

[1] On 12 May 2014, the plaintiffs, Mr. Andrew John Huxham and Ms. Faye Astrid Huxham, instituted action against the defendant. The pleaded claims were:-

INTRODUCTION:-

Stanton J

JUDGMENT

MINISTER OF POLICE	DEFENDANT
MATTHEW HUXHAM N.O.	FIRST PLAINTIFF
MATTHEW HUXHAM N.O.	SECOND PLAINTIFF

In the matter between:-

Case Number: 747/2014
Heard: 24 and 25 July 2023
Argued: 31 October 2023
Delivered: 02 February 2024

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO



1.1	In respect of the first plaintiff for: -	1.1.1	Payment of the amount of R4,400,000.00 as damages in respect of the unlawful seizure of sugilite by members of the South African Police Service on or about 01 September 2011 at Kuruman. The claim amount of R4,400,000.00 was quantified on the basis that the first defendant, had the sugilite been restored to him, would have cut, polished and sold it for this value on the open market in the United States of America; and	1.1.2	Payment of the amount of R655,000.00 as damages resulting from his unlawful arrest, assault and detention, claimed as follows:-	1.1.2.1	R5,000.00 for past hospital and medical expenses;	1.1.2.2	R150,000.00 for estimated future and medical and related expenses; and	1.1.2.3	R500,000.00 in respect of general damages; and	1.1.3	Payment of the amount of R513,598.30 for damages as a result of the malicious prosecution.	1.2	In respect of the second plaintiff for: -	1.2.1	Payment of the amount of R750,000.00 as general damages resulting from her unlawful arrest, assault and detention; and
-----	--	-------	--	-------	---	---------	---	---------	--	---------	--	-------	--	-----	---	-------	--

1.2.2 Payment of the amount of R513,598.30 for damages as a result of the malicious prosecution.

[3] According to the particulars of claim, Mr AJ Huxham's claim for general damages is based on the following injuries he sustained, namely: -

3.1 High blood pressure as a result of him not receiving his medication timeously;

3.2 Contumelia, humiliation and embarrassment; and

3.3 Emotional and psychological trauma,

which resulted in him suffering from temporary elevation in blood pressure, insomnia, decreased concentration, anxiety, loss of weight and appetite, emotional outburst and bad dreams.

[4] According to the particulars of claim, Ms FA Huxham's claim for general damages is based on the following injuries she sustained, namely: -

4.1 Contumelia, humiliation and embarrassment; and

4.2 Emotional and psychological trauma.

[5] It is common cause that Mr AJ Huxham and Ms FA Huxham were arrested and detained at Kuruman by members of the South African Police Service from 01 September 2011 until 02 September 2011 when they were released without bail.

[6] The merits and quantum were separated. The trial in respect of the merits proceeded on 16 to 18 October 2018 after which it was postponed. On 03 June 2019, prior to the conclusion of the trial on the merits, it transpired that the criminal case against the plaintiffs was withdrawn. The defendant conceded its liability and agreed to pay the plaintiffs' proven quantum. The

sugillite stones were also returned to Mr AJ Huxham at the request of Mr JCC Cohen, the plaintiffs' attorney of record.

[7] Mr AJ Huxham passed away on 14 March 2019 and Ms FA Huxham passed away on 22 April 2021. Mr Matthew Huxham, the executor in their deceased estates, accordingly substituted them as plaintiffs.

[8] The plaintiffs' particulars of claim were thereafter amended and the quantum of the first plaintiff's first claim in respect of the seized sugillite was increased to R14,400,000.00.

[9] Save to plead that the seized minerals were not sugillite, but wesselite, the defendant in essence denied the contents of all of the allegations in the particulars of claim and amended particulars of claim.

[10] At the commencement of the trial in respect of the quantum: -

10.1 The plaintiffs' claims for damages as a result of the malicious prosecution were withdrawn in view of the fact that both plaintiffs are deceased; and

10.2 The defendant conceded that the weight of the returned sugillite was 31,2kg, 2,02 kg less than the confiscated weight of 33,22kg.

THE FIRST AND SECOND PLAINTIFFS' APPLICATION IN TERMS OF UNIFORM RULE

38(2):-

[11] In view of Mr Huxham's passing on 14 March 2019, the plaintiffs filed an application in terms of Uniform Rule 38(2) that the following be admitted into evidence: -

11.1 Mr AJ Huxham's affidavit, dated 24 July 2018 ("the affidavit"); and

11.2 The video evidence of Mr AJ Huxham, recorded on 09 November 2018.

[12] The defendant opposed the application. Ms S Mahomed, on behalf of the plaintiffs, and Mr TL Manye, on behalf of the defendant, agreed that Mr AJ Huxham's affidavit and the six videos may be provisionally admitted into evidence and that a final ruling in respect thereof should be made after all the evidence had been heard.¹

[13] In the affidavit, Mr AJ Huxham stated that: -

13.1 He is a 75 year old male, diagnosed with multiple myeloma and was hospitalised for a heart attack during June 2018;

13.2 He deposed to the affidavit in the event that he is too ill to testify or if he should pass away;

13.3 He personally purchased 32kg sugilite semiprecious gemstones on 17 August 2011 from Art's King Co Ltd, a gem dealer in Hong Kong, for a purchase price of US \$350.00, which is confirmed by the copies of his passport and the invoice C-020911 attached to his affidavit. The price was reduced as Art's King Co Ltd was superstitious that the gemstones were unlucky for their company;

13.4 He took half of the sugilite with him and had the other half transported to South Africa by air freight;

13.5 The sugilite had a high value and he marked the stones with a diamond scriber;

13.6 He and Faye went to Kuruman with "a selection of sugilite" with the intention of meeting a cutter based in Griekwastad;

- 13.7 He and Faye were arrested by two armed and hostile police officers. They did not inform them of the reason for the search they were conducting;
- 13.8 Faye, who has a sensitive demeanour, began to cry;
- 13.9 The police officers confiscated the chest, informing him that imported sugillite requires a permit and in the absence thereof, his possession is illegal. A police mechanic broke open the chest containing the sugillite without either his consent or a warrant;
- 13.10 While being detained at the Kuruman police station, one detective repeatedly shouted at him, telling him he is a liar. A group of approximately 40 police officers taunted him and verbally abused, assaulted, and humiliated him. He was pushed to the ground and forced to kneel to enable the police officers to take photographs of him with the stones;
- 13.11 At the scrap yard he was "paraded around the scale and made to kneel and pose in various positions ... like a monkey for their *entertainment*." He felt utterly humiliated;
- 13.12 He was taken back to his cell and his sugillite stones were unlawfully confiscated from him. That was the last time that he ever saw his sugillite;
- 13.13 He and Faye were locked up for the night, without being charged or having been read their rights;
- 13.14 He informed them repeatedly that he needed to take his hypertension medication which was in his vehicle, but they merely ignored him;
- 13.15 They were not given any food and only water to drink;

