SOLOMON AND ANOTHER, NNO v DE WAAL
[1972] 2 All SA 112 (A)

Division:	Appellate Division
Judgment Date:	3 December 1971
Case No:	not recorded
Before:	Rumpff JA, Wessels JA, Potgieter JA, Trollip JA and Muller JA
Parallel Citation:	1972 (1) SA 575 (A)

. Keywords . Cases referred to . Judgment .

Keywords

Animal - Actio de pauperie - Domesticated animal acting contra naturam sui generis

Cases referred to:

Giliomee v Cilliers 1958 (3) SA 97 (AD) - Applied

Hamman v Moolman 1968 (4) SA 340 (AD) - Applied

Maree v Diedericks 1962 (1) SA 231 (T) - Compared

O'Callaghan v Chaplin 1927 AD 310 - Applied

Judgment

POTGIETER, J.A.: This is an appeal against a judgment of BEYERS, J.P., in the Cape of Good Hope Provincial Division in respondent's favour in the amount of R16 936,41 as and for damages suffered by her as a result of a severe injury sustained when she was attacked and savaged by a stallion in the vicinity of Eerste Rivier, Cape, on Sunday morning 19th October, 1969. I will for the sake of convenience hereinafter refer to appellants as defendants and to respondent as plaintiff. The latter instituted an action for damages against four defendants

and in her particulars of claim she averred that on the morning in question she was attacked by a stallion in an unnamed public road leading off the main Faure/Kuils River road while she was on horseback. As a result of the attack she sustained a degloving injury of her right thigh. It was further alleged that in so attacking plaintiff the stallion acted contrary to the nature of its class and from inward excitement or vice and that at the time of the occurrence the stallion belonged to one Abraham Wolf Solomon or to either the third or the fourth defendants. At the trial the matter was not pursued against these two defendants and I will, therefore, make no further reference to them.

The aforesaid Abraham Wolf Solomon (hereinafter referred to as "Solomon") has since the occurrence died and the first and second defendants (who are the appellants in this appeal) were sued in their capacities as executors testamentary in the estate of the late Solomon. The first defendant is the latter's son and the second defendant his daughter.

Alternatively to the allegation based on the *actio de pauperie* as set out above, it was averred by plaintiff that her injury was caused by the negligence of the said Solomon in whose care and control the said stallion was at the time of the attack, or by the negligence of the latter's servants acting within the scope of their employment, and in whose care and control the stallion was. The allegation of negligence was that, to the knowledge of Solomon or his servants, the said stallion was of a fierce and vicious nature and had a tendency to attack other horses and their riders, but that in spite thereof Solomon or his servants permitted the stallion to run free and unattended upon a public road which they knew or ought to have known was used by horse riders.

It is finally alleged that plaintiff suffered damages in the amount of R24 770,52 made up as follows:

(*a*)	Past medical and hospital expenses	R205,52
(*b*)	Future medical and hospital expenses	R3 000,00
(*c*)	Past loss of earnings	R1 565,00
(*d*)	Loss of future earnings	R8 000,00
(*e*)	General damages for pain, suffering, shock, loss of amenities of life and disfigurement	R12 000,00
		R24 770,52

In their plea defendants denied all the allegations material to liability and damages.

The matter was heard by the JUDGE-PRESIDENT who found that the injury sustained by plaintiff was due to the

negligence of Solomon or his servants and awarded the former damages in the amount of R16936,41 and costs.

On 19th May, 1971, plaintiff's attorneys filed a notice with the Registrar of the Cape Provincial Division intimating that plaintiff abandoned the judgment to the extent of R3 455,32 and stating that she accordingly sought to enforce the judgment to the extent of R13 481,09. It is not specified in this notice to what head of damages the amount abandoned relates.

