REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.

.....	.....
SIGNATURE	**DATE**

Appeal Case No: A5023/2021

In the matter between:

ADV SLP MULLIGAN N.O.
(as *curator ad litem*)
obo NEIL BANELE SIBIYA 1st Appellant

BIGBOY DUMISANI SIBIYA 2nd Appellant

and

THE MEC FOR HEALTH, GAUTENG Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 12 August 2022

JUDGMENT

Opperman J: (Makume J and Kathree-Setiloane J concur)

Introduction

[1] Neil Banele Sibiya, a minor, ('*the child'*) is permanently disfigured and impaired as a result of the late diagnosis of osteomyelitis to his left lower leg / ankle. He has a deformed leg and a permanent limp. Mr Sibiya instituted action on behalf of his child. His case is that he had taken the child to the Rahima Moosa Mother and Child Hospital ('*the Rahima Moosa Hospital'*) repeatedly and was not helped.

[2] The dispute on appeal concerns the question of whether the osteomyelitis could and should have been diagnosed earlier by the employees of the Rahima Moosa Hospital. Osteomyelitis is an infection of the bone, which occurs when a bacterial or fungal infection enters the bone tissue from the bloodstream.

[3] The matter before the court *a quo* was limited to the issue of liability.

[4] Mr Sibiya testified and called Dr Versfeld (an orthopaedic surgeon). The respondent called Dr Eltringham (an orthopaedic surgeon) and Drs P Nair and A Radlonova, who were the casualty officers on duty in casualty at the Rahima Moosa Hospital during the nights of 2 February 2012 and 14 February 2012 respectively.

[5] The court *a quo*, held that:

> '…The case centres on medical expert evidence and the conflicting views of two orthopaedic surgeons, Dr GA Versfeld, who gave expert evidence on behalf of the plaintiff, and Dr M Eltringham, who gave expert evidence on behalf of the defendant….'.

Although this summary of the central issues is largely correct, the facts upon which the conflicting opinions are based, is what needs analysis.

[6] The court *a quo* did not consider Mr Sibiya to be a credible witness and held that his evidence on the controversial issues was unreliable and biased as he blamed the medical staff at the Rahima Moosa Hospital for the child's present condition. The court also found his evidence to be improbable.

Mr Sibiya's evidence

[7] The facts of the matter and the sequence of events are of cardinal importance in this appeal. The court *a quo* failed to properly determine the facts of the matter and the sequence of events. It erroneously relied on the facts and sequence of events as disclosed by the hospital records, rejected and excluded the direct evidence of Mr Sibiya and overlooked other facts and probabilities. I thus hold the view that the court *a quo* misdirected itself on the facts and that we are therefore entitled to reverse such findings.[1]

[8] Mr Sibiya, during his evidence covered a number of topics including his dissatisfaction with the conduct of the staff of the Rahima Moosa Hospital. As concerning his dissatisfaction with the conduct of the staff, it was put to him in cross-examination that he has an axe to grind with the Rahima Moosa Hospital and that his evidence was clouded as a result. He denied having a grudge against the hospital and explained that all his children were born there and that the child was, in any event, treated at the Rahima Moosa Hospital after all of this had occurred.

[9] The following topics covered by Mr Sibiya in his evidence and crucially not disputed were: (a) the chronology of events; (b) that he had never complained to the hospital staff of tonsillitis and that he had not been informed that the child was being treated for tonsillitis; (c) that the only medication which he had received to administer to the child was Panado which had been given to him on 25 January 2012; (d) that he had returned to the Rahima Moosa Hospital on 2 February 2012 with the child to

[1] *R v Dhlumayo and Another*, 1948 (2) SA 677 (A) at 705 – 706.

have the backslab removed but had been told to return on 14 February 2012; and (e) that he had been referred to a number of other hospitals but the surgery was ultimately performed at the Rahima Moosa Hospital.

[10] The following constitutes a summary of the relevant proven facts and sequence of events.

The date of the injury – 22 January 2012

[11] Mr Sibiya's evidence that the injury occurred on 22 January 2012 was left unchallenged. I therefore accept it as being correct[2]. The Rahima Moosa Hospital notes, on the other hand, are at best contradictory and cannot be relied on to determine the date of the injury. For example, the reference in the hospital records dated, 28 January 2012, to an injury *"two days ago"* (i.e. on 26 January 2012) is contradicted by the hospital records of 14 February 2012, which indicate the date of the injury as 31 January 2012. Moreover, the hospital records of 15 February 2012 record the date of injury as 1 February 2012 and the progress report of 14 February 2012 refers to an injury to the left ankle "3 weeks ago" (i.e. 24 January 2012). Mr Sibiya's testimony that the injury occurred on 22 January 2012 is therefore the only admissible and reliable evidence before the court.