13.16 Faye was taken for questioning three times, during which interviews they called her stupid. He observed her to become more and more shaken and disturbed after every interview;

13.17 He was imprisoned with criminals and felt extremely threatened, unsafe and in danger of being attacked by them. He could not sleep;

13.18 He was given no receipt for the confiscated sugilite, despite his repeated requests;

13.19 During his first court appearance, the Magistrate shouted at him and threatened to hold him in contempt;

13.20 Upon returning to Cape Town, he instructed William Booth to act on Faye and his behalf. William Booth instructed a correspondent attorney in Kuruman;

13.21 He contacted the magistrate's office to obtain their appearance date and was informed that warrants of arrest had been issued for him and Faye. While travelling to Kuruman his car broke down;

13.22 They were found not-guilty of contempt of court;

13.23 Various warrants of arrest were issued and they had to travel to Kuruman almost every month for more than a year;

13.24 It was difficult for him to obtain funding to pay his legal expenses;

13.25 His business was adversely affected by the unlawful arrest and detention and the confiscation of the sugilite;

13.26 He and Faye suffered from regular panic attacks and stress since their return to Cape Town and they were plagued by fear and anxiety. He sought trauma counselling at his own expense, but was

not in a financial position to receive ongoing therapy. Medication was also prescribed for him and Faye;

13.27 He has suffered immensely and continues to suffer from insomnia, post-traumatic stress, panic attacks and elevated hypertension which has had a severe impact on his general health and well-being;

13.28 Faye has become severely incapacitated with nervousness and post-traumatic stress. She lost her job as an *au pair* in the United Kingdom as she became unable to function. She depends on her parents for her maintenance;

13.29 This experience has impacted his and Faye's lives in every aspect to such an extent that their former lives are unrecognisable; and

13.30 He and Faye fear the police and being out in public.

[14] The following emerged from the viewing of the video footage:-

14.1 Two sealed police evidence bags were opened in Mr JCC Cohen's office on 09 November 2018 in the presence of Mr AJ Huxham, Mr M Huxham, Mr JFH Huxham and Mr JCC Cohen;

14.2 Mr M Huxham cut the two sealed bags and removed the plastic bags within and opened same; and

14.3 Mr AJ Huxham immediately responded that the stones inside the bags were "*rubbish*", "*not even sugillite*" and "*not even black manganese*". He added that one "*could not do anything with it*" and that he would not even put in his driveway. He added that the stones were not "*even his stones*" as he had marked and cut some with a saw, but that the stones in the bags contained no markings. He moistened a stone with water to demonstrate that it does not have any markings. He exclaimed that his stones were stolen.

VIVA VOCE EVIDENCE:-

[15] It is prudent to set out the evidence presented during the trial prior to my finding on the admissibility of the affidavit and the video footage.

[16] Mr Julian Francis Hilton Huxham, during his examination in chief, testified that:-

16.1 He is the son of the late Mr AJ Huxham and the brother of the late Ms FA Huxham;

16.2 He is a gemstone salesman, trained by his father;

16.3 He was not present when his father purchased the stones in Hong Kong, but his father had informed him that he had purchased the sugillite in Hong Kong;

16.4 He saw the sugillite stones that his father had purchased in Hong Kong before they were unlawfully confiscated by the defendant, and he knows their appearance;

16.5 He was present in Mr JCC Cohen's office on 09 November 2018 when the two sealed evidence bags were opened. Mr. JCC Cohen recorded the video clips and his brother, Matthew Huxham cut open the bags; and

16.6 The stones in the bags were not the same stones that his father had purchased in Hong Kong. They were of inferior quality, and it did not have the colour of sugillite.

[17] When cross examined, Mr JFH Huxham testified that:-

17.1 He saw the stones that his father brought in Hong Kong for the first time before they were marked, on the dining room table of their house;

17.2 His father had informed him that stones were of a good quality. His father had determined the value of the sугилite;

17.3 He confirmed his father stating that the stones opened in Mr JCC Cohen's office were not his;

17.4 There was no need to inspect each and every stone in the bags as he could see the stones from the top of the bags that were opened;

17.5 The stones confiscated from his father had a flat surface, but the stones in the bags had irregular shapes. The colour of the stones bought by his father in Hong Kong were all consistent and had a dark purple colour, but the stones in the bags were inferior and of a completely different colour;

17.6 He conceded that he did not inspect and or analyse any of the stones in the bags opened in Mr JCC Cohen's office. He also conceded that the Court can only rely on his father's assessment and determination of the clarity and the value of the confiscated stones versus the stones that were returned to Mr JCC Cohen's office; and

17.7 When pushed to answer why he did not need to pick up any stone to examine it closely for verification, he replied that it was not necessary.

[18]

During his examination in chief, Mr JCC Cohen testified that:-

18.1 He is the plaintiffs' attorney of record;

18.2 Immediately after the bags were opened and the videos taken on 09 November 2018, he inquired from Mr AJ Huxham whether he had any leftover samples of the original batch of sugillite that he had purchased in Hong Kong;

18.3 Mr AJ Huxham confirmed that he had a sample left over, which he requested Mr AJ Huxham to provide to him; and

18.4 Mr M Huxham brought the sample to his office, which sample is depicted in the top photo of Mr J Rothon's expert report.

[19] When cross-examined, Mr JC Cohen testified that:-

19.1 When he realised that the original stones were not returned to Mr AJ Huxham, he immediately requested him to provide him with a sample of the stones that he brought from Hong Kong for the purpose of valuating the original product. The sample he obtained from Mr M Huxham was not part of the confiscated stones;

19.2 He instructed Mr J Rothon to attend to a comparative analysis of the two samples based on his expertise as a gemmologist and to value both sampled;

19.3 He was not convinced that both samples were sugillite;

19.4 He could not confirm, in view of the fact that the stones arrived in South Africa at different times, whether both batches brought to South Africa by Mr AJ Huxham were of the same quality or value;

19.5 He conceded that the stones that were delivered to his office could have been of a different kind and of a different value. He also conceded that the stones that came from Mr AJ Huxham, and stones that were delivered from Hong Kong could have been different; and

19.6 He does not know where the samples were mined.

[20] Mr Jeremy Rothon testified during his examination in chief that:-

20.1 He is a qualified gemmologist and has been a member of the Gemmological Association of Great Britain since 1987. He is also a member of the Jewellery Council of South Africa. He established the Natal Gemmological Laboratory in Durban during 1990 and was its director until 1990 and again from 1996 to 2007 when it was re-established. From 2012 to date, he has been the director of Gem Lab (Pty) Ltd in Cape Town;

20.2 He was given two samples to evaluate, which samples are depicted in photographs on page 1 of his report. His mandate was to assess the two samples and to value it;

20.3 The most important factor to consider when assessing sugillite is the colour, which resembles grape jelly;

20.4 With regard to the value of the sugillite, he testified as follows:-

20.4.1 There are no known suppliers of sugillite in South Africa. He contacted two of the biggest suppliers in Cape Town, Mineral World and African Gem and Minerals, who informed him that they do not deal with sugillite anymore and do not intend to do so in the future;