Defendants are now on appeal in this Court against the whole judgment of the Court *a quo.*

During the course of the trial a plan of the area where the accident had occurred, prepared by a land surveyor, was handed in by the latter. I proceed immediately to deal with certain relevant aspects of this plan in the light of the land surveyor's testimony and in the light of reference made thereto in the testimony of some of the other witnesses. The legend on the plan indicates that it is drawn to scale in the ratio of 1 : 200. On the plan an hotel, which according to the evidence is the Woodlands Hotel belonging to Solomon, is indicated. At the back of this hotel is a shop, the hotel yard and certain other outbuildings. Further back are two small buildings and between them is a small camp where it is alleged Solomon's stallion used to be fed. This is the "klein kampie" mentioned by the witness Bezuidenhout. Still further back is a bigger camp in which the defendants' witness Wessels testified that he had parked a wrecked car. Just below the hotel another big fenced-in camp is depicted. At the trial certain photographs were handed in and on two of these photographs a little shed appears which is described in the evidence as a "lean-to". In front of the hotel there is a tarred road running between the hotel and the Eerste Rivier Station. On one of the photographs a gate is indicated leading from the tarred road into the camp where the lean-to is situated. Next to the tarred road and lower down from the hotel area is a fenced-in railway site and between these two properties a road, marked "unmade road". It terminates at the tarred road described above.

More or less to the south of the hotel a narrow gravel road leading from the Faure/Kuils River main road is depicted. This road terminates at the commencement of an irregular track which leads onto the aforementioned tarred road. The point where plaintiff was alleged to have been attacked is shown on the plan as being at the commencement of the track described above. This point appeared at the trial to be common cause, and if one has regard to the scale of the plan, this point is, as the crow flies, more or less 150 ft. from the southern fence of the camp where the lean-to, referred to in the evidence, is situated. Even if a horse proceeding from any of the camps adjacent to the Woodlands Hotel to the accident locality has to go round the railway site described above, it has to traverse no more than about 200 ft.

I proceed now to describe briefly the events leading up to and culminating in the attack of the stallion on plaintiff on Sunday morning, 19th October, 1969. Early that morning plaintiff, accompanied by a number of other riders, eight in all, went for a ride on horseback from a riding school owned by one Fiedler. Plaintiff was riding a gelding and she and her companions crossed the main road and proceeded along the narrow gravel road. Those who testified, said that as they rode along they saw two or three mares accompanied by a stallion near the railway property indicated on the plan. When they arrived at the track, described above, the stallion darted away from the mares with its ears back and its teeth bared and approached the riders. It attacked the front horse ridden by one Brandt, plaintiff's husband, whom she has since divorced. It managed to get hold of the saddle cloth but was

warded off by him with his riding crop. Thereafter it appeared to conduct a series of lunging attacks at other riders in the group and eventually attacked the plaintiff by getting hold of her by the right thigh, lifting her completely out of the saddle, holding her for a moment in its mouth while shaking its head and then dropping her. The stallion ran off in the direction of the railway site. Plaintiff got up, ran a few yards and then collapsed. She was eventually removed to hospital by car. Plaintiff suffered a severe injury as a result of this attack. I will revert to this aspect later in this judgment.

Before analysing the evidence in this case and dealing with the different issues raised on the pleadings, I have to mention a matter of a general complaint raised by counsel for the defendants concerning the conduct of the Judge *a quo* at the trial. He submitted that the frequent interventions during the course of the trial showed that he had associated himself too closely with the conduct thereof,

> "thereby denying himself the full advantage usually enjoyed by the trial Judge who, as the person holding the scale between the contending parties, is able to determine objectively and dispassionately, from his position of relative detachment, the way the balance tilts"

-WESSELS, J.A., in *Hamman* v. *Moolman*, 1968 (4) S.A. 340 (A.D.) at p. 344E-F. Counsel submitted that the trial Judge's impressions of the defendants' witnesses and his findings as to credibility, should therefore not be accorded the weight normally given to the findings of a trial Judge.

