

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

THE ADMINISTRATOR GENERAL FOR
SOUTH-WEST AFRICA

Appellant No. 1

SERGEANT DAMASEB

Appellant No. 2

ALEXANDER DU TOIT

Appellant No. 3

and

GERHARD KRIEL

Respondent

CORAM: HOEXTER, VAN HEERDEN et STEYN, JJA

HEARD: 7 March 1988

DELIVERED: 24 March 1988

J U D G M E N T

HOEXTER, JA

HOEXTER, JA,

On 2 March 1984, and at Kombat, SWA, two members of the SWA Police Force fired shots in an attempt to arrest a robber. One bullet ricocheted and struck Marie Kriel ("Marie") in the head. Marie was then eight years old and a pre-primary pupil in sub-B. She was a normal healthy child, fond of sport, and an average scholar. Her intelligence was such that in the normal course of events she would have matriculated.

The gunshot wound caused grave injury to Marie's brain and paralysed her body; but it left her mental faculties unimpaired. After the accident Marie received medical and surgical treatment at hospitals in Grootfontein and Windhoek whereafter she spent several months in the Red Cross Hospital for Children at Cape Town. Since July 1985 she has been a pupil at the Elizabeth Conradie School at Kimberley.

Alleging

Alleging that the shot in question had been negligently fired Marie's father ("the plaintiff") instituted an action for damages in his personal capacity and in his capacity as Marie's father and natural guardian against the three appellants jointly and severally. The matter came to trial before HENDLER, AJ in the Supreme Court of SWA on 10 June 1986. At the trial the appellants admitted liability and the sole issue was the quantum of damages to be awarded.

At the conclusion of the trial judgment was reserved. On 29 August 1986 HENDLER, AJ gave judgment with costs for plaintiff in various amounts which are set forth below and which total R 836 631,96.

In respect of the period from the date of the accident to the date whereon Marie will attain her majority, the Court below -

(A)

(A) awarded the plaintiff in his personal capacity

- (1) as past expenses, including medical expenses, the sum of R36 797,96;
- (2) in respect of future care, including medical and para-medical expenses calculated from 10 June 1986, the sum of R183 817,00. (My underlining)

The Court below further -

(B) awarded the plaintiff in his capacity as the father and natural guardian of Marie

- (1) as general damages the sum of R150 000,00;
- (2) in respect of loss of income the sum of R152 553,00;
- (3) in respect of future (i e the period subsequent to Marie's majority) medical and para-medical costs, the sum of R313 464,00. (My underlining)

By agreement between the parties the amounts awarded were to be paid to a trust fund about to be formed and subject to the approval of the trial Judge.

With leave of the trial Court the appellants appeal against the quantum of the damages awarded by the Court a quo. Their sole complaint is in regard to item

(B)(1) above - the amount of R150 000,00 awarded as general

damages

damages. It is urged on behalf of the appellants that in the process of determining item (B)(1) the trial Court misdirected itself. Accordingly this Court is invited to make its own assessment of a figure fairly representing the general damages in this case and to substitute the latter for the amount of R150 000,00 at which the trial Court arrived.

Upon what part of the learned Judge's reasoning the appellants rest their contention of a misdirection will be indicated in due course. In order to prepare the ground for a proper consideration of the appellants' complaint it is necessary first to describe the nature of the injury inflicted upon Marie by the gunshot wound to her head and the nature and extent of her permanent incapacity consequent thereon; and second to particularise the computation of medical and para-medical costs underlying items (A)(2) and (B)(3) in the trial Court's total award of damages.

