Editorial note: Certain information has been redacted from this judgment in compliance with the law.

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 505/2012
Reportable

In the matter between:

ROAD ACCIDENT FUND **Appellant**

and

ADVOCATE ELE MYHILL, NO
(S[…] MINORS) **Respondent**

Neutral citation: *Road Accident Fund v Myhill NO* (505/2012) [2013] ZASCA 73 (29 May 2013)

Coram: Brand, Shongwe and Leach JJA and Willis and Van der Merwe AJJA

Heard: 3 May 2013

Delivered: 29 May 2013

Summary: **Contract – rescission of a contract concluded on behalf of a minor to settle minor's claims – defendant sued not entitled to set-off against claims brought on behalf of minor by a custodian parent any amount personally owed to it by the parent – settlement concluded on basis of such**

set-off and without making any allowance for real prospect of minor requiring future medical treatment – settlement substantially prejudicing minor – settlement set aside.

O R D E R

On appeal from: South Gauteng High Court, Johannesburg (Strydom AJ sitting as a court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

J U D G M E N T

LEACH JA (BRAND and SHONGWE JJA, WILLIS and VAN DER MERWE AJJA concurring)

[1] The appellant is the Road Accident Fund, an organ of state established under s 2(1) of the Road Accident Fund Act 56 of 1996, having as its primary function the provision of compensation to persons injured through the negligent driving of motor vehicles. The crisp issue arising in this appeal is whether agreements settling the claims for damages brought against the appellant on behalf of two minors should be recognised as binding or set aside. The high court held that they should be set aside, but granted the appellant leave to appeal to this court.

[2] On 20 March 1997, Ms S[…] S[…] ('the plaintiff') and her two children, P[…] and L[…] S[…],[1] respectively aged two years and four months at the time, sustained bodily injuries when they were run down by a motor vehicle. According to the plaintiff, the incident occurred on or alongside an unpaved road in Katlehong as she was walking facing oncoming traffic. She alleges that she was carrying L[...] on her

[1] For convenience I intend to refer to the two minors simply by their first names. No disrespect is intended.

back and holding P[…] by the hand when a motor vehicle, which approached from the rear, moved onto its incorrect side of the road and collided with them.

[3] Both P[...] and L[...] were hospitalised as a result of head injuries they sustained in this collision. Not surprisingly, the plaintiff also appears to have been injured, although the nature and severity of her injuries were not canvassed in the court a quo. Be that as it may, in due course the plaintiff consulted an attorney, Ms Cynthia Chabana of Germiston, whom she instructed to claim compensation from the appellant. Ms Chabana proceeded to complete the prescribed claim forms in respect of a personal claim of the plaintiff and separate claims by her in her capacity as mother and natural guardian of P[...] and L[...]. The claim forms, together with various supporting documents, including copies of the police accident report form, plan and key as well as the plaintiff's police statement and an affidavit by her explaining the circumstances under which the collision had occurred, were posted to the appellant on 19 August 1998.

[4] The claims made on behalf of the minors were not unduly substantial, totalling R57 260 for P[...] and R60 260 for L[...]. The major item of each claim related to so-called 'general damages', in respect of which R55 000 was claimed on behalf of P[...] and R60 000 for L[...]. The balance claimed in respect of each child was made up of R260 for past hospital expenses, R1 000 for past medical expenses and a further R1 000 for estimated future medical expenses.

[5] The claims were dealt with at the appellant's Randburg branch. On receipt, a so-called 'sub-0' file relating to the plaintiff's personal claim was opened. Into this were placed two sub-files, respectively numbered as the '01' and '02' files, each of which related to the claim of one of her children. The claims were then forwarded for assessment and were allocated for that purpose to Mr Ambrose Dickenson, a senior claims handler.

[6] Following the appellant's standard procedure, Mr Dickenson passed the claims onto a so-called 'office' operating under him for initial assessment. The office he selected was staffed by a claims handler, Siphiwe Khumalo, and a claims assistant, Adri Oosthuizen, who proceeded to seek further information from Ms Chabana. This

led to the office preparing assessments in respect of both P[...] and L[...]'s claims. Due to a lack of supporting documentation, no allowance was made for hospital or medical expenses and the assessments related solely for general damages. In respect thereof, an amount of R10 000 per child was suggested.