It is regrettable that we have to consider a complaint of this nature, but it is necessary to do so in the interests of justice.

A perusal of the record reveals that the learned trial Judge often and, unfortunately, quite unwarrantedly, intervened in the proceedings while defendants' counsel was cross-examining plaintiff's witnesses and during the hearing of defendants' case. It is unnecessary to quote the numerous passages in question. Suffice it to say that during the hearing of plaintiff's case the learned Judge asked certain questions and made certain observations

which reflected favourably upon plaintiff's case and adversely upon the evidence that defendants' counsel asserted would be adduced for the defendants. Furthermore, during the hearing of defendants' case, the learned Judge examined their witnesses in such a manner and made observations in the course thereof of such a nature as to evince his ostensible disbelief, or at any rate, his doubts about their credibility. Those and other interventions by the learned Judge must have been most harassing for defendants' counsel, but fortunately he did not allow the actual presentation of defendants' case to suffer thereby. However, by descending into the arena of the conflict between the parties in that manner the learned Judge might well have disabled himself from assessing with due impartiality the credibility of the witnesses, the probabilities relating to the issues, and the amount of the general damages sustained by plaintiff. Even if that were not so, such interventions might well have created the impression, at least in the minds of defendants, that he had so disabled himself and that he was favouring or promoting the plaintiff's cause and prejudging the case against defendants. In that regard it must be born in mind that justice should not only be done but should manifestly and undoubtedly be seen to be done.

Consequently, in my view, it is necessary that this Court should itself determine the issues between the parties on the recorded evidence, without relying on the findings made by the learned trial Judge, and so dispel any possible impression that justice has not been done. Fortunately, that can be done without much difficulty, for, as will presently appear, the assessment of the demeanour of the witnesses is not essential for a proper determination of their credibility. Otherwise, it might have been necessary to remit the case, with appropriate directions, for a complete re-hearing.

I now proceed to deal with the most important issue in the case, namely, the determination of the ownership of the stallion which attacked the plaintiff. I will first of all refer to the evidence adduced on behalf of plaintiff regarding the description of the horse which attacked her. Four persons who accompanied plaintiff on horseback that morning described this horse

[The learned Judge then dealt with the evidence of these persons and continued.]

For the aforegoing reasons I come to the conclusion that the plaintiff proved by a preponderance of probabilities that the stallion which had attacked her belonged to Solomon.

The learned Judge *a quo* found that the accident was due solely to the negligence of Solomon in that he ought to have known that his stallion was a potentially dangerous animal and did not take proper precautions to prevent it from escaping from its camp. There is much to be said for this view but I prefer to base defendants' liability simply on the *actio de pauperie.* In *O'Callaghan* v. *Chaplin*, 1927 A.D. 310, after an exhaustive review of the authorities, INNES, C.J., concluded as follows at p. 329:

> "By our law, therefore, the owner of a dog that attacks a person who was lawfully at the place where he was injured, and who neither provoked the attack nor by his negligence contributed to his own injury, is liable, as owner, to make good the resulting damage."

In the case of *South African Railways and Harbours* v. *Edwards*, 1930 A.D. 3, it was confirmed that the *actio de pauperie* was still part of our law, and at p. 9 *in fine* DE VILLIERS, C.J., said:

> "The action lies against the owner in respect of harm (*pauperies*) done by domesticated animals, such for instance as horses, mules, dogs, acting from inward excitement (*sponte feritate commota*). If the animal does damage from inward excitement or, as it is also called, from vice, it is said to act *contra naturam sui generis;* its behaviour is not considered such as is usual with a well-behaved animal of the kind."

In that case the plaintiff was walking in a street in Johannesburg and passed a wagon to which four mules were harnessed. As he passed the mules he was kicked by one of them causing him injury. It was argued, *inter alia*, that the behaviour of the mule was not due to inward vice or excitement but was caused by the traffic noise. It was held, however, that a domesticated animal which become upset by such noise and kicks someone must be held to have acted from inward excitement. The learned Judge said that the cause of the injury was not the noise but the innate wildness of the animal because it had to be assumed that a draught mule would be accustomed to traffic noises.