Visit to hospital – 25 January 2012

[12] Mr Sibiya testified that he took the child to hospital for the first time on 25 January 2012 and that the child was given Panado. His evidence on this aspect was left unchallenged.

[13] Even though no hospital records exist of this visit, Dr Eltringham**,** Dr Nair and Dr Radionova conceded that records often get lost or misfiled and that the

---

2 *President v The Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC),* par 61, 63, 64 and 65; See too *Crots v Pretorius* 2010 (6) SA 512 (SCA), par 15 on 516.

unavailability of records does not support the conclusion that Mr Sibiya did not visit the hospital on that date with his child.

[14] Mr Sibiya's evidence of the first visit to hospital on 25 January 2012 was rejected by the Court *a quo* on the basis of the existence of a *"casualty registration book"*, which according to Dr Eltringham could have confirmed a visit on 25 January 2012. The Court *a quo* accepted the testimony of Dr Eltingham that he thoroughly perused all the hospital records and could find no documents confirming a visit to the hospital on 25 January 2012. However, at no point during his evidence did Dr Eltringham testify that he perused the *"casualty registration book".* Nor was the *"casualty registration book"* produced to confirm, by way of example, the visits on 28 and 31 January 2012 or the lack of a record of the visit on 25 January 2012. Dr Eltringham clearly did not go through all the hospital records as thoroughly as he indicated he did. Had he done so, he would *inter alia* not have testified in chief that Mr Sibiya had decided to take the child to the Charlotte Maxeke Hospital instead of the Helen Joseph Hospital, and that the surgery on 15 February 2012 was performed at Helen Joseph Hospital. The hospital records clearly documented that the child was referred to Charlotte Maxeke Hospital on 14 February 2012, later to Helen Joseph Hospital and finally back to Rahima Moosa Hospital where the surgery was performed on 15 February 2012. Dr Eltringham was constrained to concede, during cross-examination, that his evidence on these aspects was incorrect.

<u>Visit to hospital on 28 January 2012</u>

[15] The hospital records of 28 January 2012 confirm that the child was given Panado. This supports Mr Sibiya's evidence of a consultation on 25 January 2012 when the child was given Panado.

Visit to hospital on 31 January 2012

[16] Mr Sibiya testified that he was called home from work to take the child to hospital for X-rays on 31 January 2012 as the condition of his ankle which was covered in a backslab was deteriorating.

Visit to hospital on 2 February 2012

[17] Mr Sibiya testified that he and the child visited the hospital again on 2 February 2012 because the child's leg, which was covered in a backslab was more swollen, shiny and looked as if the blood was not circulating. He requested a nursing sister to remove the backslab, but she refused and turned them away. Mr Sibiya testified that the nursing sister did not make an entry in the hospital file at the time of that visit. He testified that the reference in the hospital note to the right ankle was inaccurate as the backslab was on the child's left ankle. He also said that he did not receive medication for the child on that visit to the hospital.

[18] The casualty note of Dr Nair that the child presented with fever, vomiting and diarrhoea for one day was not canvassed with Mr Sibiya during cross-examination at all. Although it was suggested to Mr Sibiya that a doctor saw the child on 2 February 2012, it was not put to him that the prescription chart and the ticks made on it, indicated that he must have received medication. There are no grounds to reject Mr Sibiya's evidence that he did not receive the medication. The process involved in dispensing medication to patients at the Rahima Moosa Hospital was not canvassed with Mr Sibiya in cross-examination at all. What's more is that the

respondent failed to present any direct evidence that the medication was dispensed to Mr Sibiya.

[19] The truth of the contents of the hospital records was not admitted and as such, it constituted inadmissible hearsay evidence[3]. Both the child and his mother were available to give evidence at the hearing had the respondent disputed Mr Sibiya's evidence that they had received no medication.

[20] Dr Nair testified that she had examined the child and referred to her clinical notes. She explained the process followed in the casualty unit as consisting of a preliminary examination of the patient by the sisters on duty, followed by an examination by a doctor in a consulting room. Since this procedure was not canvassed with Mr Sibiya during his cross-examination, I do not know, amongst other things, whether he would have agreed with the process, whether the child was taken to the consultation room and if so, whether Mr Sibiya accompanied the child to the consultation room.

