

3. Advocate Johan Malherbe Killian was authorised in terms of the Court Order which Court Order reads as follows:

- 2.1. *"Instruct attorneys and counsel to investigate the reasonableness or otherwise of the settlement arrived at on or about the 18th of October 2015 between, on the one hand, the Third Respondent acting in her capacity as guardian of the minor child and, on the other hand, the First Respondent, of the minor child's claim against the First Respondent arising out of injuries sustained by her in a motor-vehicle collision which occurred on 19 September 2001 ("the settlement");*
- 2.2. *Take appropriate decision, on advice of the attorney and counsel on the strength of the aforesaid investigations, as to the following:*
 - 2.2.1. *Whether to seek to repudiate the settlement and, if so, the appropriate litigatory steps to take pursuant to that repudiation;*
 - 2.2.2. *Whether, either in the alternative to the foregoing or in conjunction therewith, to institute action against the Second Respondent.*
- 2.3. *Take such steps as are deemed by the curator ad litem on advice as aforesaid to be appropriate in light of the foregoing, including (but not limited to) instituting action against the Third Respondent and/or against the Second Respondent.*
- 2.4. *In the foregoing context, take all steps as are deemed by the curator ad litem on advice as aforesaid to be appropriate to protect the interest of the minor child and to recover from any party such compensation as the minor child might be entitled to arising out of the injuries sustained by her in the aforesaid collision."*¹

¹ As per judgment in the Johannesburg Local Division under case number 2016/083090

4. In executing his mandate Killian N.O. instructed Erasmus De Klerk Incorporated to issue summons against the Road Accident Fund to set aside a settlement which settlement was reached on 18 October 2005.
5. The history that gave rise to the settlement was pleaded in detail by the Plaintiff which is set out in the particulars of claim as follows:

"13.

13.1 During October 2001 and at Alberton, the minor child's mother, Susara Elizabeth Allen, ("Mrs Allen"), acting in her representative capacity as the mother of mandate with a firm of Attorneys, Van Rhyns Attorneys ("the attorneys"), represented therein by L Green ("Green"), in terms of which Mrs Allen, acting in her aforesaid capacity, mandated the attorneys to lodge and prosecute with the Defendant a claim for compensation on behalf of the minor child ("the mandate agreement").

13.2 The mandate agreement was partly oral partly written;

13.3 The written portion of the mandate agreement consists of a special power of attorney attached hereto marked annexure "J".

14.

14.1 Pursuant to the foregoing, the attorneys, during October 2001, lodge with the Defendant a claim for compensation on behalf of the minor child.

14.2 in acting as aforesaid, the attorneys complied on behalf of the minor child with the requirements of Section 24 of the Act, alternatively they were, in terms of the provisions of Section 24(5) thereof, deemed to have so complied by virtue of the Defendant's failure to object to the validity of the aforesaid claim, the period prescribed by Section 24(6)(a) of the Act, having

expired since the attorneys so complied, alternatively were deemed to have so complied.

15.

15.1 On 10 October 2005, the Defendant offered to compromise to minor child's claim against it on the basis of payment in full and final settlement of R70,000.00 and agreed party and party costs of R3,000.00.

15.2 A copy of the Defendant's aforesaid offer is annexed hereto marked annexure "K".

16.

16.1 Mrs Allen (acting in her aforesaid representative capacity) consulted with Green with regard to the Defendant's offer;

16.2 Green advised Mrs Allen that the settlement offer is a good offer;

16.3 Mrs Allen, in her capacity as mother and natural guardian of the minor child, instructed Green to accept the Defendant's aforesaid offer;

16.4 Green accepted Mrs Allen's aforesaid instruction to accept the Defendant's offer.

17.

17.1 In accordance with Mrs Allen's instructions to Green to that effect and Green's aforesaid acceptance of that instruction, the attorneys on 18 October 2005 accepted the Defendant's aforesaid offer in respect of the minor child by way of letter dated 18 October 2005 ("the compromise agreement").

