**IN REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**CIVIL APPEAL NO. 86 of 2007**

**BETWEEN**

**IN THE MATTER OF THE CONSTITUTION OF TRINIDAD AND TOBAGO**

**AND**

**IN THE MATTER OF AN ASSESSMENT OF DAMAGES FOR BREACH OF CONSTITUTIONAL RIGHTS PURSUANT TO THE JUDGMENT OF THE PRIVY COUNCIL DATED 12TH OCTOBER, 2004.**

**BETWEEN**

**ROBERT PEREKEBENA NAIDIKE**

**Appellant**

**AND**

**THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO**

**Respondent**

**PANEL: A. Mendonca, J.A.**
**P. Jamadar, J.A.**
**G. Smith, J.A.**

**APPEARANCES:**
Mr. P. Knox, Q.C. and Mr. J. Mobota for the Appellant.
Mr. N. Byam for the Respondent.

**DATE OF DELIVERY: February 5th, 2013.**

## JUDGMENT

**Delivered by P. Jamadar, J.A.**

**Introduction**

1. I have had the benefit of reading the draft judgments of Mendonca J.A. and Smith J.A.. I adopt the narrative set out in the judgment of Mendonca J.A. at paragraphs 1 to 17 of his draft.

2. I agree that three issues fall to be determined by this court:

(i) Whether the appellant is entitled to damages for loss of income for earnings that he could have acquired if he were at liberty to leave Trinidad and Tobago for the period 5th February, 1996 to 28th May, 2002 (when he was informed that the deportation order and the conditions imposed by the supervision order of Warner J. that prevented him from leaving Trinidad and Tobago were lifted).

(ii) Whether the appellant is entitled to certain special damages claimed (money owed to his attorney for raising the security ordered by Warner J.; transportation costs to and from court; costs of a habeas corpus application; and clothing costs), that the trial judge did not award.

(iii) whether the award of damages ($250,000.00 as compensatory damages and $50,000.00 as vindicatory damages) made by the trial judge was too low.

3. I agree with both Mendonca J.A. and Smith J.A. that the appellant cannot succeed on issue (i). I also agree and that the appellant is entitled to the special damages claimed under issue (ii) in relation only to the money owed to his attorney for posting the security bond set by the order of Warner J ($5,092.82), the costs of the habeas corpus application ($4,000.00) and the lost clothing costs ($750.00). In regard of all of the above I adopt the reasoning of Mendonca J.A.. I disagree with Smith J.A. that the awards for compensatory and vindicatory damages should remain as assessed by the trial judge. In my opinion both should be increased as follows:

(a) compensatory, from $250,000.00 to **$350,000.00**; and (b) vindicatory, from $50,000.00 to **$75,000.00**.

**Losses that are relevant, related and attributable to the constitutional violation.**

4. In relation to these two issues, issues (i) and (ii), I wish to add the following.

5. In constitutional proceedings compensatory damages may be sought and ordered only in relation to constitutionally related and relevant injury and loss suffered. Section 14 of the Constitution provides the jurisdiction for the court to make such orders as are *"appropriate for the purpose of enforcing, or securing the enforcement of"* the human rights and freedoms provisions enshrined in the Constitution. As purposive and broad as this jurisdiction is, it nevertheless is limited to violations that are constitutionally prohibited. Thus, loss and injury that may satisfy the 'but for' causation test simpliciter and that may arise in the context of a constitutional violation, may not at the same time be caused by unconstitutional behavior on the part of the State.

6. In this case, the relevant constitutional violation was essentially a section 4(a) violation: a breach of the right to liberty and the right not to be deprived thereof except by due process of law.[1] The Board in allowing the appellant's appeal did so only *"in respect of his arrest and detention"* and only remitted *"that part of his constitutional motion for the assessment of damages".*[2] Not every loss that may be attributable to the arrest and detention of the appellant on a 'but for' causation analysis is compensatable; only those losses that are causatively established and are also relevant, related and attributable to the constitutional violation found to have been established (deprivation of liberty without due process).

7. Mendonca J.A. concluded that the appellant's claim for loss of earnings/income for the period 5th February, 1996 to 28th May, 2002, when he was deprived of his liberty to leave Trinidad and Tobago because of the supervision order of Warner J. which imposed as conditions

[1] See paragraphs 16, 21, 51 – 55 and 66 of the opinion of Lord Brown in **Naidike v The Attorney General,** PCA No. 10 of 2003.
[2] See paragraph 66 of the opinion of Lord Brown and see also paragraph 2 of the order of the Board dated the 12th October, 2004.

for his release from custody that he surrender his passport and not leave Trinidad and Tobago, is unsustainable. I agree for the following reasons:

(i) the appellant's inability to leave Trinidad and Tobago was pursuant to a court order (made by consent) which, even if erroneous, was not in violation of the appellant's entitlement to due process guaranteed by section 4(a) of the Constitution.[3]

(ii) the appellant has not demonstrated, beyond speculation, that he had obtained employment elsewhere and therefore that his inability to leave Trinidad and Tobago deprived him of income.[4]

(iii) the appellant has not demonstrated that he took any concrete steps to have the terms of the order of Warner J. varied, so as to permit him to take up employment elsewhere. The general duty to mitigate loss is no less relevant in claims for constitutional compensatory damages, as it is in other areas of the law.

**The effect of the order of Warner J.**

8. In my opinion the order of Warner J. for the release of the appellant, goes to the constitutionality of the appellant's inability to leave Trinidad and Tobago (he had to surrender his passport and undertake not to leave the jurisdiction as conditions of his release from custody under the executive detention order). The order of Warner J. curtailed the appellant's liberty only to this extent. It did not and could not place the stamp of due process on the appellant's prior and continuing unconstitutional arrest and detention. That unconstitutional deprivation of the appellant's liberty (in relation to being held in custody under the executive detention order) continued until his release from custody on the 5th February, 1996. Indeed, this is exactly what the Privy Council acknowledged: "Dr. Naidike is entitled to damages for his wrongful arrest on

[3] **Maharaj v The Attorney General (No. 2)** (1978) 30 WIR 310; 1979 AC 385 – the due process entitlement is to a legal system that is fair, not one that is infallible, per Lord Diplock; **Naidike v The Attorney General** PCA No. 10 of 2009 – arrest and detention pursuant to a court order, even if wrong, is not in violation of due process, citing **The Independent Publishing Co. Limited v The Attorney General** [2004] UKPC 26 at para. 88, per Lord Brown at paras. 52 – 55.