20.4.2 He determined the value based on the overseas market and by making use of six internet searches that gave him a reliable indication of prices, from the lowest quality to the best. He believes that the latest article on sugillite, based on South African facts, is the most reliable and in accordance with the online selling prices;

20.4.3 He can only comment on the sample that was provided to him as he never saw the sample that was confiscated;

20.4.4 With reference to sample one, he estimated a reasonable average yield of between 50 to 60%;

20.4.5 He conceded that the specific gravity of sample one of 2.83 means that it is not pure sugillite, but a very good quality and 80% sugillite;

20.4.6 The second stone he assessed was of a low quality, which could be qualified as mine run, which is "*basically scrap*" and that without being rude he would put in a fish tank or "*turn it into very low-quality beads*". Sugillite of this quality is either discarded or auctioned off, so the prices can differ quite considerably;

20.4.7 For the purpose of his evaluation, he worked with a round figure of 33kg or 33,000g;

20.4.8 In respect of sample 1, he estimated that the wholesale price for a cabochon and polished cut would amount to approximately R900.00 per gram, which would result in a claim of R14,400,000.00 for 33kg;

20.4.9 He estimated the value of sample 2 at R42.70 per gram and the value of the 33kg at approximately R2,400,000.00.

[21] During cross-examination, Mr J Rothson:-

21.1 Testified that he received both samples from Mr. JCC Cohen, but he does not know where the samples came from. He stated that both samples were sugillite. The sugillite that was bought in Hong Kong

could have come from anywhere in the world, including South Africa. He could not express an opinion pertaining to the other stones in the bag as he was only given one stone as a sample;

21.2 He conceded that his calculation was based on a Google search analysis and that he is not the author of the Safacts.co.za report attached to his expert report. According to this article J Mr Rowthorn obtained from the internet search, "Rough Sugillite Bulk Sale per KG in the Rough Category was listed for R5,000.00 on 18 Aug at 15:47 by Mario Jansen PSA in Cape Town (ID196667070)."

[22] When questioned by the Court on how a purchase of US \$350 could equate to a claim of R14,400,000.00, he responded that he had heard that the people selling the sugillite wanted to get rid of it because they were superstitious.

[23] Mrs. Pamela Tudin, a clinical psychologist, was called by the plaintiffs as an expert witness in respect of the effect that the arrest and detention had on Ms FA Huxham's emotional and psychological wellbeing. She testified that:-

23.1 She holds an Honours Degree in Social Work and a Master's Degree in Clinical Psychology and has been a psychologist for 27 years;

23.2 She assessed Ms FA Huxham on 31 July 2019 at the request of Mr JCC Cohen to determine whether Ms FA Huxham was clinically traumatised by the arrest and detention. Her purpose was to determine whether there was a difference between Ms FA Huxham's psychological presentation post and prior to the arrest and detention and whether a direct correlation can be drawn between the incident and her resultant psychological state;

23.3 She observed that Ms FA Huxham came across as a homeless person, while still being alive to the fact that she was slovenly dressed and not well presented and that she was dirty. She was

wearing slippers when she came for the assessment and she looked dishevelled. Ms FA Huxham began speaking immediately about how she thought that there were people in the shops who were spying on her and trying to find out what she was buying; and how they were going to somehow use that information in relation to the arrest and detention. She immediately launched into a paranoid disposition that made itself evident throughout the assessment. Ms FA Huxham struggled to maintain any kind of contact with her. She appeared extremely paranoid and very fearful. She stated that Mrs P Tudin was somehow colluding with the police, and she kept checking to see if there were bugs under the desks. She made verbal comments that "I do not know if you're part of this or if you are with him or against him. I do not really know who you are. You could be one of them."

23.4 Her mental state had noticeably deteriorated in the four months preceding the interview. Ms FA Huxham sent 38 e-mails to Mr JCC Cohen, one about every three days that were extremely tangential, meaning that her train of thought was hard to follow on some of them. In others it was clear. Her e-mails are indicative of a complete psychological fragmentation that she was experiencing;

23.5 Ms FA Huxham wanted to get medication and reluctantly sought medical intervention to assist her in her panic and anxiety related symptoms and, but she was too frightened to take the medication because she thought that somehow it could affect her, or that the police had somehow intervened and managed to convince her doctor to give her medication that would affect her negatively. Ms FA Huxham could not get medical treatment, partly due to lack of funds and partly because she was too scared to take it;

23.6 She heard aeroplanes flying over her house and stated that they were spying on her, or she could hear voices that were telling her things about the matter;

23.7 She impressed as intellectually limited or cognitively limited, but she was functioning in her everyday life and was psychologically stable prior to the arrest and detention. She could be accountable and responsible in her limited way;

23.8 She struggled in the school system and was bullied. Mrs P Tudin was uncertain whether she matriculated or not;

23.9 Her father was her protective figure even before the incident;

23.10 There is no history of alcohol or drug abuse prior to the incident;

23.11 She never took any medication before she was wrongfully arrested and only started taking some after the unlawful arrest. She never took sleeping tablets in her life;

23.12 Pertaining to the arrest and detention, Ms FA Huxham informed her that they were treated in a very aggressive way, which included separating her from her father and that she was continuously called stupid. They took her out of the cell three times and kept asking her for information and she would not speak. She was beside herself. Her father called through the wall and told her not worry, saying "*it's going to be fine*." She was extremely agitated that they did not allow him to take his blood pressure medication and she thought he was going to die. There were no blankets, no bedding and no toilet. There was a hole in the roof and cold air was blowing on her father. She was convinced that her father got cancer as a result of the arrest and she stated that she will never forgive them for killing her father;

23.13 According to Mrs P Tudin, and as a result of the arrest and detention:-

23.13.1 Ms FA Huxham was certainly belittled and undermined throughout the incident, which often leads to trauma

symptomatology. In the simplicity of her cognitive functioning, the incident must have been very overwhelming for her. After the incident she could not leave home unless it was under extreme duress;

23.13.2 She had a complete decline in her psychological state, culminating in a paranoid disorder over and above her post traumatic stress trauma, the depression and social isolation;

23.13.3 She was unable to eat or sleep and felt like a prisoner in her own home. She was frightened that there was some kind of bug in the food that she would consume. She became petrified to go to the toilet because she was afraid that there was some kind of mechanism with which they could spy on her whilst using the toilet;

23.13.4 She could no longer function in society. She started to have conflict with everyone around her, including her brothers;

23.13.5 Her hygiene showed enormous deterioration;

23.13.6 She was quite devastated by the way in which her life had changed, and she certainly had an aliveness to the fact that her life was very different. She was not an anxious person before the arrest and detention. She and her father did lovely things together and travelled all over the country, she made jewellery or gardened. She was happy, but she now felt like she "*couldn't breathe*". She often became suicidal and stated that she hates her life like this;

23.13.7 Mrs P Tudin met with Mr Matthew Huxham who informed her that Ms FA Huxham led a simple and functioning life prior to the incident, but that she became short tempered, agitated, irritable and a completely different person to the sister that they knew and cared about before. She could not make friends anymore or socialise. Previously, she'd been quite a happy person and would love to go outdoors and chat to strangers, but not anymore; and

23.13.8 She was initially diagnosed by Dr Chouler as suffering from an adjustment disorder, but he later changed his diagnosis to that of a post-traumatic stress disorder;

23.14 According to her evaluation, Ms FA Huxham led a simple but functional life before the arrest and detention and she was accountable. Subsequent to the arrest and detention, she, however, lost touch with reality, had a psychotic break and was in a paranoid state. Her life was extremely different to the life she had led before, and she suffered a torment over the nine years before she died. The overall effect of the arrest and detention severely compromised an already cognitively compromised person, to such an extent that she was totally debilitated.

