IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 2009/30430

In the matter between:

MYHILL, ELE N.O
(SWALIBE MINORS) Plaintiff

and

ROAD ACCIDENT FUND Defendant

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED
5/03/2012 DATE SIGNATURE

JUDGMENT

STRYDOM AJ:

1. This is an action for the setting aside of compromises entered into some 13 years ago between two minor children Lufuno and Philipine Swalibe **("the minors")** as represented by their mother, Seani Swalibe **("Mrs Swalibe")** and the Road Accident Fund **("RAF")** also referred to as the

defendant. The plaintiff is cited herein in his representative capacity as the appointed *curator ad litem* of the minor children.

2. The minors were injured in a motor vehicle collision which occurred on 29 March 1997 in Katlehong. The minors were aged 4 months and 2 years respectively at the time of the accident.

3. Claims were made on behalf of the minors by Chabana Attorneys, the attorneys appointed by Mrs Swalibe, against the RAF. In the covering letters accompanying the prescribed claim forms, the RAF was requested to make a settlement offer. The defendant made offers of settlement on 21 April 1999 to Chabane Attorneys. In respect of Lufuno the offer of settlement was R4900.00 together with a contribution towards costs in the sum of R1350.00. In respect of Philipine the offer of settlement was R5300.00 together with a contribution towards costs, also in the sum of R1350.00. On or about 10 May 1999 both these offers were accepted in writing by Mrs Swalibe on behalf of the minor children. The principal issue in this matter for decision is whether these settlement agreements (also hereinafter referred to as **"compromise(s)"**) can be set aside on a legal basis affording the minors a further opportunity to claim compensation.

4. At the commencement of the hearing an application was made to separate the issues raised in paragraphs 12 to 13 and 15 to 32 of the particulars of claim, read with the defendant's plea in relation to those

paragraphs, from the remaining issues that arise from the pleadings. Initially this application was opposed and I started to hear argument, but the parties eventually consented to an order, which was granted, in terms of which the issues raised in paragraphs 12 to 13 and 15 to 32, read with the defendant's plea in relation to those paragraphs, were separated from the remaining issues that arose from the pleadings. The result of the separation of issues was that quantum and merits were separated with one proviso. Paragraphs 14 and 33 which are similarly worded, were also separated. These paragraphs alleged that fair compensation for the injuries suffered by the minors would, at the time the offer of settlement was made, have been the sum of at least R850 000.00 each.

5. Before any evidence was led Mr van der Linde, appearing on behalf of the defendant, objected to the leading of evidence as, according to the defendant, the issues for decision, after the separation order, was a legal issue capable of being decided without the leading of evidence. After hearing both parties on this issue I ordered that this was not the case and ruled that the plaintiff could not be prohibited from calling witnesses. The plaintiff then proceeded to call a witness. Before dealing with the evidence I will first deal with the plaintiff's case as pleaded and then with the defences put up by the defendant.

6. The plaintiff contends that it is entitled to set aside the compromises entered into between Mrs Swalibe on behalf of the minors and the defendant on 3 alternative grounds as pleaded in the particulars of claim.

7. Firstly, in Claim A the plaintiff seeks to set aside the compromises on the ground of mistake. It is alleged that Mrs Swalibe, in error, purported to accept the offers on behalf of the minors. It is alleged that the acceptance of the offers of settlement was not binding in law on the basis that Mrs Swalibe was ignorant of the fact that these offers:

7.1.1. Did not constitute fair and reasonable compensation for the injuries and *sequelae* suffered by the minors;

7.1.2. Were bad in law due to the application of an apportionment against the minors in circumstances where they were both *culpa incapax*;

7.1.3. Were formulated by the defendant in breach of its statutory obligation to pay fair and reasonable compensation in terms of the Road Accident Fund Act 56 of 1996 **("the Act")**.

7.2. It is alleged that in making the offers, the defendant impliedly represented that such offers constituted fair and reasonable

compensation in terms of the Act and that the offers were formulated and represented in compliance with the defendant's obligations in terms of the Act. It was further asserted that such representation was false, material and made with the intention of inducing Mrs Swalibe to accept the offers. On this basis the acceptance of the offers was *void ab initio* alternatively voidable.

8. In defence of claim A the defendant alleged that by accepting the offers made by the defendant the said claims were lawfully compromised and were fully binding on the minors. It was specifically denied that the defendant impliedly represented that such offers constituted fair and reasonable compensation or that such representation was false with the intention of inducing Mrs Swalibe to accept the offers.