[7] The assessments and all available documents were then returned to Mr Dickenson for him to deal further with the claims. Agreeing with the assessments, he authorised Ms Oosthuizen to commence settlement negotiations and to start the bidding, so to speak, by offering R8 000 in respect of P[...]'s general damages and R7 000 for those of L[...]. However, as the merits of the claim had been assessed on the basis that the plaintiff had been partially to blame for the collision (an issue to which I shall return in due course) he further instructed that the amounts offered should be reduced by 30% to cater for the plaintiff's contributory negligence. Even though he accepted that the claims of the two minor children could not be subject to an apportionment, Mr Dickenson testified that it was the appellant's standard practice to do so in these circumstances as it eliminated having to subsequently sue custodian parents for a contribution in respect of amounts paid to their children.

[8] Accordingly, on 21 April 1999, Ms Oosthuizen wrote to attorney Chabana offering to settle the children's claims by paying R5 600 in respect of P[...] (R 8000 less a 30% deduction of R2 400 in respect of an apportionment) and R4 900 in respect of L[...] (R7 000 less a 30% apportionment of R2 100). An additional sum of R1 350 per claim was offered as a contribution towards the plaintiff's costs.

[9] For some inexplicable reason the plaintiff was not called to testify in the court below to explain what had happened when these offers were received, and one is left to infer that attorney Chabana probably recommended that they should be accepted. In any event, on 10 May 1999 the plaintiff, in her capacity as P[...] and L[...]'s mother and natural guardian, signed discharge forms accepting the offers. Pursuant thereto, on 18 May 1999 the amounts concerned were paid to attorney Chabana. Unfortunately P[...] and L[...] derived no benefit from this as we were informed that attorney Chabana had subsequently disappeared together with the amounts she had received on behalf of the plaintiff. Sad though that this may be, it can bear no reflection upon the issues to be decided.

[10] Time passed, and some 10 years later a practising advocate, the respondent, was appointed as curator ad litem to represent P[...] and L[...] in civil proceedings against the appellant. In due course the respondent issued summons, seeking an order setting aside the settlements and claiming substantial damages for the two children arising out of their injuries. Inter alia, it was alleged in the summons that at the time the offers of settlement were made, a sum of R850 000 would have been fair and reasonable compensation for each child. Before the matter came to trial the parties agreed that the issue of liability should be determined at the outset as a separate issue, with the issue of damages standing over for later decision if needs be. An order to that effect was made, and the trial in the court a quo proceeded solely in regard to the so-called 'merits' of the claim.

[11] In seeking to set aside the settlement agreements, the respondent relied on three alternative causes of action: first, that the agreements were void or voidable due to mistake; second, that they were prejudicial to the interests of the two children; and third, that in making the offers, the appellant had breached a statutory duty to investigate the nature and extent of the injuries suffered by the children and their consequences, and to offer them reasonable compensation. The court a quo appears to have been somewhat sceptical about the sustainability of the first and third of these, but found in favour of the respondent on the second. The correctness or otherwise of its decision in that regard was the sole issue debated in the appeal. It is to this issue that I now turn.

[12] The principles relating to the rescission of a contract concluded on behalf of a minor are well established and do not need to be dealt with in any detail. Suffice it to say that the parties were correctly agreed that a contract may be set aside under the *restitutio in integrum* if it is shown that it was prejudicial to the minor at the time it was concluded.[2] In that regard, it is necessary to show that the prejudice suffered was serious or substantial. As Boberg states 'to succeed in a claim for restitution, the minor must show that the transaction against which he or she objects was inimical from its inception'.[3]

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[2] See in this regard Van Heerden *et al Boberg's Law of Persons And The Family* (2nd ed) pg 724 and the authorities there collected at footnote 278, and Boezzart *Child Law in South Africa* pg 30.
[3] At 724-725.

[13] Of course in considering the issue of prejudice in a case such as this, a court must guard against being wise after the event and taking into account factors unknown at the time the claims were settled. In the present case, at the time the claims were compromised the only medical information available in regard to the nature and severity of the children's injuries and the sequelae thereof was that contained in the medical report section of the prescribed claim forms and the children's hospital records.

[14] The prescribed medical reports in both cases were compiled by a Dr Snide of the Natalspruit Hospital. He recorded that both children had suffered head injuries that were 'serious'. Dr Snide's competence to assess the severity of head injuries was questioned on appeal, counsel for the appellant pointing out that he was an orthopaedic surgeon not a neurosurgeon, and that he had recorded that P[...] had been unconscious whereas her hospital records reflect that she had been conscious an hour or so after the injury had been sustained. Dr Snide did not testify, and there is thus no explanation for this possible contradiction. But more importantly, there is no reason to think that an orthopaedic surgeon, who is after all a trained medical specialist, was not able to recognise and evaluate whether a head injury should be regarded as 'minor', 'fairly severe' or 'severe' ─ those being the three standard categories set out in the medical report. Moreover P[...] was hospitalised for ten days after the collision and L[...] for six days. These periods at first blush indicate that their head injuries were by no means insubstantial.