[21] The Court *a quo* accepted Dr Nair's evidence that the ankle was not a presenting complaint when she saw the child on 2 February 2012. Dr Nair stated that it was not a complaint because had it been, she would have noted it on the clinical records. She, however, had no independent recollection of what had happened. It was not suggested to Mr Sibiya, in cross-examination, that the child's ankle was not a presenting complaint on 2 February 2012. Nor was it suggested to him that the child presented with totally different and unrelated complaints (vomiting and diarrhoea) on that visit. The sister who attended to the child, on 2 February 2012, was not called as a witness by the respondent despite the fact that she entered the child's vital signs on the hospital records. No reasons were given by the respondent

---

[3] *Visser v Life Direct Insurance Limited* (1005/130) [2014] ZASCA 193 (28 November 2014)

for why she was not called. We therefore accept the version of Mr Sibiya on this aspect.

[22] Dr Nair's evidence was that she could not remember whether she saw Mr Sibiya and the child, or whether she only saw the child or whether she had introduced herself to him/them. She confirmed that the sister in attendance, in some circumstances, would do the undoing of bandages to remove a backslab**.** There is thus some support in the procedure (assuming it to be correct and followed on the day) that Mr Sibiya requested the sister on duty to remove the backslab.

[23] Applying the principles distilled in *Stellenbosch Farmer's Winery,*[4] I am of the view that the court *a quo* ought to have concluded that Mr Sibiya's evidence contained no internal contradictions, no external contradictions with what was pleaded or with the established facts or with his own extra-curial statements and actions. It ought to have furthermore concluded that there was nothing improbable about his evidence and that the calibre and cogency of his performance did not deserve, and did not attract, criticism.

[24] In my view, the court *a quo* erred in finding that Mr Sibiya's evidence should be treated with caution. Acceptance of Mr Sibiya's evidence does not necessarily lead to a conclusion that the clinical records and prescriptions of 28 January 2012 and 2 February 2012 were falsifications, particularly in light of the respondent's failure to cross-examine Mr Sibiya on these issues. The prescriptions could have been written out without Mr Sibiya being informed of them, and without issuing the prescribed medication to him. The consultation of Dr Nair on 2 February 2012 could have been performed in his absence and without his input. The failure of the respondent to deal fully with the aforementioned issues during cross-examination of

[4] *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2013 (1) SA 11 (SCA), par 5 on p14 and further.

Mr Sibiya should have the normal consequences for the party who failed to comply with the rules of cross-examination.

[25] I thus find that the Court *a quo* erred in finding that Mr Sibiya was clearly biased because he blamed the hospital for his son's present condition.

The visit to hospital on 14 February 2012

[26] Dr Radionova's evidence on the reason for the referral of the child on 14 February 2012 to another hospital was unsatisfactory. She testified that she referred the child to Charlotte Maxeke Hospital because she thought he had a soft-tissue injury and would have referred him to Helen Joseph Hospital if she thought he had a bone injury. The referral was not necessary because Dr Eltringham testified that there was a clinical specialist on duty at the Rahima Moosa Hospital, who could have been called to attend to the child there. Mr Sibiya's evidence was that the child was referred, from Helen Joseph Hospital, back to Rahima Moosa Hospital because the doctors at Helen Joseph Hospital said that the damage was done and the child should be treated by the Rahima Moosa Hospital. The child in fact received the indicated surgical intervention required at Rahima Moosa Hospital. Dr Eltringham had to concede in cross-examination that his evidence in chief, that the surgery was not performed at Rahima Moosa Hospital at that time, was incorrect.

[27] Dr Radionova's evidence about "unsatisfactory compliance" as referred to in her referral note to Charlotte Maxeke Hospital was shocking. It was incorrect and without any factual foundation. There was absolutely no reason for her to blame the condition of the child's leg, on 14 February 2012, on an untruthful allegation of non-compliance on the part of Mr Sibiya.

[28] Mr Sibiya testified that he was told on 31 January 2012 to return in two weeks' time, and that he was not assisted when he returned two days later on 2

February 2012. On 2 February 2012 he was again told to come back in two weeks' time as he had been advised on 31 January 2012. It was reasonable for Mr Sibiya in such circumstances not to return to hospital again shortly after 2 February 2012, but to follow the direction of those with medical expertise.

