IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 14175/13

REPORTABLE

In the matter between:

V[...] V[...] N[...] **FIRST PLAINTIFF**

R[...] V[...] N[...] **SECOND PLAINTIFF**

and

THE ROAD ACCIDENT FUND **DEFENDANT**

Coram: BHOOPCHAND AJ

Heard: 9 September 2025, 24,25 November 2025, 23 March 2026

Final submissions received: 30 March 2026

Delivered: 13 April 2026

Summary: Claim for *restitutio in integrum* on a compromise agreement of settlement for damages suffered by a minor in an accident. Defendant raised a special plea that the matter was finalised and settled. The Plaintiffs' present

claim is not a repetition of the original delictual claim, but a distinct remedial claim for restitution as the original settlement was substantially prejudicial to the interests of a minor. The validity of the compromise is therefore the central issue. If the compromise is upheld, the special plea succeeds. If the compromise is set aside, the special plea necessarily fails. The special plea is thus not a discrete defence capable of determination independently of the restitution inquiry, but one that is entirely contingent upon the outcome of that inquiry.

Plaintiffs' case modelled upon *Road Accident Fund v Myhill NO* 2013 (5) SA 399 (SCA). Principles of *restitutio in integrum* applied to the facts in the Plaintiffs' case. Key differences militate against granting restitution. Reliance on Myhill is misplaced. In the circumstances, the compromise agreement entered into between the First Plaintiff and the Defendant in 2008 is upheld, the Defendant's special plea is upheld, and the Plaintiffs' claim for restitution is dismissed.

ORDER

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1. The Defendant's special plea that the Plaintiffs' claims against it were finalised and settled is upheld.
2. The Plaintiffs' claim for *restitutio in integrum* is dismissed.
3. Each party shall pay their own costs.

JUDGMENT

Bhoopchand AJ:

DEFENDANT'S SPECIAL PLEA

[1] The First Plaintiff, V[...] V[...] N[...] ('the mother'), is the mother of the Second Plaintiff, R[...] V[...] N[...] ('R[...]'). R[...] was added as a Plaintiff during the trial in this matter as he had attained the age of majority.[1] The Second Plaintiff, born on 11 January 2003, was involved in an accident on 20 May 2004. He was 16 months old. A neighbour's vehicle reversed into him. The Second Plaintiff sustained an extensive laceration to his forehead and subsequently developed epileptic seizures. The First Plaintiff settled her claim for general damages against the Defendant in August 2008 for R93 800.[2]

[2] The First Plaintiff issued summons on 29 August 2013 against the Defendant. The Plaintiffs alleged in their particulars that the compromise of the Second Plaintiff's claim with the Defendant was substantially prejudicial to the interests of the Second Plaintiff, who was a minor at the time. The Plaintiffs alleged that the settlement was prejudicial from its inception and bore no realistic relationship to the measure of damages claimable for the bodily injuries sustained by the Second Plaintiff. They contend that the Second Plaintiff is entitled to *restitutio in integrum* and that the compromise agreement be set aside. They tendered repayment of the R93 908.

[3] The Defendant raised a special plea to the Plaintiffs' claim. They asserted that the Plaintiffs' claim for damages was finalised between the parties in August 2008. The Defendant asserted that the Plaintiffs' new claim for restitution and damages is a claim based on the same medical grounds and

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1 The Plaintiffs applied for Rogen's substitution as the Plaintiff in the matter. This application was granted. Subsequently, it emerged that Rogen was added as a second Plaintiff. To the extent that it is necessary for the Court to garnt the proper order, the application to add Rogen as the Second Plaintiff under Rule 15 is granted.

2 The details of the settlement included R80 000 for general damages, R7908 as a contribution towards three medicolegal reports, R6 000 towards the attorneys' fees and a full section 17(4)(a) undertaking for future medical expenses

evidence previously available against the same Defendant. The Plaintiffs were obliged to claim all the remedies sought in the claim lodged by their previous attorneys.

[4] The Plaintiffs' case is founded on a single cause of action, namely the rescission of the compromise based on *restitutio in integrum* on account of alleged substantial prejudice to the Second Plaintiff. *Restitutio in integrum* is a specific equitable remedy, historically rooted in Roman-Dutch law, available only in exceptional circumstances, including where a compromise has prejudiced a minor. Restitution is a general concept; it returns parties to their pre-contractual position, often used in unjust enrichment or rescission contexts. However, as shorthand, the remedy sought by the Plaintiffs shall be referred to as restitution for convenience.

[5] The wording of the Defendant's special plea would suggest that it invokes the doctrines of *res judicata* or *lis alibi pendens*. Neither doctrine is applicable. The Court regards the special plea as a conventional compromise defence. The Defendant asserts that the delictual claim was finally settled in 2008 and that the compromise extinguished the original cause of action. The Defendant asserts that the present action constitutes an impermissible attempt to re-litigate the same cause of action. The Defendant presupposes the validity of the compromise. The Plaintiffs' present claim is not a repetition of the original delictual claim, but a distinct remedial claim for restitution as the original settlement was substantially prejudicial to the interests of a minor. The validity of the compromise is therefore the central issue.

[6] If the compromise is upheld, the special plea succeeds. If the compromise is set aside, the special plea necessarily fails. The special plea is thus not a discrete defence capable of determination independently of the restitution inquiry, but one that is entirely contingent upon the outcome of that inquiry.

The parties accepted these propositions, and the Court proceeded to hear the Plaintiffs' case on recission and restitution of the 2008 settlement agreement.

BACKGROUND FACTS

[7] The Second Plaintiff was involved in an accident and suffered a head injury. A claim was instituted against the Defendant by Enslin Meyer attorneys. Enslin Meyer was properly authorised to institute and settle the Plaintiffs' claim. The RAF1 form, completed a day after the accident, reflected that compensation of R100 000 was claimed for general damages alone. No claim was made for loss of earnings or medical expenses. The Defendant made an initial offer of R13 800 on 4 July 2007. The offer comprised R14 000 for general damages, apportioned by 30% to R9800. A further R4000 was offered as a contribution towards Enslin Meyer's fees.