17.2 A copy of the letter is attached hereto marked "L".

18.

18.1 Pursuant to the foregoing, the Defendant in due course effected payment to the attorneys on behalf of the minor child of the amount, and the costs, outlined hereinabove.

18.2 The attorneys in due course paid the net amount, after deduction of fees and disbursements, to Mrs Allen in her aforementioned capacity."

6. The cause of action was pleaded in the alternative. Claim 1 was that the compromise agreement referred to *supra* was manifestly contrary and prejudicial by comparison with the actual extent of the minor child's damages and that the compromise should be set aside and that *restitutio in integrum* be granted and claim 2 that not only was the compensation wholly inadequate but that the minor child's mother was not authorised to consent to a juristic act that was contrary to the minor child's interest and as a consequence of the aforesaid the compromise agreement is voidable.
7. The quantum being claimed is an amount of R5 236 739.75 calculated as follows:
 - 7.1. R5 309 739.75 – R73 000.00.
8. The Defendant chose to file a plea of denial.
9. In the Particulars of Claim the Plaintiff claims that the minor child suffered the following damages:
 - 9.1. A head injury;
 - 9.2. A brain injury;
 - 9.3. An injury to the minor child's spine;
 - 9.4. A superficial laceration of the scalp;

- 9.5. Paraplegia of the lower limbs;
 - 9.6. Abrasions of the lower back and leg;
 - 9.7. Post-traumatic shock.
10. In the Particulars of Claim, the Plaintiff pleads that as a direct consequence of the collision and the injuries sustained in paragraph 9.1 to 9.6 supra, the minor child:
- 10.1. Received medical and hospital treatment and will in the future undergo hospital and medical treatment;
 - 10.2. Underwent radiological examinations;
 - 10.3. Underwent physiotherapy;
 - 10.4. Endured pain, suffering and discomfort; still does so and will do so in the future;
 - 10.5. Experienced a loss of and the enjoyment of the amenities of life; still suffers such loss and will do so in the future;
 - 10.6. Suffered total complete incapacity and will in the future suffer a substantial degree of permanent incapacity;
 - 10.7. Will in the future suffer a loss of earnings/earning capacity;
 - 10.8. Was permanently disfigured;
 - 10.9. Suffered severe permanent psychological trauma and will do so in the future.
11. As the Defendant filed a plea of denial Counsel on behalf of the Defendant was asked which of the above injuries, the *sequelae* of the injuries and which

of the history of the matter as pleaded was admitted and which is denied and from the bar, he admitted the following injuries:

- 11.1. A head injury;
 - 11.2. Superficial laceration to the scalp; and
 - 11.3. Abrasions of the back and leg.
- 12. Defendant's counsel, disputes the brain injury, an injury to the minor child's spine², the paraplegia of the lower limbs and post-traumatic shock as pleaded by the Plaintiff.
 - 13. Defendant's counsel disputes the *sequelae* of the injuries as set out in paragraphs 10.4 to 10.9 *supra*.
 - 14. Defendant's counsel further admits the following paragraphs as quoted in paragraph 4 *supra* paragraphs namely "13.1, 14, 14.1, 14.2, 16 to 18.2."
 - 15. The letter referred to as Annexure "L" in paragraph 4 *supra* under paragraphs 17.1 and 17.2, reads as follows:

"We have been in consultation with our client and accepts the offer for settlement in the amount of R70 000.00 in full and final settlement for the following:

Section 17(4)(a) undertaking

<i>General Damages</i>	<i>R70 000.00</i>
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<i>Subtotal</i>	<i>R70 000.00</i>
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² Counsel on behalf of the Defendant at first stated when ask about An injury to the minor child's spine that "yes, because I will have to refer to the reports now" but during the cross examination of the Plaintiff's witness he corrected the statement by saying " Just to correct. I did not agree that there was a spinal injury..."