[29] Nothing on the evidence before us indicates any improvement in the child's condition before 2 February 2012 nor that it had deteriorated between 2 February 2012 and 14 February 2012. We accept that the evidence shows that Mr Sibiya was instructed to wait 14 days before returning.

The tonsillitis

[30] It is common cause that none of the clinical notes referred to complaints relating to a sore throat or tonsillitis. Mr Sibiya's evidence was that the child attended at hospital on each occasion for complaints relating to a progressively worsening ankle injury. Mr Sibiya testified that he knows what tonsillitis is because the child had tonsillitis before the incident. According to him however, the child did not have any complaints relating to a sore throat on 28 January 2012 and he did not take the child to hospital for treatment of tonsillitis. Mr Sibiya testified that he was also not told at the hospital on 28 January 2012 that the child had tonsillitis. It was not suggested to Mr Sibiya, during cross-examination, that the child had in fact been diagnosed at hospital with tonsillitis and that he had been treated on both 28 January 2012 and 2 February 2012 for this complaint.

[31] On 2 February 2012 the recorded complaints were *"fever, vomiting and diarrhoea"*. The fever, vomiting and diarrhoea on 2 February 2012 could have been caused by the tonsillitis or by the osteomyelitis, yet no attention was given on 2 February 2012 to the ankle.

[32] If the child had symptoms as result of the ankle injury and not as result of tonsillitis, it does not matter that the correct treatment was prescribed by the respondent for the tonsillitis (treating a condition which is not the problem, does not take the matter further**)**. The symptoms on 2 February 2012 (vomiting and diarrhoea) could have been caused by either tonsillitis or osteomyelitis, but Dr Nair stopped at tonsillitis and failed to consider the differential diagnosis of osteomyelitis. The child was treated for the wrong thing. The tonsillitis was a red herring and the employees at the Rahima Moosa Hospital should have seen it for what it was. The negligence lies in the fact that the ankle injury was not properly attended to on 31 January 2012 and the osteomyelitis was missed on 2 February 2012.

The Evaluation of the opinions of the two orthopaedic surgeons

Dr Eltringham

[33] Dr Eltringham did not consult with Mr Sibiya or the child and considered only the medical records (the truth of the contents of which had not been admitted). Relevant information outside of the hospital records has to be taken into account by the experts, e.g. whether the prescribed medication was dispensed or not, whether the child had worsening complaints relating to the ankle at each subsequent visit to the hospital or not, whether the clinical notes are comprehensive and complete or not etc. Dr Eltringham conceded that an expert is obliged to take into account all the relevant information, but he clearly failed to do so.

[34] Dr Eltringham testified in chief that there was no growth plate arrest even though he personally never examined the child. In cross-examination he conceded that the measurements of Dr Versfeld at the child's first and second assessments respectively, were correct. He ultimately conceded that there was growth plate arrest (the leg length discrepancy increased).

[35] Dr Eltringham's evidence was not the product of his independent expert view, uninfluenced as to form or content by the exigencies of litigation. Dr Eltringham testified in chief that the casualty officers at Rahima Moosa Hospital did not have an after-hours facility to call upon a specialist for a second opinion. Although this evidence was favourable to the respondent because it justified the referral of the child away from the Rahima Moosa Hospital on 14 February 2012, it was factually incorrect. In re-examination, Dr Eltringham testified that the orthopaedic surgeon on call at Helen Joseph Hospital covers both Helen Joseph and Rahima Moosa Hospital. He also confirmed that there was an orthopaedic surgeon available on call at Rahima Moosa Hospital on the evening of 14 February 2012. He testified in chief that the Rahima Moosa Hospital does not provide surgical services to children and that they are all referred to the Helen Joseph Hospital for orthopaedic surgery. This evidence was also favourable to the respondent because it justified the referral of the child away from the Rahima Moosa Hospital on 14 February 2012, but it was also incorrect. In cross-examination, Dr Eltringham conceded that he had misinterpreted the records which had been made available to him, and that the surgery had been performed at the Rahima Moosa Hospital on 15 February 2012. Dr Eltringham testified that Mr Sibiya chose to take the child on 14 February 2012 to Charlotte Maxeke Hospital and in cross examination added *"… because it would be quicker…"*. In cross-examination it was shown, on the basis of the hospital records that Dr Eltringham had at his disposal and had perused thoroughly, that there was no basis for his conclusion which was factually incorrect. Significantly, Mr Sibiya took the child to Charlotte Maxeke Hospital because he was referred there and not because he chose to. Dr Eltringham conceded that he had made a mistake.