[8] Enslin Meyer requested the Defendant on 24 July 2007 to abandon the apportionment and to increase the offer on general damages to R20 000. The Defendant communicated with Paul Davids ('Davids') of Enslin Meyer on 12 September 2007 that it did not intend to reduce the apportionment. David informed Lameez Modack (Modack), the Claims Handler, that he intended to obtain medico-legal reports. Davids rejected the apportionment as the minor was *doli incapax*. Davids provided the Defendant with the medicolegal reports of a Neurosurgeon, a Plastic Surgeon and an Ophthalmologist on 4 April 2008. He proposed that the claim for general damages should be increased to R150 000 as the accident contributed to the Second Plaintiff's epileptic seizures and caused the permanent scarring on his forehead. Davids also sought future medical expenses of R51 000. On 15 July 2008, Davids wrote to Johan Tolken ('Tolken'), who was Modack's senior at the Defendant. He contended that the 30% apportionment applied to the proposed settlement of the claim, and by then

attributed to the mother's alleged negligence for failing to discharge her parental duties properly, was unsustainable.

[9] Davids proposed 'purely for settlement purposes' that Enslin Meyer was prepared to recommend to the First Plaintiff acceptance of an amount of R90 000 together with an undertaking for future medical expenses, a contribution towards the costs of the medicolegal reports and a contribution of R6000 towards their costs. Tolken communicated with Modack to remove the apportionment and increase the costs as recommended by Davids. The revised offer of R93 908 was made on 16 July 2008. It was accepted on behalf of the First Respondent on 25 July 2008. The First Plaintiff accepted the undertaking on 17 November 2008.

THE PLAINTIFFS' ORIGINAL MEDICOLEGAL REPORTS

[10] As the claim was premised upon the nature, severity, and sequelae of the head injury suffered by the Second Plaintiff in the accident, it is necessary to consider the opinion expressed by the Neurosurgeon, Dr Parker, in his report dated 2 November 2007. Enslin Meyer instructed Dr Parker to assess the Second Plaintiff's head injury. The Claims Handler considered his completed report when she made the Defendant's final offer of settlement.

[11] Dr Parker had access to the RAF1 form, an ambulance report, a completed J88 form, the Day Hospital clinical notes, and the Red Cross Hospital notes about the Second Plaintiff. He also had a consultation with the Second Plaintiff. The medical report included in the RAF1 form, completed by Dr Noah, coded the Second Plaintiff's head injury as 'minor'. There was no clinical skull fracture and no bony injury on X-ray. The doctor noted the extensive forehead laceration, which was sutured. He did not elicit any localising signs suggestive of brain injury. Dr Noah did not anticipate any

permanent disability or foresee future medical treatment. The Day Hospital clinical notes documented an epileptic attack, described as a focal fit of the head and tongue, on 14 October 2006. The attending doctor noted that the Second Plaintiff also suffered febrile seizures on two occasions.[3] Further evidence of epileptic attacks was documented in an ambulance report. The Red Cross Hospital notes a referral for a focal seizure on 15 October 2006. The First Plaintiff had described the Second Plaintiff becoming stiff and unresponsive, with pulling of the eyes and face. There were no generalised tonic-clonic movements or urinary incontinence. R[...] was seen in 2004 with febrile seizures (the note does not clarify if these were before or after the accident, although the subsequent Neurology report under Dr Tucker's name, documented a history of a febrile seizure at eight months of age). A CT Scan and lumbar puncture done on 15 October 2006 were normal.

[12] Dr Parker consulted with R[...] on 19 October 2007. R[...] was four years and nine months old at that time. The accident had occurred three years and five months previously. The mother provided the history. R[...]'s early developmental milestones were normal. R[...] attended creche and was due to be enrolled for grade 1 in 2008. R[...] began experiencing headaches and some epileptic attacks soon after the accident. Dr Parker documented the family history. The mother had a standard six education, and the biological father, who passed matric, saw R[...] daily. He ran a business selling fish and vegetables. Dr Parker examined R[...]. He confirmed the prominent forehead scar. Dr Parker established that R[...] did not have any focal or long-tract signs (indicating brain or spinal cord damage manifesting in positive peripheral neurological signs on clinical testing).

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[3] The Red Cross Hospital notes also refer to two episodes of febrile seizures in 2004. The notes do not say whether the seizures predated the accident.

[13] Dr Parker's assessment indicated that R[...] was not rendered unconscious on the accident scene but was emotionally shocked. Dr Parker described the epileptic seizures suffered by the Second Plaintiff as a fit of the akinetic type, meaning that R[...]'s arms and legs did not shake. Dr Parker did not interrogate the history of febrile seizures, which occurred in 2004, and whether these febrile seizures predated the accident. The last epileptic seizure reported to Dr Parker occurred in December 2006.

[14] Dr Parker stated that R[...]'s case was complicated by the history of febrile seizures, which suggested that R[...] had a brain vulnerable to seizures. He questioned whether the accident on its own caused the seizures or whether they manifested from a vulnerable brain. He opined that if a head injury does not result in unconsciousness or cause a fracture of the skull, the risk for developing epilepsy is small. He predicted that, as febrile seizures abate after a child attains the age of six years, so do post-traumatic seizures, although at a later date. Dr Parker suggested that the Second Plaintiff receive treatment for fifteen years after the onset of the fits. Dr Parker did not expect any neuropsychological fallout in this kind of case, and he did not think that a neuropsychological assessment was necessary.