[24] When cross-examined, Mrs P Tudin:-

24.1 Confirmed that the instruction from Mr JCC Cohen was to forensically assess the severity of the impact of the arrest and detention on Ms FA Huxham;

24.2 Testified that she had read Mr AJ Huxham's affidavit but was still able to form her own opinion about Ms FA Huxham;

- 24.3 Persisted that, based on her analysis and collateral input, Ms FA Huxham did not have any psychological illness before the arrest and detention. She was adamant that no evidence existed that she was paranoid before the arrest and detention;
- 24.4 Explained that having a sensitive disposition as a result of her life experience or being intellectually challenged is not akin to a diagnosis of a psychological condition;
- 24.5 Testified that paranoid features emerge post-trauma, which is a very typical clinical presentation of extreme trauma. They start to believe that the people who hurt them can continue to hurt them, particularly if they did not feel safe and they have not been removed from the environment;
- 24.6 Conceded that Ms FA Huxham's limited intellectual abilities could have caused her to experience the arrest and detention as far more traumatising, but she persisted that she was not paranoid or traumatised before the arrest and detention; and
- 24.7 Explained that the death of Mr AJ Huxham impacted her emotionally, but it did not create the post-traumatic stress syndrome or a paranoid set of symptomatology;
- 25.8 Stated that a birth defect that affects you cognitively would limit your intellectual ability, but it would not result in a mental illness as mental illness is a psychological condition and not a cognitive disability;
- 24.9 With reference to Dr L Panieri-Peter's report, Mrs P Tudin testified that: -
- 24.9.1 Dr L Panieri-Peter had concluded that Ms FA Huxham suffered from full-blown psychosis as a result of her

experience of the trauma and a paranoia that extended to include the members of the general public, her neighbours, and simple, clearly unrelated events. She had delusions, hallucinations and thought disorder;

24.9.2 She does not take issue with anything contained in Dr L Panieri-Peter's report and confirmed that she supports Dr L Panieri-Peter's assessment that Ms FA Huxham is significantly mentally ill to the extent that she was psychotic at the time of the assessment.

[25] The defendant closed his case without calling any witnesses.

[26] Rule 38(2) stipulates: -

"The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit."

[27] The general rule in trials is that evidence should be given *viva voce*. This not only enables the Court to assess the witness giving the evidence but, more importantly, it also affords the party that has not called the witness an opportunity to cross-examine the witness, both to test the evidence that the witness has given and, equally importantly, the opportunity to elicit evidence from the witness which supports the cross-examiner's case.

[28] In the matter of *Madibeng Local Municipality v Public Investment Corporation Ltd*² it was held that a departure from the general rule is conditional upon whether it was appropriate and suitable in the circumstances to allow a deviation from the norm, which required a

² [2018] JOL 40396 (SCA) at paragraph [26].

consideration of the following factors: the nature of the proceedings; the nature of the evidence; whether the application for evidence to be adduced by way of affidavit was by agreement; and ultimately, whether, in all the circumstances, it was fair to allow evidence on affidavit.

[29] An applicant who seeks to invoke the exception must prove that "sufficient reason" exists to do so. While this requirement confers a broad discretion on a court in determining whether sufficient reason exists, a court must bear in mind the disadvantages of permitting this to both the court and the other side, and then consider whether the interests of justice nonetheless requires that the evidence be admitted on affidavit.³

[30] Section 3(1)(c) of the Law of Evidence Amendment Act, Act 45 of 1998 ("the Act") states that:-

"Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless

- (a) ...
- (b) ...
- (c) the court, having regard to –
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice."

[31] Section 3(1)(c) of the Act requires that the Court should have regard to the collective and interrelated effect of all the considerations in paragraphs (i) to (iv) of the section and any other factor that should, in the opinion of the

³ Bafokeng Land Buyers Association and Others v Royal Bafokeng Nation [2018] 3 All SA 92 (NWM) at paragraph [63].

court, be taken into account. The section introduces a high degree of flexibility to the admission of hearsay evidence with the ultimate goal of doing what the interests of justice require.⁴

[32] Zeffert and Paizes,⁵ with regard to the evaluation of the factors set out in section 3(c) of the Act, warn that:-

"Since the person upon whose credibility the probative value of the evidence depends is, in the case of hearsay evidence, not subjected to the curial devices designed to identify, assess and eliminate those aspect of the evidence that render it potentially unreliable, it is important for a court to (a) understand what the potential dangers are; (b) consider the extent to which those dangers actually arise in the case before it; and (c) identify factors that tend to reduce or even eliminate those dangers. Only then will a court be in a position to determine the extent of the prejudice caused to an adversary by the denial to that party of the benefit. The dangers to which a court must be alert are (a) insincerity on the part of the absent declarant or actor; (b) erroneous memory (c) defective perception; and (d) inadequate narrative capacity."

[33] The purpose of the Act is to allow the admission of hearsay evidence in circumstances where justice dictates its reception. In *Metedad v National Employers' General Insurance Co Ltd ("Metedad")*⁶ it was stated as follows:-

"This section invests the court with a discretion, to be judicially exercised in the interests of justice. It seems to me that the purpose of the amendment was to permit hearsay evidence in certain circumstances where the application of rigid and somewhat archaic principles might frustrate the interests of justice. The exclusion of the hearsay statement of an otherwise reliable person whose testimony cannot be obtained might be a far greater injustice than any uncertainty which may result from its admission. Moreover, the fact that the statement is untested by cross-examination is a factor to be taken into account in assessing its probative value. ... There is no principle to be extracted from the Act that it is to be applied only sparingly. On the contrary, the court is bound to apply it when so required by the interests of justice."

⁴ Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security [2012] 2 All SA 56 (SCA) para 31.
⁵ The South African Law of Evidence, Second Edition, page 401.
⁶ 1992 (1) SA 494 (W) at page 4981.

[34] In each case the factors set out in section 3(1)(c) of the Act are to be considered in relation to the facts of the case. The weight to be accorded to such evidence, once it is admitted in the assessment of the totality of the evidence adduced, is a distinct question.