[36] Dr Eltringham ignored the allegation that the child had been treated for the first time on 25 January 2012. He testified that he refused to take this into account because there was no documented evidence that the child presented to the hospital before 28 January 2012. This despite Dr Eltringham having agreed in the joint minute between him and Dr Versfeld that the child had presented at the Rahima Moosa Hospital on approximately 25 January 2012, with a history of having bumped his ankle approximately 3 days earlier (i.e. on 22 January 2012). Dr Eltringham unsuccessfully attempted to soften the agreement reached in the joint minute by testifying that he was happy with the agreement because of the "approximation"**.**

[37] When Dr Eltringham was confronted, in cross-examination, with the suggestion that he was not an objective and unbiased expert witness because he did not want to consider the evidence of Mr Sibiya that the injury occurred on 22 January 2012 and that the first visit to hospital was on 25 January 2012, Dr Eltringham stated that he had listened to the evidence, had read the transcript and that Mr Sibiya, in his view, had not specified any dates and was very vague. On the contrary, the transcript of the proceedings reveals that Mr Sibiya had specified the dates and was not vague at all. Dr Eltringham, in our view, had misconceived his role.

[38] The Court *a quo* in our view, failed to have due and proper regard to the legal principles relating to the evaluation of expert evidence.[5] On a proper consideration of the available evidence the court *a quo* failed to have regard to the fact that Dr Eltringham based his opinion almost exclusively on hearsay evidence.[6]

[39] Dr Eltringham ought to have based his opinion on the following facts: (a) the injury had occurred on 22 January 2012; (b) Mr Sibiya had taken the child to the

---

5 *Nicholson v Road Accident Fund* 2012 JDR 0672 (GSJ), par 4; *Schneider No And Others V AA and Another* 2010 (5) SA 203 (WCC), page 211E; *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA), paragraphs [36] to [40]; *Louwrens v Oldwage* 2006 (2) SA 161 (SCA), paragraph [27].

6 *Nicholson* (supra) at para 4

Rahima Moosa Hospital on 25 January 2012; (c) the child experienced worsening complaints relating to his left ankle at every subsequent visit to the Rahima Moosa Hospital including the visit on 2 February 2012[7]; (d) the child had complaints relating to his left ankle at the time of his visit to the Rahima Moosa Hospital on 2 February 2012; (e) if the medication had been prescribed per the prescription chart on 28 January 2012 and 2 February 2012 and had been dispensed to Mr Sibiya, it did not find its way to the child; (f) the child's symptoms did not get better from 2 February 2012 onwards**.**

Dr Versfeld

[40] The Court *a quo* erred in finding that Dr Versfeld's views are not capable of withstanding logical analysis and therefore not reasonable. The facts relied upon by Dr Versfeld were established at the trial and his conclusions are capable of logical support.

[41] It was established at the trial that: the injury had occurred on 22 January 2012; Mr Sibiya had taken the child to hospital for the first time on 25 January 2012; the condition of the ankle deteriorated from the 28 to 31 January 2012 and again from the 2nd of February 2012; the effective treatment in the form of surgery was performed only on 15 February 2012 at the Rahima Moosa Hospital.

[42] Dr Versfeld stated that there was a delay in treatment for more than 3 weeks from the date of the injury (22 January 2012 to 15 February 2012).

[43] Factual causation was common cause between the parties: Osteomyelitis in its early stages is completely treatable and the success rate if treated rapidly and correctly is about 90%.

---

[7] Dr Eltringham assumed that the ankle pain settled when the ankle was immobilised on 31 January 2012, but there was no evidence to this effect.

[44] Dr Versfeld opined that the outcome in the child's case was jeopardized by the massive delay in treatment. Dr Versfeld testified that even if the child had tonsillitis and even if he had received the medication referred to in the hospital records, he had nonetheless not received appropriate treatment for the ankle injury. The doctors ignored the patient's complaints relating to the ankle and focused on the redness of the tonsils instead.