[15] Dr Bruce-Chwatt, a Plastic Surgeon, also assessed the Second Plaintiff. Dr Bruce-Chwatt consulted with the mother and child on 5 January 2008. He described the forehead scar as a 12.5x 0.2-0.3cm flat, soft, shiny scar extending in a curved line from the medial end of the left eyebrow over and into the hairline on the right. The scar was stable and of good quality. The scar was visible when R[...]'s hair was cut short. It was a significant scar as it would always be noticeable. Dr Bruce-Chwatt opined that the scar will not be improved by any surgical revision. Dr Abrahamse, Ophthalmologist, consulted

with R[...] on 21 February 2008. He concluded after his examination that R[...] had normal eyes and a functional visual system.

THE TESTIMONY

[16] Both Plaintiffs testified. Their third witness was a Mr Y[...] C[...], the husband of the First Plaintiff but not the biological father of R[...].

V[...] V[...] N[...]

[17] Ms V[...] V[...] N[...] is the Second Plaintiff's mother. She described how the accident occurred and the injuries sustained by R[...]. R[...] was playing with other children when the neighbour's vehicle reversed into him. R[...] was kept at the hospital for two hours. He was quiet and only began crying when he was examined. R[...] began experiencing seizures about one to two years after the accident. Her description of the seizures concurred with what she gave Dr Parker. R[...] did not have seizures before that. The seizures were not like the typical epileptic fit. R[...] would stare upwards, being oblivious to his surroundings. The seizures occurred regularly until the R[...] attained the age of 14. He did not receive any treatment for the seizures. He was initially investigated at Red Cross Hospital. He also developed headaches. The headaches worsened when R[...] began working at a butchery. He was diagnosed with high blood pressure. The mother bought and provided R[...] with paracetamol tablets for the headaches.

[18] The mother testified that R[...] left school between 2019 and 2020 when he was 17 or 18 years of age after failing grade 11 twice. R[...] did not fail any other grades.[4] During his schooling, he was called nicknames because of the forehead scarring. After dropping out of school, R[...] was employed at Ola Ice

[4] The subsequent medicolegal reports and Rogen's testimony confirm another failure in grade 2.

cream as a truck assistant. R[...] then worked with his stepfather as a handyman in the construction industry about two to three times per week, followed by a job in the security industry. R[...] subsequently acquired a job at DC Butchery for about 8-9 months as a general worker. The mother suggested in her testimony that R[...] had not worked for two years. R[...] had a girlfriend with whom he had a child.

[19] The mother was taken through the documentation leading to Enslin Meyer's settlement of her claim for R93 908 by her attorney. Enslin Meyer paid her R60 000. She was referred to her present lawyer by a friend. Under cross-examination, Counsel for the Defendant pursued further aspects of the settlement documents. The mother admitted that she had claimed R100 000 in the claim form submitted to the Defendant.[5] Aspects of Dr Parker's factual findings and opinion were canvassed with the mother. The mother stated that R[...] had not been placed on anti-seizure medication. She denied that R[...] suffered febrile seizures in his childhood or before the accident occurred.[6]

[20] V[...] N[...] was then taken through parts of the expert report compiled by a reconstructive expert. The expert described the scar and recommended against any revision. V[...] N[...] stated that the scar was still visible even when the Plaintiff's hair grew longer. The third report furnished to the Defendant by Enslin Meyer was that of an Ophthalmologist. Dr Abrahams cross-referenced Dr Parker's report about the febrile fits that the Plaintiff allegedly suffered. V[...] N[...] denied that the Plaintiff was diagnosed with febrile seizures.

[21] Counsel put it to the mother that the Defendant considered the medicolegal reports submitted by Enslin Meyer before the final settlement was offered. It was put to the mother that the amount offered was informed. V[...]

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5 The amount reflected in the RAF1 form completed 1 day after the accident.

6 In the second set of medicolegal reports, the Neurologist attributes the history of Rogen's first febrile seizure at eight months to the mother.

N[...] declined to comment on these propositions. V[...] N[...] confirmed that Enslin Meyer had conveyed the Defendant's first offer of R13 800 to her. Enslin Meyer informed her that they were going to reject the offer because it was too little. It was then put to V[...] N[...] that the final offer was not subjected to an apportionment. V[...] N[...] stated that she had seen the document containing the final offer, which was in full and final settlement of her claim, but its contents were not explained to her. She was told to sign; hence, she signed.[7] The offer was not explained to her as Counsel explained it in this Court. It was put to her that the acceptance of the offer was in accordance with the special power of attorney she gave Enslin Meyer. She accepted that she gave the attorney the right to settle the case on her behalf. She accepted that the Defendant did not intend to prejudice both her and R[...], but stated that there was prejudice that emanated from the offer.

[22] On questioning by the Court, V[...] N[...] stated that she had been to Enslin Meyer a few times when he called her to attend. She was called twice about the offers Enslin Meyers received from the Defendant. Enslin Meyer told her to accept the R80 000 for general damages because she will not get more than that. She was paid R60 000 in November 2008. V[...] N[...] was referred to her current attorneys when R[...] was nine years old.

Y[...] C[...]

[23] He is a self-employed handyman. He is married to the mother and is the stepfather of R[...]. He has known R[...] since the age of three. He has two biological children from Ms V[...] N[...]. He noticed that R[...] had sleeping problems, nightmares and headaches. C[...] thought that R[...] was nagging for unnecessary stuff until the mother explained that these were related to the

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[7] An inspection of the document indicates that the final offer was signed by Davids on behalf of Ms Van Nee. Ms Van Nee signed the acceptance of the undertaking.

accident. R[...] had moved out of their house about three years ago. He testified that the only medication that R[...] took was paracetamol for his headaches. R[...] was called nicknames because of the scar on his forehead. R[...] did not do his school homework.

[24] C[...] took R[...] along to work with him about two to three times per week after R[...] left school in grade 11. R[...] worked with him for about one year. R[...] was forgetful, but his work was otherwise okay. R[...] complained of headaches when he was on site. C[...] paid R[...] R200 a day when R[...] worked. C[...] was adamant that R[...] could not work on his own. C[...] confirmed R[...]'s employment history after R[...] had dropped out of school. He also alluded to another job that R[...] had secured at the time of the trial.[8] Under cross-examination, C[...] testified that he knew nothing about the settlement of R[...]'s claim. It was elicited from C[...] that R[...] lost his job at the security company because he was sleeping at work and did not do the rounds he was expected to do. While working at DC Meats, R[...] was given a warning because he ate at the shop to relieve his headache.