[35] The factors set out in section 3(1)(c)(i)-(vii) should not be considered in isolation. One should approach the application of section 3(1)(c) on the basis that these factors are interrelated and that they overlap.⁷

[36] I turn to consider the application of section 3(1)(c) to the facts of the present case.

The nature of the proceedings:-

[37] Section 3(1)(c)(i) requires a consideration of the nature of the proceedings and makes it clear that it applies to both criminal and civil proceedings. Section 3(1)(c)(i) requires a consideration in the widest sense of the nature of the proceedings, for instance whether they be civil or criminal or trial or motion proceedings. One may then consider the other factors in section 3(1)(c) in relation to the nature of the proceedings. It is more likely that hearsay evidence will be admitted in civil proceedings than in criminal proceedings – this is because of the presumption of innocence, and the courts' intuitive reluctance to permit the untested evidence to be used against the accused in a criminal case.⁸

[38] If the matter is a civil trial a court may consider the absence of the testing power of cross-examination, which will always be attendant when hearsay evidence is admitted, but may nevertheless admit hearsay evidence if the party against whom it is sought to be admitted can counter the effect of such evidence by other means. In *Ndhlovu and others v S ("Ndhlovu")*,⁹ the Supreme Court of Appeal clarified that section 35(3)(i) does not create an

⁷ *Hewan v Kourie NO and Another 1993(3) SA 233 (T) at 239 B – C.*
⁸ *Metedad supra 1992 (1) SA 494 (W) at page 499.*
⁹ [2002] 3 All SA 760 (SCA) at paragraph [24].

automatic right to cross-examine. The Supreme Court of Appeal confirmed that:

"The Bill of Rights does not guarantee an entitlement to subject all evidence to cross examination. What it contains is the right (subject to limitation in terms of section 36) to 'challenge evidence'; Where that evidence is hearsay, the right entails that the accused is entitled to resist its admission and to scrutinise its probative value, including its reliability. The provisions enshrine these entitlements. But where the interests of justice, constitutionally measured, require that hearsay evidence be admitted, no constitutional right is infringed. Put differently, where the interests of justice require that the hearsay statement be admitted, the right to 'challenge evidence' does not encompass the right to cross-examine the original declarant."

[39] The defendant could have countered the tendered evidence by calling its employees to testify about the quality of the sugillite that was confiscated as well as the stones that were returned. The nature of the proceedings in this matter, namely a civil trial, thus mitigates in favour of the admission of the affidavit and the video footage.

The nature of the evidence:-

[40] Section 3(1)(c)(ii) requires that the nature of the evidence be considered. Schmidt and Rademeyer¹⁰ suggest that this requirement relates mainly to the reliability of the evidence sought to be introduced. Reliability is perhaps more pertinent to the enquiry in terms of section 3(1)(c)(iv), but as stated earlier in this judgment, the various factors are interrelated. What is required by section 3(1)(c)(ii) is a characterisation of the evidence sought to be introduced.

[41] The Constitutional Court in the matter of *Kapa v S ("Kapa")*¹¹ explained that: -

"[79] In essence, the enquiry under this rubric is, first, the extent to which the evidence can be considered reliable; and, second, the weighing of the probative value of the evidence against its prejudicial effect."

¹⁰ Bewysreg, at page 477-478.
¹¹ 2023 (1) SACR 583 (CC).

[80] There are a number of factors relevant to the reliability question, namely:

- (a) any interest in the outcome of the proceedings by the witness;
- (b) the degree to which it is corroborated or contradicted by other evidence;
- (c) the contemporaneity and spontaneity of the hearsay statement; and
- (d) the degree of hearsay.

[81] In *Savoi*,¹² this Court explained that courts' aversion to hearsay evidence stems from its general unreliability as it is not subject to the reliability checks applicable to other evidence – such as cross-examination – and as its nature makes it difficult for a party to effectively counter inferences drawn from it. This Court noted, however, that notwithstanding hearsay evidence being untested, and despite the possibility of risks of faulty memory or erroneous perception, insincerity or ambiguities in narration, hearsay evidence may prove to be reliable.”

[42] The heirs in the plaintiffs' deceased estates certainly have an interest in the matter, which may adversely affect the reliability of their evidence. Their interest must, however, be viewed in the context of seeking justice for their loved ones. Mr AJ Huxham's evidence pertaining to the quality of the stones was corroborated in material respects by the *viva voce* evidence of Mr JCC Cohen and Mr JFH Huxham. In addition, Mrs Tudin's evidence, corroborated Mr AJ Huxham's evidence contained in his affidavit that Ms FA Huxham was severely traumatised by the unlawful arrest and detention. Furthermore, no bias was attributed to Mr JFH Huxham when he was cross-examined.

[43] Even though the affidavit was attested to and the video footage was taken almost 8 years after the unlawful arrest and detention had taken place, I am persuaded that Mr AJ Huxham's physical state of health justifies the degree of lateness and does not militate against the admission thereof.

¹² *Savoi v National Director of Public Prosecutions* 2014 (5) BCLR 606 (CC) at paragraph 49.

The purpose for which the evidence is tendered: -

[44] Section 3(1)(c)(iii) of the Act requires scrutiny of the purpose for which the evidence is tendered. The plaintiffs' purpose is to prove the circumstances of the unlawful arrest and detention and the effect that it had on them; and to identify and confirm the quality of the stones that Mr AJ Huxham purchased in Hong Kong as compared to the stones that were returned. As such, it is a central issue. In the matters of *S v Dymbane*¹³ *Hlongwane and Others v Rector, St Francis College, and Others*¹⁴ it was suggested that where the evidence sought to be admitted bears on the central issue in the case, a court should be slow to admit it.

[45] The Constitutional Court, however, in *Kapa* confirmed that "It is of no legal significance, in considering whether to admit evidence, how important a party regards a piece of evidence for the bolstering of its own case."¹⁵

[46] I align myself with the judgment in *S v Mpotu*¹⁶ where the Court held as follows:-

"So far as the purpose for which the evidence is tendered I cannot, with respect, agree that the importance of the evidence is an aspect militating against its admission. Evidence that is otherwise relevant should not depend for its reception on its importance in the case. If the evidence sought to be led carries the hallmark of truthfulness and reliability then its reception is doubtless justified."

The probative value of the evidence:-

[47] Section 3(1)(c)(iv) requires that the probative value of the evidence should be considered. Evidence sought to be introduced in terms of section 3(1)(c) may be such that its probative value, even at first blush is minimal and in

¹³ 1990 (2) SACR 502 (SE).
¹⁴ 1989 (3) SA 318 (D).
¹⁵ Kapa supra at paragraph [39].
¹⁶ 1993 (2) SACR 109 (N) at 116 i:

those circumstances the enquiry will end there. Questions of relevance and reliability arise in the application of this subsection.¹⁷

[48] In **Ndhlovu**¹⁸ "probative value" was defined in the following terms:

"Probative value" means value for purposes of proof. This means not only 'what will the hearsay evidence prove if admitted?' but 'will it do so reliably?'"