[45] Dr Versfeld testified that it seems that matters had gone wrong on the 28th of January 2012 when the casualty officer did not take notice of the bone injury. Matters went drastically wrong on the 31st of January 2012 when the injury was clearly worse. X-rays revealed no fracture and the bone infection was probably already present. The casualty officer needed to escalate the matter on 31 January 2012 and the diagnosis of a sprained ankle was illogical. On the following visit (2 February 2012), the backslab was not taken off which was totally unacceptable and unforgivable. All that the casualty officer at the Rahima Moosa Hospital had to do was to escalate the matter to the orthopaedic or paediatric specialist. Dr Versfeld stated that the casualty officer should have told Mr Sibiya to come back with the child the following day or he could have put the child in the ward for observation or he could have picked up the phone and called the orthopaedic surgeon. On 2 February 2012, they at least had to examine the injured ankle. It was as easy as just unravelling the bandage. He said that if the casualty officer was unable to work out what was wrong, she should have escalated the matter. If she had escalated the matter, it would have been apparent that something was wrong with the ankle.

[46] Of considerable significance is Mrs Schoeman's evidence, which was neither elicited during her evidence in chief nor during her cross-examination. She volunteered the fact that she knew the child had returned to the Rahima Moosa

Hospital on 2 February 2012 with the specific request for the backslab to be removed and that he had not been helped.

[47] Dr Versfeld testified regarding the records of 31 January 2012 that the note contained no recordal of an examination or assessment. Dr Versfeld maintained that the casualty officer should have examined the child and recorded her findings. The absence of a fracture should have alerted the doctor that something was not right and she should have escalated the matter.

[48] Dr Versfeld testified regarding the records of 2 February 2012. He opined that the history, diagnosis and treatment on 2 February 2012 were totally unreasonable. There were complaints relating to the left leg, but they did not examine the leg. They referred to the right leg whereas the backslab was on the left leg. Mr Sibiya testified that there was no tonsillitis. The complaint of the left lower limb is not recorded. There is an incomplete history. The child presented at the hospital with a backslab and crutches. The ankle was worse than the previous visit. There is no recorded history of the leg (the two previous visits on 28 and 31 January 2012). Osteomyelitis and antibiotics would explain the vomiting and diarrhoea. Dr Versfeld maintained that there should have been a reference in the complaints relating to the history of the ankle injury, X-rays 3 days earlier and the backslab being applied then.

[49] Regarding the tonsillitis, Dr Versfeld testified that *" … you are very unlikely to have tonsillitis that is causing the problem we have here without the sore throat.*". Dr Versfeld testified on the basis of the evidence of Mr Sibiya that *"… the child's main problem was not the tonsils*". Dr Versfeld distinguished between the common general features of tonsillitis and osteomyelitis (infection) and the local features of tonsillitis and osteomyelitis (inflamed tonsils for tonsillitis versus temperature and redness at the sight of the osteomyelitis). Dr Versfeld testified that the local features

of osteomyelitis would not be influenced by the tonsillitis, but the general features would be more severe with osteomyelitis than with tonsillitis. The failure to remove the backslab on 2 February 2012 and to examine the ankle meant that the casualty doctor failed to consider the local features that would have been present with osteomyelitis (temperature / warmth and redness at the sight of the osteomyelitis).

[50] In our view, Dr Versfeld considered all the material facts and remained objective and unbiased. His opinions were founded on sound and logical reasoning. He made reasonable concessions when required to which evidences his independence. Dr Versfeld conceded that the ticks on the prescription chart may have the meaning proffered by Dr Eltringham, but that he had not heard direct evidence in that regard. He also conceded that the medication prescribed on 2 February 2012 was reasonable on the basis (only) of a diagnosis of bilateral tonsillitis. He also conceded that if only the clinical note of 2 February 2012 was considered, and the evaluation was based entirely on that, then a correct diagnosis of bilateral tonsillitis plus gastroenteritis would have been made. Dr Versfeld, however, emphasised that if all the proven facts had been considered including that the child presented at the hospital on 28 January 2012 with a sore ankle (when it was not deemed necessary to do ankle x-rays); that he returned to hospital on the 31st of January 2012 (when x-rays were done and a backslab was applied); and that he returned to hospital again on the 2nd of February 2012 with ankle complaints (according to Mr Sibiya), then a correct diagnosis of osteomyelitis would have been made much earlier.

[51] Dr Eltringham's discussion of the note of "++ medial malleolus" which forms part of the epiphysis and does not correlate to the subsequent diagnosis or point of location of osteomyelitis was never canvassed with Dr Versfeld in cross-examination.

The court *a quo* was, therefore, not given the benefit of Dr Versfeld's response thereto. Dr Eltingham, in any event, testified that the reference to the medial malleolus was *"more of a generic description for the region of the symptoms"* and not localised *"to an area the size of a thumbnail"*. On Dr Eltringham's understanding of the reference to the medial malleolus, the tenderness could just as well have been slightly above the medial malleolus, which could also be consistent with the subsequent osteomyelitis.