R[...] V[...] N[...]

[25] R[...] testified. His testimony had to be paused because he became emotional when relating certain incidents. The Court noted that the witness bit his fingernails and the skin around them. R[...] was undergoing training at his current job. He stated that he had to work. He did not have a choice as he had a baby to support. He mentioned that a supervisor had a problem with how he performed in training. His girlfriend lives apart from him with her mother. He helps with the child's maintenance when he has money. He feels suicidal at times and takes his frustrations out on the furniture, especially when he does not

8 Ms Van Nee did not allude to thius job in her testimony.

have money. He also fights with members of his family. He had scars on his left hand from physical contact with the furniture and mirror.

[26] R[...] testified that he repeated grade 2. He left school while repeating grade 11 because the work was difficult. His mother insisted that he go back and complete school. He could not cope. His mother told him that the school teachers thought he was a bit too slow to focus and to take down the work from the board. His mother had to change homes repeatedly during his early primary school years. His fellow learners made fun of his slowness and called him nicknames when his hair was cut, and the scar was exposed. He felt like someone who did not want to be at school. His forehead scar was pointed out and described for the record.

[27] It was evident that R[...] had a poor memory for dates and reasons. He took his tests at school in the morning, as he was forgetful and would not remember what he had learnt the previous night, later in the day. He did not know why he lived with his aunt and away from his mother in Tafelsig. He was dismissed from DC Meats after getting three warnings. He could not remember when he left school. He remembers working for a security company, an ice cream factory, for his stepfather as a building assistant and at DC Meats, but could not remember when he worked at these places.

[28] R[...] experienced dizzy spells and headaches when participating in school sports. He suffered migraines and headaches all the time. They began on the left forehead and have since moved to the right side. He experiences headaches every third day. He uses paracetamol and codeine preparations for his headaches. The headaches endure for a day and a half but improve with medication. His headaches were worse at school. He sometimes experienced a seizure in class. He was told that he would stare at the light and bite his tongue. He experienced the last seizure when he was at school. His mother would be

called to fetch him from school. He experienced severe headaches when he worked for DC Meats. He also experienced a blackout there, and his mother had to take him to the Day Hospital. He wants to sleep when he experiences headaches.

[29] Under cross-examination, the witness was asked about his severe hypertension referred to in Dr Tucker's report.[9] He was asked about the opinion expressed by Dr Tucker that his headaches were caused by his blood pressure or migraines rather than any residue of the accident. A family history of migraines on the mother's side was documented in Dr Tucker's report. R[...] denied knowledge of the facts upon which Dr Tucker based this aspect of his report. He confirmed that he smoked cigarettes and occasionally dagga. R[...] attended the Day Hospital for his blood pressure, but did not return immediately for further evaluation. He attended later when the hospital commenced treatment and did blood tests on him. R[...] feared that he would lose his job if he attended the hospital. He had no knowledge about the undertaking provided by the Defendant or that he could access medical attention, which would be paid for by the Defendant. R[...] did not know about the initial negotiations or the medicolegal reports that informed the final settlement of his claim in 2008. None of this was explained to him, even when he was added as a Plaintiff to the new claim. The Plaintiffs closed their case after R[...]'s testimony.

LAMEES SALIE (MODACK)

[30] The Defendant called Ms Modack to testify. She was the Claims Handler assigned to deal with the Plaintiffs' claim. She was taken through the documentation relating to the settlement of the claim and referred to earlier in this judgment. She indicated that the amount of R100 000 reflected in the RAF1

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9 Dr Tucker is the Neurologist appointed by the Plaintiffs to support their new claim.

form reflected the attorney's assessment of the claim. It did not mean that the claim from the Defendant's perspective was worth R100 000. She considered the content of her file, conceded the merits and made the offer of R14 000 in full settlement of the claim on 4 July 2007. She had applied an apportionment of 30% and offered the attorney costs of R4000. The apportionment was based on the mother not being at the accident scene to supervise the Second Plaintiff. The first offer of settlement occurred without the benefit of medicolegal reports. She considered the statutory medical report, which is part of the RAF1 form. The report accounted for the 15cm laceration to R[...]'s forehead, his level of consciousness, the absence of a skull fracture and vomiting, and the treatment offered.

[31] Modack was asked to respond to the assertion that the claim was prejudicial to the minor child and was unreasonable. Modack recounted the various stages of her assessment of the claim, her correspondence with the attorney, the advice given to her by Tolken, the medicolegal reports, the review and lifting of the apportionment, the attorney's final counterproposal and concluded that the offer was reasonable.

[32] Under cross-examination, Modack indicated that she had an LLB degree before she joined the Defendant and post-metric courses in occupational health and safety. The hierarchy involved in claims handling was the manager, a senior like Tolken and then the claims handler like her. There were a few teams of claims handlers, each with a senior. Modack was taken through the Plaintiffs' particulars. It was pointed out to her that an agreement of compromise was concluded between the First Plaintiff and the Defendant. It was put to Modack, in accordance with the pleadings, that the agreement of compromise was substantially prejudicial to the interest of the minor when it was concluded. The offer had no component for loss of earning capacity.