9. In claim B the plaintiff claims for *restitutio in integrum* as an alternative to claim A. The basis of this claim is that the offers and acceptance thereof on behalf of the minors, were not in the interest of either Lufuno or Philipine. It is alleged that prior to the settlement of the claims, the defendant had been in possession of the hospital records of both the minors from which it appeared that the injuries suffered by each of them in the collision in question were serious and that there would be significant *sequelae* to such injuries. The plaintiff then again relied on the contention that the defendant was obliged in terms of the Act and the law

to pay reasonable compensation to road accident victims, and in particular to the minors, and that the defendant was aware that:

9.1. Lufuno had suffered a severe head injury with consequent brain injury and the onset of epilepsy; and

9.2. Philipine had suffered a severe head injury with the onset of epilepsy;

9.3. That both Lufuno and Philipine were *culpa incapax* at the time of the collision and accordingly the 30% apportionment made by the defendant has no basis in law or fact and was unlawful.

10. The further basis for claim B was an allegation that having regard to the serious nature, extent and consequences of the injuries and damages of the minors, the settlements were neither fair, nor reasonable, completely inadequate and prejudicial to the interest of the minors. In the circumstances the acceptance of the offer made by the defendant is voidable and did not have the effect of absolving the defendant of the obligation to reasonably compensate the minors for their damages and more particularly as contemplated in section 28(2) of the Constitution of the Republic of South Africa. It is alleged that the settlements fall to be set aside by the court and that the plaintiff is accordingly entitled to *restitution in integrum*.

11. In defence of this claim the defendant denied that it was under a legal duty to settle claims reasonably or that the settlements were not in the interest of either of the minors. The defendant admitted that it had been in possession of certain hospital records of the minors. The defendant specifically denied that having regard to the nature, extent and consequences of the injuries and damages of the minors the settlements were neither fair nor reasonable and completely inadequate and prejudicial to the interest of the minors. It was also denied that the minors were entitled to reasonable compensation pursuant to the terms of section 28(2) of the Constitution of the Republic of South Africa. It was denied that the minors were entitled to *restitutio integrum*.

12. In claim C, as set out in the plaintiff's particulars of claim, it was alleged that the defendant acted in breach of a statutory duty. It is alleged that the defendant, as a statutory institution, is mandated by virtue of the provisions of section 4(1)(b) of the Act to investigate and settle, subject to the Act, claims arising from loss or damage caused by the negligent driving of a motor vehicle. It is alleged that the defendant was and is obliged in terms of the Act and the law to pay reasonable compensation to road accident victims and in particular to the minors. This statutory duty further included a duty to investigate the nature, extent and consequences of the injuries suffered by the minors and, accordingly, created the obligation to pay each of them reasonable compensation

pursuant to such investigation. It is then alleged that the respondent failed to carry out any investigation, alternatively any proper investigation, into the claims of the minors which resulted in offers being made in settlement which were neither fair nor reasonable and completely inadequate.

13. In defence of claim C the defendant denies that it is obliged, in terms of the Act, to pay or to settle claims which are fair and reasonable. It denied, that on a proper interpretation of the Act, it was obliged to pay fair and reasonable compensation to claimants and pleaded that the compromise was made in terms of the Act after an investigation of the information available. In essence, the defendant denied that a legal duty is created by the Act to settle claims reasonably.

14. Before dealing with the various claims and the defences put up by the defendant, I will first refer to the facts of this matter which are either common cause on the pleadings or in relation to which evidence was led.

15. The plaintiff called one witness, Ms Marilyn Adan, a counselling psychologist with a special interest in clinical neuropsychology. This witness's evidence related to identification and interpretation of documents contained in exhibit A which was handed to the Court. She referred to the hospitals records and other medical records and explained to the Court what it contained and the meaning thereof. This she has

done in relation to the records of both the minors. Her evidence was not challenged during cross-examination and can be accepted. It should be noted that during her evidence she was asked questions by Mr Ancer, appearing for the plaintiff, which solicited opinions of an expert nature. As Ms Adan was not called as an expert witness regarding those issues, these objections were upheld by the Court. The questions she was asked related to the alleged true value of the claims when these claims were made. As a result of expert evidence being disallowed, the plaintiff never presented evidence concerning the pleaded value of the claims at the time they were made.

