



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

Case no: 14175/13

REPORTABLE

In the matter between:

VANESSA VAN NEE

FIRST PLAINTIFF

ROGEN VAN NEE

SECOND PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

Coram: BHOOPCHAND AJ

Heard: 22 May 2026

Delivered: 25 May 2026

Summary: Leave to appeal the Court's finding against granting *restitutio in integrum* on a compromise agreement of settlement for damages suffered by the Second Plaintiff who was a minor when he was involved in an accident. Plaintiffs' grounds of appeal and arguments misconstrue the *ratio* in *Road Accident Fund v Myhill NO 2013 (5) SA 399 (SCA)*. The errors and misdirection alleged by the Plaintiffs are unsustainable, and they have not

demonstrated that another Court will come to a different finding, or reasonable prospects of success on appeal or a compelling reason to grant leave to appeal. Application dismissed with costs.

ORDER

The application for leave to appeal is dismissed with costs.

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

Bhoopchand AJ:

INTRODUCTION

[1] The Plaintiffs apply for leave to appeal against the whole of the judgment delivered on 13 April 2026, in which their claim for *restitutio in integrum* was dismissed. The application advances nine grounds of appeal. The Respondent opposes the application. The Court shall deal with each ground of appeal in turn.

GROUND 1: ALLEGED FAILURE TO APPLY THE EQUITABLE PRINCIPLE UNDERLYING *RESTITUTIO*.

[2] The Plaintiffs contend that the Court erred in finding that the compromise concluded in 2008 was not substantially prejudicial to the minor, and it erred further in failing to give proper effect to the equitable nature of *restitutio in integrum* for minors.

[3] This ground cannot be sustained. The Court applied the correct test, as articulated in *Road Accident Fund v Myhill NO 2013 (5) SA 399 (SCA)* (*Myhill*): whether the compromise was substantially prejudicial on the facts and medical evidence reasonably available at the time it was concluded. The heightened protection afforded to minors was expressly recognised. Equity does not permit a court to revisit a compromise with the benefit of hindsight or to substitute present-day medical knowledge for what was known in 2008. The Plaintiffs' case relied heavily on later-emerging evidence, which serves as a comparative reference for what was known in 2008, but cannot ground a finding of substantial prejudice under the test articulated in *Myhill*.

[4] Equity did not entitle the minor to a better bargain than the one reasonably available in 2008. The Plaintiffs failed to meet the factual threshold for substantial prejudice. The complaint amounts to a disagreement with the Court's factual findings, which were based on the evidence and consistent with the principles in *Myhill*. The Road Accident Fund ('RAF') was entitled to rely on the hospital admission notes after the accident, the information provided by the doctor who completed the RAF1 medical form, the hospital notes documenting the development of epilepsy and the Neurosurgeon's report discounting neuropsychological and neurocognitive sequelae. Counsel were

forewarned that the facts in this case were distinguishable from *Myhill* in material respects.

[5] The settlement amount fell within the compromise dynamics and a reasonable settlement range. The Second Plaintiff's later difficulties were neither predictable nor foreseeable in 2008. No error or misdirection is shown. There is no reasonable prospect that another court would find that the compromise was substantially prejudicial on the information available in 2008. Leave to appeal on this ground is therefore refused.

GROUND 2 AND 3: EX POST FACTO EXPERT EVIDENCE AND ALLEGED UNDER COMPENSATION.

[6] The Plaintiffs argue that the Court erred in treating their new suite of medico-legal reports as *ex post facto* reconstructions and in failing to find that the compromise materially undercompensated the minor. Plaintiff's Counsel forcefully argued that the Court "swept aside" the Plaintiffs' new expert evidence. This is incorrect.

[7] The judgment expressly recognised that such evidence is admissible, but only insofar as it illuminates what was reasonably foreseeable in 2008. This is precisely the approach mandated in *Myhill*, which prohibits the use of later-emerging expert opinions to create risks that were not apparent at the time of settlement. The contemporaneous medical evidence, including the Neurosurgeon's express view that no neuropsychological fallout was expected, did not raise any real possibility of cognitive sequelae. The later expert reports cannot retroactively create such a possibility.