In the judgment of the trial Court Marie's injury and her resultant disabilities are comprehensively

reviewed

reviewed. For purposes of the present judgment the position may be summarised as follows:-

- (1) The gunshot wound caused a depressed fracture of the skull and serious brain damage. Marie remained unconscious for some weeks after the injury but upon regaining consciousness (and after a spell of amnesia) she recovered the faculties of speech and memory. Her intelligence is normal.
- (2) Although her life expectancy has been reduced, a prognosis made in March 1985 indicated that Marie would live for at least a further 44 years, i e to the age of 53 years.
- (3) There is a risk of almost 50% that Marie may develop post-traumatic epilepsy.
- (4) The brain damage has resulted in partial paralysis of Marie's arms and legs. Such residual movement of which her limbs are still capable is functionally insignificant. She is incapable of doing anything for herself.
- (5) Marie

- (5) Marie has become severely spastic. She has already undergone a bone-marrow operation to alleviate her spasticity.
- (6) Marie suffers pain daily and she will continue to do so for the rest of her life.
- (7) Although Marie has sensation in all four limbs she has (subject to what has been said in (4) above) no functional movement below her neck. She is able to control her neck muscles sufficiently to enable her to use a headstick attached to a specially moulded helmet which fits over her head; but this exercise imposes a strain on the neck muscles and causes her pain.
- (8) The brain damage has resulted in partial incontinence of the bladder.
- (9) Marie cannot stand or sit unsupported. Left unsupported she falls over. She is confined to a wheel-chair with her shoulders strapped to keep her in an upright position. She is unable to operate a self-propelled wheel-chair.

With

With the aid of a headstick, however, she will be able to operate a motorised wheel-chair.

- (10) Marie cannot feed herself. With assistance and support she may eventually be able to use her left hand to feed herself; but in order to do so she will require a limb-balancer.

- (11) Marie is unable to maintain her balance when seated on a conventional toilet-seat. She cannot bath or even wash herself. She cannot dress and undress unaided. In bed at night she cannot, unassisted, turn from side to side.

- (12) Marie is the most severely disabled pupil at the Elizabeth Conradie School. Despite her average intelligence her school progress has been retarded by her disability. However, she will probably reach standard 8. She will remain at the Elizabeth Conradie School until she turns 21. At the school she requires a full-time live-in attendant to look after her.

- (13) In

(13) In order to complete her schooling Marie will require a sophisticated computer equipped with remote control switches. The helmet and headstick already mentioned will enable her to type on a computer key-board; and to write and to paint. She will require special tape-recorders.

(14) Once she has completed her schooling institutional care will be neither necessary nor advisable for Marie. Given suitable accommodation, architecturally adapted to her particular needs, and if she is provided with the necessary motor transport (also with suitable structural modifications) and personal attendants, Marie will be able, ^{and} she may prefer, to live on her own or in some sort of commune. Whether she chooses to live on her own or with her family or in a commune, she will for the rest of her life require two full-time personal attendants.

To

To sum up: Marie has survived catastrophic bodily injury with her mind intact. While she has the intelligence and while she experiences the emotions and feelings of any ordinary healthy girl of her age, she is now - and for the rest of her days she will remain - imprisoned in an inert and helpless body.

I turn next to the trial Court's computation of the medical and para-medical costs. The first witness called on behalf of the plaintiff was a Mrs Margaret Thompson. She is a very experienced occupational therapist and an expert in the field of para-medical aids and equipment designed to enable disabled persons to become as independent as possible. On 6 June 1986 Mrs Thompson spent 6¹/₂ hours at the Elizabeth Conradie School where she observed and interviewed Marie and discussed the latter with members of the school staff. On 7 June 1986 Mrs Thompson compiled a very comprehensive typewritten report setting forth her assessment

assessment of Marie's needs in regard to medication, equipment, personal attendants, transport and accommodation.

In the witness stand Mrs Thompson gave lengthy and detailed evidence in support of her report. Subject to a criticism that her estimates of the durability of some of the para-medical aids recommended by her were perhaps "a bit

too pessimistic" the learned Judge found Mrs Thompson to be

an excellent witness who had "an outstanding knowledge of

the needs and requirements of a paraplegic". I should add

that the testimony of Mrs Thompson was supported by two

other witnesses who are members of the staff of the

Elizabeth Conradie School. These were respectively a

State medical officer responsible for the medical welfare

of the pupils and a physio-therapist who is a graduate in

science.