*Plus Costs (Including Disbursements) to be taxed on a
Magistrate Court
Scale"*

16. The Plaintiff's only witness was Advocate Killian who testified that he is a member of the Johannesburg Bar from 2006 till date hereof and that he acted in terms of his mandate by appointing *inter alia* Advocate Combrink together with Erasmus de Klerk Attorneys to investigate the matter.
17. During his testimony, he referred to 8 reports from specialists which are annexed to the pleadings which reports were also in the possession of the Defendant at the time when the Defendant made its offer during 2005.
18. The said reports was, therefore, the source documents³ on which the Defendant based its investigation in terms of the Act⁴. He testified that he considered all the doctors' reports in conjunction with each other and came to the conclusion that the minor child was severely prejudiced as the amount tendered and accepted was wholly inadequate, not only on the basis that the general damages was inadequate but also on the basis that future loss of income capacity was not considered nor was it concluded in the settlement proposal.
19. During cross-examination, the counsel for the Defendant was nit-picking at only certain sentences in the different reports but throughout Advocate Killian's testimony, he insisted that the reports should be seen in conjunction with each other.
20. Advocate Killian was a credible witness and I am in agreement with his approach that the reports should be seen in conjunction with each other.

³ Counsel for the Defendant was asked by the Court "Is it common cause that these reports that you are debating with the witness were in possession of the Fund at the time of the tender?" The counsel stated "Yes, that is the argument of the defendant." Counsel for the Defendant further stated that the Defendant had proper regards to the documents, meaning the expert reports referred to in the Plaintiff's particulars of claim which was the only documents on which evidence was led by the Plaintiff and being cross-examined by the Defendant's counsel.

⁴ Road Accident Fund Act 56 of 1996

21. The Defendant did not call any witnesses and closed its case. This court, therefore, does not have the advantage of what facts in the reports the Defendant relied upon when it came to a conclusion that only general damages in the amount of R70 000.00 should be tendered as adequate compensation for the injuries of the minor child.
22. For this court to adjudicate this matter one needs to have regards to the reports at the time when the Fund investigated this matter and not at the current reports.
23. I now turn to the reports at the time when the offer was made by the Defendant.
24. Dr David Barnes, a specialist orthopaedic surgeon's report, dated 4th July 2002 refers in his report to a neurologist that examined the minor child on 26 September 2001 where there is a comment that "*there is a right lower limb weakness with lower motor neuron signs.*" The doctor further stated that the minor child has a drop foot plastic splint fitted to the right leg which fits inside her shoe.
25. He further states that his examination suggests strongly a spinal cord injury at the level of the upper lumbar spine. That the clonus of the calve muscles of the right leg highly suggestive of an upper motor neuron injury of the right leg.
26. That the minor child has significant functional impairment of her right lower limb due to an upper motor neuron lesion probably situation in the thoracic lumbar spinal cord.
27. Dr Snyckres, neurosurgeon's report, dated 16 October 2002, stated that the minor child walks with a marked limp and an externally rotated leg. If she does not recover fully, which is likely, certain working categories are likely to be closed to her and the occupational therapist will have to comment on this.
28. Dr Susan Badenhorst, occupational therapist's report, dated 15th April 2004 states that the development delays that the claimant reveals of her perceptual

skills can reduce learning opportunities at school and further her assessment has revealed that the claimant physical and gross motor development has been influenced by the trauma. She was a healthy toddler before the accident and presently she has many physical, emotional and perceptual difficulties.

29. The report further states that if the minor child not be developing the perceptual activities her chances of becoming and employee in a well-paid occupation or be able to study further in the field that she would like to empower herself in might be impossible because of intellectual under-stimulation.
30. Doctor Flemming's neurologist report⁵ states that the minor walked with a very disturbed gait, appearing to show a Trendelenburg phenomenon when she stepped on the right leg and this resulted in a very abnormal and almost grotesque gait.
31. The report further state that the minor child clearly has a severe neurological lesion affecting the right leg.
32. The report went further to state that the minor child must have suffered damage to her spinal cord and this has resulted in a severe spastic right leg.
33. Under the heading OPINION in the report, it is stated that the minor has suffered a mild head injury and clearly has a severe neurological lesion affecting her right leg.
34. The report under "5" PROGNOSIS states that further improvement in the spastic right leg is unlikely.
35. Under "6" PERMANENT DISABILITIES it states that the minor has permanently impaired function with spasticity in the right leg. She will always have a severe gait disturbance, inability to run or walk any substantial distance.