Negligence of the respondent

[52] The Court is not bound by expert opinion, but must decide the issue of whether the conduct complied with the standard of conduct of the reasonable practitioner in the particular professional field on the basis of a logical analysis of all the available facts[8].

Conduct on 31 January 2012

[53] The symptoms were getting progressively worse. If the symptoms were improving or not deteriorating, the child would not have been taken for X-rays on 31 January 2012.

[54] Mr Sibiya testified that the child's ankle was a little swollen and that he limped a little after the injury on 22 January 2012, but he thought that it was a minor injury, not justifying a hospital visit. He took the child to hospital after work on 25 January 2012 because his ankle was swollen and he cried of pain (he received Panado). He took the child to hospital again on 28 January 2012 because his ankle was more swollen and the child was still crying with pain. Mr Sibiya was called home from work on 31 January 2012 to take the child to hospital for X-rays because he was still in terrible pain. The child's ankle was very painful and swollen on 2 February 2012.

---

[8] *Michael* (supra) at 120D – 120E

[55] The casualty records of 31 January 2012 do not reflect that any of the child's vital signs were taken. The Court *a quo* failed to have proper regard to Dr Versfeld's testimony about an ankle injury that was getting progressively worse, a third visit to the hospital in a period of seven days; nine days after the ankle was injured on 22 January 2012. It is common cause that had the vital statistics of the child been checked and recorded on 31 January 2012, it would have provided details about the status of the child's pyrexia and whether there was an improvement or deterioration of the infection noted on 28 January 2012.

[56] The negative results of the x-rays failed to give a proper explanation for the deterioration of the ankle and further investigation was required – perhaps by merely checking the child's vital signs. If the vital signs had been checked and if the vital signs indicated persistent infection or a worsening of the infection, further investigation and treatment would have been reasonable.

[57] As conceded by Dr Eltringham, there was a worsening of the ankle injury from the 28th of January 2012 (when he could walk) to the 31st of January 2012 (when a backslab was applied), and with hindsight it was reasonable for Dr Versfeld to hold that the casualty officer should have noted that something was seriously wrong, and should have escalated the case. On the basis that it was the third visit to hospital, it was put to Dr Eltringham that the injury was not attended to properly. Dr Eltringham replied: "I do not know; I do not know the answer."

[58] From these facts and circumstances, I draw the ineluctable conclusion that the failure to have attended to the ankle injury properly was unreasonable.

<u>The Conduct on 2 February 2012</u>

[59] On the established evidence, it is clear that Dr Nair failed to pay due and proper attention to the ankle at the time of her consultation on 2 February 2012. She

agreed that it is important in the workup of a patient to obtain a proper history, that something may be missed if a full history is not obtained, that it is important to examine a patient properly to deal with the totality of the history obtained, and that it is logical that something may be missed if the examination does not tie in with the complaints and the history received. Dr Nair conceded that she was aware that the child visited the hospital, at least, on two earlier occasions namely, on 28 and 31 January 2012 for an ankle injury, and that she had the hospital records relating to those consultations available to her when she consulted with the child on 2 February 2012.

[60] Dr Nair conceded in cross-examination that osteomyelitis could also have caused the diarrhoea and the fever that she referred to in her clinical note of 2 February 2012. It is clear that in trying to find a source for the infection on 2 February 2012, Dr Nair failed to pay any attention to the child's injured ankle. She testified that she did not take the backslab off on 2 February 2012, but conceded that it would have been easy to do so, and if she had done so she would have seen a blister if the backslab was fitted too tightly and if there was a blood circulation problem; and that she would have been able to feel if the ankle was warm to touch which would have indicated an infection**.** Dr Nair further conceded in cross-examination that she did not ask the child how his ankle was on 2 February 2012 and that she did not deal with and exclude the deferential diagnosis of osteomyelitis.

[61] The ankle injury was an obvious possible source of infection. It would have been easy and reasonable to remove the backslab and inspect the ankle to consider whether the ankle was the source of the infection, bearing in mind the evidence of Dr Eltringham that the only difference between the presenting of a soft tissue injury and

osteomyelitis, would be the presence of a temperature and other signs of an infection (swelling and inflammation with warmth and sometimes redness).