Here it is necessary to quote at some length from that portion of the trial Court's judgment in which

its

its award in respect of future medical expenses (items

(A)(2) and (B)(3) aforementioned) are particularised:-

	<u>"Up until the age of 21</u>	<u>Over the age of 21</u>
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1. MEDICATION

For the tablets which Marie has to take for the rest of her life an amount of is awarded.

R37 543,00	R63 062,00
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1. TOILET AIDS

(a) Bladder

Pads and diapers are necessary to assist with bladder incontinence, for this a tranquillity system is required and I award the amount of

R37 010,00	R62 167,00
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(b) Bowel

To enable Marie to use the toilet in a conventional manner instead of lying on a bedpan, a Gil chair is necessary and at a later stage she will require a commode-shower chair with padded toilet, and for these items I award the amount of

R 1 908,00	R 1 010,00
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3. BATH AND BATHROOM

Up until the age of 21	Over the age of 21
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3. BATH AND BATHROOM

(a) Marie requires to be supported in the sitting position using a specially designed bath support cushion known as the Burnett bath-seat. She also requires a hoist and the recommended one is a Mangar bath-hoist. For these items I award the amount of

R 6 620,00

R 2 425,00

(b) This is for a Spartan examination couch to make dressing and undressing possible in the bathroom and also for a Parker bath which will be required when she eventually has a permanent home. Here I award the amount of

R 552,00

R 1 952,00

4. ATTENDANTS

I am satisfied that it would be fair to award the costs of 1 attendant only up until Marie reaches the age of 21, when she leaves the Elizabeth Conradie school, but thereafter I am satisfied that she will require an additional attendant who is also able to double-up as a driver. To this end I award the amount of

R28 594,00

R134 481,00

5. TRAVELLING

	Up until the age of 21	Over the age of 21
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5. TRAVELLING ALLOWANCES

I am satisfied that Marie should be allowed the travelling allowance from school to her home up until the age of 21 together with the costs of the attendant that will travel with her. Here the award is in the amount of

R32 940,00	-
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6. SCHOOL FEES

The amount awarded here is

R 5 833,00	-
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7. COMMUNICATION

(i) Head Sticks

The aids here form the most vital part of Marie's life and for the head sticks and helmets which she will require I award the amount of

R 9 886,00	R15 321,00
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(ii) Remote control switches

which are an absolute necessity I award the amount of

R 1 980,00	R 1 128,00
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(iii) Tape recorder

This being Marie's main means of communication, a special type is required, and for this I allow

R 4 974,00	R 4 858,00
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(iv) Intercom and Telephone

These items are also essential for Marie's wellbeing and I award

R 1 980,00	R 180,00
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8. BED

	Up until the age of 21	Over the age of 21
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8. BED AND MATTRESS

Marie requires a special type and for this I allow the amount of

R 4 076,00	R 2 442,00
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9. WHEELCHAIRS AND SUPPORTS

These are obviously essential items for Marie's wellbeing and I award the amount of

R24 759,00	R28 950,00
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10. ELECTRIC TILT TABLE
AND ARM BALANCER

These items are once again absolutely necessary as it is essential that Marie stands daily as part of the therapy and the arm balancer is required to attempt to get some useful movement in her left arm. A special support cushion is also required for standing. The amount awarded here is

R20 367,00	R23 222,00
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11. TRANSPORT

For the special transport Marie will require, I award the amount of

-	R20 527,00
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12. PHYSIOTHERAPY

This Marie will require for the rest of her life and for this I award the amount of

-	R21 580,00
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COMPUTER

<u>Up until the</u>	<u>Over the</u>
<u>age of 21</u>	<u>age of 21</u>

13. COMPUTER

The final item is a computer which is probably one of the most important aids for the rest of Marie's life and for

this I award the amount of	R26 067,00	R34 647,00
	<u>R 245 089,00</u>	<u>R 417 952,00</u>

The way has now been cleared for an examination of the appellants' complaint that the trial Court misdirected itself in regard to the award of general damages. The portion of the trial Court's judgment quoted above was prefaced by certain observations by the learned Judge which I quote hereunder:-

"On consideration of all the factors, I am satisfied that the following para-medical aids were shown on a balance of probability to be necessary for Marie to lead any type of reasonable existence at all, and in no way would provide her with an utopian situation. It must be borne in mind that Marie is not a vegetable, she has a mind which comprehends everything and is able to communicate freely with her fellow-scholars and a substantial

sum

sum is necessary in an attempt to ameliorate her tragic position.

