SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 09/30430

In the matter between:

ELE MYHILL N.O. (obo S MINORS) Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

MEYER, J

[1] This action was enrolled for trial on Tuesday, 3 August 2010 when it was allocated for hearing before me. The time estimate given was two to four days. After

the lunch adjournment today, which is Wednesday, 4 August 2010, I made an order in the following terms:

1. The plaintiff's amendment of his particulars of claim dated 3 August 2010 is allowed.
2. The defendant's application for a separation of issues is postponed sine die.
3. This action is postponed sine die.
4. The costs of the application for the amendment of the plaintiff's particulars of claim, of the application for a separation of issues, and those occasioned by this postponement, are reserved.

[2] I wished for more time to consider the amendment that had been applied for by the plaintiff and counsel's argument relating thereto, but I considered it appropriate to grant an order without having had such benefit. Reserving judgment would have resulted in the trial hanging in the air and the incurrence of further costs. I have prepared these reasons immediately after the matter was postponed.

[3] The plaintiff is the appointed curator *ad litem* to two minor children, L and P S. They were injured in a motor vehicle collision which occurred on 29 March 1997, more than 13 years ago. Their claims for compensation by the defendant, as well as that of their mother, were compromised and paid out. The defendant's offers of settlement were accepted by their mother on their behalf, and she, in turn, was represented by an attorney. The plaintiff in the present proceedings seeks to set aside the compromise of the claims of the minors.

[4] The unamended particulars of claim averred that the '... purported acceptance of the offer ... is invalid and unenforceable and did not have the affect of absolving the Defendant of the obligation to reasonably compensate (the minors).' The grounds upon which reliance was placed why the acceptance of the offer 'did not have the effect of absolving the Defendant' appeared to have been an alleged duty of

care on the part of the defendant and the breach thereof, which averments were made in paragraphs 20 – 22 of the unamended particulars of claim.

[5] At the commencement of the proceedings application was made on behalf of the defendant for the separation of the issues raised in paragraphs 20 - 22 of the particulars of claim and for the remaining issues to be determined at a later stage. In opposing the application, Mr. B. Ancer SC, who appeared for the plaintiff, disavowed any reliance by the plaintiff upon the averments of an alleged duty of care on the part of the defendant and the breach thereof. The plaintiff's cause of action, as submitted by the plaintiff's counsel, was one founded on the avoidance of a contract. The existence of such contract, however, was a matter that was not pleaded. Nevertheless, what became clear during the plaintiff's counsel's argument was that the separation of the issues as contended for by the plaintiff would amount to a *brutum fulmen*. The plaintiff was afforded an opportunity to prepare an amendment of the particulars of claim.

[6] The plaintiff's proposed amendment was opposed on behalf of the defendant. Mr. WHG van der Linde SC, who appeared with Ms. G. Schwartz for the defendant, submitted that the proposed amendment lacked averments necessary to sustain a cause of action.

[7] The plaintiff, in terms of the proposed amendment, seeks the avoidance of the compromise that was entered into on their behalf by their mother on the basis that such agreement was not in their interest. See: *Edelstein v Edelstein N.O. and Others* 1952 (3) SA 1 (A), at p 11 A. Mr. van der Linde informed me that he was unable to find any decided case on the issue whether a compromise entered into by a guardian on behalf of a minor could legally be avoided if it was so prejudicial that

the minor will suffer serious loss if it is not set aside. The power of a court to grant *restitutio in integrum* in such circumstances is recognised by *Voet 4.4.20*. Mr. van der Linde referred me to *Gane's* translation, which reads:

> 'It is true that manifest damage in a compromise is shown with difficulty, since even in the case where nothing is in issue and no debt exists the very fact that a law suit is avoided appears to be a sufficient cause for compromise. None the less should it later appear that a clear right of a minor has been forgone in the compromise, one which a major would not have been likely to forgo with such readiness, nothing stands in the way of restitution being vouchsafed and the own right of either party to compromise being made whole again.'

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

[9] Mr. van der Linde submitted that in order for the minors in this instance to establish that prejudice arose at the time when the conclusion of the compromise occurred, a comparison is required between the terms of the compromise and what they should have been at that time in order not to have been prejudicial. A minor must show that the transaction to which he objects was inimical from its inception. Prejudice arising from a change of circumstances does not constitute a ground for relief. See: *Boberg's Law of Persons and the Family* (2nd Ed.), at page 724 *et seq*. In *Metedad v National Employers' General Insurance Co Ltd* 1992 (3) SA 538 (W), a minor, with the assistance of her mother or natural guardian, had abandoned a large portion of a claim instituted by her for damages arising from the death of her father in a motor vehicle accident in order to bring her claim within the jurisdiction of the magistrate's court. Van Schalkwyk J, at page 541 H – I, said that '... it would be for the plaintiff to demonstrate what the prejudice was and, moreover, that such prejudice arose at the time when the abandonment occurred (and not subsequently).'

[10] The objection against the plaintiff's particulars of claim was essentially that the plaintiff failed to plead what the terms of the compromise should have been at the time when the compromise was concluded in order for it not to have been prejudicial to the minors. The plaintiff has pleaded that the defendant had been in possession of the hospital records from which it appeared that the injuries suffered by each minor were serious and that there would be significant *sequelae* to such injuries; that the defendant was aware that L had suffered a severe head injury with consequent brain injury and the onset of epilepsy; that P had suffered a severe head injury with the onset of epilepsy; that both L and P were *culpa incapax* at the time of the collision and accordingly that the 30% apportionment made by the defendant had no basis in law or fact and was unlawful; and that, having regard to the serious nature, extent and consequences of the injuries and damages, the settlements were neither fair nor reasonable and completely inadequate.

[11] The amounts that ought to have been paid for the compromise not to have been prejudicial to the minors are not averred. I am nevertheless of the view that the averments made inform sufficiently what the prejudice was and that such prejudice arose at the time when the compromise occurred. It is implicit in these averments that the minors allege that the compromise should have taken into account the serious nature, extent and consequences of their injuries and the fact that they were *culpa incapax*, and that their claims for compensation should have been compromised at substantially higher amounts in order for the compromise not to have been prejudicial to them at the time when it occurred.

[12] This is a borderline matter and the opposition to the application for the amendment of the plaintiff's particulars of claim was in my view reasonable. I was

also satisfied that the amendment would cause the defendant prejudice if a postponement of the action had not been granted.

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

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P.A. MEYER
JUDGE OF THE HIGH COURT

4 August 2010