

3287/07

IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO.: 3287/2007

In the matter between

**VALENCIA OOSTHUIZEN obo  
CHADWYNN OOSTHUIZEN**

Plaintiff

and

**THE ROAD ACCIDENT FUND**

Defendant

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**JUDGMENT DELIVERED ON 17 JUNE 2009**

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**K J MOLOI, AJ**

[1] The plaintiff is the mother of Chadwynn Oosthuizen (the claimant). The defendant is the Road Accident Fund, a juristic person created by and in terms of section 2(1) of the Road Accident Fund Act, 56 of 1996 (The Act) with the principal place of business within the jurisdiction of this court at 7<sup>th</sup> Floor, 1 Thibault Square, Cape Town, Western Cape.

[2] On 6 November 2004 the claimant, who was then 14 years old, was involved in a motor vehicle accident in Park Road, Mitchell's Plain, Cape Town. As a result of the accident he sustained certain injuries giving rise to a claim for compensation as envisaged in the Act, more specifically section 17 thereof, against the defendant. The merits having been conceded the judgment is in respect of the determination of quantum alone regarding the general damages and the future loss of earnings/earning capacity only the other aspects of the claim having been settled.

[3] The sequelae of the accident are that the claimant sustained soft tissue injuries to his body and a head injury. The injuries led to the claimant experiencing pain, suffering and discomfort and loss of amenities of life. The head injury is said to

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have resulted in migraine manifesting itself in chronic debilitating headaches, nausea, vomiting, blurred vision, dizziness and disorientation and this occurs irregularly at least once a month. The defendant denied that the injuries directly led to the migraine headaches i.e. denied that there is a causal link between the migraine headaches the claimant suffers from and the accident and, if there is, that it has any potential impact on the claimant's vocational career, i.e. earning capacity.

[4] The claimant testified that he hit his head against the windscreen of the vehicle and received treatment at Mitchell's Plain Day Hospital and was discharged the same day. His back was sore. He thereafter suffered migraine attacks which he never experienced before the accident. No member of his family ever suffered migraine attacks so that it could not be said to be hereditary. He believed these attacks affected him at school with the result that he failed Grade 10 three times. He was presently doing the first year of a three-year course in welding at False Bay College. He wanted to be a welder and get employed at Caltex where his brother works as a payroll master. The cross-examination revealed that his lack of academic achievement could not directly be linked to the post-accident effects as the claimant failed to pass Grade 10 before the accident. Evidence showed that even other factors could have affected his performance at school e.g. adolescence and change in curriculum. When the migraine attacks occurred he treated them with normal analgesics such as Panado or Disprin as was suggested by Drs Saban and Jafta whom he saw shortly after the accident. The blurring of vision and headaches started about two weeks after the accident and progressively became worse. When the migraine headaches attack, he must get home and lie down in a quiet, darkened room, take his medication and wait for the effects to subside. When the severe pain subsided he would still be left with, what is called "secondary headache" that would persist for a number of hours. This would require him to stay away from school a second day.

[5] The plaintiff, Valencia Oosthuizen, largely confirmed that the headaches the claimant suffered started immediately after the accident, and that the family had no history of migraine attacks. That she took the claimant to Dr Cassiem, a family doctor, who prescribed Panado. As the attacks came over time she treated the

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claimant with Panado or Disprin. Later as the pain became worse and more frequent she took the claimant to Dr Saban and also Dr Jafta. Only in 2006 did Dr Saban diagnose migraine.

[6] Dr Badenhorst, a Neurologist, testified about the normal symptoms of migraine, how these are treated and the effect of timeous treatment of the sufferer. After examining the claimant and assessing the history of his condition, he concluded that the migraine the claimant suffered from could be the result of the accident but that "the head injury sustained was not such that poor progress at school could be attributed to the accident nor is the frequency of migraine such that it should impair his progress". He also stated that at present symptomatic medication in the form of Migril and Maxalt would provide effective relief.

[7] Mr Willie Marais, an Industrial Psychologist, investigated whether the injuries the claimant suffered, particularly the migraine, would have an impact on his future career path and earning capacity. He is of the view that after qualifying as a welder, the claimant will be at a disadvantage in the competitive labour market as against the welders who do not suffer migraine. This would be as a result of the unpredictability and irregular occurrence of the attacks of migraine. When the attacks occurred they would inevitably result in absenteeism and that may result in exhaustion of leave credit resulting in loss of income and possible laying-off. In the event of retrenchment, less productive employees as those mostly absent from work would become the first candidates. The frequency of the attacks and the resultant absenteeism might also affect the prospects of promotion. The poor achievements the claimant had with mathematics pre-date the accident though mathematics was not a pre-requisite for attaining the welding qualification. It would, however, enhance his performance and preference by the prospective employer. He is of the view that loss of earning capacity is between 10-20%.

[8] Dr Alison Madden, a Clinical, Neuro and Educational Psychologist, conducted an assessment of the claimant with a view to ascertain the presence and extent of neuro-cognitive sequelae as a result of the head trauma suffered. Her conclusion is that the migraines the claimant suffers do have a debilitating effect on his

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performance and that his cognitive capacity is better suited to the more practical qualification he was now studying for.