[8] The Plaintiffs relied upon a part of paragraph 36 of the judgment when they alleged that the defendant's Claims Handler had accepted that the offer

made by the defendant did not include damages for the aforesaid significant neuropsychological behavioural sequelae of the brain injury. They omitted further parts of paragraph 36 of the judgment. The Claims Handler stated in evidence that the offer did not include damages for significant neuropsychological fallout as the Defendant did not have any expert report that dealt with these aspects. She agreed that if she had access to reports that stated what the recent reports stated, she would have included it in the offer.

[9] The florid physical damage sustained by the two children in the *Myhill* case e.g., the one who suffered an occipital impact with parietal lobe infarcts, made post traumatic epilepsy eminently predictable in that case. Dr Parker's opinion in this case amounted to the following: in the absence of skull fractures and organic (physical) brain damage, functional anomalies (neuropsychological and neurocognitive sequelae) are less predictable. The hospital records in *Myhill* already contained evidence of epilepsy. The later Neuropsychologist, Ms Adan explained that evidence. There was no reference to neurocognitive or neuropsychological sequelae that the later experts in this case had to explain. There was certainly no 'real possibility' of neuropsychological or neurocognitive sequelae ever documented up to the settlement of this claim in 2008.

[10] The Plaintiffs allege that because the child was apprehensive, the examination conducted by Dr Parker was unreliable. Dr Parker did not say in his report that the examination was unreliable or that he could not assess neurological function.

[11] These grounds mischaracterise both the evidence and the judgment. The Court did not exclude the new expert evidence; it held, correctly, that such evidence may only illuminate what was known in 2008 and may not create new

risks or impose hindsight on past decision-makers. This is precisely what *Myhill* requires.

[12] This is not a case that is inimical from its inception as the Plaintiff's argue. The rhetoric is forceful, but the facts legally weak on the test to be correctly applied, the actual evidence, and the limits of hindsight. The RAF's omission to compensate for unforeseeable sequelae is not evidence of prejudice. It is evidence of compliance with the medical evidence available at the time. There was no factual or medical basis upon which the RAF could have compensated for neuropsychological deficits or loss of earnings.

[13] In 2008, the Neurosurgeon did not anticipate neuropsychological fallout, found no focal neurological signs, and expressly stated that no neuropsychological assessment was indicated. The Neurosurgeon did not foresee cognitive sequelae at that stage. There were no contemporaneous red flags suggesting a real possibility of later neuropsychological impairment. The settlement amount of R80 000 fell within a reasonable 2008 range for the injuries then known. These grounds disclose no error or misdirection and no reasonable prospect that another court would find that the compromise materially undercompensated the minor on the information available in 2008. Leave to appeal on these grounds is refused.

GROUND 4 AND 5: INTERPRETATION OF *MYHILL* AND FORESEEABILITY

[14] The Plaintiffs contend that the Court misapplied *Myhill* by failing to find that the facts known in 2008 gave rise to a real possibility of further neurological or neuropsychological sequelae. Plaintiff's Counsel argued that the

Court applied the incorrect test of ‘reasonable foreseeability’ at the time of the compromise as *Myhill* prescribed a ‘real possibility’ test.¹

[15] The submission advanced by Plaintiffs’ Counsel regarding paragraph 18 of *Myhill* is misplaced. The “real possibility” referred to in *Myhill* arose from contemporaneous evidence already pointing to possible epilepsy. The submission that *Myhill* would be meaningless if it set the test at reasonable foreseeability is misconceived. The “real possibility” referred to in paragraphs 18 to 21 of *Myhill* arose from contemporaneous evidence already pointing to possible epilepsy. Plaintiffs’ Counsel’s argument proceeded along the lines that because the subsequent experts the Plaintiffs appointed between 2014 and 2026 found neuropsychological deficits, they must have therefore been a ‘real possibility’ in 2008 when the present matter was settled. The Court should have therefore applied paragraph 18 of *Myhill*. This is impermissible as it constitutes a misreading of *Myhill* by Counsel. The contemporaneous medical evidence did not indicate any real possibility of neuropsychological sequelae. The Plaintiffs’ reliance on later expert evidence to retroactively create such a possibility is precisely what *Myhill* prohibits. In *Myhill*, the ‘real possibility’ of the children developing epilepsy was the lower threshold of reasonable foreseeability. It was not a separate test.