[4] See the evidentiary analysis of Mendonca J.A. at paragraphs 30 - 31 of his draft, with which I agree.

28th November, 1995 and his wrongful detention from that date until his release on 5th February, 1996" (per Lord Brown at paragraph 51).

**Compensatory and vindicatory damages.**

9. In relation to issue (iii), I am of the opinion that the trial judge's assessment is sufficiently outside of the margin of appreciation to permit this court to reconsider what is an appropriate award in the circumstances of this case. In doing this I accept the constraints that govern a court of appeal in reviewing a trial judge's assessment of damages. A court of appeal must be satisfied that: the trial judge either misdirected him/herself on the relevant facts or law (took irrelevant facts into consideration or ignored relevant ones or misinterpreted or misapplied some relevant legal principle), or the trial judge's assessment of damages is a "*wholly erroneous estimate"*. [5]

10. This aspect of the appeal raises what has been a rather troublesome issue in local constitutional proceedings: the issue of appropriate remedies for the violation of constitutional rights. The teasing out of the answer has proven at times to be confusing and consequently costly – both in terms of money and the timely delivery of justice. This case is no exception.

**Section 14 of the Constitution.**

11. As with so many things, we should engage this exploration from its origins. As I have already noted, section 14 of the Constitution provides that where there has been, is or is likely to be the perpetration of a constitutional violation, then the court has the jurisdiction (and I would add, duty) to make such orders as are appropriate for the purpose of enforcing or securing the enforcement of any of the human rights provisions to which the aggrieved person is entitled.

12. The local court of appeal has since February 1997 (in **Jorsingh v The Attorney General**) interpreted the jurisdiction and power of the court in the following terms:

(i) *"The Court is mandated to do whatever it thinks appropriate …".* [6]

[5] See de la Bastide C.J. in **Bernard v Quashie**, Civ. App. No. 159 of 1992.
[6] Sharma J.A. in **Jorsingh v The Attorney General,** Civ. App. No. 144 of 1991.

(ii) *"The discretion given to the Court by this provision is a very wide one indeed. It empowers the Court to make any order, without limitation, which the Court considers appropriate for the purpose of enforcing the rights enshrined in the Constitution"*.[7]

13. It may be worth pausing to note, that the only words of limitation in section 14 and in the statements of Sharma J.A. and de la Bastide C.J. are *"as are appropriate"* - for the purpose of enforcing or securing the enforcement of the constitutional provisions. Both Sharma J.A. and de la Bastide C.J. agreed that there is really *"no limitation on what the court can do"*. I concur.

**Europe.**

14. This open ended jurisdiction has resonances with the jurisprudence in relation to the powers and duties of The European Court of Human Rights (the Strasbourg jurisprudence), in granting redress for violations of The European Convention on Human Rights by member states. By Article 41 the court is mandated to *"allow just satisfaction to the injured party"*. In this regard the Strasbourg jurisprudence acknowledges the award of both pecuniary (including loss of earnings) and non-pecuniary damages (including damages for injury to feelings – such as anxiety, frustration and distress) for Convention violations.[8]

**Canada**

15. Significantly, the Canadian jurisprudence in its interpretation of the Canadian Charter of Rights and Freedoms and in particular in relation to the remedies permissible to grant redress for Charter violations, integrate these two notions of *'appropriateness'* and *'just satisfaction'*. In **R v Conway**[9] (at paragraphs 2 and 103), the Supreme Court of Canada noted the following: (i) *"There are two provisions in the Charter dealing with remedies: s. 24(1) and s. 24(2). Section 24(1) states that anyone whose Charter rights or freedoms have been infringed or denied may apply to a "court of competent jurisdiction" to obtain a remedy that is "appropriate and just in the circumstances"*; and (ii) *"Remedies granted to redress Charter wrongs are intended to*

[7] de la Bastide C. J. in **Jorsingh v The Attorney General** (supra).
[8] See **Eweida v UK** [2013] ECHR 37, at paragraphs 111 to 114.
[9] 2010 SCC 22.

*meaningfully vindicate a claimant's rights and freedoms".*[10] What is of great significance, is that the vindication of a claimant's rights and freedoms in cases of constitutional violation is achieved by fashioning a remedy that is both *"appropriate and just in the circumstances".*

**Trinidad and Tobago and the Caribbean.**

16. In our Trinidad and Tobago jurisprudence, the Privy Council in 1978 in **Maharaj v The Attorney General (No. 2)**[11], a case involving the loss of liberty by an attorney-at-law without due process, held (by majority) that monetary compensation was recoverable for constitutional violations. Lord Diplock delivering the majority decision stated:

> *"Finally, their Lordships would say something about the measure of monetary compensation recoverable under s. 6 (of the Independence Constitution, now section 14 of the Republican Constitution) where the contravention of the claimant's constitutional rights consists of depravation of liberty otherwise than by due process of law. The claim is not a claim in private law for damages for the tort of false imprisonment (under which the damages recoverable are at large and would include damages for loss of reputation). It is a claim in public law for compensation for the depravation of liberty alone. Such compensation would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during his incarceration."*

However in **Maharaj's case**, Lord Hailsham in his judgment noted, quite prophetically, that:

> *"As a result of the majority decision the case will return to the High Court with a direction to assess damages. I doubt whether their task is as easy as might be supposed. We are told that this is not an action of tort... But if it is not a tort, but something sui generis, the question arises on what principles are damages to be assessed? Are punitive damages available on the basis of* ***Rookes v Barnard****.... and* ***Cassell Co. Ltd. v Broome****... and if not why not? How far may aggravated damages be awarded, inasmuch as the judge is not a servant and the State's liability is said not to be vicarious? Are damages to include an*

[10] Citing **Doucet-Boudreauv v Nova Scotia (Minister of Education)**, 2003 SCC 62 (CanLII, 2003 SCC 62, [2003] 3 S.C.C. 3, at para. 55; **Canada (Prime Minister) v Khadr**, 2010 SCC 3 (CanLII), 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 30.