[33] Modack was taken to task about the apportionment envisaged in the settlement of the claim. She agreed that there was no basis in law to apportion a claim of a *doli incapax* minor. She was referred to a telephonic conversation the attorney had with the senior, Tolken and was asked why the attorney approached her senior. Modack testified that if an attorney was not satisfied with a claim's handler, they could approach her senior or the manager. Modack was also challenged about the wording used by Tolken, i.e., that 'the attorney had called their bluff'. Modack conceded that if the attorney did not object to the implementation of the apportionment, she and thus the Defendant would have imposed it. She was then asked what was meant by 'getting rid of this attorney'. She conceded that there was a nuisance element implicit in that phrase.[10]

[34] Modack was taken through the J88 form as well as the Day Hospital notes which concurred with the description of the injuries sustained by the Second Plaintiff. Modack was taken through the entries in the clinical hospital notes referring to R[...]'s epileptic seizures. She was then taken to Dr Parker's report which stated that he did not expect any neuropsychological fallout and there was no need for a neuropsychological assessment regarding the accident-related injuries. It was put to her that the Plaintiffs recent expert reports stated that there could be neuropsychological fallout from this kind of injury. It was put to Modack that responsible attorneys do not settle claims where there is a subsequent risk of developing neuropsychological fallout from a head injury suffered by a minor. Modack answered that there was a time period of three years that elapsed between the date of the accident and when the claim was

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[10] Tolken's email to Modack, dated 15 July 2008 stated: 'We have to make an economic decision here. If we proceed and join the mother, we will be throwing good money after bad. The attorney has called our bluff and to settle I suggest we remove the apportionment, but retain the quantum as it stands. We can also increase costs as requested by the attorney. I will sign. Lets get this offer out as soon as possible so I can get rid of this attorney.'

settled. The settlement of the claim included the consideration of the expert reports that were available to her. She was guided by what the experts said.

[35] It was suggested to Modack that the Defendant should have told the attorney to wait before the claim was settled despite what Dr Parker said in his report. It was put further that the Defendant should have obtained a neuropsychological or speech therapy report on their initiative. Modack replied that Enslin Meyer accepted what Dr Parker said and so did the Defendant. Enslin Meyer wanted to settle the claim. It was suggested to Modack that the neurosurgeon was not the appropriate expert and that the Defendant should have considered Dr Parker's report more critically. Modack defended her position by referring to the findings made by Dr Parker and the attorney's decision not to refer the Second Plaintiff to a Neuropsychologist. Modack accepted that the Defendant was in a position to appoint, and could appoint a Neuropsychologist, but in this case both the Defendant and Enslin Meyer did not think it necessary.

[36] It was suggested to Modack that a public body should not take the approach it did in this claim. She replied that the final offer of settlement did not contain an apportionment. Modack was then taken to the Neurologist's report obtained by the Plaintiffs' present attorney. Dr Tucker considered the other medical reports which identified significant neuropsychological behavioural abnormalities which are consistent with the sequelae of a traumatic brain injury. Modack accepted that the offer made did not include damages for significant neuropsychological fallout as the Defendant did not have any expert report that dealt with these aspects. Dr Tucker had identified four reasons why an expert Neurologist could not assess the initial injury including that there was no specialised assessment of the Second Plaintiff's level of consciousness, he did not have the initial hospital records, there was no CT scan done, and the second Plaintiff was only sixteen months old and would have not been able to describe

any anterograde amnesia. Dr Tucker confirmed his initial opinion that the Second Plaintiff did have a concussive head injury and that he suffered a mild to moderate brain injury. Dr Tucker thought that, absent an alternative compelling reason, the neuropsychological behavioural changes were a sequela of the accident-related injury. Modack agreed that if she had access to reports that stated what the recent reports stated, she would have included it in the offer.

[37] Under further cross-examination, Modack confirmed that she had the insured driver's affidavit and was aware of how he described the accident when she made the offer. The statement of eyewitness Galiema Moses was put to Modack. Modack declined to comment on whether the offer was substantially prejudicial to the Plaintiffs. On re-examination, Modack confirmed that she did not think the offer was prejudicial to the Second Plaintiff. The claims handlers request medical reports if there are disputes regarding the injury the claimant sustained. There was no need for the Defendant to obtain their own reports in this matter.

THE PLAINTIFS' SECOND SET OF MEDICOLEGAL REPORTS

[38] The Plaintiffs commissioned a new set of medicolegal reports to support their new claim. The reports were admitted as evidence under Rule 38(2) and 39(20) of the Uniform Rules of Court. It was understood that the content of these reports would be used to recalculate the Second Plaintiff's claim for general damages and loss of earning capacity if the Plaintiffs surmounted the compromise and obtained restitution. The relevant content of the Neurologist's, Speech Therapist's, Clinical Psychologist's, Educational Psychologist's and Industrial Psychologist's reports shall be considered briefly.

[39] Neurologist, Dr Tucker ('Tucker'), assessed the Second Plaintiff on three occasions, namely 6 March 2015, 22 August 2025, and 3 September 2025. His

assessment of the clinical notes accorded with that of Dr Parker. The Second Plaintiff's epileptic seizures progressed beyond Dr Parker's report. Mrs V[...] N[...] reported in October 2013 that R[...] continued to suffer seizures at the rate of about 1 per month. Tucker suggested that R[...] had a vulnerable brain and that the collision may have impacted this brain to give rise to epilepsy, mild and infrequent as it was. He affirmed Dr Parker's general statement that if a head injury does not result in unconsciousness and does not cause a fracture, the chances of post-traumatic epilepsy are very small. He expressed the opinion that R[...]'s brain was not normal, but one susceptible to epileptic seizures caused by the pre-existing febrile seizures. He agreed that the accident contributed to R[...]'s development of epilepsy.

[40] As R[...] continued to manifest cognitive and behavioural abnormalities and his scholastic performance appeared to have been poor, Tucker recommended neuro-psychometric testing. Tucker graded the brain injury sustained by the Second Respondent as mild or moderate with focal onset epilepsy. Tucker opined that R[...]'s severe hypertension at the time of the follow-up consultation was unlikely to be related to any accident-related traumatic brain or other injury. He referred R[...] to the Groote Schuur Hospital Casualty Unit for investigation and management of this condition. Tucker believed R[...]'s headaches more likely represent migraines and/or hypertension-related headaches. Tucker added that unless a compelling alternative explanation is identified to explain the significance of cognitive and neuropsychological abnormalities identified by the other experts, it is reasonable to regard these as sequelae of the accident-related head injury.