16. Ms Adan's evidence relating to Philipine's hospital records and other reports contained in exhibit A can be summarised as follows:

16.1. According to the RAF assessment, Philipine obtained a head injury with severe unconsciousness. She had minor abrasions on her face. It is stated in her assessment report that she was admitted to hospital for one month. (This does not accord with the hospital records which indicated that she was only hospitalised for approximately 5 days). After the collision, which happened on 29 March 1997, she was taken to the Natalsprult Hospital. On arrival she was conscious. Her level of consciousness was considered and Philipine was admitted for observation. She was discharged, but more than a year later, on

6 October 1998, Philipine was taken to the hospital as an outpatient. On the hospital record a note was made relating to a history of fits. The examiner noted that the fits are not related to the motor vehicle accident. She was sent to the paediatric section. On the records it was then noted that the child had a general seizure on two occasions. The last seizure occurred during August 1998. The seizure was described as a "*seizure with up rolling of eyeballs*". Philipine was booked for further tests and to attend the epileptic clinic on 14 October 1998. No further records are available in this regard. Ms Adan testified that Philipine probably had a *grand mal* epileptic seizure. On 18 May 1998, Dr Schnaid, an orthopaedic surgeon, filled in the medical report section of the MMF1 claim form. In this report he stated that no future medical treatment was foreseen. Reference was also made to the report of the district surgeon, Dr Hlongwane, who examined Philipine on 12 April 1997. His clinical findings were described as minor bruises to the face of Philipine. This was the entire record available upon which the defendant could make its assessment with regard to Philipine to offer compensation for the injuries that she had suffered.

16.2. Lufuno was 4 months old when the accident occurred. Her mother, a pedestrian carried, Lufuno on her back when they

were hit by the insured vehicle. Lufuno suffered, as per her hospital records, an "*occipital infarct*". This is a brain injury. On arrival at hospital she was conscious and was booked for a scan. The scan indicated an *infarct* on the left parental area of the head. She was discharged on the same date as her sister, Philipine. More than a year after the accident she, with her mother, visited the outpatient section of the hospital. It was noted on the hospital record that, according to her mother, Lufuno fitted twice. The last fit took place during August 1998. She also suffered of a general seizure with "*up rolling of the eyeballs*". It was noted on the hospital records as follows: "*Book for EEG to attend Epileptic clinic on 14/10/98.*" There exists no further record indicating what transpired after this entry was made. The further medical report available is the report of Dr Schneid as part of the MMF1 form. He described the nature of the injuries of Lufuno and any complications as *"concussion"*. He indicated that no future medical treatment was foreseen. The district surgeon, Dr Hlangwane, also examined Lufuno on 12 April 1997. He noted Lufuno's injuries as "*occipital bumps and lesions*". This would have been the medical records which the defendant could assess to determine the offer to compensate Lufuno. Ms Adan further testified that the head injuries of both minors would be consistent with the reports of epileptic seizures.

She stated that the cost of medication to prevent or control epileptic seizures would amount to approximately R1000.00 per month. That was the evidence led by the plaintiff and the plaintiff closed its case.

17. The defendant called one witness, Mr Ambros Dickenson. He worked for the defendant from 1995 to 2001. He was a senior claims handler at the Randburg branch and dealt with the claim of the two minors. He testified that the Randburg office dealt with between 600 and 900 claims per month and that he has no independent memory of this case, but can recognise signatures on documentation and could confirm that these claims were assessed by him. In relation to Philipine's claims he testified that, on 24 August 1998, a claim was lodged by Cynthia Chabana, an attorney instructed by Philipine's mother, Mrs Swalibe. The MMF 1 claim form and other supporting documents were attached to the covering letter.

18. On 23 October 1998, the defendant acknowledged receipt of the claim and further documentation was requested. A further request for complete hospital records of the minors were requested on 26 February 1999. These hospital records were delivered to the defendant and are those documents referred to above. He then referred to a document under the heading *"Assessment"* which is used by the defendant to assess a claim and to consider compensation, *inter alia*, for settlement purposes.

According to the MMF1 form, the claim made in relation to Philipine was for an amount of R57 260.00. This amount was broken down as follows:

Hospital expenses (Provincial Hospitals)	R110.00
Hospital expenses (other hospitals)	R150.00
Medical expenses	R1 000.00
Estimated future medical expenses	R1 000.00
General damages	R55 000.00
TOTAL	R57 260.00