[11] [1978] 30 WIR 310; 1979 AC 385.

*element for injured feelings, or damage to reputation? No doubt all these questions are capable of solutions, especially if tort is taken to be a sound analogy. But on what principle is a sound analogy? At present the sea is an uncharted one, as no similar case has ever been brought, and the action is not in tort".*

17. Indeed, it was not until maybe March 2005, with the Privy Council decision in **The Attorney General v Ramanoop,**[12] that the issue of what was the appropriate approach to constitutional relief was somewhat clarified.

Commenting on the Court of Appeal's statements in **Jorsingh**, the Board stated:

*"13. In Trinidad and Tobago the Court of Appeal made observations on this issue in Jorsingh v Attorney General (1997) 52 WIR 501. The extent of the court's jurisdiction did not arise for decision. But de la Bastide CJ and Sharma JA both correctly prophesied that this issue would come before the Privy Council again. They expressed the hope their Lordships' Board would then re-examine this issue and the "tentatively austere" approach to damages adumbrated by Lord Diplock.*

*17. Their Lordships view the matter as follows. Section 14 recognises and affirms the court's power to award remedies for contravention of chapter I rights and freedoms. This jurisdiction is an integral part of the protection chapter I of the Constitution confers on the citizens of Trinidad and Tobago. It is an essential element in the protection intended to be afforded by the Constitution against misuse of state power. Section 14 presupposes that, by exercise of this jurisdiction, the court will be able to afford the wronged citizen effective relief in respect of the state's violation of a constitutional right. This jurisdiction is separate from and additional to ("without prejudice to") all other remedial jurisdiction of the court.*

*18. When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The*

[12] PCA No. 13 of 2004.

*comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.*

*19. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award.*

*20. For these reasons their Lordships are unable to accept the Attorney General's basic submission that a monetary award under section 14 is confined to an award of compensatory damages in the traditional sense."*

18. In my opinion the key guideline given by Lord Nicholls in **Ramanoop**, is to be found in the statement: *"Section 14 presupposes that, by exercise of this jurisdiction, the court will be able to afford the wronged citizen effective relief in respect of the state's violation of a constitutional right"* (paragraph 17). What followed in the first sentence of the next paragraph has become, since **Ramanoop**, the lens through which constitutional relief is to be considered. Lord Nicholls explained that: "*When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened"* (paragraph 18).

19. Since **Ramanoop** a lot of discussion has taken place as to what is the ambit and limits of relief that may vindicate violation of constitutional rights, and in particular the ambit and/or limits of constitutional compensatory relief. However, it would do well to remind ourselves constantly that the purpose of constitutional relief is to find and fashion *'appropriate'* remedies, that afford *'effective relief'* for the violation of constitutional rights. In this regard, the Strasbourg jurisprudence on *'affording just satisfaction'* to an aggrieved party is most useful. The court is always concerned to uphold and to vindicate [13] the constitutional right concerned; but it is also required to do so in ways that afford the aggrieved person appropriate and effective relief. As the Canadians' express it, meaningful vindication of constitutional rights requires remedies that are *'appropriate and just in all the circumstances'.*

20. Since **Ramanoop** the Privy Council has delivered several decisions on this issue, and in particular on how the award of monetary compensation for constitutional violation is to be approached. Some of the more relevant decisions are as follows:

(i) **Subiah v The Attorney General.**[14] Decision delivered on the 3rd November, 2008. At paragraph 11, Lord Bingham stated:

> *"11. The Board's decisions in Ramanoop, paras 17-20, and Merson, para 18, leave no room for doubt on a number of points central to the resolution of cases such as the present. The Constitution is of (literally) fundamental importance in states such as Trinidad and Tobago and (in Merson's case), the Bahamas. Those who suffer violations of their constitutional rights may apply to the court for redress, the jurisdiction to grant which is an essential element in the protection intended to be afforded by the Constitution against the misuse of power by the state or its agents. Such redress may, in some cases, be afforded by public judicial recognition of the constitutional right and its violation. But ordinarily, and certainly in cases such as the present (and those of Ramanoop, and Merson, and other cases cited), constitutional redress will include an award of damages to compensate the victim. Such compensation will be assessed on ordinary principles*

[13] From the Latin ***'vindicatus'*** and ***'vindicare'*** – to clear from censure or doubt; to claim, uphold or avenge; hence to establish the merits of. And note its associations with the idea of 'revenge' – in the sense of exceeding what is due (compensatory simpliciter) and moving also towards punishment.
[14] PCA No. 39 of 2007.

*as settled in the local jurisdiction, taking account of all the relevant facts and circumstances of the particular case and the particular victim. Thus the sum assessed as compensation will take account of whatever aggravating features there may be in the case, although it is not necessary and not usually desirable … for the allowance for aggravated damages to be separately identified. Having identified an appropriate sum (if any) to be awarded as compensation, the court must then ask itself whether an award of that sum affords the victim adequate redress or whether an additional award should be made to vindicate the victim's constitutional right. The answer is likely to be influenced by the quantum of the compensatory award, as also by the gravity of the constitutional violation in question to the extent that this is not already reflected in the compensatory award. As emphasised in Merson, however, the purpose of such additional award is not to punish but to vindicate the right of the victim to carry on his or her life free from unjustified executive interference, mistreatment or oppression."*

Lord Bingham also commented on the quantum of awards, it would appear rhetorically, as follows at paragraph 13:

*"13 The Board is inclined to wonder, given the passage of time and changes in the value of money since some of the earlier precedents relied on, whether the level of compensatory damages may call for upwards revision by the courts of Trinidad and Tobago."*

In **Subiah** the award of the Court of Appeal was not interfered with by the Board, in the exercise of its policy of due regard for *"the superior knowledge and experience of local courts in assessing levels of damages"* unless there is *"such manifest error as would justify the Board in intervening"* (at paragraph 13).[15]

(ii) **Durity v The Attorney General.**[16] Decision delivered on the 8th December, 2008. At paragraph 34, Lord Hope stated:

[15] The Board will only vary an award of damages for 'manifest error'; but the Court of Appeal can do so if it is found to be a 'wholly erroneous estimate' (given its knowledge and experience of local conditions).
[16] PCA No. 83 of 2007.