[41] Dr Dale Ogilvy, Speech and Language Therapist, assessed the Second Plaintiff and provided two sets of reports dated 31 July 2014 and 19 January 2025. She found that R[...] presented with mild disturbances of speech and

specific and significant cognitive-communicative deficits. The nature of his difficulties comprised a deficit and not a delay. Despite R[...]'s head injury being considered minor in severity, and considering the young age at which it occurred, the nature and specific profile of his deficits were highly consistent with traumatic brain injury, even mild brain injury. She opined that R[...]'s speech and cognitive-communicative deficits would cause him to struggle in any form of future employment requiring communication and that this, together with his truncated educational opportunities, would significantly alter and curtail his future vocational opportunities.

[42] Dr Ogilvy documented the truncated tenure of R[...]'s employment history. She stated that these problems will, unfortunately, follow R[...] wherever he goes and will likely result in him having severe difficulty sustaining employment. He may remain unemployed for most of his life. R[...] continued to present with significant cognitive-communicative deficits and significant expressive and receptive communication impairments, and the nature of his cognitive-communicative deficits and communication impairments has remained the same over a long period of time.

[43] Mignon Coetzee ('Coetzee'), a Clinical Psychologist, assessed the Second Respondent and produced two reports on 15 November 2015 and 18 January 2025. On her first assessment, Coetzee found that R[...] had borderline to low average intelligence. Verbal memory, visual memory, and motor skills were preserved. R[...] had significant difficulties with sustained attention and concentration. In her second report, Coetzee reassessed R[...]'s intellectual capacity. She reported that another normed test administered to R[...] revealed that he had an average to high intellect. He had managed to expand his vocabulary. She identified deficits of an executive nature which would explain the fluctuations in R[...]'s academic performance and behavioural difficulties.

[44] The Educational Psychologist predicted that R[...] would not progress past grade 10 and that the accident had a negative impact on R[...]'s earning capacity. In her report emanating from her third assessment, dated 6 August 2024, the Occupational Therapist found that R[...] did not require occupational therapy. He has intact non-verbal practical abilities, but in the absence of further training, R[...] is likely to remain an unskilled assistant to a tradesman with poor prospects of promotion.

[45] There were two Industrial Psychology reports. The Court was not warned about a report from Ms Auret-Besselaar, dated 12 May 2016. Auret-Besselaar predicted that R[...] would have completed matric in the uninjured state. She sketched a career path that progressed to a terminal level at the median and upper semi-skilled level of R99 500 per annum. Her injured career progression was limited to sympathetic employment at R2600 to R3000 per month. The Plaintiffs relied upon a second Industrial Psychology report of Bernard Swart. Swart also sketched an uninjured career progression premised upon R[...] attaining his matric. He terminates R[...]'s employment at the midpoint between the median and upper quartile earnings in the non-corporate sector. He suggests earnings of R142 000 per annum or R11 833.33 per month by the age of 40. R[...] would have then enjoyed annual salary increases linked to inflation. For the injured state, Swart was of the view that R[...] would be confined to sheltered employment without any gainful income. The Actuarial calculations of the Auret-Besselaar and Swart career projections differ materially, with the loss of earnings under the Swart projections materially higher by about R1million than the Auret-Besselaar projections.

[46] Plaintiff now claims R4 013 661, comprising R1 500 000 for general damages, R2 013 661 for loss of future earnings, and R500 000 for medical expenses.

EVALUATION

[47] The Plaintiffs modelled their claim seeking restitution on *Myhill*.[11] Both *Myhill* and this case involve minors whose claims were settled on their behalf by adults. In *Myhill*, the mother accepted a settlement on behalf of her injured children.[12] In this case, the mother, through an attorney, accepted a settlement for the Second Plaintiff, who was sixteen months old when the accident occurred and five years and seven months old when the settlement occurred. Courts treat minors as a protected class.[13] In both cases, *restitutio in integrum* was sought. In this case, the summons commencing the restitution action was served five years after the settlement, which is considerably shorter than the ten years it took in *Myhill*. In the case of minors, restitution remains available even many years later. Delay does not bar restitution where minors are concerned, but prescription relating to their attainment of majority may. Any settlement concluded on their behalf is subject to strict scrutiny and can be rescinded if prejudicial. The Plaintiffs need to show that any prejudice to the minor occasioned by the settlement is serious or substantial and was inimical (unfavourable or adverse) from its inception.[14] There are, however, key differences between this case and *Myhill*.

[48] In both cases, the Defendant sought to impose an apportionment of 30% attributable to the mother's alleged negligence and did so in *Myhill*. In this case, the Plaintiff's attorney resisted the apportionment, and the Defendant acquiesced in the final offer of settlement. A debtor liable to a minor, when sued

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11 *Road Accident Fund v Myhill NO* 2013 (5) SA 399 (SCA) ('[*Myhill')*
12 Id at para 9
13 Id at para 12
14 Id at paras 24-29

by the child's custodian parent, may not set off any amount that the custodian parent may owe it against its liability to the child.[15]

[49] Both cases involve possible long-term neurological consequences. In *Myhill*, the Defendant ignored the risk of post-traumatic epilepsy.[16] In this case, the Second Plaintiff developed seizure-like episodes shortly after the accident. The Supreme Court of Appeal emphasised that ignoring future medical risks, especially neurological ones, renders a settlement substantially prejudicial.[17] In this case, the Defendant's final offer was informed by three medicolegal experts, including a Neurosurgeon. The Neurosurgeon linked the Second Plaintiff's post-traumatic epilepsy positively to the accident, regardless of the history of febrile seizures or whether it may have occurred in a susceptible brain or not. Pre-existing vulnerability does not absolve the Defendant of paying damages as the thin skull rule (*talem qualem* or egg-skull rule) is a principle in the law of delict stating that a wrongdoer must take their victim as they find them.[18] The history of headaches, which has persisted, was relayed to the Neurosurgeon. The Claims Handler testified that she had regard to all three medico-legal reports and identified the epileptic attacks and the permanent facial scarring as compensable sequelae of the head injury. In addition to increasing the offer on general damages, the Defendant provided an undertaking to cover the costs of future anticonvulsant and other treatment for sequelae arising from the accident. The First Plaintiff accepted the undertaking.