[62] Dr Versfeld testified that it was totally unreasonable not to consider the ankle again during the consultation on 2 February 2012. The backslab should have been removed to investigate. The Court *a quo* erred in stating that it was Dr Versfeld's view that *"the leg symptoms seemed to have been deteriorating"* during the period from 22 January 2012 to 2 February 2012 – that was the undisputed evidence of Mr Sibiya (a deterioration from 28 to 31 January 2012 was accepted by Dr Eltringham). The Court *a quo* erred in stating that Dr Versfeld *"made certain material factual assumptions that have not been established"*. The facts relied upon were established by the uncontested and undisputed evidence of Mr Sibiya. It is common cause that the backslab was not removed on 2 February 2012 even though it would have been simple and easy to do so.

Conclusion in respect of negligence

[63] As alluded to earlier in the judgment, the conduct of the attending nurses and doctors of the hospital should be considered against the standard of conduct expected from the reasonable hospital based on a logical analysis of the available facts. The test is ultimately how reasonable nurses and medical doctors in the position of the respondent's employees would have conducted themselves.

[64] The employees of the respondent failed to act reasonably by: not investigating further and/or by not at least checking and recording the vital signs of the child on 31 January 2012 and by overlooking an obvious risk on 2 February 2012 when they failed to enquire about and investigate the status of the child's ankle injury.

Conclusion

[65] The child was taken repeatedly to the Rahima Moosa Hospital for the specific complaint of a sore ankle. Instead of addressing the complaint, the child was treated for tonsillitis and his father, Mr Sibiya was not even told about the treatment. Significantly, there was no evidence on record of the child having had a sore throat.

[66] On the 31st of January 2012, Mr Sibiya was told to return in 14 days. It is on the 31st of January 2012 that the casualty officer should have made the referral upwards or admitted the child for observation or told him to return the following day or sought the assistance of an orthopaedic surgeon.

[67] The defendant's nursing sister who had attended to the child on 2 February 2012 was not called to testify. By virtue of the dispute regarding the presenting complaint (ankle or tonsils), one would have expected her to be called as a witness. She was not.

[68] Although only instructed to bring the child in 14 days, Mr Sibiya returned on 2 February 2012 with a request that the backslab be removed. Dr Nair did not do so. Although it was the fourth time in 9 days that the child had been to the hospital, the medical staff at the Rahima Moosa Hospital did not remove the backslab on the 2nd of February 2012 and did not investigate the status of the ankle injury. I consider this conduct to be unreasonable. I accordingly find that the respondent's conduct was negligent and that the court a quo erred in not finding the respondent liable.

Order

[69] I accordingly make the following order:

69.1. The appeal is upheld with costs.

69.2. The order of the court *a quo* is set aside and replaced with the following order:

69.2.1. The Defendant is liable for the Plaintiffs' agreed or proven damages;

69.2.2. The Defendant is ordered to pay the costs of suit to date hereof, to be agreed upon or taxed, as between party and party, which costs shall include:

69.2.2.1. The costs reserved on 24 April 2017.

69.2.2.2. The costs attendant upon the employment of counsel, including the full day fees of counsel for 26 to 30 November 2018, 7 December 2018, 25 to 26 March 2019, 12 April 2019 and 24 May 2019.

69.2.2.3. The reasonable costs of the appointment of the Curator *Ad Litem* herein and the reasonable costs of the Curator *Ad Litem.*

69.2.2.4. The reasonable travelling costs incurred by the Plaintiffs in attending the Plaintiffs' medico-legal appointments and in respect of the trial herein, including the necessary consultations in preparation for trial, as allowed by the Taxing Master.

69.2.2.5. The costs of the medico-legal reports, follow-up medico-legal reports and addendum reports, and the reasonable preparation and reservation fees of Dr Versfeld.

69.2.2.6. The reasonable costs pertaining to the consultations with the Curator *Ad Litem* to obtain instructions; and

69.2.2.7. The costs of the Plaintiffs' attorney attending any consultations with witnesses in preparation for Trial, including consultation with the expert.

69.2.3. The balance of the issues relating to the quantification of the damages of the Plaintiffs is postponed *sine die.*

_____

I Opperman
Judge of the High Court
Gauteng Local Division, Johannesburg

Counsel for the Appellant: Adv J.F. Grobler S.C.

Instructed by: Friedman Attorneys

Counsel for the Respondent iro heads of argument: Adv Pieter Pauw S.C and Adv R Mansingh

Counsel for the Respondent at the hearing: Adv R Mansingh

Instructed by: The State Attorney

Date of hearing: 14 March 2022

Date of judgment: 12 August 2022