*"34 ... the trial judge did not have the benefit of the Board's observations in Attorney General of Trinidad and Tobago v Ramanoop [2005]UKPC 15, [2006] 1 AC 328, paras 18 and 19, about the approach that the court should take when it is awarding damages in the exercise of its constitutional jurisdiction. In most cases something more than a declaration that the Constitution has been infringed will be necessary. Compensation measured by the comparable common law measure of damages may be awarded if the person has suffered damage, but in principle this may not suffice as the fact that the right that has been violated was a constitutional right adds an extra dimension to the wrong. An additional award may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right that has been violated and to deter further breaches. As punishment in the strict sense is not its object, the expressions "punitive", "aggravated" or "exemplary" damages are best avoided. The purpose of the award, whether it is made to redress the contravention or as relief, is to vindicate the right, not to punish the executive. Vindication involves an assertion that the right is a valuable one, as to whose enforcement the complainant herself has an interest: Inniss v Attorney General of St Christopher and Nevis [2008] UKPC 42, para 27."*

(iii) **Takitota v The Attorney General.**[17] Decision delivered on the 18th March, 2009. At paragraphs 11, 13, 14 and 15, Lord Carswell stated:

*"11. In their reference to aggravated damages in para 94 of their judgment the Court of Appeal appear to have equated them with exemplary damages, whereas they form a quite distinct head of damage based on altogether different principles. In awarding compensatory damages the court may take account of an element of aggravation. For example, in a case of unlawful detention it may increase the award to a higher figure than it would have given simply for the deprivation of liberty, to reflect such matters as indignity and humiliation arising from the circumstances of arrest or the conditions in which the claimant was held. The rationale for the inclusion of such an element is that the claimant would not*

[17] PCA No. 71 0f 2007

*receive sufficient compensation for the wrong sustained if the damages were restricted to a basic award.*

*13. The award of damages for breach of constitutional rights has much the same object as the common law award of exemplary damages. The relevant provisions of the Bahamian Constitution are Article 17 (inhuman or degrading treatment) and Article 19 (deprivation of personal liberty). The basis of the jurisdiction to award such damages was set out in Attorney General of Trinidad and Tobago v Ramanoop [2005] UKPC 15, [2006] 1 AC 328.*

*14. In Merson the Board regarded the same principles as applying to cases brought in The Bahamas for redress under the comparable provisions of the Constitution. Lord Scott of Foscote said at para 18 that the purpose is not to teach the executive not to misbehave, but to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in The Bahamas free from unjustified interference, mistreatment or oppression. The Privy Council returned to the subject in Inniss v Attorney General of Saint Christopher and Nevis [2008] UKPC 42, where Lord Hope of Craighead, giving the judgment of the Board, cited the guidance given by the Supreme Court of New Zealand in Taunoa v Attorney General [2007] 5 LRC 680, a case brought for damages for breach of the New Zealand Bill of Rights. He related the purpose of vindication of the claimant's rights to the effect of an award in deterrence of executive wrongdoing in a passage at para 27:*

> *"The purpose of the award, whether it is made to redress the contravention or as relief, is to vindicate the right. It is not to punish the Executive. But vindication involves an assertion that the right is a valuable one, as to whose enforcement the complainant herself has an interest. Any award of damages for its contravention is bound, to some extent at least, to act as a deterrent against further breaches. The fact that it may be expected to do so is something to which it is proper to have regard."*

*15. Their Lordships consider that it would not be appropriate to make an award both by way of exemplary damages and for breach of constitutional rights. When the vindicatory function of the latter head of damages has been discharged, with*

*the element of deterrence that a substantial award carries with it, the purpose of exemplary damages has largely been achieved. To make a further award of exemplary damages, as the appellant's counsel sought, would be to introduce duplication and contravene the prohibition contained in the proviso to Article 28(1) of the Constitution."*

Lord Carswell also stated (at paragraph 17), in relation to unlawful detention constituting deprivation of liberty without due process, that:

*"17. The court should determine what they consider to be an appropriate figure to reflect compensation for the long period of wrongful detention of the appellant, taking into account any element of aggravation they think proper, reflecting the conditions of his detention and, in their own words, the misery which he endured. In assessing the proper figure for compensation for such long-term detention, they should take into account that any figure they might regard as appropriate for an initial short period, if extrapolated, should ordinarily be tapered, as their Lordships have pointed out in para 9 above. The final figure for compensatory damages should therefore amount to an overall sum representing appropriate compensation for the period of over eight years' detention, taking account of the inhumane conditions and the misery and distress suffered by the appellant."*

(iv) **James v The Attorney General.**[18] Decision delivered on the 29th July, 2010. At paragraphs 24 and 28, Lord Kerr stated:

*"24. Enforcement of the protective provisions may require more than mere recognition that a violation of those provisions has occurred. As Lord Nicholls said in Ramanoop, "when exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened" (para 18). The constitutional dimension adds an extra ingredient. The violated right requires emphatic vindication. For that reason, careful consideration is required of the nature of the breach, of the circumstances in which it occurred and of the need to send a clear message that it should not be repeated.*

[18] PCA No. 112 of 2009.