[16] It bears repetition that in *Myhill*, the two children suffered ‘serious’ head injuries. One child was hospitalised for 10 days and the other for 6 days. After they had been released from hospital, the Plaintiff in *Myhill* alleged that both had suffered seizures on various occasions. One of the two children had an impact in the occipital area and suffered an infarct, i.e. the death of tissue, in the parietal area of the brain. The SCA stated that this type of focal injury would predispose a child to a higher risk of developing post traumatic epilepsy. Both

¹ *Myhill* at paragraph 18

had electroencephalograms (electric readings of the currents in the brain similar to an electrocardiogram of the heart) but the results thereof were not available. The possibility of epilepsy was not taken into account by the Road Accident Fund (RAF) in the assessment of the childrens' general damages although these facts were known when the compromise occurred.

[17] In this matter, the facts known to the First Plaintiff, 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 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. The Second Plaintiff 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 regarded as being probably post-traumatic. He did suffer a significant scar to his forehead.

[18] Hence, in this matter, the contemporaneous medical evidence did not indicate any real possibility of neuropsychological sequelae; on the contrary, the Neurosurgeon expressly ruled it out. The Plaintiffs' reliance on later expert evidence to retroactively create such a possibility is precisely what *Myhill* prohibits. The Court took note of Dr Tucker's opinion on why the assessment of the severity of the Second Plaintiff's head injury after the accident was difficult. This opinion did not state that the initial assessment was therefore incorrect.

[19] The Court's application of reasonable foreseeability was correct and consistent with binding authority. The Court applied *Myhill* faithfully. The seizures were attributed to a vulnerable brain with pre-existing febrile seizures and were expected to resolve. The Neurosurgeon expressly ruled out cognitive

fallout. There was no factual or medical basis in 2008 to foresee the sequelae later alleged.

[20] The argument that the RAF ought to have assumed that even a minor head injury could lead to severe neuropsychological sequelae is inconsistent with *Myhill*. The RAF is required to consider risks raised by the contemporaneous evidence, not to assume the worst in the absence of such evidence.

[21] The RAF was entitled to finalise the claim on the evidence then available. No error or misdirection is shown. There is no reasonable prospect that another court would find otherwise, and these grounds of appeal are without merit.

GROUND 6 AND 7: COMPARABLE CASES AND QUANTUM

[22] The Plaintiffs argue that the Court erred in rejecting their comparable cases and in relying on the Defendant's older cases when assessing the reasonableness of the 2008 settlement.

[23] The Plaintiffs' authorities involved moderate to severe brain injuries with significant neurocognitive and behavioural sequelae and multiple injuries. They were not analogous to the injuries known in 2008 and could not properly inform the assessment of a reasonable award.

[24] The Defendant's cases, although older and reflecting a conservative era, were materially comparable in terms of injury profile, namely a long facial laceration and a mild head injury without anticipated cognitive sequelae. They were used not as binding precedents but as guides to the relative scale of awards for similar injuries in 2008. The Court's conclusion that a reasonable 2008 range lay between R50 000 and R100 000 was based on the totality of the

evidence and the discretionary nature of general damages. It took cognisance of the significant facial scarring and the contemporaneous opinions of the Plastic Surgeon. Incorporated.² An award which was more than the highest award in Defendants cited cases by about R26 000 was considered to be appropriate in a compromise. No misdirection is shown. These grounds disclose no reasonable prospect that another court would reach a different conclusion. Leave to appeal on them is refused.

GROUND 8: LOSS OF EARNINGS / EARNING CAPACITY

[25] The Plaintiffs contend that the Court erred in dismissing the claim for loss of earnings or earning capacity and in referring to the Auret-Besselaar report.

[26] At the expense of repetition, the correct test is whether the compromise was substantially prejudicial on the facts and medical evidence reasonably available at the time it was concluded. It was not. There were no contemporaneous indicators of future occupational dysfunction.