What is meant by an animal acting *contra naturam sui generis* is set out by *Voet*, 9.1.4, as follows:

> "Animals are said to do harm contrary to their nature when, though tame, they take on wildness; as when a horse kicks or an ox gores, albeit that a horse is apt to kick and an ox wont to gore. An ox and a horse, along with other animals which come under the term 'cattle', are wont to graze in a herd under the control of a shepherd without doing harm, and to that extent they are counted among tame four-footed creatures. Hence it is correctly said that they do damage contrary to the nature of their kind when on their wildness being roused they kick or gore."

(*Gane's* translation).

I agree with the following remarks of P. M. A. Hunt, the author of an article entitled "Bad Dogs" in (1962) 79 *S.A.L.J.* 326 at p. 328:

> "The *contra naturam* concept seems, in fact, to have come to connote ferocious conduct contrary to the gentle behaviour normally expected of domestic animals. This imports an objective standard suited to humans. It is far more refined than behaviour literally *natural* to that species of animal. It is what *Voet*, 9.1.4, means when he speaks of *animalia mansueta*

feritatem assumunt."

In the instant case plaintiff proved that she was bitten by a stallion, a domesticated animal, belonging to Solomon. She also proved that she was lawfully at the place where she was attacked. It was not disputed that the gravel road and the track were frequently and legitimately used by the public.

There was evidence to the effect that a stallion, when in the company of mares, may attack a strange male horse which comes near the mares. It does so, said the witnesses, in order to protect its interests in its female company. In principle, such conduct is, in my judgment, no different from that of a mule which kicks as a result of being upset by traffic noises (cf. *Edwards'* case, *supra*), or a dog which, because of hunger, catches fowls (cf. *Maree* v. *Diedericks*, 1962 (1) S.A. 231 (T) at p. 237), or an ox or bull which gores a person who comes near it.

It is expected of such animals, because they have become domesticated, that they should be able to control themselves, and if they do not, they are regarded as having acted *contra naturam sui generis. A fortiori*, in my view, if a stallion attacks a person on horseback, it acts contrary to the nature of its class, and that is so despite the fact that the attack takes place while the stallion is in the company of mares.

There was no suggestion that plaintiff provoked the stallion or that it was in any way due to her fault that it behaved in the way it did.

I come to the conclusion, therefore, that defendants are liable to plaintiff on the *actio de pauperie.*

The learned trial Judge awarded an amount of R832,52 in respect of past medical and hospital expenses, and this amount was not attacked on appeal in this Court. For past loss of earnings the learned trial Judge awarded the sum of R4 971,39 stating that the latter amount was not seriously disputed. That, however, does not appear from the record, and the learned Judge *a quo* did not state at all how the figure was arrived at. Under this head the learned Judge awarded an additional amount of R1 132,50 for loss of tips. The record of the proceedings certainly does not reveal that plaintiff came near to proving either of these amounts. That may well be the reason which prompted her to abandon the amount of R3 455,32, although unfortunately she did not specify to which claims the abandonment related.

Before dealing with these awards, it may be apposite to set out briefly plaintiff's source of income before and after she had suffered the injuries complained of. Plaintiff was employed by a firm of exclusive

men's hairdressers in the city of Cape Town. Inasmuch as the plaintiff was, according to the evidence, very popular and had a big clientele, she earned, in addition to her salary, a substantial amount in the way of tips.

Plaintiff's employer, one Rothchild, testified as to her loss of earnings as a result of the accident. According to him plaintiff was employed at a basic salary plus a commission which was calculated at 50 per cent of her takings less double her salary. Rothchild handed in schedules indicating the wages and commission that she had earned for the year immediately preceding the accident-i.e. from October, 1968, to September, 1969-and secondly a schedule indicating her salary and commission from the date of the accident until approximately the date of the institution of the proceedings. It is necessary to set out these schedules

[The learned Judge proceeded to set these out and continued.]