[9] An actuarial report by Munro Consulting was handed in by agreement. The calculations therein were based on a determination made by Marais with regard to the lower of the two grades of welders in the industry earning respectively R83.46 and R59.62 per hour based on loss of earnings of between 10% and 20% until the claimant reached the age of 65 years. An amount of R320 500.00 was arrived at.

[10] The defendant closed its case without calling any witnesses to gainsay the evidence of the claimant and the experts that testified on his behalf as to the fact that the migraine was caused directly by the accident. Dr Badenhorst in his report stated as follows in paragraph 3 thereof under the heading Migraine:

*"Migraine is a common condition, mostly not considered to be the result of trauma. There is often a family history of the disorder. In this case there is a very clear temporal relationship between the onset of such episodic headaches and the accident under discussion. Symptoms developed for the first time within hours after the accident and has recurred repeatedly since. He never had such episodes before. As a result the causal relationship is accepted: the patient had post-traumatic migraine. This likely to be a chronic problem. The current frequency of episodes is on average once per month. It is certainly possible that the frequency might increase for periods, but longer periods without episodes of headache is equally possible difficult to predict."*

I am consequently of the view that the causal connection between the accident and the migraine attacks is clearly established there being nothing to the contrary.

[11] Assessment of general damages involves consideration of a number of factors such as the nature of injuries suffered, the extent and permanence thereof, the severity thereof and the impact they may have on the claimant's social life. Looking at previous awards made can only serve as a guideline as no injuries can be identical nor have the same impact on different people. Moreover it is an established

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trend to progressively increase the awards as a result of changing societal values, higher standards of living, rising costs of living and inflationary corrosion of monetary value. In the final analysis the determination of fair and adequate compensation lies within the discretion of the court after considering all the factors above.

[12] The medical report of the Day Hospital where the claimant was first treated indicates that he suffered a blunt head injury. In evidence the claimant stated his back was also sore. There is also evidence that the claimant did not lose his consciousness as a result of the accident and that the head injury was for all intents and purposes mild. No evidence was led as to the severity, extent and duration of the pain, suffering, and discomfort on which the claim is based under this heading. The fact that he was merely treated and discharged from the Day Hospital is indicative of the fact that the claimant's injuries were not considered to be serious save for the migraine following upon the accident. The plaintiff also indicated that after the accident, claimant suffered headaches and ordinary analgesics like Panado were used to give him relief. From soon after the accident he had been seeing doctors including Dr Saban primarily for treatment of headaches. There is evidence that the claimant was involved in drag racing and that the family enjoyed attending those events over weekends. There is however no evidence as to how far the claimant wanted to advance his participation in this kind of sport and whether the injuries sustained would make it impossible for him to continue taking part in the sport. One can only assume that the migraine attacks would limit his participation in drag racing as they occur irregularly and without giving prior indication of imminent attack.

[13] Under general damages the plaintiff claimed an amount of R150 000.00. At the trial it was submitted on her behalf that an amount of R100 000.00 to R120 000.00 would represent a fair compensation. Having considered all the factors alluded to above and having considered previous awards made for similar circumstances as a guideline, I am of the view that an amount of R100 000.00 is a fair and adequate compensation for general damages in this case.

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[14] The plaintiff claimed an amount of R320 500.00 in respect of loss of earnings/earning capacity. This amount was arrived at from the actuarial calculations by Mr Alex Munro whose report was admitted in evidence by agreement. I am satisfied that considerations taken into account in arriving at that figure are sound and in terms of the accepted principles. It has been suggested that provision be made for the contingency of between 10% and 20% in the calculation of the final amount as the reduction of the claimant's earning capacity. For the plaintiff it was argued that 15% is fair reduction while for the defendant 45% was put forward. Based on the opinion of Dr Badenhorst that the episodes of migraine may decrease in frequency in future I am of the view that 20% reduction is fair. I consequently award an amount of R256 400.00 in respect of future loss of earnings/earning capacity.

[15] The following order is consequently made:

15.1 The defendant is ordered to furnish the claimant with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act No 56 of 1996 in respect of future medical expenses.

15.2 The defendant is ordered to pay the plaintiff as follows:

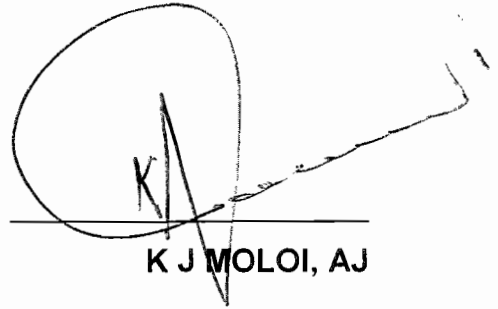
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| (a) | In respect of general damages                              | R100 000.00  |
| (b) | In respect of future loss of earnings/<br>Earning capacity | R256 400.00. |

15.3 The defendant is ordered to pay interest in respect of the amount of R356 400.00 at the rate of 15.5% per annum reckoned from the expiry of 30 days from date of this judgment.

15.4 The defendant is ordered to pay costs of suit on a party and party scale on the High Court tariff, duly taxed or agreed including costs of counsel.

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- 15.5 The defendant is ordered to pay qualifying fees of the plaintiff's experts.



K J MOLOI, AJ