[50] The Second Plaintiff's testimony described emotional distress, current psychosocial difficulties, forgetfulness, job instability, hypertension, family conflict, financial stress, occasional suicidal ideation, headaches, past teasing at

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15 Id at para 28
16 Id at para 18
17 Id at paras 18-21
18 *Wilson v Burt (Pty) Ltd* 1963 (2) SA 508 (D) at 516, *Gibson v Berkowitz and Another* 1996(4) SA 1029 at 1049F- 1050D, *Clinton Parker v Administrator, Transvaal; Dawkins v Administrator, Transvaal* 1996 (2) SA 37 (W) at 65H-66F

school, early school failure, seizures that resolved, and environmental instability. None of this, apart from the headaches and the seizures, was known in 2008 and more importantly none of the other difficulties was reasonably foreseeable in 2008 based on the neurosurgeon's evidence. The testimony cannot retroactively create foreseeability or prejudice for purposes of restitution. They cannot retroactively render the settlement prejudicial, as later-emerging difficulties cannot be used to show that the original settlement was unreasonable.

[51] Both cases involve settlements that are arguably too low for the injuries sustained. In *Myhil*l, the settlements were trivial, namely R4900 and R5600. In this case, the settlement was R80 000, which may still be low given that the Second Plaintiff sustained a permanent facial scar extending from the left eye to the right ear and suffered post-traumatic epileptic seizures. Quantum is not assessed in isolation. The question is whether the settlement materially undercompensated the minor given the injuries and risks. The Plaintiffs sought to underscore the settlement of general damages by referring to awards of general damages in recent cases.[19] The Plaintiffs suggested that an award of R1 500 000 should have been made under this head of damages. *Myhill* cautioned against this approach. It acknowledged substantial increases in awards for general damages have occurred, but stated that it is necessary to consider what would have been reasonable then and not now.[20] The trend towards increased awards for general damages was affirmed in *Marunga*.[21] *Myhill* also cautioned that a Court should take into account factors known at the time the claim was settled.[22]

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19 *Braun NO (obo Tiripano v PRASA* 2025 QOD (9) A4-1 (WC), *Mv RAF* 2023 QOD (8) B4-76 (NC), *Cawood NO v RAF* 2023 QOD (8) A4-195 (GHCP), *BV v RAF* 2021 QOD (8) A4-5 (FS), *Nawe v RAF* 2021 QOD (8) A4-46 (GHCP), *Maribeng v RAF* 2021 QOD (8) A4-39 (GHCP)

20 *Myhill* at para 19

21 *Road Accident Fund v Marunga* 2003(5) SA 164 (SCA), see *De Jongh v Du Pisani*, [2004] 2 All SA 565 SCA which warned against undue reliance on more recent higher awards.

22 *Myhill* at para 13

[52] The usual practice adopted by practitioners in motivating an appropriate award for general damages is to consider comparable cases in readily accessible reference sources like Robert Koch's Quantum of Damages and SAFLII. To establish what would have been comparable and reasonable in 2008, practitioners would have to look at the corresponding quantum yearbook or 2008 and pre-2008 awards in SAFLII. An award made for general damages in another case is comparable if the nature of the injuries and their sequelae correspond to the case being considered. The facts known to the Plaintiffs, their attorney, and the Defendant in 2008 were that the Second Plaintiff, according to the RAF1 medical form, suffered a minor head injury. The Neurosurgeon did not classify the head injury any further except to say that the accident contributed to the Second Plaintiff's development of epilepsy. The Second Plaintiff was shocked, but not unconscious, after the accident. The skull X-ray and subsequent CT Scan of the head and brain were normal. He did not show the classic symptoms or signs of a brain injury, like vomiting or peripheral neurological deficits. He did complain of headaches, which were probably post-traumatic. The Second Plaintiff suffered a significant scar to his forehead. The Court directed the parties to provide additional submissions on comparable awards for general damages that would have been reasonable in 2008.

[53] The Plaintiffs relied upon *Nombhadi Princess Mbola* ('*Mbola*'), an unreported case of the Eastern Cape High Court, Grahamstown, which was cited in *Makapula v RAF* 2010 QOD 6 B4-48 (ECM). The award made in *Makapula*, as adjusted to 2008 terms, was R268 537 and R300 000 in *Mbola*. In both cases, extensive neurocognitive deficits and behavioural problems were documented. The credible evidence presented to the Defendant by Enslin Meyer on behalf of the Second Plaintiff in this case was that no neuropsychological sequelae were anticipated.

[54] The Plaintiffs submitted three further cases for comparison. The facts in *Torres v RAF*, QOD 6 A4-1 (GHCJ), are distinguishable as they involve an older person with a severe diffuse brain injury. Similarly, *Sterris v RAF*, 2009 QOD 6 B4-26 (WCHC) is also distinguishable as it involved an older person with a myriad of severe orthopaedic injuries in addition to his brain injury. The fourth case forwarded by the Plaintiffs, *Combrinck v RAF*, 2001 QOD 5 B4-81 (W), is also distinguishable as it involved severe head and brain injuries comprising a skull fracture with significant contusions of the frontal lobes of the brain and bleeding into the cerebellum, the latter requiring a surgical decompression procedure. The awards made, as adjusted to their 2008 value, in *Torres* were R669 124, *Sterris* R233 378, and *Combrink* R272 550.

