

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
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**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case Number 747/2014

In the matter between:

MATTHEW HUXHAM N.O.

FIRST PLAINTIFF/FIRST APPLICANT

MATTHEW HUXHAM N.O.

SECOND PLAINTIFF/SECOND APPLICANT

and

MINISTER OF POLICE

DEFENDANT/RESPONDENT

Heard on: 12 November 2024

Delivered on: 06 December 2024

Summary: Application for leave to appeal - Grounds of appeal pertain to the expert evidence and cost order made - Application dismissed.

ORDER

1. The application for leave to appeal is dismissed.
2. The first and second applicants shall pay the respondent's costs.

JUDGMENT

Stanton J

Introduction:

[1] For ease of reference, I will refer to the parties as they are cited in the action issued under case number 747/2014.

[2] The first and second plaintiffs (jointly “the plaintiffs”) seek leave to appeal against a part of my judgment and the following order handed down on 02 February 2024 where I held:

2.1 The defendant liable for payment of R150 000,00 in respect of Mr AJ Huxham’s claim for general damages;

2.2 The defendant liable for payment of R550 000,00 in respect of Ms FA Huxham’s claim for general damages;

2.3 The plaintiff liable to pay 80% of the defendant’s taxed costs; and

2.4 The defendant liable to pay 20% of the plaintiff’s taxed costs, including the reasonable qualifying fees of the expert, Mrs P Tudin - clinical psychologist.

Legal principles applicable in applications for leave to appeal:

[3] Section 17(1) of the Superior Courts Act 10 of 2013 (“the Act”) provides:

‘(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

- (a)(i) *the appeal would have a reasonable prospect of success; or*
- (ii) *there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.'*

[4] In *Mont Chevaux Trust v Goosen*¹, Bertelsmann J found that the introduction of the provisions of section 17(1) of the Act raised the threshold for granting leave to appeal against a judgment of a High Court. Bertelsmann J reasoned that the former test whether leave to appeal should be granted was a reasonable prospect that another court *might* come to a different conclusion, whilst the use of the word *would* in the Act indicated a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against [my emphasis].

[5] In *S v Smith*², Plasket AJA reaffirmed that:-

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a Court of Appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

The grounds of appeal:

[6] The grounds of appeal can be distilled that I erred in:

- 6.1 Refusing to grant judgment in favour of the first plaintiff against the defendant in the amount of R14,400,000 in respect of the unlawful seizure of sugilite by members of the South African Police Service on or about 01 September 2011; and

¹ 2014 JDR 2325 (LCC) paras 5-6.

² 2012 (1) SACR 567 (SCA) para 7. See also *S v Notshokovu* 2016 JDR 1647 (SCA).

- 6.2 Not exercising my discretion to award 100% costs in favour of the second plaintiff and 100% costs in respect of claim 2 of the first plaintiff, as well as the costs of the Rule 38(2) application.
- [7] In respect of the first ground of appeal, the plaintiffs submit that my finding at paragraph 20.4.9 of the judgment was erroneous because it was affected by a misdirection on the facts when I held that Mr Rothon estimated the value of sample two at R42.70 per gram with the resultant value of 33kg at approximately R2,400,000.00.
- [8] During argument Ms Mahomed, on behalf of the plaintiffs, conceded that the first ground of appeal was not a misdirection of the facts, but merely a calculation error, and as such, that the plaintiffs would not persist with this ground.
- [9] The second ground of appeal can be considered collectively as it pertains to Mr Rothon's evidence. The plaintiffs contend that I erred in:
- 9.1 Finding that Mr Rothon's evidence did not measure up to the required standards when taking into consideration the findings in paragraphs 61 to 64 of the judgment;
- 9.2 Finding that the defendant was successful in his defence in respect of the first plaintiff's claim for R14,400,000; and
- 9.3 Dismissing the first plaintiff's claim in respect of the sugilite.

Mr Rothon's evidence:

- [10] Mrs Sieberhagen, on behalf of the defendant, submitted that Mr Rothon's evidence did not measure up to the required standard. In support of her argument, she referred me to *Schneider NO and Others v AA and Another*³ where Davis J quoted the English case of *National Justice Compania*

³ *Schneider NO and Others v AA and Another* 2010 (5) SA 203 (WCC) at 211F-H.

*Naviera SA v Prudential Assurance Co Ltd (The 'Ikarian Reefer')*⁴ with approval as follows:

- '1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise An expert witness should never assume the role of an advocate.
3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. If an expert opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.'

[11] In addition to the findings in my judgment, I remain unpersuaded that Mr Rothon could determine the value of the seized sugilite at R14 400 000 for the following reasons:

- 11.1 According to the first plaintiff's particulars of claim, if the sugilite had not been confiscated by police officers, he would have cut, polished and sold it for the value claimed on the open market in the United States of America;

⁴ [1993] 2 Lloyd's Rep 68 at 81.

11.2 Mr Rotheron, however, failed to provide the Court *a quo* with any details regarding the realistic possibility that the value of R14 400 000 would be attained on the open market in the United States of America after the deduction of the costs of cutting, carving, polishing, marketing and shipping;

11.3 Mr Rotheron testified that:

'It took a lot of research because as I said there is no known supplier of sugilite in South Africa. I believe that the mine puts it aside – the sugilite aside and then it goes off to *auctions* so the *prices can differ quite considerably* I would *imagine on auction* because you have got different people bidding.' [my emphasis]. Mr Rotheron, however, failed to provide any details or information relating to the value that the sugilite could or had in the past earned at auctions in South Africa or the United States of America;

11.4 Mr Rotheron, with regard to the research he conducted, referred to his online research via SA Facts, but he included a proviso in his evidence that he still had to assess the sample before he could place a value on it. He, however, did not give evidence that he assessed the cut and polished sample;

11.5 Where property has been damaged, or rendered less valuable, the difference in the pre-delinquency market value and the post-delinquency market value of the property usually indicates the extent of the diminution of a plaintiff's patrimony. The difference is assessed as at the time of the delinquency.⁵ Mr Rotheron's calculation was made during May 2019 at the exchange rate of 18,5%. He did not assist the court with the values as calculated at the existing exchange rate when the sugilite was confiscated in 2011 or when it was returned to the first plaintiff's attorney in November 2018; and

⁵ 15 *Lawsa* 3 ed para 195 (and the authorities cited therein).