I consider that the aids recommended as essential by Mrs Thompson should be considered as future medical expenses and that the amounts awarded for these aids should not be deducted or play any meaningful role when deciding upon the amount of general damages to award which requires entirely different considerations.

I make the following awards for future medical expenses being essential medication and para-medical expenses being the aids which I find on the balance of probabilities were necessary." (My underlining)

Mr Scott (who, with Mr Avenant, appeared for the appellants) submitted that the sentence underlined in the above-quoted remarks by the learned Judge constituted a material misdirection. As pointed out by this Court in Southern Insurance Association v Bailey NO 1984(1) SA 98 (A) at 113 E/F, where (as here) damages for bodily injuries are awarded not in a globular amount but under separate heads, a trial Court should guard against the danger of duplication as a result of an overlapping between separate awards.

Counsel for the appellants contended that in seeking to

determine

determine the quantum of general damages by excluding from consideration the amounts awarded under items (A)(2) and (B)(3) to cover the cost of the para-medical aids thereunder specified, the trial Court's total award had resulted in a duplication of damages. Most of these para-medical aids, so it was urged, were of a nature calculated to ameliorate Marie's loss of the amenities of life - a factor looming large in the trial Court's award of R150 000,00 for general damages; and in consequence, so the argument proceeded, there was overlapping between the awards under items (A)(2) and (B)(3) on the one hand and the award under item (B)(1) on the other. On behalf of the respondent Mr Scholtz contended that in the instant case there had been no duplication of damages. He forcibly argued that any possibility of overlapping had been eliminated for the reason that in weighing general damages the learned Judge had visualised Marie as a patient already equipped with and served by the para-medical aids. Now it may well be that the Court below so viewed the matter, but the

the question remains in what way Marie's unhappy lot is likely to be ameliorated by the provision of the para-medical aids; and whether such amelioration does not in fact to some extent impinge upon the issue of general damages.

Counsel for the appellants relied strongly upon the reasoning reflected in a judgment of KRIEGLER, J delivered on 14 June 1986 in the Witwatersrand Local Division in the matter of Johannes Dhlamini v Government of RSA and reported in Corbett & Buchanan, The Quantum of Damages, vol III, p 554.

Following a spinal cord injury caused by a gunshot wound the plaintiff in that case had become a paraplegic unable to stand or walk unassisted and he was permanently confined to a wheel-chair. KRIEGLER, J awarded the plaintiff damages totalling R224 000,00 and computed under ten separate heads. In respect of loss of earnings (para 1) the sum of R74 000,00 was awarded. In respect of pain and suffering, loss of the amenities of life, disability and disfigurement, (para 10) the sum of R50 000,00 was awarded. The balance of

R100,000.00

R100,000.00 was made up of 8 separate awards (paras 2 - 9)

to cover the costs of the following: a wheel-chair,

a Levo chair; tyre inserts; an attendant; treatment

and consultations; and future medical expenses. In

assessing general damages at the sum of R50 000,00

KRIEGLER, J remarked (at 587):-

"If I were to have assessed the damages for the non-patrimonial elements in isolation, I would have arrived at an award considerably in excess of the figure at which I have arrived. I have grappled with the question what, in law, logic or equity, underlies my conviction that there must be some interaction between the awards for patrimonial loss on the one hand and the award for non-patrimonial loss, on the other. Whatever may be the rationale in principle or in other cases, it appears to me, in this case, and on its particular facts, that I cannot ignore the very substantial awards made under paragraphs 2, 3, 5 and 6 above when I come to assess general damages for pain and suffering, loss of amenities of life, disability and disfigurement. Those awards were considered reasonable for the very reason that they served to ease the plaintiff's painful shuffle across this mortal coil. They were intended to

reduce

reduce the suffering, the loss of amenities of life and general disablement that the plaintiff will have to live with. I cannot ignore them when assessing those very elements under what is a different head of damage, but forms part of one and the same award.