[15] Importantly the hospital records show that after P[...] and Lufuna had been released from hospital, the plaintiff alleged that both had undergone seizures on various occasions. This complaint had led to a Dr Levuno examining P[...] in October 1998, but although he recorded his opinion that whatever fits she might have had were not related to the accident, subsequent entry in P[...]'s hospital records of a complaint by the plaintiff that P[...] had twice had seizures throws some doubt on this. The plaintiff described two incidents, the most recent in August 1998, where a seizure was accompanied by 'uprolling of the eyeballs.' According to the evidence of Ms Adan, a neurophysiologist who testified in the court below, this was a classic description of a general tonic chronic epileptic seizure. The plaintiff's complaint in this regard led to arrangements being made for P[...] to go to an epilepsy clinic on 14

October 1998 and for her to be booked for an electro-encephalogram, an examination used to diagnose abnormal activity in the brain typical of epileptic seizures. Unfortunately her hospital records are incomplete. There is no report from the epilepsy clinic and it is not known whether P[...] received the encephalogram or, if she did, what it showed.

[16] Turning to L[...], Dr Snide's report reflected that she was suffering from concussion on admission to hospital and that she was referred for neuro-observation. An impact wound to the occipital area was noted. This is consistent with the plaintiff's statement submitted to the appellant that a portion of L[...]'s scalp was removed. Whatever L[...]'s symptoms may have been, it was decided to perform a CT scan later that day. It showed an infarct in the parietal area of the brain just behind the frontal lobe where a blood clot obstructing the blood flow in that area caused the tissue around it to die. It was accepted that a child with a focal injury such as this would be at a higher risk of developing post-traumatic epilepsy. Indeed in L[...]'s case as well, the plaintiff subsequently took her back to the hospital and complained that she had twice had seizures. L[...], too, was booked for an electro-encephalogram and was to attend the epileptic clinic at the hospital on 14 October 1998. However, as was the case with her sister, the results of these investigations were not available.

[17] In assessing the general damages of each child at R10 000, Mr Dickenson and his office were guided by a list of recommended awards for general damages used by the appellant at the time. In respect of a fracture of the base of the skull, a sum of R8 640 was suggested in cases with minor after-effects and R10 800 in cases involving moderately severe after-effects. For a fracture of the parietal area of the skull, it recommended R9 720 in cases of minor after-effects and R14 040 in the event of there being moderate after-effects. How these guideline figures had been arrived at was unexplained. It is of some relevance that Mr Dickenson did not know what an infarct was and clearly he did not appreciate the severity of L[...]'s injury. He also incorrectly thought that the occiput, the site of L[...]'s external injury, was at the front part of her head.

[18] Be that as it may, although the evidence of Mr Dickenson was somewhat ambivalent about the issue, it appears that possible epilepsy was not taken into account by the appellant's staff in the assessment of the children's general damages. This is borne out by the appellant's assessment forms and the failure to make any allowance in respect of future medical expenses. Indeed appellant's counsel was driven to argue that epilepsy had been disregarded as, on the medical records available to the appellant at the time, it had not been positively diagnosed. That may be so, but the medical information available indicated, as I have said, that they had each sustained a head injury that was by no means insubstantial and had required hospitalisation of some duration. Moreover, not only had L[...] suffered an infarct in the brain but the plaintiff had complained that both children had suffered epileptic seizures. This complaint could not just be ignored for purposes of a compromise. Post-traumatic epilepsy is a complication wholly consistent with head injuries such as those the children had suffered. Any reasonable assessment of the children's damages should therefore have taken into account that there was a real possibility that they had developed post-traumatic epilepsy.

[19] Taking that possibility into account, the amounts of R8 000 and R7 000 offered as an assessment of the general damages of the two children were not only substantially less than the appellant's own assessment of the claims but were, in my view, wholly inadequate. In reaching that conclusion I am aware that substantial increases in awards have occurred since 1999 and that it is necessary to consider what would have been reasonable then and not now. But the amounts offered, even then, would have been appropriate only for substantially less severe cases, and certainly not in cases where there were indications of post-traumatic epilepsy.

[20] It is neither necessary nor desirable to deal with the issue of the general damages any further. Suffice it to say that I am satisfied that the offer to settle P[...]'s general damages at R8 000 and those of L[...] at R7 000 was wholly inadequate and that, had the real possibility of them having suffered epilepsy as a result of their injuries been taken into account as it should have been, a reasonable assessment of their damages would probably have substantially exceeded the appellant's assessment of R10 000.