19. As no proof was provided for the specific expenses these were not allowed by the defendant. For purposes of calculating an amount which should be offered to the claimant, it was stated in the assessment form, in a column under the heading *"1st offer"*, *"R1 000.00 to R10 000.00"* should be offered for general damages. This form also provided for a percentage apportionment by which a claim could be reduced. In this instance 30% was noted. Mr Dickenson testified that he was well aware that the claim of a minor could not be apportioned. For settlement purposes however, it was considered that Mrs Swallbe was also negligent and it was estimated that her negligence contributed 30% to the accident taking place. To avoid a claim to be instituted against the

mother, and purely for settlement purposes, a 30% reduction of the claim was implemented. He testified how the amount of R8 000.00 noted as compensation for general damages was calculated and arrived at. He testified that the MMF1 form, hospital records and other available records would have been considered. During that period their office had written general damages guidelines which were updated with reference to relevant case law. He also would have looked at hospital records and when certain medical terms were unknown to him he consulted a medical dictionary and consulted his senior colleagues. That is how he made his assessments and that is what he would have done in this instance in relation to both claims. This resulted in a *"without prejudice"* written offer, dated 21 April 1999, in relation to Philipine's claim in the total amount of R5 600.00 plus a contribution towards costs of R1 350.00, or a bill of costs on the magistrate's court scale to be taxed/settled. The offer was made without admission of liability. The way in which the capital amount offered was arrived at, was set out as follows:

General damages	R8 000.00
Minus 30% apportionment	R2 400.00
TOTAL	R5 600.00

20. Attached to the written offer dated 21 April 1999, was a discharge form, which, on proper completion and signature, would be the acceptance of the offer made by the defendant.

21. On 10 May 1999 Mrs Swalibe signed the document accepting the offer on behalf of Philipine. The printed form allows for the provision of an undertaking in terms of sections 17(4)(a) of the Act. This was specifically deleted and not included in the acceptance. Further, the following was recorded on this discharge form as follows:

"This discharge records the full and final settlement agreement between me and the Fund. It serves as the only evidence of the terms thereof. Neither I nor any of my successors-in-title shall be entitled to allege in any manner before any Court or other Tribunal anything which is in conflict or irreconcilable with the terms hereof."

22. On or about 18 May 1999 the settled claim was paid out to Chabana Attorneys.

23. Dickenson then testified that exactly the same procedure was followed in relation to Lufuno's claim. In the "*1st offer*" column of the assessment form used by the RAF, an amount of R7 000.00 to R10 000.00 was filled in, whilst the claim for general damages was an amount of R60 000.00. One S van den Berg wrote on the form, dated 16/4/99, as follows: "*I*

would start at R7 000, injured was only in hospital for ± 10 days. Could not have been that severe." The 30% apportionment was applied on the amount of R7 000, which resulted in an offer of R4 900.00, plus the same offer for costs as for Philipine. This amount was similarly offered, accepted and paid out.

24. Under cross-examination by Mr Ancer, Mr Dickenson conceded that if compensation is paid by the defendant to third parties that have been injured in a motor vehicle accident, the compensation paid should be fair and reasonable. To establish what reasonable compensation would be in a particular case, he would have looked at the medical documentation and would have consulted medical dictionaries. He conceded that he did not know the meaning of the word *"infarct"*. It was put to him that it is a serious brain injury. He conceded that he did not consider this aspect as part of his assessment. As regards the apportionment applied, he made it clear that the reason was to factor in the contributory negligence of Mrs Swallbe as it was estimated that her negligence contributed 30% to the occurrence of the accident. Instead of claiming this amount from the joint wrongdoer, the claim of the minors were reduced. The apportionment, which represented the extent of a counterclaim against the mother on the basis that the defendant considered her to have been contributory negligent in relation to the accident, was included in the offer as part of the settlement proposal. It was suggested to him that the evidence of the

epileptic fits was not considered, but he testified that it would have been considered in the assessment of the claim. It was put to the witness that, from 1 May 1998, it became the policy of the defendant to provide an undertaking to pay future medical expenses in relation to claimants. This would benefit an injured party who may have future medical expenses that is not foreseen when a claim is settled. The witness accepted that this was indeed the situation. He could not explain why Lufuno, whose injury was more serious than that of the Philipine, was offered less than Philipine. The witness conceded in his evidence that the offers of compromise made by the defendant to the minors, having regard to the apportionment that was applied, were not fair and reasonable, and, further, that the defendant was in breach of its statutory mandate to pay fair and reasonable compensation to victims of road accidents.

25. As far as concessions made by Mr Dickenson relating to the reasonableness of the compromises entered into, the court should not attach much weight to these opinions. It is for the court to decide, considering the available evidence at the time, whether the compromises were in the best interest of the children. The court must decide reasonableness against objective standards.