In the result, I have assessed the damages under this head, in the sum of R50 000.00."

(I should mention that the awards under paragraphs 2, 3, 5 and 6 here mentioned by KRIEGLER, J were for the costs respectively of a wheel-chair(R16 000,00); a Levo chair (R16 000,00); an attendant (R40 000,00) and drop shields (R7 000,00)).

It seems to me, with respect, that KRIEGLER, J was entirely right in concluding that, on the facts of the case before him, some reciprocal relationship necessarily existed between the patrimonial and the non-patrimonial elements in the total award of damages; and that he rightly guarded against the danger of duplication by assessing general damages in the light of the fact that the sums awarded to cover the costs of some of the para-medical aids would to an appreciable

appreciable extent serve to ameliorate Dhlamini's suffering and to compensate him for the amenities of life which he had lost. In my view, furthermore, on the facts of the case before us, the awards under items (A)(2) and (B)(3) on the one hand and the award under (B)(1) on the other are likewise interlinked and to some degree overlap. For the reasons which follow the criticism levelled by the appellants at the trial Court's approach to the matter of general damages is, in my opinion, well-founded.

Under the heading of general damages the trial Judge included "damages for pain and suffering and loss of the amenities of life"; and in this connection he further observed in the course of his judgment:-

"As already stated, Marie, because of her spasticity, will endure pain for the rest of her life and it is also quite clear that there are really no amenities of life left to her whatsoever besides the fact that she is able to speak and hear and communicate by using a head stick."

I deal first with the matter of pain. The sum of the

amounts

amounts awarded under items (A)(2) and (B)(3) is R183 817 +
 R313 464 = R 497 281. Of the last-mentioned amount a little
 more than one-fifth, that is to say R37 543 + R63 062
 = R 100 605 was awarded to cover the costs of medication.

The broad purpose of medication is therapeutic and curative;
 and the award of R100 605 must be regarded, I think, as being
 calculated to reduce and alleviate, at least to some extent,
 the pain which will burden Marie for the rest of her life.

I consider next the matter of the loss of the
 amenities of life. The balance of the awards under items
 (A)(2) and (B)(3), that is to say R497 281 less R100 605
 = R396 676 is aimed at the provision of the twelve para-
 medical aids already detailed in this judgment. An appraisal
 of those various aids, so it seems to me, points inescapably
 to the conclusion that the provision of many of them are
 calculated to ameliorate, to some extent at least, the loss
 of the amenities of life suffered by Marie. That the learned
 Judge in the Court a quo took a different view of the matter

is

is indicated not only by that portion of his judgment already quoted, and underlined by me, but further appears from the following remarks made by him in dealing with the appellants' application for leave to appeal:-

"I am also not impressed by the argument that in calculating general damages and especially with regard to the loss of amenities of life, I should have considered the amounts awarded for the para-medical aids. The reason I say this is because none of the aids are able to restore to Marie the loss of amenities of life. None of them can replace the loss of all her limbs and what this deprives her of. The aids merely make life less intolerable."

The concept of the loss of the amenities of life has been tersely but aptly defined by LORD DEVLIN in H West & Son Ltd v Shephard (1963) 2 AER 625 (HL) at 636 G/H as -

"...a diminution in the full pleasure of living."

The amenities of life may further be described, I consider, as those satisfactions in one's everyday existence which flow from the blessings of an unclouded mind, a healthy body, and sound limbs. The amenities of life derive from such simple

but

but vital functions and faculties as the ability to walk and run; the ability to sit or stand unaided; the ability to read and write unaided; the ability to bath, dress and feed oneself unaided; and the ability to exercise control over one's bladder and bowels. Upon all such powers individual human self-sufficiency, happiness and dignity are undoubtedly highly dependent.