According to this witness's evidence plaintiff was off work altogether from the date of the accident-i.e. from 29th October, 1969-until 14th December, 1969. Thereafter she returned to work on a part time basis until June, 1970, when she resumed full time employment. The evidence was that, although she resumed full time employment as from the beginning of June, 1970, she had not fully regained her strength and moreover, as a result of a recurring pain at the injury site, her takings were less than they had been the year previous to the accident. She also stated that, owing to her frequent absences as a result of operations and leave, her customers became dissatisfied and she was not as much in demand as she had been previously. Her employer also handed in a schedule of her takings for the year prior to the accident which amounted to R6 532. Her takings for six months during that year would have been more or less half the amount, namely R3 266. Yet, during the six months from October, 1970 to 31st March, 1971, her takings amounted only to R2 642,45 according to a schedule for that period, prepared by Rothchild, which was some R600 less than her takings during six months in the year prior to the accident. I consider that the facts mentioned above fully answer the argument of counsel for defendants that since September, 1970 plaintiff had not suffered any loss in respect of earnings.

Having regard to the aforegoing factual situation, I proceed to determine plaintiff's loss of earnings from the time of the accident to the time the action was instituted. I consider that the only practical way of calculating this loss is to take as a starting point the wages and commission plaintiff had earned the year prior to the accident. According to Rothchild's schedule the wages and commission she had earned from October, 1968 to September, 1969 was R3 276. On this basis she probably would have earned R1 638 for six months. She should, therefore, but for the accident, have earned R4 914 for the period of 18 months from October, 1969, to March, 1971. According to the schedules plaintiff in fact only earned R3 016 during that period which shows a loss of R1 898. The trial Judge should, therefore, have allowed this amount and not R4 971,39.

In respect of the award made for the loss of tips, plaintiff testified that she received an average of between R4 to R5 per day, including Saturdays. Although she only worked half days on Saturdays, the evidence

was that more customers were received on Saturday mornings than on week-day mornings, so that a Saturday morning could for practical purposes be regarded as a full day. The learned trial Judge briefly dealt with the claim in respect of tips in the following way:

> "The plaintiff put tips at R4,50 per day and defendants suggest R1 per day. I think a fair figure is the sum of R3 per day for the period 1st October, 1968, to 30th September, 1969. For the period 1st October, 1969, to 30th September, 1970, I think R1,50 per day is fair. I accordingly under this head award the plaintiff the sum of R1 132,50."

The learned Judge's calculation was obviously incorrect. If the sum of R1 132,50 is divided by R1,50 the number of working days for the period in respect of which the calculation was made would be 755 which is palpably wrong.

As pointed out above, plaintiff testified that she received an average of R4-R5 per day in tips. Considering all the circumstances, I can see no reason why an average figure of R4 per day would not be fair. If, then, one awards R4 per day for the periods that she was, as a result of the accident, wholly out of work and R2 per day during the periods she was part-time out of work and allows her nothing during the periods she was in full-time employment after June, 1970 (except for two periods during which she was out of work owing to operations she had to undergo), and if one leaves out of account Sundays and public holidays, the amount of R598 should be awarded for the loss of tips during the period October, 1969, to March, 1971. I arrive at this amount as set out hereunder and I base my calculations on the schedule prepared by Rothchild:

From 20th October to 14th December, 1969-i.e. 48 days-plaintiff was wholly out of work. At R4 per day this amounts to R192. From 15th December, 1969, to 30th April, 1970, plaintiff was in part-time employment for 103 days. Calculated at R2 per day a figure of R206 is arrived at. During the whole of May, 1970, except for two days when she was part-time out of work, plaintiff had to undergo an operation which kept her out of work for 17 days-calculated at R4 per day for 17 days and R2 per day for two days-her loss in tips amounts to R72. During August she was off duty for 15 days at R4 per day which resulted in a loss of R60. During February, 1971, she was again out of work for 17 days owing to an operation which resulted in a loss of R68. During the periods not mentioned above she was in full-time employment and she has not proved that she suffered any loss in tips during that period. The total of the amounts mentioned above comes to R598. The learned Judge should, therefore, have allowed the amount of R2 496 for loss of earnings during the period 20th October, 1969, to 31st March, 1971.

I now proceed to deal with the award of general damages. The learned Judge *a quo* awarded an amount of R10 000 under this head. As I will show hereunder, the learned trial Judge misdirected himself in a material respect. In his judgment he said:

> "She has spent overall nine weeks in hospital during which time she suffered intense pain, mental distress which has left her understandably depressed and generally psychologically disturbed. When this case is behind her, her psychological position will undoubtedly improve."

I have no doubt that the learned Judge meant by this statement that after the accident, and right up until the date of trial, plaintiff was depressed

and psychologically disturbed. It is to be observed that the trial Judge drew a distinction between depression and psychological disturbance. There was no evidence at all that plaintiff was ever psychologically disturbed as opposed to mere depression. Furthermore, although the evidence was that she was depressed just after the accident, and for some time thereafter, which is quite understandable, the evidence of both Dr. Engelbrecht, who examined her in February, 1970, and Dr. Binnewald, who examined her in April, 1971, was that on these respective occasions plaintiff had recovered from her depression and seemed to be quite relaxed. In fact during the course of the trial plaintiff's counsel expressly disavowed that plaintiff was depressed at the date of the trial. The trial Judge in this respect, therefore, clearly misdirected himself. And, in any event, for reasons already given in this judgment, it is preferable not to place any reliance on the learned trial Judge's assessment of general damages. Hence, we are at large on this particular issue.

According to the evidence the plaintiff, a divorcee, aged 29 years, is an attractive woman who had a figure of which she was very proud. The nature of her injury sufficiently appears from a series of photographs handed in. These photographs certainly show that the bite left a horrible scar on the plaintiff's thigh. The evidence of Dr. Binnewald, one of the medical men who examined plaintiff after the skingraft operations had been performed, was that the skingrafted scar which is situated over the posterior-medial and lateral aspect of the thigh is five inches in width and nine inches in length. On the lateral aspect of the leg the scar extends for a further ten inches in a tapering way downwards to a point immediately below the knee. The affected area, by reason of its size, its gross depression below the normal contour of the leg, and its alteration in texture and colour is certainly a most severe and unsightly cosmetic deformity especially having regard to the age and sex of the plaintiff. According to the medical evidence there is a lack of sensation in the affected area which may cause plaintiff to traumatise it in her normal duties or in normal social events. The evidence is also clear that, apart from this absence of sensation, the skin at this area is much weaker than normal skin. The result of all this is that plaintiff has constantly to be careful in her normal movements lest she injures this area, which injury, according to the medical evidence, will take a long time to heal.

Owing to the insensitivity of the skingraft area, the potential danger of injury to it and the cosmetic deformity, which is extremely unsightly, plaintiff had to give up basket ball, net ball, horse riding and swimming. As a result of this injury, she has, therefore, suffered and will in future suffer considerably in the way of loss of amenities of life.

I also bear in mind that she has had no less than four operations and that she has suffered intense pain and inconvenience during her periods in hospital, especially the excruciating pain she suffered during and immediately after the skingraft operation caused mainly by the removal of skin from the buttocks. I also take into consideration that immediately after the accident and for some months thereafter she was "terribly depressed". I have no doubt that all the aforegoing considerations

called for a substantial award in respect of general damages.