26. This concluded the evidence and the defendant also closed its case.

27. It should be noted that the defendant's counsel conceded that, for the purposes of the argument regarding the defendant's legal duty to pay fair and reasonable compensation, the offers made by the defendant were not reasonable. This concession must be considered in the context it was made. On behalf of the defendant it was argued that no evidence was required to consider whether the defendant was under a legal duty to pay reasonable compensation to motor collision victims. For purposes of this legal argument the concession was made. This concession was never intended to be a concession in relation to other claims, where the causes of action include something more than the alleged legal duty.

28. The plaintiff's counsel handed to the court a schedule, without objection, stating the Consumer Price Index from which schedule value of historical awards can be calculated to show the year 2011 monetary values. Applying these schedules, the R4 900.00 paid in respect of Lufuno's claim would be the equivalent of R9 893.10 in 2011, whilst the R5 600.00 paid in settlement of Phillpine's claim would now amount to R11 306.40. In the particulars of claim, it has been alleged that the fair and reasonable compensation for the injuries suffered by the minors would, at the time the offer was made, have been the sum of at least R850 000.00 each. No evidence was led to substantiate this allegation, more particularly as a result of this issue not falling within the purview of the issues separated for hearing at this stage. Evidence to the alleged value of the claims

would have assisted the court to make an assessment of the reasonableness of the amounts for which the claims were settled. As the parties agreed to a separation of issues excluding evidence on what the payment allegedly should have been, the court will now have to decide this issue on the available evidence. For instance, as far as claim B is concerned, the court will have to decide whether, objectively speaking, the compromises were in the best interest of the children without having regard to the allegation that reasonable compensation would have been R850 000.00 per minor. The court will have to asses, what reasonable compensation would have been considering the seriousness of the injuries and the *sequelae* to such injuries.

29. According to the medical and hospital reports available at the time, Philipine suffered a severe head injury. Later on it was reported that the child had a general seizure on two occasions which according to the evidence was similar to a *grand mal* seizure. The doctor to whom the report of the fits was made, recommended at that time that Philipine should attend an epileptic clinic. Lufuno's injuries were more severe. She suffered from an *occipital infarct* which is, according to the evidence, a severe head injury which caused brain damaged. There was a similar report about epileptic fits. Exactly the same epileptic seizures were described by Mrs Swatlbe as she has done in relation to Philipine. This aspect seems somewhat coincidental, but for purposes of my judgment I

must consider whether the settlements were in the best interest of the children considering the available facts and evidence at the time. The evidence relating to the epileptic fits was part of the evidence available at the time and I must accept the veracity of such evidence for purposes of my judgment.

30. Part of the available evidence at the time was the reports of Doctors Hlongwane and Schneid. These reports are contradictory. Dr Schneid noted severe head injuries in relation to both minors, but reported that no future medical expenses were foreseen. Dr Hlongwane reported in relation to Phillpine "*minor bruises on face*" whilst in relation to Lufuno he reported "*occipital bumps and lesions*" in considering this evidence on its own it, would be difficult to come to a conclusion that the settlement amounts settled were unreasonable. The hospital records, however, tell a different story. The evidence of an occipital infarct and epilepsy should, in my mind, have resulted in substantially higher payments to the minors. I am further of the view that, in the light of the evidence of epileptic fits, the possibility of future medical expense should have been taken into account when the settlement figures were accepted. As Mrs Swalibe was not called as a witness, the court is faced with a situation where it is not known what Mrs Swalibe considered. The court was not provided with any evidence or explanation why she was not called. Her evidence might have assisted the court in its decision. The court is however still obliged

to consider the reasonableness of the compromises in the light of the available evidence. Mrs Swalibe, according to the documentation referred to in evidence, accepted the compromises without an undertaking from the defendant to pay for future medical expenses. Provision for such an undertaking appeared on the printed forms she has signed, but was deleted. Considering her knowledge at the time that the children suffered from epileptic fits, she should not have, objectively considered, accepted these settlements without an undertaking from the defendant to pay for future medical expenses. By doing this she did not act in the best interest of the minors.

31. For settlement purposes anything may be taken into account, but to consider whether a particular compromise was in the best interest of another, not only the end figure will be considered, but also how this figure was calculated and arrived at. The apportionment applied by the defendant for settlement purposes, by deducting 30% of the estimated value of the claims, was similarly not in the interest of the minor children. If the minor children's mother was contributory negligent in causing their damages, they would have had a claim against her to the extent that her negligence contributed to their injuries, alternatively, the defendant being liable for the full amount, would have had a counterclaim against Mrs Swalibe. On behalf of the defendant it was argued that the defendant was entitled to make an offer for settlement and it clearly was entitled to

take into account that it had a counterclaim on its view of the merits. I was referred to Voet 16.2.8 (Gane's Translation)[1], where the following was stated:

"[iii] Guardians' debt to creditor who is also in debt to ward.—But if a guardian is sued in his own name by his creditor who is likewise a debtor of the ward, the position is rather that set-off is allowed of that which the guardian owes against that which is owed to his own ward."

