug offences. However, having given careful thought to the entire circumstances of the instant case, I find on a

preponderance of probabilities, that the search carried out at the dwelling of the plaintiff, in this particular matter does not show good faith on the part of the defendants.

[35] Now the crucial question arises whether the defendants (the NDEA officers) committed a *fault* in law in conducting the search (hereinafter called the impugned search) at the residence of the plaintiff in the afternoon of 5th December 2011. For the sake convenience and clarity this question may be bifurcated into two. That is:

(a) Was the impugned search a *malicious act* carried out in retaliation against the plaintiff due to the incident, which occurred in the morning at the airport? Or

(b) Was it a genuine search carried out on a *reasonable suspicion* against the plaintiff that arose from the morning incident?

[36] Before one proceeds to find answers to the above questions on merits, it is pertinent to ascertain first, which party bears the burden of proof in respect of the two issues namely: (i) the “malicious act” alleged by the plaintiff against the defendants and (ii) the “reasonable suspicion” alleged by the defendants against the plaintiff. Both are indeed, the core issues involved in the above questions (a) and (b) respectively.

[37] The burden of proof may shift from time to time as a matter of evidence only. The burden of proving a “fact-in-issue” generally lies on the party, who asserts that that fact does exist in order to prove its claim. The burden of proof does not lie with the person who denies the existence of that fact. This is the rule. However, the party denying is entitled to admit evidence to show that what is asserted by the opponent was not the case. Unless the party is able to prove the fact by relying on judicial notice or a presumption, the fact must be proved by formal evidence. Obviously, the plaintiff’s action in this matter is based on “**fault**” allegedly sprouting from a malicious act of search by the defendants. Therefore, the precise nature of the “*fault*”, the “**maliciousness**” must be proved and the burden of proving it undoubtedly lies on the plaintiff. Mere conjectures and presumptions are not sufficient. On the other hand, it is the claim of the defendants that the impugned search was carried out on a *reasonable*

suspicion against the plaintiff, which arose from the incident at the airport. Hence, I find the burden of proving the “**reasonable suspicion**” squarely lies on the defendants.

[38] Since the instant action is based on “fault”, the principles of law applicable to this case are that which found under Article 1382 (2)&(3) of the Civil Code of Seychelles. This Article reads thus:

[39] *“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.*

[40] *“Fault may also consists 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”*

[41] As I found *supra*, the defendants misconstrued the words of the plaintiff and his behaviour as a suspect, when he refused Mr. Benoiton access onto the plane at the material time. In fact, the self-provoked anger of Mr. Benoiton against the plaintiff over the morning incident, has in my view, clouded his ability to see the genuineness and the reasoning behind the plaintiff’s refusal. If one considers the entire circumstances of the case, and the sequence of events narrated *supra*, it is evident that the NDEA has conducted the impugned search in retaliation to the stance the plaintiff took in the morning by denying an NDEA agent access onto the plane, when passengers were disembarking. In my considered judgment, the impugned search conducted at the residence of the plaintiff in the afternoon was a malicious later thought, a contrived reaction by the officers of the NDEA to the morning incident that occurred at the airport. I find on evidence that the **dominant purpose** of the impugned search was to intimidate the plaintiff in retaliation. It was not done by the NDEA personnel in good faith. Hence, on the points of law, defendants cannot claim any immunity under Section 7 of the NDEA Act against any action for anything done in bad faith in exercise or discharge of any powers, duties or functions under the NDEA Act and the Misuse of Drugs Act. As I see it, this act of impugned search by the defendants constitute a “fault” in law, in terms of Article 1382 (3) of the Civil Code of Seychelles (*vide supra*),

even if it appears to have been done by the NDEA in the exercise of a **legitimate interest** to implement the national effort to combat drug offences in the country.

[42] As regards the “**reasonable suspicion**” to justify the impugned search, the defendants should prove on a balance of probabilities that there had been an objectively justifiable suspicion against the plaintiff that necessitated them to conduct the search at his residence. Reasonable suspicion should be based on specific facts or circumstances from which any reasonable person would suspect that a crime has been committed or likely to be committed to justify a search at the private dwelling or residence of the plaintiff, who was thought to be involved in criminal activity. However, according to the defendant only the following two circumstances, gave rise to “**reasonable suspicion**” that the plaintiff was a suspect:-

(1) the plaintiff prevented the officer Mr. Benoiton from going onto the plane to conduct the search at the material time: and

(2) The plaintiff did not allow the NDEA officers to search his luggage at the arrival lounge.

[43] Indeed, a reasonable suspicion is always evaluated using the "**reasonable person**" or "**reasonable officer**" standard, in which said officer in the same circumstances could reasonably suspect that person has been, is, or is about to be engaged in criminal activity; it all depends upon the totality of circumstances, and can result from a combination of particular facts, even if each is individually innocuous. In the present case, no reasonable officer, from the matrix of facts and circumstances narrated supra, would suspect that a crime has been committed or likely to be committed by the plaintiff in order to justify the impugned search at his private residence. Reasonable suspicion cannot be based on unreasonable inferences drawn from guesswork or from non-specific facts and equivocal circumstances as has happened in the instant case. A reasonable suspicion is more than a hunch or speculation. In the case on hand, I find that the officers were not able to point to specific facts or circumstances even though the level of suspicion need not rise to that of the belief that is supported by probable cause.

[44] Incidentally, I hold that when police officers or NDEA agents carry out a warrantless search at any private dwelling of a person on reasonable suspicion or probable cause that a crime has been committed or likely to be committed or to recover or seize an illegal substance or property, the Courts in determining lawfulness of such search, should consider the entire circumstances and all other relevant factors including:

- (1) What information did the officers have?
- (2) What information could they infer?
- (3) What were their alternate courses of action? and
- (4) What was the reasonableness of the action they took?

[45] Having thus given meticulous thoughts to the entire facts and circumstances of the case including the factors mentioned supra, I conclude that the impugned search was a *malicious act* carried out in retaliation against the plaintiff for the morning episode tainted with misinterpretation and wrong inferences. Furthermore, I find that it was not a genuine search; and not based on reasonable/probable cause or *reasonable suspicion* against the plaintiff. In the circumstances, I hold all defendants jointly and severally liable in delict for the consequential loss and damage, the plaintiff suffered as a result of the fault committed by the defendant's officers and agents. However, I find the amount claimed by the plaintiff under each head appears to be highly exaggerated and unreasonable. After taking all relevant factors into account, I award the following sums to the plaintiff for loss and damage:-

(a) Unlawful entry and search	SR 100,000/-
(b) Breach of privacy	SR 75,000/-
(c) Moral Damage	SR 150,000/-
	Total SR 325,000/-

[46] Accordingly, I enter judgment for the plaintiff and against the defendants jointly and severally in the total sum of SR 325,000/- with interest on the said sum at 4% per annum (the legal rate) as from the date of the plaint and with costs of this action.

Signed, dated and delivered at Ile du Port on 22 October 2014

D Karunakaran
Acting Chief Justice