11.6 No specific evidence was placed before the Court of the value of the “raw” sugilite or cut sugilite on the open market in the United States of America at the time of the delict or on the date of the return of sugilite.

[12] Despite my obiter remark that the defendant chose not to present evidence in respect of the value of the sugilite, the defendant bore no onus to disprove the value of the sugilite. It follows that in dismissing the first plaintiff’s claim, the defendant was 100% successful in his defence.

[13] I accordingly remain unpersuaded that an appeal court would come to a different conclusion based on the value of the sugilite as assessed by Mr Rothon.

Costs:

[14] I granted an order that the plaintiff is liable to 80% of the defendant’s taxed costs and that 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. I pause to clarify that the defendant is liable to pay 100% of Mrs P Tudin’s costs.

[15] In *Erasmus – Superior Court Practice*⁶, the following guidelines are provided regarding cost orders:

‘The rules referred to above, which the court should follow in exercising its discretion in the award of costs, are as follows:

(1) The general rule is that the successful party is entitled to his costs.

...

(3) In determining who is the successful party the court looks to the substance of the judgment and not merely to its form.

...

(4) The court has the power to deprive a successful party of portion or all of his costs and, in a proper case, to order him to pay portion or all of the costs of the unsuccessful party’.

⁶ RS 23, 2024, D5-7.

[16] In *Gelb v Hawkins*⁷, the Appeal Court confirmed that the award of costs in any matter is in the exclusive discretion of the Court, which discretion should be exercised judicially upon a consideration of all of the facts of each case, and that in essence, it is a matter of fairness to both sides.

[17] It is trite that a court, sitting as a court of appeal, will not lightly interfere with any judgment (specifically with a judgment as to costs) where the court *a quo* exercised a discretion when deciding on the issue, on condition that the discretion was judicially exercised.⁸ In essence, whether I exercised my discretion judicially, entails an investigation on whether the decision is based on grounds upon which a reasonable person would have reached the same conclusion.⁹

[18] In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*¹⁰, the Constitutional Court confirmed, with reference to *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*¹¹, that:

‘When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised:

“... judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles”.’

[19] Ms Mahomed argued that my apportionment of the costs at 80% (plaintiffs’ liability for the defendant’s taxed costs) and 20% (defendant’s liability for the plaintiffs’ taxed costs) is incorrect as one day was spent in respect of the

⁷ [1960] 3 All SA 371 (A) at 376.

⁸ *Kruger Bros & Wasserman v Ruskin* 1918 AD 63 at 69. See also *Cronje v Pelser* [1967] 1 All SA 265 (A) at 267.

⁹ *Merber v Merber* [1948] 1 All SA 437 (A) at 443 with reference to *Ritter v Godfrey* (1920, 2.K.B. 47).

¹⁰ 2015 (5) SA 245 (CC) para 88.

¹¹ 2000 (2) SA 1 (CC) para 11.

sugilite claim, including the interlocutory application in respect of which the first plaintiff was successful, and the second day for the adjudication of the second plaintiff's claim for general damages. She furthermore contended that different evidence was led in regard to the second claim of the first and the second plaintiff's claim.

[20] My assessment of the costs was not solely based on the time allocated for the adjudication of the matter. I also took cognisance of the number of witnesses who testified in each claim. In addition to the video footage, three further witnesses testified in respect of the sugilite claim; and only Mrs Tudin was called to testify about the second plaintiff's claim. The plaintiffs were entitled to institute their claims against the defendant jointly. In determining who the successful party was, I also considered the substance of the judgment and not merely the form. This being said, the defendant was successful in its defence against the R14 400 000 claim whilst the first plaintiff was only partially successful in his claim for general damages in the amount of R150 000. The second plaintiff was successful in her claim for R550 000. However, the successful defence of the R14 400 000 claim far outweighs the amounts awarded as general damages to the first and second plaintiffs.

[21] Ms Mahomed submitted that separate cost awards would not be impractical as the cost consultant and the taxing master will determine the issue. I remain unpersuaded as there is only one set of pleadings; and one attorney and one counsel for the plaintiffs and the defendant respectively.

[22] The Court in *Stolp v Du Plessis*¹², reiterated that:

'... there is no rigid rule which can be laid down as to what order as to costs will produce a fair result, but each case must be dealt with on its own facts and an order appropriate to those facts should be made. It is almost impossible to arrive at a formula which will produce mathematically accurate apportionment to costs and what the Court should do is to make an order which will produce a result which is substantially fair.'

¹² [1960] 2 All SA 588 (T) at 590.

[23] After a careful and dispassionate consideration, I am satisfied that there are no reasonable prospects that another court would come to a different finding in respect of the issue of costs.

[24] In the result, the application for leave to appeal fails.

Wherefore the following order is made:

1. The application for leave to appeal is dismissed.
2. The first and second applicants shall pay the respondent's costs.



STANTON, A
JUDGE
NORTHERN CAPE DIVISION

On behalf of the plaintiffs:

Adv. S Mahomed on instruction of Jonathan Cohen & Associates and care of Elliot Maris Attorneys

On behalf of the defendant:

Adv. AS Sieberhagen on instruction of the Office of the State Attorney