[49] It is not required that every material aspect of the hearsay evidence must be corroborated. In order for the affidavit and the video footage to be reliable or for it to have probative value in its entirety, there must either be corroboration of every material aspect or corroboration of a significant number of material aspects.¹⁹

[50] Regard being had to these factors and the corroborating evidence of Mr JHF Huxham, Mr JCC Cohen and Mrs P Tudin, one is led to the conclusion that Mr AJ Huxham's affidavit and the video footage have both relevance and probative value.

The reason why the evidence is not given by Mr AJ Huxham and Ms FA Huxham: -

[51] Section 3(1)(c)(v) of the Act requires that a court enquire into the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends. It is common cause that Mr AJ Huxham and Ms FA Huxham are both sadly deceased. There is consequently no other way to place Mr AJ Huxham's version of the events pertaining to his arrest and detention and the quality of the stones he purchased before the Court, but by way of his affidavit and the video footage.

The prejudice to the defendant: -

¹⁷ S v Ramavhale at 1996 (1) SACR 639 (A) at page 649 e – 650 a.
¹⁸ Ndhlovu supra at paragraph [45].
¹⁹ Kapa supra at paragraph [86].

[52] Section 3(1)(c)(vi) requires a consideration of prejudice to the party against whom the evidence is sought to be adduced. The inability on the part of the defendant to test by cross-examination the accuracy of the statement and the video footage is obviously prejudicial, but prejudice of that nature is implicit when hearsay evidence is admitted. It is the degree of the prejudice that must in each case be taken into account to determine whether an injustice will be done to the party against whom it is sought to be adduced and that, as has been stated earlier, is a matter of fact to be determined in the circumstances of each case.

[53] There can hardly be any doubt that the defendant is prejudiced by the admission of both the affidavit and the video footage as he is deprived of the opportunity to cross examine the deponent. But, as was enunciated by the Constitutional Court in *Kapa*²⁰ that the inability to cross-examination "...is not the only consideration – the Court must also consider the fact that the witness is deceased, and the overriding consideration of the interests of justice. Ultimately, the question is whether there are adequate pointers of truthfulness, reliability, and probative value for the statement to be admitted as evidence."

[54] I am reassured that there are indeed adequate pointers of truthfulness, reliability, and probative value for the affidavit and the video footage to be admitted as evidence. This view is bolstered by the fact that the defendant elected not to call any evidence to refute the allegations regarding either the circumstances of the arrest and detention or the returned sugillite. The absence of evidence from the defendant does not provide corroboration of the plaintiffs' case nor does it attract an adverse inference for the defendants case, but it does leave the plaintiffs' case unanswered.

Any other factors: -

[55] Finally, in terms of section 3(1)(c)(vii) of the Act the court is required to take into account any other relevant factor, which should in the opinion of the court be taken into account, to determine whether such evidence should be admitted in the interests of justice.

[56] As was stated in *Ndhlovu*²¹: -

"A just verdict, based on evidence admitted because the interests of justice require it, cannot constitute 'prejudice'. . . . Where the interests of justice require the admission of hearsay, the resultant strengthening of the opposing case cannot count as prejudice for statutory purposes, since in weighing the interests of justice the court must already have concluded that the reliability of the evidence is such that its admission is necessary and justified. If these requisites are fulfilled, the very fact that the hearsay justifiably strengthens the proponent's case warrants its admission, since its omission would run counter to the interests of justice."

[57] Bearing all of these factors and the circumstances of the case in mind, I have come to the conclusion that it is in the interests of justice to admit both the affidavit and the video footage into evidence.

EVALUATION OF THE EVIDENCE: -

[58] It is trite that the plaintiff bears the overall onus to prove its case, on a balance of probabilities.²²

[59] In the absence of any evidence by the defendant, this matter stands to be adjudicated according to the evidence presented by the plaintiffs and their cross-examination by defence counsel.

Evaluation of the evidence in respect of the two sugillite samples:-

²¹ Ndhlovu supra at paragraph [50].

²² Govan v Skidmore [1952] 1 All SA 54 (N) page 57.

[60] Mr TL Manye submitted that Mr JFH Huxham's evidence was unsatisfactory and contradictory in view of the following:-

60.1 He relied on Mr AJ Huxham's assessment of the quality of the sugillite and did not inspect the stones himself;

60.2 He did not know how many kilograms of stones were returned to his father; and

60.3 He did not look and inspect all the stones that were returned to Mr JCC Cohen's office when the bags were opened.

[61] I do not agree. Mr JFH Huxham's presented his version in a forthright, albeit emotional, manner without deviating from the essence thereof, notwithstanding thorough cross-examination. He correctly made relevant concessions with regard to the weight of the sugillite that was returned and that he relied on his father's determination of the value and the clarity of the stones. Furthermore, Mr JFH Huxham's evidence pertaining to the difference between the sugillite bought by Mr AJ Huxham when compared to the returned stones was consistent, credible and reliable

[62] Mr JFH Huxham's evidence on this essential aspect is also corroborated by the affidavit and the video footage. Mr JCC Cohen, making correct concessions, was also a credible witness and confirmed Mr JFH Huxham's evidence in material respects.

[63] I accordingly find that the sugillite that was returned to Mr AJ Huxham's attorney is not the sugillite that Mr AJ Huxham had purchased in Hong Kong.

Evaluation of Mr J Rothon's evidence: -

[64] As I have indicated in the judgment, the difficulty confronting the defendant is that no evidence was tendered to challenge the evidence of Mr J Rothon with regard to the two samples. It was open to the defendant to present

evidence to demonstrate why Mr Rothon's evidence, in his view, should not be accepted. Neither was any evidence presented by the defendant as to the value of the sugillite.

[65] An expert is there to assist the court, must be neutral and must provide sufficient factual basis for his/her reasoning and explain why the reasoning is appropriate to enable the court to be able to assess the value of his/her opinion.²³

[66] In the matter of **MEC for Health, Western Cape v Sinethemba Qole**,²⁴ the Supreme Court of Appeal affirmed that a court must be satisfied that the expert's opinion has a logical and rational basis, in other words, that the expert has considered comparative factors, including the risks and benefits and has reached a conclusion which accords with the facts and underlying reasoning.