On the other hand one must not lose sight of other factors which tend to diminish the seriousness of the injury. The main disability at the date of trial was a cosmetic one and although, bearing in mind the sex and age of the plaintiff, I do not wish to minimise the seriousness of this disability, nevertheless, plaintiff did not suffer any permanent functional disability, inasmuch as the nature of her injury was such that, although the skin and underlying fat had been removed, no damage was sustained to the muscles or deeper structures of the leg. At the date of the trial she was, therefore, in that sense, as well off as she was before the accident. Her case is, therefore, not nearly as serious as a person who has lost a limb.

Plaintiff's counsel submitted that the Judge *a quo*, in his award for general damages, wrongly failed to take into consideration future medical expenses and future loss of earnings and asked this Court to take these two items into account in the assessment of general damages. As indicated above, plaintiff specifically claimed amounts under these two heads. These claims were, however, dismissed by the learned trial Judge and, as there is no cross-appeal against such dismissal, this Court cannot now consider these claims. (See *Giliomee* v. *Cilliers*, 1958 (3) S.A. 97 (A.D.) at p. 100).

Taking into consideration all the circumstances, as revealed by the evidence of the medical men as well as that of plaintiff, I am of opinion that the award of R10 000 under this head was excessive and that an amount of R7 500 would adequately compensate plaintiff, as far as money can do, for the injury sustained by her, and its *sequelae.*

In the result, the plaintiff is entitled to damages in the amounts of R832,52, R2 496 and R7 500, a total amount therefore of R10 828,52 which was the extent to which plaintiff sought to enforce the judgment of the trial Court.

It only remains to deal with question of costs. It was urged upon us by counsel for plaintiff that if the appeal on the merits is dismissed but that it succeeds on the issue of damages, defendants should not be awarded all the costs of appeal. He submitted that of the record of 318 pages only 38 pages of evidence dealt with the question of damages. He accordingly suggested that the parties should each pay their own costs of appeal.

Defendants are unsuccessful in the appeal on the merits but are substantially successful on the issue of damages. It is quite correct that only a small portion of the record relates to the question of damages. If, however, defendants' appeal had been directed only against the *quantum* of damages awarded, they would, in my view, have been justified in filing the whole of the record in order to substantiate their criticism of the conduct of the learned trial Judge, which criticism, as pointed out above, also had a bearing on the assessment of general damages. On the other hand, however, it would, I consider, be unjust to penalise the plaintiff for the learned Judge's conduct by holding her responsible for the costs of the whole record.

In so far as the incurrence of the costs of appeal is concerned, both parties are, in my judgment, at fault: the plaintiff for not having abandoned

a larger amount of the damages awarded than she did, thereby causing the *quantum* of damages to be determined on appeal, and defendants for appealing on the merits, which resulted in costs being incurred by the plaintiff in order to secure judgment in her favour on that issue.

In this regard I wish to point out that roughly only one-quarter of the heads of argument and the time of the hearing of the appeal were devoted to the issue of damages. In all the circumstances I consider that it will be equitable to award the defendants one-half of their costs of appeal.

The appeal is accordingly allowed. Respondent is ordered to pay one-half of appellants' costs of appeal. Part 1 of the order of the trial Court is altered to read:

"Judgment for plaintiff in the sum of R10 828,52 with costs against first and second defendants in their capacities as executors testamentary in the estate of the late Abraham Wolf Solomon."

Part 2 of the order stands.

RUMPFF, J.A., WESSELS, J.A., TROLLIP, J.A., and MULLER, J.A., concurred.

Appearances

W Vivier - Advocate/s for the Appellant/s

J van Zyl Steyn, SC - Advocate/s for the Respondent/s

Minde, Shapiro and Smith, Bellville; Israel, Sackstein and Simon, Bloemfontein - Attorney/s for the Appellant/s

Mallinick, Ress, Richman and Company, Cape Town; Horwitz, Arvan and Lewis, Bloemfontein - Attorney/s for the Respondent/s