32. The question is not whether legally some form of set-off could be applied in this kind of circumstance. It might be legally correct to do so, but is it in the best interest of the children when a mother avoids a counter-claim against her by reducing her minors' claims? I am of the view that set-off under these circumstances will not be in the best interest of minors. Considering that the amount offered is already an amount less than full value, such amount should not be reduced by 30%. The effect of the apportionment is that the minors only received 70% of that which was calculated to be the value of their claims. It would have been in the best interest of the minors to have received 100% of their calculated value of their claims. I find it difficult to understand why, under such circumstances, their claim should have been apportioned. Although possible litigation was avoided between the defendant and Mrs Swalibe in her personal capacity, this should not have been done at the expense of

[1] The Selective Voet being the Commentary on the Pandects [Paris Edition of 1829] Vol 3 page 157

the claims of the minor children. Accordingly, the avoidance of litigation between the defendant and Mrs Swalibe is not a factor which renders the settlement figures more acceptable. The 30% reduction of the claims were substantial and not in the interest of the minor children. Considering all the evidence available at the time, I am of the view that the settlement figures were unreasonably low and, accordingly, prejudicial to the interest of the minor children.

33. Once a finding is made that the compromises were not in the best interest of the children, the next enquiry should be whether these settlement agreements could legally be set aside.

34. I will start by considering whether the alternative claim for *restitutio in intergrum* provides such legal basis. *Restitutio in intergrum* is an action by which the parties to a contract are restored to the same position as they occupied before the contract was entered into. It is a form of relief which comes to us from Roman and Roman Dutch law and has been applied by our courts.[2]

35. The purpose of *restitutio in integrum* is to return to the *status quo ante*. This remedy is available to a minor who seeks to escape the effect of a contract concluded on his or her behalf by his or her guardian on the

[2] Breytenbach v Frankel 1913 Ad 390 at 398; Skead v Colonial Banking & Trust Co Ltd 1924 TPD 497 at 398-400: Metedad v National Employers' General Insurance Co Ltd 1992 (3) SA 538 (W) at 541 B-D; Grotius 1.8.8, 3.48.5,10,11,12; Van Leeuwen CF 1.4.43.1,2; Voet 4.1.11,4.4.12-54; Van der Keesel Prealectiones Voorlesinge iv [1113] [Th. 517]

ground that the contract was inherently prejudicial to his or her interest.[3] It is available to a minor who can show that:

35.1. A transaction was entered into;

35.2. by his or her guardian;

35.3. on his or her behalf; and

35.4. is inherently prejudicial in that the minor will suffer serious loss if it is not set aside.[4]

36. *In casu*, the only disputed issues were those mentioned in paragraph 34.4 above. But is this remedy also available when a compromise was reached on behalf of minor children?

37. The parties could not refer me to any decided cases on the issue whether a contract in the form of a compromise entered into by a guardian on behalf of a minor could legally be avoided if it was so prejudicial that the minor will suffer serious loss if it is not set aside. Ultimately, the test should be whether the compromise was concluded in the best interest of the child at the time that it was concluded. In exercising the court's discretion as upper guardian, the court's paramount consideration is

[3] Wood v Davies 1934 CPD 250 at 258 260
[4] Boberg, The Law of Persons and the Family, 2nd Ed, p.724-725: Edelstein v Edelstein 1952 (3) SA 1 (A)

always the best interest of the child in question.[5] This principle has been echoed in constitutional and international law that enshrine "*the best interest of the child*" standard as paramount or a primary consideration in all matters concerning children. In terms of section 28(2) of the Constitution of the Republic of South Africa Act 108 of 1996 it is so legislated:[6]

"A child's best interests are of paramount importance in every matter concerning the child."

This constitutional principle is also echoed in section 6 (2) of the Children's Act 38 of 2005:[7]

"(2) *All proceedings, actions or decisions in a matter concerning a child must –*

(a) Respect, protect, promote and fulfil a child's rights set out in the Bill of Rights, the best interest of the child's standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation."