Their evidence must be weighed as a whole and it is the exclusive duty of the court to make the final decision on the evaluation of expert opinion.²⁵

[67] Proper evaluation of the opinion can only be undertaken if the process of reasoning which leads to the conclusion, including the premise from which the reasoning proceeds, are disclosed by the expert. The Appellate Division in **Coopers S.A. Ltd v Deutsche Schädlingsbekämpfung MBH**,²⁶ confirmed that: -

'... an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if

²³ PriceWaterhouseCoopers v National Potato Co-operative Ltd and another [2015] JOL 32954 (SCA) at paragraph [97].
²⁴ [2018] ZASCA 132 at paragraph 38.
²⁵ Life Healthcare Group (Pty) Ltd v Dr Abdool Samad Suliman [2018] ZASCA 118 paragraph 15. Michael & Another v Linksfield Park Clinic (Pty) Ltd 2001 (3) SA 1188 (SCA) at paragraph 36. to 37; Charles Oppelt v Head: Health, Department of Health, Provincial Administration: Western Cape [2015] ZACC 33 at paragraph 36.
²⁶ 1976 (3) (A.D.) at 371 F – G.

the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert;

[68] In *PriceWaterhouseCoopers v National Potato Co-operative Ltd*,²⁷

the following passage from the Canadian judgment of *Widdington (Estate of) c. Wightman*²⁸ was cited with approval:-

"[326] Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.

[327] As long as there is some admissible evidence on which the expert's testimony is based it cannot be ignored; but it follows that the more an expert relies on facts not in evidence, the weight given to his opinion will diminish.

[328] An opinion based on facts not in evidence has no value for the Court.

[329] With respect to its probative value, the testimony of an expert is considered in the same manner as the testimony of an ordinary witness. The Court is not bound by the expert's opinion."

[69] It is a principle of the law of evidence that an expert witness may only rely

on information in a textbook if the following requirements stated in *Menday v Protea Assurance Co Ltd*²⁹ are met:-

"If an expert relies on passages in a text-book, it must be shown, firstly, that he can, by reason of his own training, affirm (at least in principle) the correctness of the statements in that book; and secondly, that the work to which he refers is reliable in the sense that it has been written by a person of established repute or proved experience in that field. In other words, an expert with purely theoretical knowledge cannot in my view support his opinion in a special field (of which he has no personal experience or knowledge) by referring to passages in a work which has not itself been shown to be authoritative."

[70] Mr Rothon's evidence did not measure up to the required standards. He has no personal experience in the valuation of sugillite; he relied on internet searches and based his valuation on the overseas market without providing evidence that the valuations were provided to him by persons of established

²⁷ [2015] JOL 32954 (SCA) at paragraph [99].
²⁸ 2011 QCCS 1788.
²⁹ 1976 (1) SA 565 (E) at 569 G-H. See *Frantzen v Road Accident Fund* [2022] JOL 54566 (SCA) at paragraph [37].

repute or proved knowledge in the valuation of sugilite. With regard to the value of sugilite in South Africa, his evidence was that he used an online portal that "*seemed to be pretty reliable.*" He also failed to affirm the correctness of the information he relied on based on his own training. Additionally, despite testifying that he valued the second sample at R2,400,000.00, he stated that it is "*scrap really*" and could be turned into "*very, very low quality beads.*" Curiously, according to Mr J Rothon's initial report, dated 29 May 2019, he valued the price per gram of sample 1 at R75.00, but in his addendum, dated 22 June 2023, he opined the value of a gram to be worth R900.00. No explanation was requested and none proffered in respect of this vast discrepancy. In my view, Mr J Rothon's opinion is not based on inferences drawn from established facts. Mr Rothon's opinion is therefore tenuous and his conclusions, on the probabilities, are neither rational nor justified.

Evaluation of the evidence in respect of the claims for general damage: -

[71] The claims for general damages for the late Mr AJ Huxham and the late Ms FA Huxham amount to R500,000.00 and R750,000.00 respectively. Ms Mahomed submitted that a fair and reasonable assessment of the general damages should be:-

71.1 For Mr AJ Huxham in respect of the unlawful arrest and detention an amount of R150,000.00 and R350,000.00 in respect of the severe emotional and psychological trauma he suffered; and

71.2 For Ms FA Huxham in respect of the unlawful arrest and detention an amount of R150,000.00 and an amount of R550,000.00 in respect of the severe emotional and psychological trauma she suffered.

[72] In *Rahim and others v Minister of Home Affairs*,³⁰ Navsa ADP reiterated that: -

³⁰ [2015] 3 All SA 425 (SCA) at paragraph [28].

[27] The deprivation of liberty is indeed a serious matter. In cases of non-patrimonial loss where damages are claimed the extent of damages cannot be assessed with mathematical precision. In such cases the exercise of a reasonable discretion by the court and broad general considerations play a decisive role in the process of quantification. This does not, of course, absolve a plaintiff of adducing evidence which will enable a court to make an appropriate and fair award. In cases involving deprivation of liberty the amount of satisfaction is calculated by the court *ex aequo et bono*. *Inter alia*, the following factors are relevant:

- (i) circumstances under which the deprivation of liberty took place;
- (ii) the conduct of the defendants; and
- (iii) the nature and duration of the deprivation."

[73] I find guidance in the decision by Plasket J in the matter of **Peterson v Minister of Safety**,³¹ where the following principle was enunciated:-

"The correct approach to the assessment of damages for unlawful arrest and detention was summarised by Erasmus J in *Ntshingana v Minister of Safety and Security & another*, as follows:

"The satisfaction in damages to which plaintiff is entitled falls to be considered on the basis of the extent and nature of the violation of his personality (*corpus, fama and dignitas*). As no fixed or sliding scale exists for the computation of such damages, the Court is required to make an estimate *ex aequo et bono*. The authors of Visser and Potgieter's Law of Damages 2nd ed, 475 have extracted from our case law factors which can play a role in the exercise:

"The circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or "malice" on the part of the defendant; the harsh conduct of the defendants; the duration and nature (eg solitary confinement) of the deprivation of liberty; the status, standing, age and health of the plaintiff; the extent of the publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendants; awards in previous comparable cases; the fact that in addition to physical freedom, other personality interests such as honour and good name have been infringed; the high value of the right to physical liberty; the effect of inflation; and the fact that the *actio injuriarum* also has a punitive function."

[74] In the matter of **Minister of Safety and Security v Seymour**,³² a 63 year-old respondent was arrested and detained for five days. The Court

³¹ [2009] JOL 24495 (ECG) at paragraph [15]. Also see Minister of Police of Safety and Security v Seymour 2006 (6) SA 320 (SCA) 325 paragraph 17 and Rudolph and others v Minister of Safety and Security and others [2009] 3 All SA 323 (SCA).
³² [2007] 1 All SA 558 (SCA); 2006 (6) SA 320 (SCA).

considered that the plaintiff had had free access to his family and doctor throughout his detention at the police station and that he had suffered no degradation beyond that inherent in being arrested and detained. It also considered that, after the first 24 hours, the plaintiff had spent the remainder of his detention in a hospital bed at a clinic and that, although the experience had been traumatic and distressing, it warranted no further medical attention after his release. The Supreme Court of Appeal replaced the award of R500,000.00 by the High Court with one of R90,000.00.