[27] The reference to the Auret-Besselaar report was contextual and non-determinative. The report was commissioned, served, and filed by the Plaintiffs and used by their own actuary. It was mentioned to illustrate the inherent variability of medico-legal projections, particularly where two experts instructed by the same party produced actuarial losses differing by approximately R1 million. Furthermore, in circumstances where the Plaintiffs were critical of the Defendant for allegedly failing to act justly in 2008, it would have been preferable for the Court to have been expressly alerted to the existence of both reports, particularly given the substantial discrepancy between them. The Court had no duty, as the Plaintiff's suggest, to alert them to a document they themselves placed in the court file or to give them an

² E.g., paragraphs 15 and 52 of the judgment

opportunity to deal with it. A Court is entitled to refer to documents in the file for contextual, conduct, or illustrative purposes. These observations do not affect the outcome but underscores the need for full and balanced disclosure of expert material in complex damages litigation. The Plaintiffs suffered no prejudice, and the report played no role in the Court's findings on foreseeability or liability. It is inconceivable, as Plaintiff's Counsel seemed to suggest, that the reference to this report would have impacted on the Court's eventual findings.

[28] The Plaintiffs' Counsel's criticism of the Court's reference to the Second Plaintiff's actual life course, as an 'unnecessary finding' is misplaced. It was neither unnecessary nor determinative of foreseeability. It was relevant to assessing the reliability of the Plaintiffs' retrospective expert reconstructions and the contention that the Second Plaintiff suffered catastrophic neuropsychological fallout. Courts routinely consider real-world functioning when evaluating expert evidence.

[29] This ground discloses no misdirection and no reasonable prospect that another court would reach a different conclusion. Leave to appeal on this ground is refused.

GROUND 9: ALLEGED COMPELLING REASON TO DEVELOP THE COMMON LAW

[30] The Plaintiffs contend that, if the Court correctly applied *Myhill*, the matter should nevertheless be referred to the Supreme Court of Appeal to develop the common law so as to permit reliance on hindsight when assessing prejudice in the context of a compromise concluded on behalf of a minor.

[31] This contention is untenable. *Myhill* is binding authority. A High Court is not at liberty to depart from it, to create exceptions to it, or to develop the

common law in a manner inconsistent with it. The requirement that prejudice must exist at the time of the compromise is a foundational principle of the law of compromise, the law of contract, and the need for finality in RAF litigation. No constitutional basis for development was identified. Moreover, even if the law were different, the Plaintiffs' case would fail on the facts: the contemporaneous medical evidence did not indicate a real possibility of neuropsychological sequelae or the potential of occupational difficulties necessitating loss of earnings. The compromise bore a reasonable relationship to the damages then claimable. This ground of appeal is without merit. It discloses no compelling reason for an appeal as contemplated in section 17(1)(a)(ii) of the Superior Courts Act. Leave to appeal on this ground is refused.

CONCLUSION

[32] Section 17(1) of the Superior Courts Act requires the Court to grant leave to appeal only where there is a reasonable prospect that another court would come to a different conclusion, or where there is some other compelling reason for the appeal to be heard.

[33] Having considered all nine grounds, the Court is satisfied that the judgment contains no error or misdirection. The Court's factual findings are supported by the record, the application of *Myhill* is correct and unavoidable, The Plaintiffs arguments rely on hindsight, which the SCA expressly prohibits, the quantum assessment falls within the Court's discretion, the causation and foreseeability findings are unassailable, and no novel legal issue or constitutional matter arises or forms a compelling reason to grant leave to appeal.

[34] There is accordingly no reasonable prospect of success and no compelling reason for the appeal to be heard. The Defendant sought its costs if it prevailed in its opposition to the application for leave to appeal. There is no reason why the Court's order should reflect otherwise.

ORDER

In the premises, the order follows:

The application for leave to appeal is dismissed with costs.

BHOOPCHAND AJ

Acting judge

High Court

Western Cape Division

Judgment was handed down and delivered to the parties by e-mail on Monday 25 May
2026

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