*Frequently, this will lead to the conclusion that something beyond a mere declaration that there has been a violation will be necessary. This is not inevitably so, however. Nor is it even the case that it will be required in all but exceptional circumstances. Close attention to the facts of each individual case is required in order to decide on what is required to meet the need for vindication of the constitutional right which is at stake.*

*28. An injury suffered as a result of discrimination is no less real because it does not possess tangible physical or financial consequences. And the difficulty in assessing the amount of compensation for that type of injury should not deter a court from recognising its compensatable potential. This concept was well expressed by Mummery LJ in Vento v Chief Constable of West Yorkshire Police [2003] ICR 318, at 331: -*

> *"50. It is self evident that the assessment of compensation for an injury or loss, which is neither physical nor financial, presents special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedent. Subjective feelings of upset, frustration worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise. As Dickson J said in Andrews v Grand & Toy Alberta Ltd (1978) 83 DLR (3d) 452, 475-476, (cited by this court in Heil v Rankin [2001] QB 272, 292, para 16) there is no medium of exchange or market for non-pecuniary losses and their monetary evaluation: 'is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution.'*
>
> *51. Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation*

*and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury"."*

In response to the question: *"Does the constitutional breach require to be marked by an award of damages?"* Lord Kerr, relying on Lord Brown's analysis in **Suratt v The Attorney General** (at para. 12) and on Lord Nicholls' in **The Attorney General v Ramanoop** (at para. 18), stated, at paragraphs 35, 36 and 37, as follows:

*"35. I do not understand Lord Nicholls in this passage to be suggesting that, in principle, compensation should normally be awarded. What, as it seems to me, he was at pains to point out was that a violation of someone's constitutional rights will commonly call for something more than a mere statement to that effect. This is required in order to reflect the importance of the constitutional right and the need for it to be respected by the state authorities. A risk of the devaluation of such rights would obviously arise if the state could expect that the most significant sanction for their being flouted was a declaration that they had been breached. It is, of course, significant that in Ramanoop there was no dispute as to whether the respondent was entitled to damages. The question in that case was whether the state should be required to pay an additional amount of damages in order to reflect the sense of public outrage that the breach of the constitutional right had occasioned. Moreover, the case was one which clearly called for a compensatory award (as well as the additional award). The respondent had been assaulted over a prolonged period by a police officer. The latter's behaviour had been described by Lord Nicholls as "quite appalling". The need for a compensatory award – and, indeed, an additional award – of damages was, in that case, quite plain.*

*36. To treat entitlement to monetary compensation as automatic where violation of a constitutional right has occurred would undermine the discretion that is invested in the court by section 14 of the Constitution. It would also run directly counter to jurisprudence in this area. In Inniss v Attorney General of St Christopher and Nevis [2008] UKPC 42, in considering this issue Lord Hope of Craighead said this in para 21:*

*"The question … is whether a declaration that there has been a contravention of s 83(3) would be sufficient relief for the*

*Appellant in the circumstances. The function that the granting of relief is intended to serve is to vindicate the constitutional right. In some cases a declaration on its own may achieve all that is needed to vindicate the right. This is likely to be so where the contravention has not yet had any significant effect on the party who seeks relief."*

*37. The very least that these statements make obvious is that there will be cases where the vindication of the constitutional right will be achieved by the making of a declaration. Where there has been no major impact on the claimant, a declaration is more likely than not to suffice."*

Indeed, in **James v Attorney General** the local Court of Appeal (Hamel-Smith, Kangaloo and Jamadar, JJA), had opined as follows (at paragraphs 2 and 38):

*"2. We state at the outset that the purpose of all relief in constitutional matters is to vindicate or uphold the rights of individuals.*[19] *This vindication can take the form of a declaration by itself or together with an award of monetary compensation. An additional award to serve the purposes set out in* ***Ramanoop*** *discussed later in paragraph 38, may also be granted. But whether a declaration alone is granted or a declaration and monetary compensation or a declaration with monetary compensation and the additional award is granted, they each serve to vindicate the rights of the individual.*

*38. It should be noted that this additional award referred to in* ***Ramanoop*** *has been called 'vindicatory damages' by Lord Bingham in* ***Subiah,***[20] *and the elements of it are described by Lord Nicholls. They are to:*

*(1) reflect the sense of public outrage;*

*(2) emphasise the importance of the constitutional right and the gravity of the breach; and*

[19] See **Ramanoop v Attorney General** (2005) 66 WIR 334, 341 at para. 18.
[20] See paras. 13 and 14 of his judgment.

*(3) deter further breaches.*

*With respect to the second element we are of the view that in determining the gravity of the breach, a court is required to look at the circumstances giving rise to the breach and the consequences of the breach."*

(v) **Webster v The Attorney General.**[21] Decision delivered on the 18th July, 2011. At paragraph 18, Lord Wilson commenting on **Ramanoop's** case, stated:

*"18. The Board's decision was to uphold the conclusion of the Court of Appeal that the vindicatory damages to which the claimant was entitled under the subsection could exceed the level of compensatory damages comparable to that provided at common law in that it could include an additional element 'needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches'."*

21. This then is how, albeit rather summarily, the evolution of the law on this issue has unfolded. What these cases show, collectively and consistently, is that constitutional damages are *sui generis*. And, whereas comparable common law awards, say for deprivation of liberty by reason of the tort of false imprisonment, maybe a helpful guide in the assessment of damages in constitutional matters, there is a clear and necessary distinction between an award for damages at common law and for the violation of constitutional rights. The Privy Council has reiterated this distinction most recently in the case of **Graham v Police Service Commission and Another**.[22] It may therefore be appropriate at this point to return to first principles, before I embark on the analysis of non-pecuniary damages (compensatory and vindicatory) due to the appellant.