[5] Shawzin v Laufer 1968 (4) 657 AD at 662G-H
[6] Section 28(2)(a)
[7] Children's Act 38 of 2005

38. Mr Van der Linde, on behalf of the defendant, argued that the plaintiff's case to obtain an order for *restitutio in integrum*, as pleaded, was premised on an absolute duty in law or in terms of the Act to pay reasonable compensation, not only in relation to claims of minors, but also in relation to all claims. He argued that, should I find that such duty in law does not exist, then this claim for *restitutio in integrum* should fail. I do not agree with this argument. Sufficient allegations are made in the particulars of claim, substantiated by evidence, to sustain a claim for *restitution in integrum* without a finding that a legal duty exists to pay reasonable compensation. It is not the breach of a duty that brings a minor within the requirements of a claim for restitution. *Restitutio in integrum* is available to a minor who can prove that he or she was prejudiced by an agreement entered into on his or her behalf. This may be an agreement pursuant to the Act, which provides for settlement of claims,[8] or any agreement for that matter. The court can make a finding that the plaintiff is or is not entitled to *restitutio in integrum* without finding whether an absolute duty in law exist to pay reasonable compensation. If I am of the view that the compromise was not in the best interest of the minor children, the settlement should be set aside. In the alternative, Mr Van der Linde argued that should the court find that the existence of absolute duty is not required, then the plaintiff did not prove its cause of action by showing that the compromise in relation to both minor children

[8] Road Accident Fund Act 56 of 1996 section 4 (1)(b) "the investigation and settling, subject to this Act, of claims....."

were not in their best interest. I was referred to Voet 4.4.20 (Gane's translation)[9] where the following was stated:

"It is true that manifest damage in a compromise is shown with difficulty, since even in the case where nothing is in issue and no debt exist the very fact that a lawsuit is avoided appears to be a sufficient cause for compromise. Nonetheless should it later appear that a clear right of a minor has been foregone in a compromise, one which a minor would not have been likely to forego with such readiness, nothing stands in the way of restitution being vouched saved and the own right of either party to compromise being made whole again."

39. With reference to this quoted portion, Meyer J, who considered an application for an amendment in this case, found as follows:

"I accordingly accept that an action for and on behalf of a minor to avoid a compromise is legally competent. That it will not be easy to prove is altogether a different matter."

40. I also accept this to be the legal position. A minor's right to claim for *restitutio in intergrum*, where a clear right of a minor was foregone, was not contested. What was contested with reference to the quoted portion of Voet, is whether the minors, considering the facts of this matter, are

[9] Voet 4.4.20; The Selective Voet, Translated by Percival Gane Vol 1

entitled to the relief sought. Mr Van der Linde argued that the mere fact that litigation was avoided by the compromise, a substantial advantage has been gained by the minors. This argument applies only to some extent. The avoidance of litigation is only one of the factors that should be considered when considering whether the compromise was in the best interest of the minor children. Moreover, on the facts, it is not clear whether litigation would have followed had the offers been rejected. The offers made were opening bids. This is evidenced by the assessment forms that referred to "*1st offer(s)*". A rejection of the offers would probably have resulted in increased offers.

41. For reasons stated hereinbefore, I have already come to the conclusion that the compromises were not in the best interest of the minors. In arriving at this conclusion, I have taken cognizance of the seriousness of the injuries and the evidence of epilepsy, the 30% apportionment applied, the lack of an undertaking given to pay for future medical costs, and the fact that possible litigation was avoided. I accept that a compromise should not lightly be set aside and that, in the words of Voet,[10] "*manifest damage in a compromise is shown with difficulty.*" I am of the view again in the words of Voet,[11] "*that a clear right of minor have been foregone in a compromise*". The "*best interest of minor children*" standard tipped the scale, even considering that litigation was avoided, in favour of a finding

[10] Voet 4.4.20
[11] Voet 4.4.20

setting aside these compromises. These compromises are prejudicial to the interest of the minor children.

42. The facts relating to Lufuno and Phillpine are virtually the same although the injury to Lufuno, which has been described as an *occipital infarct*, is somewhat more serious. This does not materially change the situation and the compromises entered into on behalf of both of them should be set aside.