That none of the para-medical aids with which the case is concerned will be able - to use the words of the learned trial Judge - "to restore to Marie the amenities of life" which she has lost, must be accepted of course as a sombre truth. It is no less important to bear in mind that no amount of para-medical aids can ever be a substitute for limbs which have ceased to function. But the matter does not end there. As HENDLER, AJ himself pointed out, the para-medical aids would make life "less intolerable" for Marie. It seems to me that whatever renders the uncomfortable and deprived existence of an accident victim less intolerable

or

or more endurable must inevitably have the tendency to restore to the victim of an accident at least some of the pleasure in living once enjoyed by such victim; and likewise to serve as some measure of compensation for the loss of the amenities of life.

Without the para-medical aids Marie would be doomed to a wretched existence spent, to the end of her days, within the walls of an institution. She would remain helpless, comfortless, and wholly dependent upon others to satisfy her most basic bodily and intellectual needs. Since her mind is clear there must be added her anguish and frustration flowing from the realisation of her utter helplessness. It is true that even when she has the advantage of the para-medical aids Marie's plight will still be a pitiable one; but it will no longer be a completely hopeless one. A few examples will suffice. Having her own full-time personal attendant while she remains at the Elizabeth Conradie School will make life a little more comfortable and congenial

congenial for her. Having two such personal attendants when she attains majority and leaves the school will give her greater mobility and independence. In particular it will enable her to throw off the shackles of confinement to an institution and allow her, if she so wishes, to live in a home of her own - by common consent not the least of the many pleasures of living. The aids to communication and the sophisticated computer will help Marie to become more self-sufficient and self-reliant; and so will the wheel-chairs, the electric tilt-table, and the arm-balancer. The toilet aids and the specialised bathroom and bedroom equipment will all conduce to her greater comfort and to a sense of comparative well-being.

For the reasons foregoing I conclude that in disregarding the interrelationship between the patrimonial and non-patrimonial elements of damages in its assessment, and in treating items (A)(2) and (B)(3) on the one hand and item (B)(1) on the other as completely discrete and individually distinct components in its total award of damages, the trial

Court

Court materially misdirected itself. In the present case the said components to some degree overlap and the approach of the trial Court resulted to an appreciable extent in an improper duplication of damages. Accordingly the appellants' attack upon the award of general damages as determined by the Court below succeeds and this Court is required to substitute for the trial Court's figure its own assessment of general damages.

Notwithstanding the perceptible amelioration of her burden of pain and suffering and of her loss of the amenities of life which will result from the provision of the various para-medical aids, it is clear on all the facts of this pathetic case that Marie has suffered and will always suffer pain and discomfort; and that for her the ordinary pleasure of living has been grossly and cruelly diminished. Having made due allowance for the aforesaid amelioration the award under the head of general damages must be a very substantial one. In all the circumstances of the case I would

would assess general damages for pain and suffering and for loss of the amenities of life at the figure of R110 000,00.

An adjustment of a patent error in the order of the trial Court is necessary. The trial Court's assessment of damages for loss of earnings (see item (B)(2)) was based upon a figure of R213 403,00 derived from actuarial evidence adduced. In order to provide for contingencies the learned Judge sought to reduce this figure by 25%. However, an arithmetical error crept into the trial Court's deduction for contingencies and under the head of loss of earnings it awarded R152 533,00. It should have awarded R160 052,00.

In the result the following orders are made:-

(1) The

- (1) The appeal succeeds with costs, including the costs consequent upon the employment of two counsel.
- (2) The amount of general damages awarded in paragraph (B)(1) of the trial Court's order is reduced from R150 000,00 to R110 000,00.
- (3) In order to cure a patent arithmetical error paragraph (B)(2) of the trial Court's order is corrected by substituting for the figure of R152 553,00 awarded as damages for loss of income the figure of R160 052,00.

G G HOEXTER, JA

VAN HEERDEN, JA)
STEYN, JA) Concur