[75] In the matter of *Rudolph and others v Minister of Safety and Security and another*,³³ the Supreme Court of Appeal deemed it appropriate to award a R100,000.00 as damages as a result of the humiliating conditions to which the appellants were subjected during their incarceration of four nights and three days. The appellants were arrested and detained under extremely unhygienic conditions in the Pretoria Moot police station. The cell in which they were held was not cleaned for the duration of their detention. The blankets they were given were dirty and insect-ridden and their cell was infested with cockroaches. The shower was broken and they were unable to wash. They had no access to drinking water. Throughout their detention, the first appellant, who suffers from diabetes, was without his medication. They were not allowed to receive any visitors, not even family members.

[76] In the matter of *Minister of Safety & Security v Kruger*,³⁴ the Supreme Court of Appeal, after taking into consideration that the respondent was severely humiliated, awarded an amount of R50,000.00 for unlawful arrest and detention for one day.

[77] In *Komape and Others v Minister of Basic Education, ("Komape")*³⁵ the Supreme Court of Appeal awarded R350,000.00 to each parent with regard to their claims for nervous and emotional shock following the death of their son who had drowned in a pit latrine, and held that:-

³³ [2009] 3 All SA 323 (SCA), 2009 (5) SA 94 (SCA).
³⁴ [2011] JOL 27025 (SCA).
³⁵ [2019] ZASCA 192 at paragraph [25].

"However, for many years now, such a claim has been recognised in the country where the claimant shows that the nervous shock is associated with a detectable psychiatric injury. Thus, in *Bester v Commercial Union*³⁶ this court seemingly influenced to an extent by developments in England, held a psychological or psychiatric injury to constitute a bodily injury for the purposes of delete reliability and that there was no reason in our law why a claimant who suffered such an injury as the result of the negligent act of another should not be entitled to receive compensation."

[78] In the matter of *RK and others v Minister of Basic Education and others (Equal Education as amicus curiae)*,³⁷ the Supreme Court of Appeal, dealing with similar facts as it did in *Komape*, also awarded R350,000.00 to each parent, after confirming that a plaintiff can only claim damages for so-called nervous or emotional shock where it is suffered as a consequence or cause of a detectable psychiatric injury.

[79] In view of the defendant's failure to call any witnesses to controvert Mr AJ Huxham's evidence pertaining to the conditions and circumstances of the arrest and the detention described in his affidavit as well as the psychological and physical impact it had on him, his evidence is accepted. On the uncontroverted evidence, Mr AJ Huxham and Ms FA Huxham were arrested and detained for one day in a hostile and humiliating manner and Mr AJ Huxham was not allowed to take his medication. I have no doubt that the experience had been traumatic and distressing.

[80] However, no evidence was presented that Mr AJ Huxham's trauma and emotional shock caused a psychological or psychiatric injury.

[81] I was favourably impressed by Mrs Tudin's evidence in respect of Ms FA Huxham, who presented her well-reasoned conclusion based on facts established by her own expertise and her thorough assessment of Ms FA Huxham. Her evidence was consistent throughout examination in chief and cross examination and her findings were substantiated with full clinical explanations. Moreover, Mrs Tudin and Dr Panieri-Peter are in agreement

³⁶ 1973 (1) SA 769 (A).

³⁷ [2020] 1 All SA 651 (SCA) at paragraphs [24] to [32].

that Ms FA Huxham had limited functioning prior to the arrest and detention, but that the arrest and detention resulted in her complete mental deterioration and the development of mental illnesses, which included psychosis to such an extent that she was completely unable to resume living the limited functional life she had lead prior to her arrest. The defendant failed to call an expert witness to substantiate Mr Manye's statements to Mrs Tudin that Ms FA Huxham's mental condition could have been attributed to other factors. Ms FA Huxham's trauma and emotional shock clearly caused a psychological or psychiatric injury.

[82] On a proper evaluation of the evidence, and taking into account all the factors that play a role in the assessment of damages, as well as comparable awards made, I am of the view that the following globular amounts would be fair and just compensation for the *inuria* suffered by the plaintiffs:-

83.1 R150,000.00 for Mr AJ Huxham; and

83.2 R550,000.00 for Ms FA Huxham.

COSTS:-

[83] Two basic principles had developed over the years with regard to costs, namely that (i) the award of costs, unless otherwise expressly enacted, is in the discretion of the presiding judicial officer; and (ii) the successful party is generally entitled to his or her costs.

[84] As a general rule, separate and distinct issues carry their own costs. This is, however, not a hard and fast rule.³⁸ If there are issues which can be separated and a litigant fails on some of the issues, the court may refuse to give the litigant his or her costs on those issues, especially if the evidence on those issues can be separated.³⁹ A successful plaintiff is entitled to his or

³⁸ Estate Wege v Strauss 1932 AD 76 at 86.

³⁹ Port Elizabeth Municipality v SA Breweries 1925 EDL 99; Penny v Walker 1936 AD 241 260; May v Union Government 1954 1 All SA 76 (N) at page 87; Kunze v Steytler 1932 EDL 4

her costs unless the defendant has been entirely successful on a distinct issue wholly unconnected with the issue upon which the plaintiff has succeeded. Where the issues are distinct and not interwoven or closely connected a court may separate awards of costs on such issues or apportion the costs.⁴⁰ Depending on the circumstances, where a litigant has small or only partial success, the plaintiff will not necessarily be deprived of his costs if the claim is for damages.⁴¹

[85] The defendant was successful in his defence in respect of Mr AJ Huxham's claim of R14,400,000.00 for the seized sugillite. Ms FA Huxham was substantially successful in her claim for general damages whereas Mr AJ Huxham had small and partial success.

[86] Although the plaintiffs' respective claims for general damages are distinct from Mr AJ Huxham's claim for R14,400,000.00, it is impractical in the circumstances to award distinct cost orders in respect of the three claims as it would occasion the taxing master great difficulty in disentangling the costs of the various issues. In my estimation, 80% of the trial was spent on the determination of the sugillite claim and 20% on the claims for general damages. I have come to the conclusion that it would be just and equitable to allocate the costs on this basis.

ORDER:

In the result the following order is made:-

1. The first plaintiff's claim in respect of the sugillite is dismissed;
2. The defendant is liable to pay R150,000.00 in respect of Mr AJ Huxham's claim for general damages;

⁴⁰ *Golding v Torch Printing & Publishing Co (Pty) Ltd 1949 4 All SA 234 (C)* at page 263.
⁴¹ *Kennedy v Dalasile 1919 EDL 17.*

3. The defendant is liable to pay R550,000.00 in respect of Ms FA Huxham's claim for general damages;
4. The plaintiff is liable to pay 80% of the defendant's taxed costs; and
5. The defendant is liable to pay 20% of the plaintiff's taxed costs, including the reasonable qualifying fees of the expert, Mrs P Tudin - clinical psychologist.



STANTON, A
JUDGE

<u>On behalf of the plaintiffs:</u>	Adv. S Mahomed (on instruction of Jonathan Cohen & Associates) (Elliot Maris Attorneys)
<u>On behalf of the defendant:</u>	Adv. TL Manye (o.i.o. Office of the State Attorney)