⁵ The report stated that the date of consultation was 15 September 2004 but the report itself is undated

36. Under "8" LOSS OF AMENITIES, it states that the minor will be precluded or restricted in activities involving walking, running or long-standing. She would be unable to dance effectively.
37. Under "9" DISFIGUREMENT it states that the minor's grotesque, spastic fait certainly represents a form of disfigurement in a pretty young girl.
38. Under "11" EMPLOYABILITY AND EARNING CAPACITY it states that the minor may not be substantially affected as she does not have any mental change or problems with manual dexterity. She would be able to walk, for example, in an office setting. However, certain jobs which would involve more ambulation be well be restricted and the net effect would be a moderate impairment in her long term earning capacity.
39. In Doctor Swartz Orthopaedic surgeon's report, dated 5 October 2004, it states that he is in agreement with Doctor Flemming's report of what is set out *supra*. His report further stated that the minor child sustained a spinal injury as a result of the accident and this has resulted in a spastic right lower leg with significant shortening of the right leg as a result of the neurological injury. The spasticity and shortening are responsible for the functional impairment experienced.
40. In Doctor Schultz, neurophysiologist report, dated 13 October 2004, it states unilateral (right) slowed conduction through the posterior (dorsal) columns in the spinal cord in relation to the dorsal thoracic spine. Normal conduction within the somatosensory cortex. There is electrophysiological evidence of significant central conduction slowing through the right-sided dorsal columns in relation to the thoracic spinal cord.
41. When one has regards to the medical reports that the Defendant had in its possession⁶ when it made the tender it is clear that the injuries as set out in paragraphs 9.3 and 9.5 *supra* and the *sequelae* as a result of the injuries set out in paragraphs 10.4 to 10.8 *supra* are contained in the reports and the offer

⁶ It is clear that the Defendant did not investigate this claim properly as it is incumbent to do.

made on general damages alone must have disregarded these injuries alternative did not investigate the injuries.⁷

42. There is no evidence that the Defendant investigated the neurological injury, the spinal injury, the possibility of a loss of earning capacity nor that the minor child walks very abnormally, almost with a grotesque gait.
43. The amount of R70 000.00 relating to general damages is a substantial prejudice that the minor child suffered and it's out of proportion if one has regards to the injuries suffered.
44. The minor child loss of earning capacity that was not investigated alternative not taken into account when there is evidence that there is a possible loss of earning capacity is an even more serious prejudice that the minor child has suffered.
45. I am mindful of the case law that the court should be cautious when interfering with a compromise which was seriously concluded⁸ , but having regard to the facts of this case and the substantial prejudice that the minor child has suffered this court cannot allow the agreement to stand.
46. Accordingly, I make the following order:
 - 45.1. The Compromise Agreement entered into on behalf of the minor child is hereby set aside;
 - 45.2. *Restitutio in integrum* is hereby granted to the minor child;
 - 45.3. Costs of suit relating to prayers 45.1 and 45.2 *supra*.
 - 45.4. Prayers 3 and 4 of the summons is postponed *sine die*.

⁷ This Court does not take into account factors that was unknown at the time of the offer but on the contrary, all the facts was available to the Defendant.

⁸ Road Accident Fund v Myhill N.O. 2013 (5) SA 426 (A)



**CLH HARMS
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA GAUTENG
DIVISION, PRETORIA**

Heard on: 27 September 2019
Judgement delivered:

Appearances:

For the Plaintiff: Adv Combrink

For the Defendant: Adv Sioga