**Universal Declaration of Human Rights.**

22. On the 10th December, 1948, following the end of World War II, the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights. This ideological statement and covenanted declaration informs the fundamental human rights

[21] PCA No. 79 of 2010.
[22] [2011] UKPC 46 at para. 15, per Sir John Laws.

provisions found in the Constitutions of Trinidad and Tobago, including its Republican Constitution; as it has informed the human rights provisions of all nation states post World War II. Article 3 of that Declaration provides as follows: *"Everyone has the right to life, liberty and security of the person"*. Its deep resonances with section 4(a) of the Trinidad and Tobago Republican Constitution are obvious. Indeed, Articles 1 and 5 of the Declaration are also apposite: *"All human beings are born free and equal in dignity and rights" and "No one shall be subjected to … degrading treatment or punishment"*.[23]

23. These rights (and others) contained in the Declaration of 1948 were purposive in intent, recognition and enforcement and hence dependent on deterrence. The Preamble to the Declaration places this in focus. The first three recitals state as follows:

> *"Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.*
>
> *Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.*
>
> *Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."*

24. The effect of the covenant by Nation States to uphold, enforce and vindicate fundamental human rights, is understood and accepted as essential for freedom, justice and peace; and premised on the recognition that where and when violations occur the democratic way of life and its fundamental values are undermined. Fundamental rights are vindicated to preserve and sustain freedom, justice and peace and to prevent arbitrary rule, oppression and tyranny. That is always what is at stake when there is violation of the fundamental rights and freedoms enshrined in the Constitution.

[23] See the Preamble clause (a) and section 5(2) (a) and (b) of the Trinidad and Tobago Republican Constitution.

**Dr. Naidike**

25. This case is about the unlawful detention and deprivation of liberty without due process of a professional medical doctor. A summary of the relevant circumstances is set out in detail in the judgment of the trial judge and repeated in the judgment of Mendonca J.A..

26. Dr. Naidike was not simply unlawfully detained for 69 days. That in itself by reason of the length of time of the detention was *ipso facto* an affront to his dignity and honour. No doubt, by reason of his unlawful detention for this period alone, Dr. Naidike suffered distress and inconvenience. However, the undisputed facts (which were not challenged in cross-examination) show that Dr. Naidike was humiliated by what can only be described as cruel, callous and bigoted (hence discriminatory) conduct by the arresting officers and his custodians when first taken into custody.

27. Dr. Naidike's arrest arose in the context of an intended visit by him to meet with the Minister of National Security to resolve his immigration status. It was a meeting arranged on his behalf by the Minister of Public Administration and Information. It was therefore peaceful and reconciliatory in intent and purpose (given the history of this matter). Unable to meet with the Minister of National Security as had been arranged, Dr. Naidike went to the Twin Towers in the heart of the capital city, Port of Spain, to meet with the Minister of Public Administration and Information, to inform him about what had happened. There in his car, in broad daylight, he was virtually attacked and was beaten by the arresting officers. He was choked with his own tie, handcuffed to the steering wheel of the vehicle, and a gun pointed at him. All this in the presence of his two-year-old daughter and a friend. He was cursed, abused, ridiculed and mocked about his religion and profession.

28. The circumstances of Dr. Naidike's arrest were completely tainted by aggravating circumstances; circumstances which on the face of it were not only in breach of his 4(a) rights as found, but also an affront to his dignity as a human being and his entitlement to choose to observe and practice religion as he wanted to. Moreover, the insensitivity, even callousness, towards his family, in the form of his infant daughter, could only also have aggravated the injury

suffered by Dr. Naidike. Added to this is the obvious and undeniable humiliation caused to Dr. Naidike; to have been arrested in this way, in a public place at 10:00 a.m. on a working day in the capital city.

29. The trial judge accurately summarized the aggravating circumstances of Dr. Naidike's detention. However, language can never capture what Dr. Naidike endured. To talk about *'appalling'* and *'deplorable'* conditions, and about *'profane language'*, can never be a substitute for reading Dr. Naidike's witness statement and trying to enter into his experience.

***What is it like to wake up in a pool of blood, your own blood, in a cell, being taunted by your captors about your profession and religion and not knowing about the welfare of your infant daughter?***

***What is it like to be placed in a cell that reeked of faeces and urine?***

***What is it like to be in a cell for over two months, where only a small bucket is provided to defecate and urinate in; and where there is no bed and bedding, only a cold, dirty, smelly concrete floor?***

***What is it like to be stripped naked, in an open courtyard, with other naked persons, and hosed down with cold water – no soap, no towel – every day for over two months?***

***What is it like for months, to have no reading or writing material and to be made to eat with ones hands without being able to wash them before or after meals?***

30. The law is never applied in a vacuum. It always applies to real people in real circumstances. Subjectivity and objectivity must somehow be reconciled. How then does one vindicate the violations that were rendered to Dr. Naidike over the period of 69 days that he was wrongfully arrested and detained?

Have we judges who pass judgment and assess damages even visited the prisons of Trinidad and Tobago? Can we even in our imaginations dare to enter into Dr. Naidike's experiences; enter into his skin, and re-live what he endured? If not, how then is one to 'assess' his injuries, his distress, his inconvenience, his suffering? Yet we must!

**Compensation**

31. In my opinion, considering all of the comparable cases, both constitutional and tortious, that my brothers Mendonca and Smith JJA have so carefully alluded to, I am satisfied that the award of the trial judge for compensatory damages including an uplift for aggravating circumstances is altogether too low. She awarded $250,000.00 under this head.

32. I accept Smith J.A.'s analysis of the constitutional awards in this area and that generally comparable cases are to guide assessments. His analysis is careful and thorough. I accept that in terms of comparable cases (especially public law cases), **Ronnie Abraham v The Attorney General**[24] (unlawful detention of 70 days; deplorable prison conditions; award of $125,000.00 in 1999) and **Josephine Millette v McNicholls**[25] (unlawful detention of 132 days; inability to care for an invalid son; award of $145,000.00 in 2000) are most similarly circumstanced to this one. And, that given the awards in those cases the trial judge's award in 2007 cannot be considered as being too low. In addition, I can find no fault with Smith J.A.'s analysis of the relevant common law cases for false imprisonment where there were aggravating circumstances that are somewhat comparable; such as **Ted Alexis v The Attorney General**[26] (detention for two and a half months; beaten on arrest; $100,000.00 in March 2008); **Curtis Gabriel v The Attorney General**[27] (detention of eighty-four days; $125,000.00 in June 2008); and **Chabinath Persad v The Attorney General**[28] (detention for seventy-six days; deplorable prison conditions; strip searched; $110,000.00 in November 2011); and the conclusion that damages for compensation within a range of $100,000.00 to $125,000.00 in the period 2008 to 2011 were awarded by the courts in Trinidad and Tobago. I also accept Smith J.A's analysis that the decisions in **Victor**

[24] H.C.A. No. 801 of 1997.
[25] Civil Appeal No. 14 of 2000.
[26] H.C.A. S 1555 of 2002. H.C.A. No. 3795.
[27] H.C.A. S 1452 of 2003/ H.C.A. No. 2544 of 2003.
[28] CV 2008-04811.