[21] The failure to take epilepsy into account is also crucial in a further respect. The compromise made no allowance in respect of future medical expenses. There was direct evidence before the court a quo that the cost of treating epilepsy could amount to R1 000 per month and, that being so, in the event of epilepsy manifesting itself, the amounts at which the claims were settled would be wholly inadequate. Even if on the medical information available epilepsy was no more than a real possibility and not a probability, that does not mean future medical treatment could be discounted in settling the claims. It is well established that in actions arising out of bodily injuries involving prospective loss, a plaintiff is not required to prove on a preponderance of probability that such loss will in fact occur and a court in assessing future loss may make a contingency allowance for the possibility of it occurring.[4] Moreover, the real possibility of future medical expenses could easily have been catered for by the appellant providing a certificate in respect of future medical expenses under s 17(4)*(a)* of the Act. Indeed, such certificates are tailor made to deal with any uncertainties that might arise in cases such as this. In the absence of a certificate or any other provision for the real contingency that future medical expenses might be incurred to treat both children for epilepsy in the future, the settlements were obviously to P[...] and L[...]'s prejudice.

[22] Then there is the fact that the already parsimonious amounts offered were reduced by a further 30% to cater for an apportionment against the plaintiff herself. One does not know on what basis the appellant concluded the plaintiff had been 30% to blame for the collision. On the plaintiff's version (that the vehicle swerved across the road and ran her and the children down from the rear while they were either close to the edge or indeed off the road) it is hard to see how it could have been concluded that she had been negligent to any degree. Unfortunately the appellant's assessment of the merits of the collision was in the plaintiff's sub-0 file and no copy was available in the sub-files of the two injured children that were handed in as exhibits in the court below. In addition, for some inexplicable reason the merits assessment was neither called for nor debated in any detail in the court below. When asked about it, Mr Dickenson had a vague recall that it had been

[4] See *Jowell v Bramwell-Jones* [2000] 2 ALL SA 161 (A) para 23, *Blyth v Van den Heever* 1980 (1) SA 191 (A) at 225E-226B and *Burger v Union National South British Insurance Co* 1975 (4) SA 72 (W) at 75D-F.

based on an allegation that the plaintiff had moved into the road with the children. But even if such an allegation had been made, its source is a mystery. It is certainly wholly inconsistent with all the police documentation. Be that as it may, for present purposes I am prepared to accept that the 30% apportionment which the appellant sought to apply was based on a bona fide assessment of the plaintiff's negligence and was not merely a groundless attempt on the part of the appellant to reduce the extent of its liability. Even so, it is another matter whether it was entitled to apply an apportionment against P[...] and L[...]'s damages.

[23] The general principle is trite that in order for set-off to operate between two parties there should be reciprocal indebtedness which, if both debts are equal, leads to their mutual discharge or, if they are not equal, to the larger being reduced by the amount of the smaller.[5] It is also trite that individuals in their personal capacities are treated as different persons from when they act in representative capacities. Consequently 'a debt owed by or to a person in his individual capacity cannot be set-off against a debt owed to or by the same person in a representative capacity whether as executor, trustee, custodial parent, stakeholder or however'.[6]

[24] Despite this, the appellant argued that it had been permissible as an exception to the general rule for it to set-off any amount it could recover from the plaintiff in her personal capacity from what it owed her in her capacity as mother and natural guardian of her two minor children. In advancing this contention the appellant relied on Voet 16:2:8 the opening passage of which reads as follows: [7]

'*Set-off in cases of* ─

(i) Guardian's claim against own debtor and debt of ward. ─ Furthermore a guardian who sues against his own debtor in his own name is not held liable to suffer set-off of what his own ward owes to the opponent sued.

(ii) Guardian's claim for debt to ward and his own debt. ─ Nor does what a guardian claims in the name of his wards from a debtor to the wards undergo set-off of what the guardian owes in his own personal name to such debtor of the wards.

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[5] *Blakes Maphanga Incorporated v Outsurance Insurance Company Ltd* [2010] 3 All SA 383 (SCA) para 14.
[6] Christie *The Law of Contract in South Africa* 6th ed at 498.
[7] Voet *Commentary On The Pandects* (Gane's translation) 16:2:8.