43. Having found that the minors are entitled to have the compromises set aside, it is not necessary for this court to make a finding on claim A and claim B. The plaintiff, however, asked for cost on an attorney and client scale. This was asked on the basis that the defendant defended the claims of the minors whilst it was not "*responsibly contestable*". Mr Ancer referred me to the decision of **Road Accident Fund V Klisiewicz**[12] in this regard. He also compared the defendant's defences to what was called in **Mlatsheni v Road Accident Fund**[13] as "[a]s*purious defence*". I cannot agree with these submissions. The defences put up against the claim for *restitutio in integrum* was far from spurious. The minors' right to this relief was novel and was not previously considered in the context of this factual situation. Legal certainty concerning the duties that the defendant may or may not owe to third parties pursuant to the prescribes

[12] [2000] ZASCA 57 (29 May 2002) at para 42
[13] 2009 (2) SA 401 (E)

of the Act, is of paramount importance to the fund, a public body, placed in control of public funds. One would have expected strong opposition to a claim that a legal duty exists to settle claims only for a reasonable amount after proper investigation of claims. What constitutes the prescribed investigation is further dependant on many factors, for instance, available human and financial resources, cooperation from the claimant or representatives etc. Moreover, in terms of section 4(1)(b) of the Act, the powers and functions of the defendant include *"settling"* of claims arising from loss or damage. I am in agreement with Mr Van der Linde that the power to *"settle"* necessarily implies the possibility either of under-compensating or of over-compensating, by means of an agreement entered into between two parties. The question whether a legal duty exists to only pay reasonable compensation, is highly contestable and to suggest that the defences pleaded by defendant is spurious, and in fact, irresponsible, is farfetched and is rejected. The cause of action of claim A is mistake, also known as *justus error*. To be successful in this claim, the plaintiff had to prove that Mrs Swalibe was misled by the defendant and that she mistakenly accepted the compromises.[14] No evidence was led that Mrs Swalibe was misled. The court was left in the dark as to what transpired between her and her attorney. Whether they were ignorant on the relevant issues remains unanswered. The plaintiff failed to prove claim A and the defences put up by defendant were not only legally

[14] **Hlobo v Multilateral Motor Vehicle Accident Fund 2001 (2) SA 59 SCA at para [13] at 66E and 66H-67A/B; Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis, 1992 (3) SA 234 (A)**

sustainable, but also good. I am of the view that the plaintiff is only entitled to costs on a party and party scale.

44. Ms Adan, the counselling psychologist, was called as a witness but her evidence focused on the interpretation and identification of medical reports and hospital records. Her evidence did not relate to her field of expertise. Accordingly the plaintiff is not entitled to the qualifying costs of this witness.

45. One further issue requires consideration and that is the costs reserved pursuant to the hearing on 4 August 2010, when the matter was on the trial roll and postponed by my brother, Meyer J. The judge handed down a written judgment and ordered, *inter alia*, that an amendment of the plaintiff's particulars of claim, which was sought by the plaintiff on 3 August 2010, the date on which the matter was set down for trial, be allowed. Through this amendment the cause of action based on *restitutio in integrum* was inserted in the plaintiff's particulars of claim. It appears from the judgment that Mr Ancer, on behalf of the plaintiff, disavowed any reliance upon the averments of an alleged duty of care on the part of the defendant and the breach thereof. Before me, however, this cause of action was strenuously pursued. Meyer J, in granting the postponement, remarked that he was satisfied that the amendment would cause the defendant prejudice in its defence of the action should the postponement

not be granted. The postponement was clearly occasioned by the plaintiff. As far as costs are concerned the court stated as follows:

"Finally, the only reason why I reserved the issue of costs instead of making adverse costs orders against the plaintiff in respect of the wasted costs occasioned by the postponement of this action and the defendant's costs of opposing the application of the amendment, including the costs attendant upon the engagement of senior and junior counsel, was not to prejudice the minors in the continuance of these proceedings."

46. The matter has now been decided on its merits and a cost order should be made relating to the proceedings that took place on 3 and 4 August 2010. The court hearing the matter then was in the best position to consider which party should have been held responsible for the wasted costs. The plaintiff's pleading was not in order and the plaintiff elected to apply for an amendment. Although the amendment was granted, the plaintiff further amended its pleadings before the trial started before me. It seems as if the plaintiff experienced difficulty to plead its case properly. From what was argued before me, I was not convinced to deviate from the views expressed by Meyer J. Plaintiff should be held responsible for the wasted costs occasioned by the postponement on 4 August 2010.

47. I make the following order:

47.1. The compromises entered into on 14 May 1999 between the defendant and Martha Seani Swalibe on behalf of the minors Philipine and Lufuno Swalibe, are set aside;

47.2. The defendant is to pay the cost of suit to date, including the cost of two counsel, excluding the cost occasioned on 3 and 4 August 2010 when the matter was set down for trial but postponed;

47.3. The plaintiff is ordered to pay the wasted costs occasioned by the postponement of the matter on 3 and 4 August 2010, which cost is to include the cost of two counsel.

STRYDOM AJ