[55] The Defendant relied upon two cases. The injuries sustained by the minor in *Duncan and Duncan NO v Commercial Union Assurance Co Ltd* 1974 (2B2) QOD 443 (W) are closely comparable to those suffered by the Second Plaintiff. In Duncan, the minor suffered lacerations to his head and post-traumatic epilepsy. The 2008 equivalent of the amount awarded would be R53 640. In *Maja v SA Eagle Insurance Company Limited* 1987 (4B2) QOD 1 (W), the minor also suffered comparable injuries to those of the Second Plaintiff, i.e., a head injury with post-traumatic epilepsy. The monetary award of R6 000 in 1987 equates to a 2008 value of R33 540. However, these cases are too old and represent an era when awards for general damages were conspicuously conservative. The Court nevertheless appreciates the effort the parties expended in sourcing and presenting these submissions.

[56] In accordance with the approach in *Myhill*, the settlement must be evaluated against the medical evidence and quantum norms reasonably available in 2008. The Plaintiffs' comparable cases involved significant neurocognitive and behavioural sequelae and are not analogous to the present

matter. The Defendant's cases, though older, are materially comparable and, when adjusted to 2008 values, yield awards between R34 000 and R55 000. Having regard to the neurosurgeon's prognosis, the absence of acute neurological signs, the minor's functioning for many years, and the nature of the injury, a reasonable 2008 range for general damages would have been between R50 000 and R100 000. The settlement of R80 000 falls squarely within that range and cannot be said to bear no realistic relationship to the damages reasonably claimable at the time. The negotiation history between the First Plaintiff's attorney spanned the amounts of R100 000, R14 000, R20 000, R150 000, R90 000 and was finally settled at R80 000. The final settlement reflects ordinary compromise dynamics and does not render the final figure unreasonable.

[57] Awards for general damages fall within the broad discretion of the court, exercised to achieve fair compensation in the circumstances of each case. Comparable cases serve as guides rather than binding precedents, and a range of reasonable awards may exist for the same injury. Even if a court might have awarded a somewhat different amount, the compromise cannot be said to bear no realistic relationship to the damages reasonably claimable at the time. The Plaintiffs have therefore not established that the compromise was substantially prejudicial when concluded

[58] The Plaintiffs argue that the attorney and the Defendant should have foreseen a claim for loss of earning capacity in 2008, and that their failure to do so constitutes substantial prejudice. This argument cannot succeed. The test is not whether such a claim is viable today, but whether it was reasonably foreseeable in 2009. The contemporaneous evidence did not support such foreseeability. The Neurosurgeon did not anticipate cognitive or neuropsychological deficits. The minor's early development was normal. There

were no behavioural or educational red flags at the time. The seizures were expected to resolve and did. The Defendant was entitled to rely on the Neurosurgeon's opinion. It was not required to obtain additional experts on its own initiative or to delay settlement indefinitely "just in case" further deficits might emerge. The Neurosurgeon's opinion accorded with the clinical notes relating to the accident and its aftermath. The Defendant relied on the medicolegal reports provided by the First Plaintiff's attorney, responded promptly to the claim and did not delay in acquiring reports of their own. [23] The Plaintiffs' reliance on present-day expert reports to establish past foreseeability is legally impermissible. These reports cannot retroactively impose obligations on the Defendant or the attorney that did not exist at the time. There was no basis in 2008 to foresee a loss of earnings claim.

[59] The Plaintiff's new battery of expert medicolegal reports, namely that of a Neurologist, Neuropsychologist, Speech Therapist, Occupational Therapist, Educational Psychologist, Industrial Psychologists, and Actuaries, are all *post-facto* reconstructions. They cannot be used to re-value the claim as if it were 2026, impose present-day knowledge on 2008 decision-makers, or create prejudice by hindsight. They are only relevant insofar as they illuminate what should reasonably have been foreseen in 2008.

[60] The Minor's Actual Life Course undercuts the "florid neuropsychological fallout" Narrative. The Second Plaintiff has a girlfriend and a child. He functions socially and occupationally. His ongoing headaches have two other credible causes, namely migraine and hypertension. This real-world functioning is inconsistent with severe neuropsychological impairment, catastrophic cognitive fallout, or the kind of deficits that would justify a multi-million-rand claim. The real issue in this case is whether the settlement was so objectively

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[23] *Modise obo Minor v Road Accident Fund* 2020 (1) SA 221 (GP) at para 4.11

inadequate, given the expert evidence available in 2008, that it was substantially prejudicial to the minor's interests? Is this a case of hindsight rather than demonstrable prejudice?

[61] The Plaintiffs' reliance on *Myhill* is misplaced on the facts. There are material differences in key aspects between this case and *Myhill*. The determinative question of whether the compromise concluded in 2008, on the evidence reasonably available at the time, was substantially prejudicial to the minor's interests to justify the exceptional remedy of *restitutio in integrum* has to be answered in the negative. On the totality of the evidence, the Plaintiffs have not established that the compromise was substantially prejudicial when concluded. *Restitutio in integrum* is therefore not warranted.

COSTS

[62] The Plaintiffs sought their costs on a party and party scale with Counsel's fees on the C scale, if they prevailed. The Defendant was ambivalent about the costs if it were to succeed. Defendant's Counsel suggested that Defendant would not seek costs against the Plaintiff if the Defendant prevailed. Counsel later suggested that the costs should follow the outcome. The Court, acting upon the generous cue from Defendant's Counsel, concludes that each party should pay their own costs.

ORDER

In the premises, the order that follows:

1. The Defendant's special plea that the Plaintiffs' claims against it were finalised and settled is upheld.
2. The Plaintiffs' claim for *restitutio in integrum* is dismissed.
3. Each party shall pay their own costs.

BHOOPCHAND AJ

Acting judge

High Court

Western Cape Division

Judgment was handed down and delivered to the parties by e-mail on 13 April 2026

Applicant's Counsel: M A Crowe SC
Instructed by: Jonathan Cohen & Associates
Respondent's Counsel: LX Dzai
Instructed by: State Attorney