**Romeo v The Attorney General**[29] and **Kedar Maharaj v The Attorney General**,[30] apart from suffering the disability of no or no adequate reasons, are also outside of the general trends of awards in Trinidad and Tobago for false imprisonment (in both the period of detention was for 29 days and the awards were $210,000.00 and $280,000.00 respectively).

33. However, I disagree with Smith J.A. that the public law cases of **Anneson Stanisclaus v The Attorney General**;[31] **Perry Matthew v The Attorney General**[32] and **Bryan Lynch v The Attorney General**[33] have no usefulness for the purposes of this assessment. I agree that the periods of detention in all were significantly longer (691 days, 409 days and 672 days respectfully) and that the core factual circumstances were different to those in this appeal. However, their value lies in the fact that they show that the local courts are shifting their approach to awards and some judges are making significantly higher awards than have been made in the past ($225,000.00 in 2007; $350,000.00 in 2007 and $450,000.00 in 2009 respectively). Indeed, in this case, the trial judge, as Smith J.A.'s own analysis shows, also did the same thing: that is, made an award that was significantly higher than that of the average awards made in comparable cases. The decisions in **Victor Romeo v The Attorney General** and **Kedar Maharaj v The Attorney General** in the common law arena, demonstrate that some judges there are also of the view that awards for unlawful detention in Trinidad and Tobago are simply too low.[34]

[29] CV 2007-04388.
[30] CV 2009-01832.
[31] H.C.A. No. 1785 of 2000.
[32] H.C.A. No. 3342 of 2004.
[33] H.C.A. No. 1595 of 2008.
[34] See also **Neptune v A.G.** , CV 2008-03386, des Vignes J., delivered 14th November, 2011 (Detention for 7½ hours, $25,000.00, uplift for aggravating features – humiliation of public arrest); **Scott v A.G.** , CV 2008-02309, Master Alexander, delivered 16th May, 2012 (Detention for 37 days, $150,000.00, no uplift for aggravating features); **Deacon v A.G.**, CV 2010-04134, Master Mohammed, delivered 26th September, 2012 (Detention for 225 days, $900,000.00, uplift for aggravating features –deplorable prison conditions); **Brown and Others v A.G.**, CV 2009-00900, Master Alexander, delivered 28th September, 2012 (Detention for 12 hours, $75,000.00, uplift for aggravating features – arrested in church**); Dover v A.G.**, CV 2010-00108, Pemberton J., delivered 18th December, 2012 (Detention for 4 days, $80,000.00, uplift for aggravating features – humiliation of public arrest); **Richardson v A.G.**, CV 2007-2686, Dean-Armorer J., delivered 8th January, 2013 (Detention for 3 days, $40,000.00, uplift for aggravating features – unsanitary conditions of detentions).

34. In **Subiah v The Attorney General,**[35] Lord Bingham, in 2008, invited the local courts to consider whether the levels of compensatory damages awarded in constitutional cases needed to be increased – not only because of changes in the value of money, but also because of *"the passage of time"* (paragraph 13). In my reading of **Subiah**, this was an invitation to reconsider, from a policy basis not limited overly by the burden of 'precedent', whether what constitutes 'effective relief' to uphold and to vindicate the violation of constitutional rights when expressed in terms of both compensatory and vindicatory damages needs to be revised upwards. In short, I agree that the time is now overdue for such an upward revision.

35. The local courts themselves, as Smith J.A. has so carefully shown, have been trying to break free of the shackles of the ranges set by the precedents. This reflects the local courts' knowledge and experience of local circumstances and what is appropriate in monetary terms to vindicate the breach of constitutional rights. I share these feelings and insights.

36. In my opinion, in this case, given the context and circumstances of the arrest, the conditions and duration of detention, the injuries to Dr. Naidike (some of which are apparently permanent), including the distress, anxiety, humiliation and inconvenience associated with all of the attendant circumstances, a fair, just and appropriate award for constitutional compensatory damages is $350,000.00.

37. In so far as some justification based on precedent is required for this figure of $350,000.00, I accept with approval the statements of Mummery L.J. in **Vento's** case, referred by Lord kerr in **James v The Attorney General** (supra). Translating the non-pecuniary loss in constitutional compensation into monetary terms is ultimately *"a philosophical and policy exercise more that a legal or logical one".* Indeed, as de la Bastide C.J. stated in **Jorsingh**, given the purpose of granting relief where there is a violation of constitutional rights, there really ought to be no limits set on what the courts may consider a fair, just and appropriate remedy.

38. In **Maharaj (No. 2)** an attorney-at-law was imprisoned in 1975 for a total of 7 days. In 1978 he was awarded $25,000.00 for his unlawful detention, inconvenience and distress. There

[35] PCA No. 39 of 2007.

were no special aggravating circumstances, and no 'punitive', 'exemplary' or 'vindicatory' considerations applied. That was 30 years prior to 2007. Three decades later that first assessment has been the virtual root of all precedents in this area. The time has come to reconsider compensation for non-pecuniary loss in terms of what is fair, just and appropriate compensation for these times. That reconsideration must be in light of what is necessary to both compensate and vindicate a claimant whose rights have been violated. While such awards must never be arbitrary, there are times in the evolution of the law when an incremental approach to increasing awards of damages simply cannot achieve justice. This is such a time. It is for the local courts, with their superior knowledge of local conditions, to accept the responsibility of intervening boldly and decisively to set new baselines and thresholds. The court of appeal ought to lead in this regard. Indeed, these are policy decisions that higher courts are called upon to make when the burden of precedent simply cannot meet the cries of justice. In the circumstances of this case $350,000.00 is an appropriate sum as compensatory damages for Dr. Naidike.