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

[25] The appellant relied solely upon Voet's opinion in *(iii)* above as authority for its argument. However, not only does that passage appear to be inconsistent with the principle set out in *(ii),* but it flies in the face of the well-established general principles of set-off just mentioned — which are consistent with what is set out in *(i)* and *(ii).* It is therefore not surprising that the principle espoused in *(iii)* has been the subject of trenchant criticism. Christie refers to it as being an authority 'of doubtful validity'[8] while Wessels, in his seminal work on the law of contract, states 'the debts are in (such a) case not mutual, and it seems difficult to reconcile the opinion of Voet with . . . the general principle'.[9] Wessels further points out that Voet's opinion in this regard follows that of Faber and that '[t]here is no evidence that the Roman-Dutch Law recognised Faber's principle.'[10]

[26] Wessels suggests that Voet favoured the principle suggested by Faber as both were of the opinion that its operation would not prejudice a minor.[11] It seems to me, however, that the prejudice to a minor in a case such as the present is obvious; the amount of an innocent minor's claim against a defendant would be diminished by reason of the fault of another. In my view even if the underlying premise on which Voet and Farber based their opinions reflected the views of their time, it cannot be regarded as valid today.

[27] Indeed more than a century ago the author of a case note published in the South African Law Journal, in referring to Voet 16:2:8, commented that 'when the tutor on behalf of the ward sues A, A cannot demand that what the tutor personally owes him shall be set-off against the claim now made'.[12] Similarly Wessels states:[13] 'Hence, if a guardian demands a debt due to his ward, the minor's debtor cannot claim to

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[8] Christie at 498.

[9] Wessels *Law of Contract in South Africa* (2nd ed) vol 2 § 2517.

[10] Referring to Van Leeuwen *Censura Forensis* 1.4.36.20; Pothier *Obligation* s 594; Demolombe *Contrats* vol 5 n 561.

[11] See Gane at 157.

[12] South African Law Journal (Vol 20) 1903, 55 at 56.

[13] §2515.

set-off what is due to him by the guardian in his own right and not in his capacity as guardian.'

[28] Not only has this been accepted as a correct reflection of the law for many years[14] but there seems to me to be no reason in principle why the general rules of set-off, which exclude a debt owed by or to an individual in his personal capacity being set-off against a debt owed by or that person in a representative capacity, should not operate in respect of claims brought by custodian parents on behalf of their minor children. Not to apply the general rule can only be to the disadvantage of any such minor. While there do not appear to be any reported decisions advancing the contrary conclusion, I think the time has now come for this court to put the matter beyond doubt and to rule that a debtor liable to a minor child, when sued by the child's custodian parent, may not set off against its liability to the child any amount that it may personally be owed by the custodian parent.

[29] That being so, it was impermissible to reduce the appellant's liability to P[...] and L[...] by way of setting off against their claims the alleged personal liability of the plaintiff to it it arising from contributory negligence on her part, and the two children were clearly prejudiced by it having done so.

[30] Of course the mere fact that the claims were settled in amounts less than what they were worth does not in itself lead to the inexorable conclusion that the settlement agreements should be rescinded. Weighed in the scale must also be the inherent advantages of compromising a claim. The old adage that a bird in the hand is worth two in the bush is all too frequently true in respect of litigation which is, by its very nature, fraught with unforeseen difficulties. All too often the anticipated strength of a case wilts during the progression of a trial. Not only do witnesses both err and make unmerited concessions, but the assessment of general damages and future losses are matters of discretion upon which opinions may validly differ. All in all, the prediction of the outcome of a claim for damages for bodily injuries is not a matter for the fainthearted and is incapable of accurate determination. A value judgment has to be made and, bearing in mind that a settlement not only does away with the inherent uncertainties of litigation but also limits the escalation of costs and brings about an

[14] *Cf Exley v Exley* 1952 (1) SA 644 (O) at 647A-C.

immediate payment rather than one forthcoming at some future, uncertain stage, it is often best to settle even if the amount offered is less than what is hoped would be finally awarded.

[31] Nevertheless, despite the advantages attendant upon settling P[...] and L[...]'s claims even before the issue of summons, in my view the agreements fall to be rescinded. The relatively trifling amounts at which the children's claims were settled bear no realistic relationship to the measure of their damages, regard being had to the nature and severity of their injuries and the very real prospect that they could experience epilepsy in the future. Although a court should always be cautious in interfering with compromises seriously concluded, there was in my view such substantial prejudice suffered by P[...] and L[...] that the agreements cannot be allowed to stand. Accordingly the court below correctly concluded that they should be set aside.

[32] The appeal is dismissed with costs, including the costs of two counsel.

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L E Leach

Judge of Appeal

APPEARANCES:

For Appellant:	M Patel (with him J Schwartz) Instructed by: Lindsay Keller Attorneys, Rosebank Matsepes Inc, Bloemfontein
For Respondent:	B Ancer SC (with him A Berkowitz) Instructed by: Norman Berger & Partners Inc, Highlands North, Johannesburg Lovius, Block Attorneys, Bloemfontein