**Loss of Reputation**

39. In so far as Mendonca JA and Smith JA have considered the issue of damages being awarded for loss of reputation in constitutional compensation, I accept the binding nature of the decision of the Court of Appeal in **Crane v Rees,**[36] and the position *"that damages per se for such loss are not available"* in constitutional claims (per Hamel-Smith J.A.).[37] However, on first principles I see no good reason why this should be so if that is an injury suffered as a consequence of a constitutional violation. It appears that the spectre of Lord Diplock's presence (and precedent) in **Maharaj (No 2)** has continued to influence (and haunt) the development of the law in this area. On first principles I find such a categorical position difficult to reconcile.

40. However, it matters little pragmatically, because it seems that loss of reputation can be considered as a factor under distress, indignity, humiliation and inconvenience (see Hamel-Smith J.A. in **Crane v Rees** and Lord Carswell in **Takitota,** at paragraph 11). Such injury can constitute an element of aggravation to be reflected in an award of compensatory damages. It

[36] Civil Appeal No. 181 of 1997/ Civil Appeal No. 201 of 1997.
[37] (2000) 60 WIR 407.

would appear trite and in accordance with common sense, that every unlawful and constitutional arrest and detention, would not only adversely affect liberty, but also reputation.

41. In this case, the trial judge did not specifically identify 'loss of reputation' as an aggravating factor, nor did she aver to the learning cited on the subject, but she did include as an aggravating factor 'the public humiliation' suffered by Dr. Naidike.[38] In my opinion loss of reputation as a facet of indignity and humiliation was a specific aggravating factor raised by Dr. Naidike, not contested, and ought to have been taken into account. In this regard the newspaper reports that sensationalized Dr. Naidike's arrest and detention are relevant,[39] especially the report of the 15th December, 1995 under the bold headline **"Those Illegal Nigerians!"** In so far as the trial judge did not adequately consider this, she fell into error.

**Vindication**

42. In relation to what is now referred to as an additional award, beyond compensation, to reflect specifically the vindication of the constitutional violation where the award for compensation may not fully achieve this, I am of the opinion that an appropriate award for this purpose is $75,000.00 and not $50,000.00 as the trial judge ordered. Lord Nicholls in **Ramanoop** (at paragraph 19) identified four elements that need to be considered in relation to the constitutional violation:

(i) the sense of public outrage;

(ii) the importance of the constitutional right;

(iii) the gravity of the breach; and

(iv) the deterrence of further breaches.

43. Regrettably the trial judge did not offer any specific analysis in relation to these elements, though she did make reference to five factors identified by Sharma J.A. in **Ramanoop** in the Court of Appeal.[40]

[38] See paragraph 17 of the trial judge's judgment.
[39] See paragraphs 29 and 31 of Dr. Naidike's witness statement and exhibit RPN 18.
[40] See paragraphs 21 to 23 of the trial judge's judgment.

44. In my opinion, the circumstances surrounding the arrest and initial treatment of Dr. Naidike when taken into custody, especially in light of the fact that what transpired was done in the presence of his two-year-old daughter, would evoke a strong and harsh sense of public outrage.

45. In my opinion, the liberty of the person, which is really their freedom, is one of the most essential of the fundamental rights. Indeed, as I have sought to demonstrate from the Preamble to the Universal Declaration of Human Rights, the protection of fundamental rights from violation is in service of freedom, justice and peace. The preamble to the Constitution of Trinidad and Tobago speaks of *"a society of free men and free institutions"* and of *"the dignity of the human person"* and that *"men and institutions remain free only when freedom is founded upon ... the rule of law"*. It is therefore no accident that protection of liberty is the first right that is recognized and declared (section 4 (a) of the Constitution). Deprivation of liberty without due process is therefore one of the most serious of constitutional violations.

46. In this case the egregious circumstances surrounding the arrest, delivery into custody and detention of Dr. Naidike, make this case one in which the gravity of the breach is properly considered as being immense. In the circumstances of this case, to have violently arrested and beaten Dr. Naidike and to have done so in the presence of his two-year-old daughter, demonstrated a callousness, cynicism and insensitivity that is reprehensible. To have cursed, abused, disrespected and humiliated him personally, professionally and religiously, only served to compound the gravity of the breach in a completely unacceptable manner and contrary to constitutionally avowed values of a democratic society. The 'appalling' and 'deplorable' circumstances of Dr. Naidike's subsequent detention for such an extended period also add to the gravity of the breach.

47. In my opinion, even the increased award of $350,000.00 for compensation (including an uplift for aggravating factors) is not sufficient to properly vindicate the violation of Dr. Naidike's constitutional right not to be deprived of his liberty without due process (in the circumstances of this case). Such an occurrence must never occur again in Trinidad and Tobago, and an additional award must also be sufficient to deter any further such breaches.

48. In these circumstances, and guided by the opinion of Lord Bingham in **Subiah v The Attorney General,** I am of the opinion that an additional award of $75,000.00 is justified so as to vindicate and uphold the right of Dr. Naidike to carry on his life in the fullness of liberty that the Constitution recognizes, enables and guarantees.

**Conclusion**

49. Though Mendonca J.A. and I have arrived at the same outcome in relation to the awards for compensatory and vindicatory damages, we have done so by following somewhat different paths. I do not disagree with the essential reasoning of Mendonca J.A. on these issues; but prefer to rely overtly on textual and policy warrants in support of them. Quite frankly, I think the precedents as to quantum can only be stretched so far and no further (as Smith J.A. has argued) and that this case calls for something more. Legal argumentation is not limited to precedent for legitimacy. Text and policy are equally legitimate bases for decision making. In any event, as I have sought to demonstrate, there is precedent to support the approach we have taken.

50. On all of the awards interest as ordered by the trial judge will apply.

51. This appeal is therefore allowed and the awards of the trial judge are varied as set out above. The general rule is that costs follow the event. The appellant has succeeded and is entitled to be paid two-thirds of the costs below as his costs of this appeal. I am however willing to hear the parties on the appropriate order for costs in this appeal.

P. Jamadar
Justice of Appeal